THE

FEDERAL CASES

COMPRISING

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES

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

BOOK 16

Case No. 8735 — Case No. 9417

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McCUE—MENCKEN

Case No. 8,735—Case No. 9,417

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FEDERAL CASES.

BOOK 16.

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

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

Case No. 8,735.

McCUE v. WASHINGTON.

[3 Cranch, C. C. 639.] [1]

Circuit Court, District of Columbia. June 23, 1829.

LOTTERY—MANAGERS—ISSUING TICKETS—BOND OF MANAGERS—HOLDER OF PART TICKET — PLEADING AT LAW — GENERAL DEMURRER — BAR TO PLEA OF LIMITATIONS.

1. The managers of "The Lottery for Building Lancastrian School-houses, a Penitentiary, and City Hall, in Washington City," had no authority to sell quarters of tickets, so as to multiply causes of action against the corporation.

2. The holder of a prize ticket cannot, without the consent of the corporation, maintain an action against the managers upon their bond to the corporation; who may order the suit to be dismissed.

3. Upon a general demurrer, the judgment must be against him who commits the first substantial fault in the pleadings.

4. A special demurrer operates as a general demurrer, as to all the pleadings of the party demurring.

5. A rejoinder is bad, which avers several distinct answers to the replication, or puts in issue to the jury matter of law.

6. The fact that the plaintiff brought an action, in the name of the corporation of Washington, against the managers, upon their bond, to recover one fourth part of the prize drawn upon or by the ticket No. 1037, which action was dismissed by the corporation, after it had been pending three years in court, is no bar to the plea of the act of limitations.

7. The corporation of Washington were not liable to the holder of a quarter of a ticket, suing alone.

8. A general demurrer to the declaration must be overruled if it contain one good count, although it contain also three bad counts.

Assumpsit, for one fourth part of the prize of $10,000, drawn upon ticket No. 1037, in the first class of a lottery called "The National Lottery."

The declaration contained four counts: 1. The first count sets forth the amended charter of the city of Washington, of May 4, 1812; the by-law of July 24, 1815; the managers' bonds; the scheme of the lottery, first class, 19th December, 1817. That the managers issued and exposed to sale the ticket No. 1037, by which the defendants promised to pay to the possessor thereof such prize as might be drawn to the said number, if demanded within twelve months, &c., subject to a deduction of fifteen per cent. &c. That the plaintiff, on the 1st of July, 1818, "for a full and valuable consideration paid by him, became the purchaser and lawful possessor of one fourth part, or quarter share, of the said last mentioned ticket." That the drawing of the said lottery was finished July 21, 1819, and that the said ticket, No. 1037, was drawn to a prize of $10,000; "by means whereof the plaintiff became entitled to have and demand of the said defendants the one fourth part of the said $10,000, subject," &c.; "and the plaintiff, being so entitled, on the 1st of October, 1819, demanded of the defendants payment of the said quarter share, or fourth part of the said prize; by means whereof the defendants became liable and bound to pay to the plaintiff the said quarter part of the said $10,000, subject," &c., "according to the tenor and effect of the said ticket; and, being so liable, in consideration thereof, afterwards," &c., "undertook and promised the plaintiff to pay him the said last-mentioned sum of money," &c. 2. The second count was like the first, except that it did not set forth the charter and by-law at large, and did not mention the bonds of the managers. 3. The third count, after stating the lottery, and that the defendants, by their managers, issued and offered for sale the ticket No. 1037, says that

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

the plaintiff, on the 1st of July, 1818, became the lawful owner and possessor of one fourth part, or quarter share of the said ticket, No. 1037, which, in the course of the drawing, which terminated on the 21st of July, 1819, drew $10,000; and, on the 1st of October, 1819, the plaintiff demanded of the defendants payment of the said fourth part of the said prize, "by means whereof the defendants became liable," &c. &c. 4. The fourth count is for money had and received.

To this declaration the defendants pleaded: 1. Non assumpserunt. 2. Non assumpserunt infra tres annos. 3. Actio non accrevit infra tres annos.

Upon the first plea, the issue was joined. To the pleas of limitation, the plaintiff, in his replication, says that he ought not to be precluded from having his action, because he says, "That the defendants standing in the relation of trustees for the benefit of the fortunate adventurers in the said lottery, and for the purpose of insuring the payment of such prizes as they should draw therein, took bonds from the said managers respectively, each in the penal sum of $10,000, to be paid to the said defendants, if the said managers should not diligently and impartially exercise and perform the duties and authority vested in them by the said ordinance of the 24th of July, 1815; and that afterwards, when the said lottery had been fully drawn, and the said plaintiff had demanded of the said managers the payment of the said prize so as aforesaid drawn by him, and the said managers had refused to pay the same, or any part thereof; and when the plaintiff had obtained from the register of the said corporation of the city of Washington, who had the lawful custody thereof, copies of the said bonds taken as aforesaid from the said managers, and instituted suits thereon in the name of the said defendants, for the use of the said plaintiff against the said managers (without any objection made thereto by the said defendants) for the recovery of his share of the said prize so as aforesaid drawn; and when the said plaintiff had prosecuted the said suit in the circuit court of the United States for the District of Columbia, and for the county of Washington, and in the supreme court of the United States by writ of error; and when, by mandate from the said supreme court to the said circuit court, the said plaintiff was about to receive the benefit of the said suit by obtaining a judgment against the said managers for his share of the said prize, they, the said defendants, in violation of their duty, and in utter disregard of the trust so reposed in them by every law of decent morality, and by the fair intendment of the said act of congress, did then, that is to say, on the 1st of January, 1825, at the county aforesaid, by virtue of their authority, as plaintiffs at law (the suit being in their name as plaintiffs) cause the said suits to be dismissed, whereby the said plaintiff was unjustly and oppressively deprived of all benefit derivable from the said suits; and this the said plaintiff is ready to verify, whereupon he prays judgment." &c.

To this replication the defendants rejoined as follows: "And the said defendants pray oyer of the copy of the bond and condition thereof, in the said replication mentioned; and it is read to them as follows, to wit," &c. They also "pray oyer of the record and process of the said suit in this court; and of the said mandate from the said supreme court in the said replication mentioned, and the same are read to them as follows," &c. "All which being read and heard, the defendants say, that the plaintiff ought not to have or maintain his action aforesaid against them, by reason of any thing by him above pleaded or alleged by way of replication to the second and third pleas of the said defendants," because they say that they did not take the "said bonds as trustees for the said plaintiff, or other of the fortunate adventurers in the said replication mentioned; nor was the said suit in the said replication mentioned, commenced or prosecuted by the said defendants, or with their assent or authority, for the use of the said plaintiff against the said managers; nor was the plaintiff about to recover any judgment in the said suit, against the said managers in virtue of the said mandate or otherwise; nor did the defendants, in fraud or violation of their said pretended trust, cause the said suit to be dismissed; nor did the defendants, at any time, within three years next before the commencement of this suit, make any such promise or assumption as in the said declaration is alleged; nor did the plaintiff's cause of action aforesaid arise, or in any manner accrue at any time within the said three years, in manner and form as the plaintiff, in his said replication to the said second and third pleas of the defendants, has above pleaded and alleged, and of this he puts himself upon the country." To this rejoinder the plaintiff demurred; and stated for cause of demurrer, that the defendants have thereby tendered an issue to the country; which issue is not responsive to the said replication; and is an immaterial issue.

Ashton & Key, for plaintiff.
Wallach & Jones, for defendants.

CRANCH, Chief Judge (THRUSTON, Circuit Judge, not sitting in this cause). Upon a general demurrer the judgment must be against the party who commits the first substantial fault in pleading. The demurrer, in this case, is special only so far as regards the rejoinder, which avers so many distinct answers to the replication, involving several negatives pregnant, and putting in issue to the jury, matters of law mingled with allegations not responsive to the replication, as to make it a bad rejoinder. But the replication itself is not a sufficient legal justification for not bringing the suit within three years. It

confesses and attempts to avoid the plea of the statute of limitations, by showing that the plaintiff instituted suits in the name of the defendants, (without any objection by them,) against the managers, whereby the three years were expended, when the defendants, by virtue of their authority as legal plaintiffs, dismissed the suits. This is certainly no legal bar to the operation of the act of limitations. The supreme court of the United States, in the case of Corporation of Washington v. Young, 10 Wheat. [23 U. S.] 406, upon the same ticket No. 1037, decided that the holders of the ticket had no right to use the name of the corporation, and sue upon the managers' bond, without the consent of the corporation, and that no consent appeared to be given in that case; and it was upon the return of that cause to this court, by mandate, after having reversed the judgment and set aside all the pleadings up to the declaration that the plaintiffs in that cause (the now defendants) caused the suits to be dismissed as mentioned in the replication. The replication, therefore, cannot be maintained.

The pleas are good; but the first three counts of the declaration are not sufficient to support the action, because they do not state of whom the one fourth of the ticket was purchased; and because the defendants are not liable for a quarter ticket, suing alone; the only obligation of the corporation being upon the contract contained in the whole ticket, signed by their managers, as was decided in this court, in Shankland v. Washington [Case No. 12,703], at May term, 1828. The fourth count, however, for money had and received, is a good count, and, therefore, the judgment upon the demurrer cannot be for the defendant, although the first three counts are insufficient, because the plaintiff's special demurrer to the defendant's rejoinder, is special as to that rejoinder only, but operates as a general demurrer to the whole declaration; and upon a general demurrer to the whole declaration, if there be one good count, the demurrer must be overruled. But the plaintiff's replication to the second and third pleas, being insufficient to support his action, the judgment upon this demurrer must be for the defendants.

It was stated by the plaintiff's counsel, in the course of the argument in this cause, that it was the wish of the parties, that the court should decide the merits of the case upon this demurrer; and that they would ask leave to amend the declaration if the court should be of opinion that, by any such amendment as could be made consistently with the facts which appeared on the trial of the former cases, namely, Washington v. Young [Case No. 17,241]; Clark v. Washington [Id. 2,839]; and Shankland v. Washington [supra],—the plaintiff would be entitled to recover. The court has looked into those cases, and finds that although Davis, who sold to the plaintiff this quarter of a ticket, and Gillespie, who sold the ticket to Clark, must, under the decision of the supreme court in Clark's case, be considered as the agents of the corporation for the sale of tickets, yet, that they had no right to sell less than a whole ticket, or to sell a fractional part of a ticket, so as to multiply the causes of action against the corporation at their pleasure. In the plaintiff's printed statement of the case for the supreme court in the case of Corporation of Washington v. Young [supra], it is said that the original ticket, No. 1037, was never in the possession of the parties for whose use the suit was brought; but was retained by Gideon Davis, who sold four quarters of the said ticket, each quarter being in the terms following: "By authority of congress, $30,000 highest prize, quarter of No. 1037, in the lottery for building Lancastrian school-houses, a penitentiary, and city hall, in Washington city, payable sixty days after the completion of the drawing. Gideon Davis, 4th." And it is stated "that the said Gideon Davis, since the completion of the drawing of the said lottery, and before the bringing of this suit, delivered to the said managers the said original ticket, No. 1037, towards the securing and paying of the money stipulated to be paid by him, under the contract recited and set forth in the said condition," that is, of Davis's bond to the managers. The ticket had been sold and delivered by the managers to the said Davis, under that contract. It will be perceived that the certificate given by Davis for the quarter of the ticket, appears to be his own individual act. It does not name the managers, nor allude, in any manner, to the authority or responsibility of the corporation of Washington. We think, therefore, that it must be considered as his personal engagement only, and that it cannot, in any manner, bind the corporation. The judgment upon this demurrer must, therefore, be for the defendants.

Case No. 8,736.

McCULLOCH v. DEBUTTS.

[1 Cranch, C. C. 285.] [1]

Circuit Court, District of Columbia. March, 1806.

PRACTICE AT LAW—CONTINUANCE—COSTS.

When the writ of inquiry is set aside by the defendant, the plaintiff may have the cause continued at the defendant's costs.

Mr. Youngs, for defendant, set aside the office judgment, and pleaded not guilty.

E. J. Lee, for plaintiff, elected a continuance, and said it was the practice in such cases that the continuance should be at the costs of the defendant, although the defendant offered ready.

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

THE COURT inquired of the clerk, who said such was the practice.

Continued, at the costs of the defendant.

McCULLOCH (DEBUTTS v.). See Case No. 3,718.

Case No. 8,737.

M'CULLOCH v. GIRARD.

[4 Wash. C. C. 289.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1822.

CONTRACTS — WRITTEN INSTRUMENT — WHETHER WHOLE OR PART OF CONTRACT—PAROL EVIDENCE TO VARY—STATUTE OF FRAUDS.

1. Explanation of the rule that parol evidence shall not be given to explain or vary the written contract.

2. The question is, is this written instrument the contract, or merely a part performance of the parol agreement. It has elsewhere been decided, that in cases not within the statute of frauds, evidence may be given to contradict a written simple contract, by showing that the whole of it was not reduced to writing. It may be well doubted, nevertheless, whether the safest rule is not to apply the policy and reason of the statute of frauds to all cases of written contracts.

[Cited in Astor v. Girard, Case No. 595; The Alida, Id. 200; Page v. Sheffield, Id. 10,667.]

[Cited in Barker v. Bradley, 42 N. Y. 320.]

This was an action to recover the quarter interest payable the 1st of October, 1816, on $125,000, six per cent. funded stock of the [Bank of the] United States, with interest from the 2d of October, 1816, when it was received by the defendant. The declaration contained two counts, one upon a special agreement, which was fully proved by Mr. Jones, and the other for money had and received to plaintiff's use.

Mr. Jones, who was one of the five commissioners for receiving subscriptions to the Bank of the United States in Philadelphia, was examined as a witness, who stated, that he, after the 20th of July, 1816 (when, as it afterwards appeared by a return of the commissioners from other parts of the United States, that the twenty-eight millions to be subscribed by individuals had not been taken, by about thirty thousand shares), was authorized by sundry persons to subscribe for them to the amount of about ten thousand shares, including the plaintiff; for whom, and his associates, he was to subscribe for five thousand shares, being furnished by the plaintiff with the specie and certificates, accompanied by a power of attorney, to pay the first instalment. The specie part, $25,000, he deposited in the bank of the defendant. The power of attorney was to himself, to transfer the stock, $125,000, to the commissioners. That after divers conversations with the defendant, a verbal agreement was entered into between the defendant and the witness, as the agent of the plaintiff and others, previous to the 27th of August, 1816, on which day a final arrangement was made in writing, and which was given in execution of the agreement. The paper alluded to was as follows: "For value received, I promise to transfer to J. W. M'Culloch or order five thousand shares of the Bank of the United States, on which the first instalment has been paid, as soon as the books for that purpose shall be opened by the said bank." Signed by the defendant. The whole of this paper is printed, except the date, the name of the person to whom the transfer was to be made, the number of shares and the signature.

The counsel for the defendant objected to any evidence being given by the witness of a parol agreement with the defendant variant from the above instrument, which they contended was the final agreement between the parties. They cited 1 Phil. Ev. 494, 496; 3 Camp. 426; [Grant v. Naylor] 4 Cranch [8 U. S.] 229; 12 East, 6; 3 Wils. 275; 4 Brown, Ch. 515.

On the other side, it was contended that the paper of the 27th of August was not the agreement, but was merely intended as a part performance of the parol agreement, so far as it could be performed, until the books of the bank should be opened for making transfers.

Chauncey & Sergeant, for plaintiff.

Mr. Binney and J. R. Ingersoll, for defendant.

WASHINGTON, Circuit Justice. We admit the general rule of law, that parol evidence to vary or explain a written contract, except in the case of a latent ambiguity, is inadmissible. But the question is, whether the paper which has been given in evidence be the contract between these parties, or was given merely as a certificate of the number of shares to which the plaintiff was entitled under the parol contract, and in part performance of that agreement, so far as it could be performed before the bank was organized, and had opened its books for transfers? The court is of opinion, in the present stage of the cause, that the instrument under consideration was given for the purpose of executing the parol agreement as far as it could then be executed; and that if it should turn not that it formed a part of that agreement, that such a paper should be given, or that a paper of that description was, in the ordinary course of the defendant's business, in respect to transactions of this nature, given by him; evidence of the parol contract will be proper, and will not violate any of the rules of law upon this subject.

The witness then proceeded to state that, having ascertained in his conversations with the defendant that he intended to take the

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

unsubscribed shares, he informed the defendant that he was authorized to subscribe five thousand shares in the name of the plaintiff, and also for other persons, whom he named, a certain number for each, and that he had a right, and intended to do so. But not wishing that any collision should take place between the commissioners (the defendant being one), he was willing not to exercise his right, if the defendant would engage that the plaintiff, and the other persons by whom he was employed, should participate with the defendant in his subscription, to the extent of the shares he was authorized to subscribe for them severally, and stand in all respects in the same situation as they would stand in case they were actually subscribers. To this proposition the defendant assented, in consequence of which the witness did not subscribe for those persons, but immediately gave them notice of the arrangement he had made with the defendant. The witness, at the same time, informed the defendant that he was provided with the specie and certificates of funded stock to pay the first instalment on the number of shares which he was empowered to subscribe. On the 26th of August he gave the defendant a check for the $25,000 specie, lying in his bank, the specie instalment for the five thousand shares for the plaintiff; and, in consequence of the arrangement made with the defendant, he returned to the plaintiff the power of attorney for transferring the $125,000 of funded stock to the commissioners, that another might be forwarded to the witness to transfer that stock to the defendant. This he received soon after, which, as also the certificates, he delivered to the defendant. On the 26th of August the defendant took the unsubscribed shares. On the 27th of August he delivered the above instrument of that date to the witness. The witness understood from the plaintiff that Mr. Donnell of Baltimore, and some others, were concerned with him in the five thousand shares, but to what extent he knew not. The stock transferred to the defendant stood in Mr. Donnell's name, and was accompanied by a power from him to transfer it. But the certificates and power were put into his hands by the plaintiff, and he knew no other person in the transaction but the plaintiff. When the contract was made with the defendant, he did not contemplate the subject of the present controversy.

It appeared by the books of the loan office, that the $125,000 of six per cent. funded stock delivered to the defendant by the plaintiff, were transferred to the defendant on the 16th of September, the day before the books closed for that quarter; and that, on the 2d of October, the interest on that stock being $1875, for the quarter due on the 1st, was paid to the defendant. It also appeared by the books of the commissioners of the bank, that on the 5th of November 1816, the day after the board was organized, certain resolutions were introduced by Mr. Sergeant, asserting a right to all the interest due the 1st of October on the funded stock transferred to the commissioners, and providing that no transfers of shares in the bank should be permitted by any subscriber, until that interest was paid to the bank. On the 7th of that month the board agreed to reconsider these resolutions, and the same were referred to a committee, who, on the 25th of the same month, reported a substitute, which was rejected, and Mr. Sergeant's resolutions were then rescinded. It was further proved, that, on the 29th of November, immediately or soon after the books were opened, the defendant transferred five thousand shares to the plaintiff, who, on the same day, transferred four thousand five hundred of them to other persons, amongst whom was Mr. Donnell. The defendant also produced a book belonging to the defendant, containing a number of printed promissory notes, similar to that given to the plaintiff on the 27th of August, of which a certain number had been filled up, and having been complied with, had been returned to the defendant. The material parts of the arguments of the counsel are noticed in the charge.

WASHINGTON, Circuit Justice (charging jury). Great talents and ingenuity have been displayed by the learned counsel on both sides, in the argument of this cause. But after all, it lies within a very narrow compass; the only question as to which any difficulty is perceived by the court, being, what was the real contract between these parties? Or, to render it more intelligible, which was the contract between them?—the parol agreement, as proved by Mr. Jones, or the promise contained in the paper of the 27th of August? When the objection was made to the introduction of evidence, to prove the parol agreement, the court could have but an imperfect glimpse of the question to be decided, the terms of that contract being, at that stage of the cause, unknown to the court. But as far as the case had been disclosed, we thought the evidence ought to be admitted; and in coming to this conclusion, we were in no small degree influenced by the form and character of the instrument which, by the defendant's counsel, has been considered as the real contract between these parties; but which seemed to us to be rather intended to give effect to the parol agreement, so far as it could be available for that purpose before the bank was organized, and the books were opened; than as reducing the parol contract to writing. The court was nevertheless of opinion that such evidence would, generally speaking, be improper, unless it should appear that the parties had agreed that a written contract should be given as evidence in part, or in part performance of the parol agreement; or unless it was to be given by some usage or prac-

tice, either general or special, in relation to the party giving the promise, so as to be at least evidence of such an agreement, or that such was the understanding of the parties. I know that it has been elsewhere decided, and that too by very learned judges, that, in cases not within the statutes of frauds, evidence may be given to contradict a written simple contract, by showing that the whole of it was not reduced to writing. It may be well doubted, nevertheless, whether the safest rule is not to apply the policy and reason of the statute of frauds to all cases of written contracts. Without, however, giving any opinion on this point, we are clearly of opinion that, under the restrictions laid down by the court in admitting the parol evidence in this case, the rule is a safe one. The parol agreement having been fully laid before the jury, together with other circumstances which attended it, it is for them to decide, whether the paper of the 27th of August contains the real contract between the parties on that day, or whether it was merely intended to give effect to the parol contract, as far as it could be done prior to the opening of the books of the bank to receive transfers? When this question is settled, there can be no difficulty in deciding whether the contract has been broken or not. To prove that the parties could not have intended to change the terms of the parol agreement by reducing it to the mere form of a promise to transfer so many shares, the character in which Mr. Jones acted, and the nature of his authority, have been strongly pressed by the plaintiff's counsel upon the attention of the jury. He was a mere agent, authorized to subscribe for the plaintiff five thousand shares, and was furnished with the means to make good the subscription. Strictly speaking, he was bound to comply literally with his instructions by subscribing. But supposing that the contract with the defendant was a substantial compliance with his authority, and most undoubtedly it was, if fulfilled; he forbore to exercise his right of subscribing for the plaintiff in consequence of the solemn assurances of the defendant that, if he would so act, the plaintiff should participate in the defendant's subscription to the extent of five thousand shares, and stand in the same situation as if he had actually subscribed. Of this contract Mr. Jones gave immediate notice to the plaintiff, with which, it would seem, he was satisfied. Now the argument founded on these facts is, that after a substantial performance of his instructions, and that communicated to his constituents, it is against all probability that Mr. Jones would enter into a new and different agreement; or that he and the defendant should so have intended.

Another argument of still more weight is drawn from the character and form of the instrument of the 27th of August. The whole of it is printed except the date, name of transferee, number of shares, and the signature. No blank is left in which five words of a special contract could be inserted. This is not the case with printed forms of conveyances, charter parties, policies of insurance, and other instruments intended to admit the introduction of special contracts, for which sufficient blank spaces are always left: and so purely formal are the printed parts of a policy of insurance considered, that if there be any discrepancy between them and the written parts, the latter is always considered as containing the real contract of the parties. The form of the paper under consideration was strictly adapted to a sale by the defendant of his shares, previous to the opening of the books of the bank; and yet we find that it was made use of as evidence of the number of shares to be transferred, in cases where no sales were made, but where a special contract subsisted. It also appears that the defendant kept a book of these printed documents, with a duplicate of each, many of which had been issued, and being fulfilled, were returned to the defendant, and deposited in the book. From these circumstances, it would seem that these instruments were considered as merely formal; used by the defendant as such in the ordinary course of his business, in negotiations of this kind. The conclusion drawn by the plaintiff's counsel from these facts and circumstances is, that the paper of the 27th of August was understood by the parties as evidence merely of the number of shares which were to be transferred under the parol contract, and not as evidence of the contract itself.

On the part of the defendant, it has been contended, that since the parties, at the time the contract was entered into, did not contemplate the subject of interest to become due on the first of October, but must, in common with others, have considered that as belonging to the bank (as no doubt it did;) and as a relinquishment of her right to such interest could not have been expected, the parties had no motive to adhere to the strict letter of the parol agreement, the written contract embracing every object which could by the parties have been deemed material, or worth incorporating into it; that the premature transfer to the defendant by the plaintiff, of the funded stock, on the 16th of September, which he need not have made until the bank was organized, and his acceptance of a transfer of the bank shares on the 29th of November, and delivering up the defendant's engagement of the 27th of August, prove that the whole contract was considered as fully satisfied, those acts amounting to a waiver of the parol agreement, even if it was not absorbed and extinguished by the written contract. To all this it is answered, that the circumstances relied upon prove nothing in relation to the question, which was the real contract between the parties? for if the parties did not contemplate any casual or unexpected consequences

to grow out of the precise terms of the parol contract, and had therefore no motive to adhere to that contract, they were equally without a motive to change or to waive it, and therefore it was left unaffected by the written contract. That, whether the one contract or the other was considered as the subsisting one, still the transfer of the stock to the defendant, and of the bank shares to the plaintiff, were necessary acts to be performed in fulfillment of either of them; and that as to the time when the former act was performed, it was quite unimportant to the plaintiff; since if the parol contract was regarded by the parties as the subsisting one, then the October interest would be received by the defendant as trustee for the plaintiff, and for his use.

After this examination of the arguments of the counsel on each side, we return to the question, which was the real contract between the parties? If the written one, then it is admitted that it was fulfilled according to its terms. If the parol agreement, then the question will be, has that been fulfilled? To enable you to give an answer to this question, you will have to inquire what would have been the rights of the plaintiff in relation to the subject in controversy, if on the 26th of August Mr. Jones had subscribed for five thousand shares in the name of the plaintiff? since, by the agreement with the defendant, he was to stand precisely in the same predicament as if he had subscribed those shares. The plaintiff contends that he would have been entitled to the October interest. The defendant's counsel deny this, and insist that the bank was, and still is, entitled to that interest, and that, having never relinquished her right, she may yet recover it from the subscribers. That if the bank is not entitled, then the interest belongs to Mr. Donnell, who was the owner of the stock paid on account of the first instalment. Let us examine these pretensions. And first, as to that set up for the bank. We have no doubt but that the bank had at least an equitable right to the October interest on all the stock which constituted the first instalment, although the transfer to the bank was not, and could not be made previous to its being organized. It stood, nevertheless, to the credit of the owner of the stock on the 1st of October, to whom it was legally payable. But whatever her rights were, they were perfectly known to the board. Her claim was asserted by Mr. Sergeant's resolutions, as well as by a reference of them to a committee, and were finally retracted and given up by the resolution of the 25th of November, rescinding Mr. Sergeant's resolutions. The October interest having been received by the subscribers, the bank has acquiesced from that time to the present, and the question is, whether, if the bank were now the plaintiff, she could, under all the circumstances of the case, and the absence of every pretence of fraud, ignorance, or mistake, maintain the action? We think she could not. As to the right set up for Mr. Donnell, it stands upon ground still less tenable. In the contract between the plaintiff and the defendant, he was no party, and was altogether unknown. The plaintiff was to transfer to the defendant $125,000 of stock, and to the latter it is quite immaterial whose stock he transferred. He had certificates of stock in the name of Donnell, with a regular power to transfer it, and he did accordingly transfer it to the defendant, who thus became the legal owner of the stock. The plaintiff therefore treated this stock as his own, and was possessed of all the power of an owner of it, under an authority derived from Mr. Donnell, who, during more than six years, has never asserted a right to the interest received by the defendant. To whom then can the defendant be liable for that interest, if liable at all, but to the plaintiff? If indeed he is not entitled to retain the money after he shall have received it from the defendant, in consequence of some agreement between him and Donnell, that is a matter between them with which the defendant has nothing to do. There is not a possibility of his being twice called upon for the sum in dispute. The question then is, what are the plaintiff's rights under the parol contract, should you be of opinion that that is the real subsisting contract between the parties? The answer is a plain one. To the interest due on the 1st of October, which was received by the defendant, with interest from the time of the receipt.

The jury found accordingly.

McCULLOCH (JACKSON v.). See Case No. 7,140.

Case No. 8,738.

M'CULLOCH v. The LETHE.

[Bee, 423.] [1]

Admiralty Court, Pennsylvania. 1781.

SEAMAN'S WAGES — RISK OF WAR — WAR TERMINATED—LESION OF WAGES.

A mariner ships at Philadelphia, in time of war, for Bordeaux and back again. While the ship is at Bordeaux, peace takes place. The ship returns to Philadelphia, which terminates the voyage. The mariner's wages shall not be lessened on account of the decrease of the risk on the homeward voyage.

[Cited in Shaw v. The Lethe, Case No. 12,721.]

M'Culloch had shipped on board the Lethe in time of war, for a certain voyage from Philadelphia to Bourdeaux, and back again, at the wages of £18 per month. The ship was detained long at Bourdeaux, and whilst she was there, peace took place. The libellant performed the voyage, but was refused the wages on account of the peace, on a sug-

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

gestion that the risk, which was the occasion of the high wages being removed, the libellant ought to have only customary peace wages from Bourdeaux to Philadelphia.

Judgment in favour of the libellant for wages agreeable to contract.

Case No. 8,739.

McCULLOCH v. McLAIN.

[1 Cranch, C. C. 304.] [1]

Circuit Court, District of Columbia. March Term, 1806.

WILLS—REAL PROPERTY—CHARGE ON TO PAY DEBTS.

The words, "I will, in the first place, that my just debts be paid," charge the real estate with the payment of the debts.

Bill in equity [by McCulloch against McLain's executors] to charge real estate with the payment of debts. The words of the will were, "I will, in the first place, that my just debts be paid by my executors." The testator then devises all his estate, real and personal, to trustees. and makes them executors. The authorities cited for the complainant were: 1 Eq. Cas. Abr. 198; 2 Eq. Cas. Abr. 371, 372; and Trott v. Vernon, 2 Vern. 708.

THE COURT decreed a sale of the real estate.

Case No. 8,740.

McCULLOCH et al. v. TAYLOR et al.

[1 Wkly. Notes Cas. 391.]

Circuit Court, E. D. Pennsylvania. April 22, 1875.

BILLS—ACCEPTOR — LETTER OF CREDIT—ISSUER—OFFSET.

The acceptor of bills drawn under the usual forms of commercial letters of credit can compel the holder of the letter to furnish funds to meet the acceptances; and a debt due by the issuer of the letter to the holder cannot be set off against this obligation.

In equity. This case was heard on bill, answer, and proofs. The bill averred the existence, prior to 18th September, 1873, of two firms, viz., Jay Cooke & Co., and Jay Cooke, McCulloch & Co., doing business as bankers in Philadelphia and London respectively. The firms were in no way connected, except that a number of persons (not including the plaintiffs) were members of both firms. The plaintiffs were the only members of the firm of Jay Cooke, McCulloch & Co. who were not also members of the other firm. During 1873 Jay Cooke & Co. issued to the defendants N. & G. Taylor Co. several commercial letters of credit for £10,000 each, drawn on Jay Cooke, McCulloch & Co. The letters of credit were in the following form: "No. ——. Philadelphia, ——, 187—. Sir: We hereby authorize you or such parties as you may direct to value on Messrs. Jay Cooke, McCulloch & Co. of London, in drafts at four months to the extent of ten thousand pounds (£10,000) for account of N. & G. Taylor, drafts to be drawn in within six months from this date for the costs of tin plates to be exported to an Atlantic port in the United States, and advice thereof to be given to Messrs. Jay Cooke, McCulloch & Co., accompanied by certified invoices, consul's certificates, policies of insurance, and bills of lading to order of Jay Cooke & Co. We hereby agree with the drawers, endorsers and bona fide holders of bills drawn under and in compliance with the terms of this credit that the same shall be duly honored upon presentation at the counting house of Messrs. Jay Cooke, McCulloch & Co. in London. Very truly yours, ——————." Accompanying each of these documents was a receipt, in the following form: "New York, ——, 187—. Received from Messrs. Jay Cooke & Co. the letter of credit of which annexed is a copy, in consideration whereof we hereby agree to provide them with sufficient and satisfactory funds to meet the payment of all bills drawn under it twenty days before the maturity of the same in London, respectively, either in cash at their drawing rate, or in bankers' bills payable at not exceeding sixty days sight in London, endorsed by us and approved by them, it being understood that they may decline any bills, however good, at their discretion. We also agree to give security for the same at any time if required by the said Jay Cooke & Co.; and further, that all property purchased under the said credit, and the proceeds thereof, together with the policies of insurance thereon (which we agree to effect) and the bills of lading are hereby pledged and hypothecated to Jay Cooke & Co., and Jay Cooke, McCulloch & Co., as collateral security for the fulfilment of this contract, and are held subject to their order, with authority to take possession and dispose of the same at discretion for account of whom it may concern, charging all expenses, including commission for sale and guarantee, and applying the proceeds for their security or reimbursement. And we further pledge, as security for any other indebtedness of our firm to Jay Cooke & Co. or Jay Cooke, McCulloch & Co. any surplus that may remain either in the property or the proceeds thereof after providing for the acceptances under said credit. On all drafts drawn under said credit we agree to pay one per cent. commission, and interest at five per cent., or the Bank of England rate if higher. We further authorize you to cancel the said credit at any time to the extent it shall not have been acted upon when notice of revocation is received by the user. This obligation is to continue in force notwithstanding any changes in the individuals composing either of the firms par-

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

ties to this contract, or in that of the user of the credit."

These receipts were signed by the defendants. Under these letters goods were purchased and bills drawn on Jay Cooke, McCulloch & Co., which were accepted and paid at maturity by them. On 18th September, 1873, Jay Cooke & Co. stopped payment, and were on 26th November, 1873, adjudicated bankrupts. Up to that time N. & G. Taylor Co. had made payments to Jay Cooke & Co. pursuant to their engagement to meet the bills drawn under the letters of credit. On the day of the suspension of Jay Cooke & Co. there was outstanding a letter of credit, under which bills had been drawn and accepted by Jay Cooke, McCulloch & Co., and together amounting to £22,678 19s. 7d. sterling, over and above the amounts that had before that date been paid to Jay Cooke & Co. by N. & G. Taylor Co.; there was also due for commissions £226 15s. 10d. sterling, and £9 17s. for stamps. For the sum of £22,678 19s. 7d., Jay Cooke, McCulloch & Co. had made themselves liable by accepting bills drawn under the letters of credit, and N. & G. Taylor Co. had not paid Jay Cooke & Co., or Jay Cooke, McCulloch & Co., anything on account of the same. After the suspension of Jay Cooke & Co., and in anticipation of the bankruptcy that ensued, that firm, believing that the equitable right to be paid for the amount advanced under the letters of credit was in Jay Cooke, McCulloch & Co., who had agreed to make the advances, and who alone were competent to carry out their contract, and who ultimately did so by paying their acceptances, consented, at the instance of the agent of Jay Cooke, McCulloch & Co., to hand over the documents to Drexel & Co., as agents of Jay Cooke, McCulloch & Co., to collect the balance due or to become due from N. & G. Taylor Co. under their contracts above set forth. In September, 1873, after the suspension of Jay Cooke & Co., two of the consignments of goods purchased under the letters of credit arrived. The goods were consigned, according to the agreement, to Jay Cooke & Co., as collateral security for the performance by N. & G. Taylor Co. of their contract to provide funds. These bills of lading were handed over to the Messrs. Taylor Co. upon their signing a contract in this form, one on the 24th, and the other on the 29th of September, 1873: "Philadelphia, Sept. 29, 1873. Received from Hugh McCulloch, Philadelphia, the merchandise specified in the bill of lading, per Pennsylvania, dated 10th of Sept., 1873: * * * 1207 boxes tin plates * * * And in consideration thereof we hereby agree to hold said goods in trust, with liberty to sell the same, and in case of sale, to hand the avails, as soon as received, to Hugh McCulloch, as security for due provision for the acceptance of Jay Cooke, McCulloch & Co., of London, on our account noted at foot; and we further pledge to them said goods, and proceeds thereof, as security for the payment of any other indebtedness of ourselves to Hugh McCulloch, or Jay Cooke, McCulloch & Co. We further agree to keep said property insured against fire, payable in case of loss, to Hugh McCulloch, with the understanding that they are not to be chargeable with any expenses incurred thereon, the intention of this arrangement being to protect and preserve, unimpaired, the lien of Hugh McCulloch, and Jay Cooke, McCulloch & Co., on said property. N. & G. Taylor Co."

After the delivery to them of these goods, as above, N. & G. Taylor Co. continued to make payments to Drexel & Co., as agents of Jay Cooke, McCulloch & Co., of the amounts they were bound to pay on their contracts, and these were all made after the adjudication of Jay Cooke & Co. as bankrupts. The proceeds of the goods received were more than enough to pay the claims of plaintiffs. The bill prayed for discovery, and that a decree should be made ascertaining plaintiffs' rights to receive the amount due by defendants as against any claim by the assignee in bankruptcy of Jay Cooke & Co. The material facts alleged in the answer were as follows: They had been in the habit of transacting business which required the payment of large sums annually in England and Scotland. When the exact amount of these payments was known to defendants, they purchased sight drafts from Jay Cooke & Co. on Jay Cooke, McCulloch & Co., paying for them as received. But where they did not know the exact amount required, they bought of Jay Cooke & Co. the right of drawing on Jay Cooke, McCulloch & Co. any amount which they might require, and this was done through the medium of the open letters of credit alluded to in the bill. Defendants drew drafts on Jay Cooke, McCulloch & Co. by virtue of these open letters, having, at the time of purchasing the latter, agreed to pay Jay Cooke & Co., at Philadelphia, in U. S. currency, the equivalent of each draft drawn, twenty days before maturity thereof in London, with one per cent. commission.

When Jay Cooke & Co. stopped payment, defendants did not know that there existed any probability of insolvency. Defendants denied that Jay Cooke, McCulloch & Co. were either alone competent to carry out their contracts in regard to the drafts in question, or that they actually did so by paying their acceptances, except to the extent of £2761 13s. 4d. The acceptances were paid through Jay Cooke, McCulloch & Co. by defendants, who supplied the funds in each case a short time before the acceptance became due. On 18 September, 1873, there was out a sight draft of Jay Cooke & Co. on Jay Cooke, McCulloch & Co. for £2264 7s. 11d., for which defendants had paid Jay Cooke & Co. in full; and there were three open letters of credit, as aforesaid, each for

£10,000, for which they had agreed to pay Jay Cooke & Co., in Philadelphia, twenty days before the maturity in London of each draft drawn thereunder. On receiving the bills of lading for each lot of merchandise, defendants had signed to Jay Cooke & Co. a printed receipt, identical with the one set forth above, under date of 29 Sept., 1873, except that the name of Jay Cooke & Co. was printed therein, wherever the name of Hugh McCulloch occurs in the above receipt. On arrival of the Pennsylvania, 23 September, 1873, defendants, for their own protection, called on Jay Cooke & Co. for the purpose of stopping in transitu such merchandise as had been consigned to Jay Cooke & Co. for them. They were informed that Jay Cooke & Co. were solvent; that the bills of lading had been transferred to Hugh McCulloch, and were held for him by Drexel & Co.; that all acceptances would be paid by Jay Cooke, McCulloch & Co., by which firm the draft for £2264 7s. 11d. would be also accepted and paid. As the indebtedness of defendants on the drafts drawn on Jay Cooke, McCulloch & Co. matured (after the 18th of September, 1873), defendants bought drafts of Drexel & Co., and sent them to Jay Cooke, McCulloch & Co. to be applied to the payment of the particular acceptances about to mature, describing them specifically. Defendants understood when sending them that said drafts were so indorsed that they could not be used except to pay the specific acceptances then becoming due. The said draft for £2264 7s. 11d. was actually protested for non-payment on the 23 September, 1873. It remains still unpaid. Defendants had paid for all drafts drawn on Jay Cooke, McCulloch & Co. before the same matured, including commissions, etc., excepting the sum of £2761 13s. 4d. on the last draft drawn by them, from which amount they claimed that they had a right to deduct the amount of the draft of Jay Cooke & Co., aforesaid, for which they had paid Jay Cooke & Co. They admitted that they would be liable to the latter £2761 13s. 4d., provided the last-mentioned draft had been paid.

Sydney Biddle and Mr. McMurtrie, for plaintiff.

This transaction is simply an agreement by one firm (Jay Cooke & Co.) that another firm (Jay Cooke, McCulloch & Co.) shall accept drafts drawn on them by the defendants, for a profit of one per cent. to be divided between the firms. Defendants agree to supply funds to meet the acceptances before they become due. The agency of Jay Cooke & Co. in the matter was merely to pledge themselves for the reliability of the defendants. The contract was this: The English firm agreed to accept drafts for defendants, provided they were assured of the latter's credit. The American firm assumed the responsibility of assuring the credit of defendants, and the latter agreed to supply the English firm with the necessary funds to meet the acceptances before they matured. It is merely a loan of their credit by the two banking firms to defendants, who are liable to the English firm for the amount of their drafts. The latter can resort either to them or to the American firm. As the firms are entirely distinct, there is no set-off possible. The American firm, in receiving funds from defendants to meet the latter's drafts, were the agents of the English firm.

Mr. Fallon, contra.

This was a contract made entirely between defendants and Jay Cooke & Co. They knew Jay Cooke, McCulloch & Co. in the transaction solely as agents of the former. The letter of credit was the basis of the whole transaction. That was purchased from defendants Jay Cooke & Co. exclusively. Jay Cooke & Co. contracted that they should be supplied with certain credit, for which they were to pay Jay Cooke & Co. Defendants would have been liable on a breach of their contract to the Philadelphia firm, not the London firm, and vice versa. They were, therefore, entitled to deduct the amount of the Philadelphia firm's indebtedness to them on the unpaid draft from their debt to the latter. As for the commissions, plaintiffs could in no case claim commissions from defendants, and would have been entitled to but half thereof from Jay Cooke & Co.

Mr. McMurtrie, in reply, was restricted to the question of commissions.

Before McKENNAN, Circuit Judge, and CADWALADER, District Judge.

CADWALADER, District Judge (to defendants' counsel): Do you deny that the drafts have been paid by the English firm?

Fallon: Yes. The drafts were paid by the defendants through the English firm, to whom defendants' other drafts were specially endorsed, payable to the particular drafts in question.

PER CURIAM: But as to the balance?

Fallon: As to that we have a set-off, as our contract to furnish funds is with Jay Cooke & Co. alone.

CADWALADER, District Judge: "McCulloch possesses proof of payment in holding the drafts, and could recover in an action of assumpsit for money paid for defendants. If he had not paid the drafts, he could recover on the ground of his liability thereon for having accepted them."

McKENNAN, Circuit Judge: "This is a very simple question. It was merely a loan by Jay Cooke, McCulloch & Co. of their credit to defendants for a commission. Defendants cannot set off their claims against Jay Cooke & Co. I think plaintiffs are only entitled to half-commissions."

Decree accordingly.

McCULLOH (THATCHER v.). See Case No. 13,862.

McCULLOUGH (BELL v.). See Case No. 1,256.

Case No. 8,740a.

McCULLOUGH v. The ECHO.

[24 Betts, D. C. MS. 25.]

District Court, S. D. New York. Jan. Term, 1858.

SHIPPING — AFFREIGHTMENT — DAMAGE TO CARGO BY SWEATING—MASTER'S CONTRACT — HELD UNDER CHARTER PARTY — ANSWER TO LIBEL — AMENDMENT.

[1. The vessel is not liable for damage to the cargo caused by the sweating of the vessel.]

[2. A ship is liable in rem upon the master's contract of affreightment, though it is let to him by charter party, where the shipper is ignorant of that fact.]

[3. An answer in an action on a bill of lading, which fails to allege that the damages claimed accrued from the sweating of the vessel, is amendable.]

[This was a libel in rem by Jethro J. McCullough and others against the steam propeller Echo (James G. Wilson, claimant) for failure to deliver goods under the terms and conditions of a bill of lading.]

BETTS, District Judge. This action claims $3000 damages for the non-delivery at this port of three several parcels of galvanized iron shipped by the libellants at Wilmington on board the propeller Echo, September 11, 1856, to be delivered in good order (the dangers of the seas only excepted) to Phelps, Dodge & Co. and others, or assignees, in New York, according to the undertaking of the master of said vessel in three several bills of lading of that date. The libel charges that the parcels of iron were respectively laden on board the propeller in good order according to the statement in the respective bills of lading, and that the vessel sailed from Wilmington with the iron on board, and arrived at the port of New York September 19, 1856, but her master failed to deliver the same according to the undertaking in the bills of lading; and owing to negligence and want of care and proper management in the transportation of said cargo the iron was found on its arrival here greatly damaged by rust, &c., not arising from dangers of the seas, &c. The answer controverts those allegations of the libel, and further denies the responsibility of the vessel for those damages, however they may have occurred, because she was chartered by the master, and the contract with the libellants for the affreightment in question was upon the personal responsibility of the master alone. The further defence was attempted to be made on the trial, by proof that the iron was stowed and dunnaged in lading it on board according to the express directions of the libellants, and if it was injured on the voyage by wetting, other than by means of dangers of the seas, that damage was caused by such stowage of the libellants made by their agents or by occasion of the sweating of the vessel, for neither of which could the vessel be held answerable to the libellants. The latter point as a proposition of law would supply an adequate defence if sustained by testimony, as the injury would be an accident of navigation, and not the result of negligence or misfeasance on the part of the ship (Clark v. Banerall, 12 How. [53 U. S.] 272), and a vessel wholly demised by charter is under like liabilities when sailed by the charterer as by her owner (9 Stat. 636, § 5). The objection that the ship was under charter to the master would not, if properly pleaded and proved, exempt her from liability in rem upon his contract of affreightment. Under the maritime law the ship is specifically liable for breach of the bill of lading, although let by charter party, and the shipper is ignorant of that fact. The Phebe [Case No. 11,064]; The Waldo [Id. 17,056]; The Casco [Id. 2,486].

The defect of pleading in not alleging in the answer that the damages to the iron accrued from the sweating of the vessel, and that she was not answerable for such accident of navigation, would be remedied to the claimants by allowing them to amend their answer in that respect, had they established that fact by proof, but in my opinion the evidence is against them on that point, and the case will accordingly be disposed of upon the pleadings and proofs as they stood on trial.

A close scrutiny of the facts was made on the trial by the examination of ten witnesses to the condition of the iron when shipped and that of the vessel when it was received on board; the manner of stowage; the state of the weather during the voyage, and the condition of the iron when unladen in New York. It seems to me upon the whole proofs there is no sound foundation for the hypothesis that the injury which the iron sustained from wetting was caused by the sweating of the vessel; nor, if the evidence of the engineer of the vessel is to be credited, that the bottom of the hold was damp when the iron was put on board and that the fact was known to the shipper and the iron was stowed under his direction and approval in a way to avoid injury to it from that cause, is there reason for imputing the wet or rusting from the damp state of the bottom of the ship, because it is clearly proved that water was standing upon the iron and was between the places so as to drip out of the bundles in unlading and carting them from the vessel. The direct and strong proof in the case is that the cargo was exposed to rain in its transportation, and on board the vessel before delivery to the consignee thereof, and that the damages thereby sustained are at the responsibility of the vessel.

The decree in the cause must therefore be that the libellants recover in this action the

damages they have sustained in this behalf, and that an order be entered referring the matter to a commissioner to ascertain and report the amount of such damages unless the same be agreed between the parties.

McCULLOUGH (GUION v.). See Case No. 5,863.

McCULLOUGH (JOHNSON v.). See Case No. 7,401.

McCULLOUGH (PIATT v.). See Case No. 11,113.

McCULLOUGH (PICKERING v.). See Case No. 11,121.

Case No. 8,741.

McCULLOUGH v. STERLING SCHOOL FURNITURE CO.

[4 Dill. 563.] [1]

Circuit Court, D. Iowa. 1877.

REMOVAL OF CAUSES — ACT MARCH 3, 1875—TIME WHEN APPLICATION MUST BE MADE.

1. An action at law in the state court was commenced by attachment, but no process was issued or served. At the next term the defendant, by consent, entered an appearance, and, by consent, also, the cause was continued, and leave given to the defendant until the second day of the next term, to answer; all of which was contained in the same journal entry. The Code of Iowa, provides that such actions "shall be tried at the first term after legal and timely service." Section 2744. At the term to which the cause was thus continued, a petition, under the act of March 3, 1875 [18 Stat. 470], for the removal of the cause to the circuit court of the United States was filed: *Held*, under the circumstances, that the application for the removal was in time.

[Cited in Wheeler v. Liverpool, London & Globe Ins. Co., 8 Fed. 198.]

2. If the entry of an appearance by the defendant had been general and unconditional, and at a term prior to the order for continuance, a different question would have been presented.

On motion to remand. The defendant, an Illinois corporation, removed this cause to this court under the act of March 3, 1875, the plaintiff being a citizen of Iowa. The plaintiff moves to remand the suit because the petition for the removal was not made and filed in time. The suit in the state court, which was an action at law, was commenced by attachment in December, 1876. No original notice (which, under the Iowa statute, takes the place of a writ of summons) was issued or served on the defendant. The next term of the state court was in January, 1877. At that term the defendant, by consent, entered an appearance, and at the same time, and likewise by consent, the cause was continued, and leave given to the defendant until the second day of the next term, to answer. The defendant's appearance, the continuance, and the order to answer at the next term, were contemporaneous, and are contained in the same journal entry. At the next term the defendant filed an answer and counter-claim; the plaintiff demurred thereto, which was not disposed of, and the plaintiff amended his petition; and thereupon, on the next day, and at the same term, the defendant filed its petition and bond in due form, to remove the cause to this court, and the removal thereof was ordered.

Mr. Blake, for the motion.

Mr. Tracy, contra.

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

DILLON, Circuit Judge. The mode of making and the effect of an appearance by the defendant in an action, are regulated by the Code of Iowa of 1873 (section 2626). This was an action at law, and the Code (section 2744) provides that such an action "shall be tried at the first term after legal and timely service has been made." This case was not triable at the January term, 1877, because process had not been served. The defendant may, however, enter a voluntary appearance, and such an appearance, if absolute and unconditional, has the same effect as to the power and jurisdiction of the court to proceed with the cause and the trial thereof, unless it shall order otherwise, as if original process had been served in time. But, as we construe the record of the state court, the appearance in this case was not general and unconditional, but it was the result of an agreement with the plaintiff's counsel to this effect: The defendant said to the plaintiff, "I will enter an appearance now, and thus save the expense of issuing and serving process, if you will consent that the cause shall go over to the next term, and that the answer shall be then filed;" to which the plaintiff agreed. Accordingly, the record of the state court shows that the defendant's appearance and the continuance of the cause were made at the same time and embodied in the same entry, which states that this was by consent of the parties. If the entry of appearance had been general, and at a prior time to the order for continuance, a different question would be presented. It is to be observed that, as the plaintiff had not served the defendant with process, he could not have forced the defendant to a trial, and the cause could not have been tried at the January term, except by the act or consent of the defendant, and the defendant did no act, and gave no consent, which made it legally possible to have tried the suit at that term. The action could not have been tried until the succeeding term, and at that term, and before the issues were finally completed, the application for the removal was made. Under these circumstances, it is our judgment that removal was in time. Motion denied.

As to time for the removal of suits, in Iowa, under the act of March 3, 1875, see Atlee v. Potter [Case No. 636]; Palmer v. Call [Id. 10,686].

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

McCULLOUGH (UNITED STATES v.). See Case No. 15,665.

McCULLY v. CUNNINGHAM. See Case No. 17,280.

Case No. 8,742.

McCUTCHEN v. HILLEARY.

[1 Cranch, C. C. 173.] [1]

Circuit Court, District of Columbia. July Term, 1804.

COSTS—SECURITY FOR—PARTY REMOVED FROM DISTRICT.

The defendant may require security for costs, from a plaintiff who has removed from the district since the commencement of the action.

Assault and battery. The defendant [Nicholas Hilleary] stated that since the bringing this suit the plaintiff [James McCutchen] had removed from the district to Philadelphia, and has there fixed his residence, &c. Motion by the defendant's counsel to lay a rule on the plaintiff to give security for costs. Granted. KILTY, Chief Judge, doubting.

Case No. 8,742a.

McCUTCHEON v. RECEIVERS et al.

[3 Cent. Law J. 635.]

Circuit Court, E. D. Missouri. Sept. 30, 1876.

DEATH BY WRONGFUL ACT—MISSOURI STATUTE—GRANDCHILDREN.

In this case the court was called upon to construe section 22, c. 43, p. 519, Wag. St., relative to the right to recover damages for the death of a person through the wrongful act of another. This section allows a certain amount to be sued for and recovered. "First, by the husband or wife of the deceased; or, second, if there be no husband or wife, or he or she fails to sue within six months after such death, then by the minor child or children of the deceased, etc." It was sought to extend this right of action to orphan children, living with their grandmother, for her death through the alleged wrongful act of the defendant railway.

DILLON, Circuit Judge, held that the statute must be construed strictly, and that no action was given under it to the grandchildren, in the case before him.

Case No. 8,743.

McCUTCHIN v. JAMIESON.

[1 Cranch, C. C. 348.] [1]

Circuit Court, District of Columbia. July Term, 1806.

APPRENTICE—AGE—RECITAL IN INDENTURE.

The master of an apprentice is concluded, by the recital in the indentures, as to the age of his apprentice.

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

Habeas corpus, to Andrew Jamieson to bring the body of McCutchin, whom he claims as an apprentice. The return showed an indenture between the overseers of the poor and Andrew Jamieson, under their seals, in which they state that the boy is nine years old in July, 1794, (the date of the indenture,) and bind him until he shall be twenty-one years old. Andrew Jamieson, wished to show, by parol evidence, that the boy was only seven years old when bound, and of course had two more years to serve.

THE COURT was of opinion that Andrew Jamieson could not, by parol, contradict his seal, and was at law estopped to deny the age. And in equity he had no claim to the further services of the boy, because he saw the boy at the time he took him, and agreed to his age, and expected only twelve years' service from him.

THE COURT discharged the boy.

Case No. 8,744.

McDANIEL v. FISH et al.

[2 Cranch, C. C. 160.] [1]

Circuit Court, District of Columbia. Dec. Term, 1818.

PRACTICE AT LAW—REINSTATEMENT OF ACTION—NON PROS.—ACTION ON REPLEVIN BOND—MITIGATION OF DAMAGES—MERITS OF CASE.

1. The court will not, at a subsequent term, reinstate an action of replevin which had been non-prossed at a preceding term, upon a rule to declare.

2. In an action upon a replevin-bond, it seems that the defendant may, in mitigation of damages, give evidence of fraud, by which the defendant was cheated by the plaintiff and others, in playing at cards, whereby the plaintiff won the mare of the defendant, which was the subject of the replevin.

[This was an action at law by McDaniel, for the use of James Semmes, against Francis Fish and others.]

Debt on replevin-bond. The breach assigned was that the plaintiff in replevin did not prosecute the replevin to effect.

Mr. Jones, for defendants in the present action, moved the court for leave to reinstate the replevin, and bring it forward on the docket, it having been non-prossed at December term, 1816, on the imparlance docket, upon a rule to declare, on the ground that the plaintiff in replevin, was an ignorant man, and did not know that he was to appear in court to prosecute his suit, and did not employ an attorney. The motion was supported by the affidavits of Fish himself, and several witnesses tending to show a gross cheating of Fish, by James Birch, ——— Burgerson, and James Semmes, in playing at cards and winning Fish's mare, which was the subject of the replevin. Fish had never entered his appearance in the replevin, either in proper person or by attor-

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

ney. At the return term of the writ the defendant appeared and laid a rule on the plaintiff to declare by the rule-day, upon which rule the replevin was non-prossed at the subsequent term. No judgment was ever entered for a return.

THE COURT (nem. con.) refused to reinstate the cause, on account of the wide door it would open to motions of this kind, and because the merits of the case might be given in evidence in mitigation of the damages in the present action upon the replevin-bond.

Case No. 8,744a.

McDANIEL v. MILAM.

[Hempst. 274.] [1]

Superior Court, Territory of Arkansas. July, 1835.

STATUTE OF LIMITATIONS—LAPSE OF TIME—EVIDENCE OF RESIDENCE.

Appeal from Hempstead circuit court.

[This was an action at law by George McDaniel against Benjamin R. Milam to enforce the payment of a note. From a decree of the court below in favor of defendant, plaintiff appealed.]

Before JOHNSON and YELL, JJ.

YELL, J. On the 24th day of December, 1819, the defendant executed his note to plaintiff for the sum of one hundred dollars, due and payable in all the month of April next after the date of said note, at Natchitoches, in Louisiana, and on the 20th of August, 1833, a summons was sued out on said obligation, and at the October term, 1833, it was returned not executed, and an alias summons was ordered and returned executed on the third day of January, 1834. The defendant, among other things, relied on the statute of limitations of five years, which was plead. The plaintiff replied that the defendant, by his removal out of the United States, to parts unknown, defeated the bringing of the action in five years after the cause of action accrued; to which the defendant replied that he did not defeat the bringing of the action aforesaid, in five years, as the plaintiff has alleged, upon which the plaintiff joined issue. Neither party requiring a jury, the cause was submitted to the court upon the testimony as appeared in the bill of exceptions.

E. S. Williams, a witness, stated in substance that he became acquainted with defendant Milam in June, 1820, in New Orleans. Defendant remained there until January, 1821, and then went to Mexico, remained there about two years, and returned again to New Orleans and remained a few days, and then went to Kentucky on a visit and remained there about two months, and again returned to New Orleans, where he remained a few days, and went again to Mexico and remained there several months, and again returned to the United States, and has since then been in Louisiana, frequently passing back and forth from there to Arkansas and Texas. He stated that the defendant could not have been esteemed a citizen particularly of any place. At the time the witness first knew him, he stayed most of his time in New Orleans, and lived at a boarding-house. He believed defendant did not reside at Natchitoches. Had heard him, Milam, say he went to New Orleans in 1819, and traded from thence to the West Indies. The defendant first settled in Arkansas eight years ago last fall. Witness further stated that Milam was in Natchitoches every year after his return from Mexico, as often as once or twice a year.

Upon this evidence the court rendered a judgment in favor of the defendant, from which the plaintiff appealed to this court.

Without going at large into the grounds upon which this judgment was rendered for the defendant, which admits of ample vindication, we are of opinion that the lapse of time, in the present case, is a bar to the plaintiff's recovery. We therefore affirm the judgment of the court below. Judgment affirmed.

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

Case No. 8,745.

McDANIEL v. RIGGS.

[3 Cranch, C. C. 167.] [1]

Circuit Court, District of Columbia. May Term, 1827.

JUDGMENTS—SURETY—SUBROGATION — EXECUTION QUASHED—RIGHT OF SURETY TO RECOVER MONEY PAID.

Judgment was rendered in Virginia, in favor of Shepherd, for the use of Riggs against Dixon, and McDaniel, his bail. McDaniel paid the money to Riggs, upon the execution, and took an assignment of the execution against Dixon. The execution against McDaniel, the bail, was quashed by the court in Virginia; and he brought suit in this court against Riggs for money had and received, to get back his money. *Held*, that he was entitled to recover, although he still held the assigned execution against Dixon.

This was submitted to the court, upon the following case agreed: In 1818, in the superior court of Loudoun county, in Virginia, one Shepherd, for the use of Riggs, brought an action of debt against Jacob Dixon, for whom, McDaniel, the present plaintiff, became appearance-bail. At November rules 1818, there was an office-judgment against Dixon and McDaniel, his appearance-bail, nisi, which was confirmed at December rules, 1818. On the 6th of April, 1819, McDaniel came into court, and entered himself special bail for Dixon. On the 10th of the same April, 1819, judgment was again rendered by default against Dixon, and McDaniel, his "common bail." On the 9th of April 1823, upon an execution issued on the 16th of April, 1819, agreeably to an office judgment render-

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

ed on the —— day of April, 1819, upon motion of McDaniel, it appearing to the court that special bail was entered on the 6th of April, 1819, the execution was quashed as to him, McDaniel. On the 6th of April, 1824, upon an execution issued on the 16th of April, 1819, agreeably to an office-judgment entered at the rules on the 10th of April, 1819, on the motion of McDaniel, and it appearing that special bail was entered on the 6th of April, 1819, it was ordered that the judgment as to McDaniel be set aside, and that execution as to him, be quashed; and a writ of restitution was awarded to the said McDaniel, he having before paid the money on the execution, to Riggs, upon receiving an assignment of the execution against Dixon; which execution was returned by the sheriff, at the return term, (August, 1819,) with the indorsement of the assignment thereon; but without any other return written thereon. Riggs was never a resident in Virginia; and a writ of restitution could never have been served upon him, if such could have issued, or had issued against him. It did not appear, by the record, whether the writ of restitution was awarded against Shepherd, the legal and nominal plaintiff in the action, or against Riggs, for whose use the suit was originally brought, as appeared by the record, and who actually received the money; although this fact, the receipt of the money by Riggs, did not appear in the transcript of the record. The question submitted to the court was, whether the plaintiff was entitled to recover, in this action, upon that state of facts.

THE COURT (CRANCH, Chief Judge, contrà) was of opinion, that the plaintiff was entitled to recover.

CRANCH, Chief Judge, thought that as this was an action for money had and received, which is an equitable action, the plaintiff must show that ex aequo et bono, he was entitled to get back the money; but as he had received an assignment of the judgment at the time of paying the money to Riggs, (which was a valuable consideration,) and still held that assignment, Riggs, who had lawfully received the money, had a right to retain it; especially as McDaniel was still bound as special bail.

McDANIEL (UNITED STATES v.). See Case No. 15,666.

Case No. 8,746.

McDANIEL v. WAILES.

[4 Cranch, C. C. 201.] [1]

Circuit Court, District of Columbia. May Term, 1832.

EJECTMENT—AMENDMENT OF THE FICTITIOUS LEASE.

In ejectment, the fictitious lease may be amended, after the jury is sworn, upon payment of the costs of the term.

The fictitious lease to the plaintiff [McDaniel's lessee] was, by mistake, dated before the expiration of the lease to the defendant [Wailes, tenant of Dyer].

After the jury was sworn, the plaintiff prayed leave to correct the declaration in that respect, which

THE COURT (nem. con.) permitted to be done on payment of the costs of the term. A juror was withdrawn, the amendment was made, and the jury sworn again.

McDERMOTT (HOWE v.). See Case No. 6,768.

Case No. 8,747.

McDERMOTT v. NAYLOR.

[4 Cranch, C. C. 527.] [1]

Circuit Court, District of Columbia. March Term, 1835.

PRACTICE AT LAW—CLERK OF COURT—FAILURE TO ENTER APPEARANCE—REINSTATEMENT.

A replevin discontinued at March term, 1834, by negligence of the clerk, was reinstated at March term, 1835.

Replevin, discontinued at March term, 1834, for want of appearance by the defendant.

Mr. Hall, for defendant, moved to reinstate it on the docket, on the ground that he had directed the clerk to enter his appearance for the defendant at March term, 1834, which he neglected to do. See Williamson v. Bryan, April, 1823 [Case No. 17,751]; and French v. Venable [Id. 5,105], December, 1824, in this court. Reinstated.

Case No. 8,748.

M'DERMOTT v. The S. G. OWENS.

[1 Wall. Jr. 370.] [2]

Circuit Court, E. D. Pennsylvania. Nov. 13, 1849.

MARITIME LIEN—STEVEDORE—COSTS.

1. No lien exists in the admiralty for services performed by a stevedore in loading and storing the ship's cargo.

[Cited in The A. R. Dunlap, Case No. 513. Disapproved in The George T. Kemp, Id. 5,341. Followed in Paul v. The Ilex, Id. 10,842. Criticised in Roberts v. The Windermere, 2 Fed. 725. Cited contra in The Canada, 7 Fed. 121; The Wivanhoe, 26 Fed. 928. Criticised in The Maggie P., 32 Fed. 301; The Gilbert Knapp, 37 Fed. 211. Disapproved in the Main, 2 C. C. A. 569, 51 Fed. 956, 957.]

2. An unfounded claim for lien dismissed without costs, the owners of the vessel having profited by the claimant's services,—which constituted a personal demand,—under circumstances not quite honourable.

M'Dermott claimed a lien for labour and services as a stevedore in loading and storing

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

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

[2] [Reported by John William Wallace, Esq.]

the cargo of the vessel S. G. Owens, while lying at one of the wharves of Philadelphia, previous to proceeding on a voyage to California; and the question was whether, admitting the vessel to be a foreign vessel, he had such a lien under the general maritime law. As a domestick vessel, it was admitted he had no lien. The case was a hard one upon the stevedore. The persons who employed him had become insolvent, and had transferred the ship and cargo, all ready for sea, to the present owners, who took it with knowledge of this and similar claims, but without making any provision for paying them.

Mr. Vandyke, in favour of the lien, contended that the duties of the stevedore were essentially maritime, being done on the ship and essential to her carrying freight. That, formerly, the mariners performed this service of loading and unloading vessels, and had a lien for their wages whether earned in port or at sea; and that, it being now found more convenient to have this service performed by labourers on shore, before the mariners come on board or after they are discharged, the stevedore,, who is substituted for the sailor, is entitled to the same lien.

Mr. Kennedy and G. M. Wharton, for owners.

GRIER, Circuit Justice. The argument of the libellant's counsel is ingenious, but it wants the support of authority. No decision or dictum has been brought to the notice of the court which would justify them in treating this as a maritime service. It does not follow because sailors once performed these duties now better executed by landsmen, that therefore they should have the mariner's lien on the vessel. "The services are performed on a contract, which is neither made at sea nor for a service to be performed at sea; both were in the port of Philadelphia, and within the county of Philadelphia. The ship was safely moored at the wharf, and was in the actual possession of the owners; the service had no agency in bringing her in; she was not earning freight." For these reasons, which I quote from the opinion of the court in Phillips v. The Thomas Scattergood [Case No. 11,106], with others there mentioned, that court decided that a seaman whose wages have been paid up to the termination of the voyage, but who afterwards remains on board the vessel moored at the wharf, has no claim for services which a court of admiralty will enforce. The stevedores are usually employed by the owner, consignee, or master, on their personal credit. The service performed is in no sense maritime, being completed before the voyage is begun or after it is ended; and they are no more entitled to a lien on the vessel than the draymen and other labourers who perform services in loading and discharging vessels. Judgment must be therefore entered for the owners, but without costs, as the court cannot approve of the transaction by which they became the owners of this vessel, without any provision being made for the payment of those persons whose property and labour was expended in fitting her for sea, and which has been appropriated by the owners to their exclusive benefit. Decree accordingly.

Case No. 8,749.

McDERMOTT v. YEATMAN.

[5 Pittsb. Leg. J. (O. S.) 29.]

Circuit Court, W. D. Pennsylvania. 1857.

CHATTEL DEED OF TRUST—SUBSTITUTION OF PROPERTY.

The case here referred to was McDermott v. Yeatman. This case first came up at the last term of the court. It appeared that McDermott was a trustee in a deed given on two horses, which deed had a clause providing that other horses might be substituted. Some time after the deed was made the horses mentioned therein were, by the consent of the parties interested in the deed, traded off for other horses, in accordance with the clause of substitution. The defendant, Yeatman, levied, under a magistrate's judgment, on the horses thus substituted, and McDermott replevied.

Mr. Morgan, for defendant, asked the court to instruct the jury that if the jury, from the evidence, were satisfied that the horses levied on by defendant were not the identical horses described in the deed of trust, they must find for defendant, except they should further find that there was a formal act of delivery of the horses, for the purpose of the trust, by the grantor in the deed to the trustee before the levy by Yeatman.

THE COURT gave the instruction, and the jury found for the defendant. A motion was then made for a new trial, on the ground of misdirection of the court, but the court, at the present term, has overruled the motion, and affirmed their previous decision. This decision also applies to deeds on stock in trade.

Case No. 8,750.

In re McDERMOTT PATENT BOLT MANUF'G CO.

[3 Ben. 369; [1] 3 N. B. R. 128 (Quarto, 33).]

District Court, S. D. New York. Aug., 1869.

BANKRUPTCY—WHAT IS COMMERCIAL PAPER—OBJECT FOR WHICH MONEY USED.

1. A note and a due bill given for money loaned to a manufacturing company, payable on demand, is not "commercial paper" within the

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

meaning of the 39th section of the bankruptcy act [of 1867 (14 Stat. 536)].

[Disapproved in Re Chandler, Case No. 2,591; Re Carter, Id. 2,470. Cited in Re Clemens, Id. 2,877.]

[See In re Hollis, Case No. 6,621. See, contra, In re Nickodemus, Id. 10,254; In re Stevens, Id. 13,393; In re Kenyon, 6 N. B. R. 238; In re Hercules Ins. Co., Case No. 6,402; In re Clemens, Id. 2,878.]

2. The object to which the money borrowed was applied, cannot affect the character of the instrument given as evidence of the indebtedness.

[In the matter of the McDermott Patent Bolt Manufacturing Company, involuntary bankrupts.]

John Todd, for petitioners.
J. D. Taylor, for debtors.

BLATCHFORD, District Judge. The alleged act of bankruptcy in this case is, that the company, a corporation, on the 10th of March, 1869, being a merchant and trader, fraudulently stopped or suspended and did not resume payment of its commercial paper within a period of fourteen days. Such paper consists of two instruments. One is a promissory note, dated November 12th, 1868, and signed by the president and secretary of the company, and reading as follows: "On demand, after date, we, the McDermott Pat. Bolt Mfg. Co. promise to pay to the order of John E. Walsh, three hundred dollars, at the office of Co. Value received." The other is a receipt or due bill, signed by the treasurer of the company, and in the words following: "Received, New York, Nov. 7, '68, from Mr. J. C. Brinck, two hundred doll. for the McDermott Pat. Bolt Manufg. Co. as a loan for their use, the same to be returned, due on demand." I do not think that, on the facts proved in this case, either of these instruments can be regarded as "commercial paper," within the meaning of those words in the 39th section of the bankruptcy act. The consideration of each of them was a loan of money made to the company by the payee named therein. The consideration was unconnected with merchandise, trade or commerce, or with any mercantile, trading or commercial transaction. The object to which the money borrowed by the company was applied by it, cannot affect the character of the instruments given as evidences of the indebtedness, even though it was previously known to the lenders that the money would be applied to such object. Both of the instruments are payable on demand. The one to Brinck has no feature of negotiability on its face; and, although the note to Walsh is payable to his order, yet, in view of the fact that it is made payable on demand, and of the actual consideration for it, its negotiable form is not sufficient to make it commercial paper, within the 39th section. That section requires that the debtor must be a merchant or trader, and must have fraudulently stopped or suspended payment of his commercial paper. This I understand to mean a fraudulent stoppage or suspension of payment of commercial paper given by him in his character as a merchant or trader. The note to Walsh and the due-bill to Brinck were not thus given. The petition must be dismissed, with costs to be paid by the petitioning creditors.

McDIVITT (BANKS v.). See Case No. 961.

Case No. 8,751.

In re McDONALD.

[9 Am. Law Reg. 661.]

District Court, E. D. Missouri. 1861.

HABEAS CORPUS—JURISDICTION OF FEDERAL COURT—EXCLUSIVE JURISDICTION—HOW DETERMINED—HISTORY OF HABEAS CORPUS.

1. A United States district judge, or a United States district court, has jurisdiction to issue the writ of habeas corpus, and hear the case when the petitioner is held under illegal restraint, without any formal or technical commitment.

[Cited in Re Reynolds, Case No. 11,722.]

2. The writ of habeas corpus may issue from a federal judge whenever the applicant is illegally restrained of his liberty, under or by color of the authority of the United States, and such case is exclusively within the jurisdiction of the federal tribunals.

[Cited in Re Farrand, Case No. 4,678.]

3. The question of jurisdiction is to be determined by the acts of congress and the decisions of the supreme court, the circuit courts, and the district courts of the United States, thereupon.

4. The construction and interpretation of the acts of congress, of September 24, 1789, § 14 [1 Stat. 81], and of March 2, 1833, § 7 [4 Stat. 634].

5. The history of the habeas corpus, under the judiciary acts and the force bill, as drawn from the adjudicated cases, given and explained.

6. The adjudicated cases on the habeas corpus in the supreme court, in the circuit courts, and in the district courts of the United States, cited, and commented on..

[In the matter of Emmet McDonald.]

TREAT, District Judge. Since the adjournment, as thorough an examination of authorities as practicable has been made, with the view of arriving at a correct conclusion upon the jurisdictional question presented. Every authority cited by the learned counsel, and their able arguments, have been carefully considered. The question, though one of pure law, involves an inquiry into the United States constitution and statutes, the organization of the United States courts, the power vested in United States judges, and the sources of American jurisprudence. In the hasty preparation of an opinion taking so wide a range, it is not to be expected that much labor has been bestowed upon logical order or method, or mere forms of expression. The important consideration is to reach a correct conclusion. The undivided attention of the court, therefore, has been fixed upon the single proposition submitted. With other points

or issues, which may or may not be reached in the further prosecution of this cause, the court, at this time, has nothing to do.

The case stands, at present, on a demurrer to the return. The counsel for the respondent has suggested a question of jurisdiction; and, as that question always lies in limine, it is right and proper that it should be first considered. As a preliminary step, then, it must be determined whether the court has jurisdiction—whether it can proceed any further in the matter before it; for, most certainly, when asked to pass upon the authority of others, official or otherwise, it should be scrupulously careful not to exceed its own legal powers. The duty to decide what the law is, in each case before it, and to enforce its decisions for the maintenance of constitutional and legal authority in whomever vested, for the time being, is no less imperative than to protect the humblest rights of persons and property. Every officer of the government, and every private citizen, is alike entitled to the full measure of protection furnished by law, and is alike responsible to it for every violation of its mandates. In its administration, there is no inequality—all stand before it on the same level. Has a United States district judge, or a United States district court, jurisdiction to issue the writ of habeas corpus and hear the case, when the petitioner is held under illegal restraint without any formal or technical "commitment?" Is it not essential to such jurisdiction that the petitioner should be in jail, or imprisoned by virtue of some judgment, warrant, order, rule, or process, judicial or otherwise—or, at least, be so held "under restraint?" Or, on the other hand, is it sufficient that he is illegally restrained of his liberty "under or by color of the authority of the United States," irrespective of the fact whether there has been a technical "commitment" or not? In short, is this case one of federal or exclusively state jurisdiction?

The petition, on which the writ was issued, avers substantially, that the petitioner is now, and has been since the 10th inst., held in unlawful confinement within the United States arsenal in this city, a military post under the command of the respondent; that he is so held under no writ, process, judgment, decree, committal, or order of any state court, or state officer, or by virtue of any state law, proceeding, or power, civil or military; that, "on the contrary, his said illegal confinement is under or by color of the authority of the United States;" and that said unlawful confinement is by no order, judgment, decree, or committal of any judicial tribunal of the United States, nor in virtue of any writ or process issuing therefrom. The petition then sets out the facts and circumstances connected with his caption, which are unimportant at this stage of the case, inasmuch as they do not qualify, in any manner, the direct averments above mentioned. Hence the jurisdictional question is free from all technicalities pertaining to careless use of language, for the averments are full and precise. It becomes a fundamental question, then, in the case, and must be directly and fairly met at the very threshold. Nothing has, in many cases, been more perplexing to American jurists than a correct definition of the exact limits, or the ascertainment of the true boundaries, between federal and state jurisdiction. In some classes of cases, federal jurisdiction is exclusive; in some, state jurisdiction; whilst in others the federal and state judiciary have concurrent authority. The dividing line is not always to be readily ascertained.

The whole power vested by the United States constitution in the federal judiciary has never yet been called into potential or full force and activity; nor have the necessary statutes been passed to give vital and practical energy to all of the grants of power concerning any of the three great departments of the government. The courts are, therefore, compelled to pass upon each case separately, as it arises, limiting their decisions to the particular facts before them. In the organization of the United States district courts, congress has defined the portion of judicial power with which they are entrusted. Turner v. Bank of North America, 4 Dall. [4 U. S.] 8. Beyond that limit they cannot pass. 1 Kent. Comm. 294. It is not whether congress could not have vested in them larger powers; but simply what authority has actually been entrusted to them. Hence, in each instance, recurrence must be had to the United States statutes; and, if those statutes are within the grants of the constitution, the means are at hand for settling the controversy. No actual or apprehended conflict between the state and federal authority exists in this case; yet the inquiry is just as appropriate concerning the extent of power really vested in this tribunal. Every public officer —whether executive, ministerial, or legislative—has to decide for himself, in the first instance, the true extent of his authority, subject always, in free governments, to a lawful revision of his acts in every case which may involve their validity. So is it, most unquestionably, with judicial officers and courts. Hence acts of congress have been solemnly pronounced unconstitutional and void; executive mandates condemned as in contravention, or without authority of law; ministerial proceedings, supposed legal for a time, finally adjudged trespasses; and judicial decisions overruled and annulled by superior judicial tribunals. Yet there is no instability in all this; it is merely an assertion of the fundamental principle of free government, viz. the supremacy of law. A thorough knowledge of the law, applicable to each case, and implicitly followed, would render all conflict of legal authority almost an impossibility. It is only necessary, therefore, to avoid conflicts, for citizens, whether acting in their private or official capacity, to understand correctly their legal rights and duties—to comprehend fully that, in all the varied and shifting exigencies

of public and private affairs, law is still supreme—the source of all legitimate authority, the only power no one can disobey with impunity, to which all are subject, and which all have an equal right to invoke for the maintenance of their lives, liberties, and property. No one in this land is so exalted as to be above its restraining force, and none so humble as to be beneath its protecting care. Were it otherwise, lawlessness would dominate, anarchy follow, and liberty itself be impossible, for "there can be no liberty save in the harness of the law." "When the law ceases to be the test of right and remedy—when individuals undertake to be its administrators by rules of their own adoption—the bonds of society are broken. The first duty of citizens in a government of laws is obedience to its ordinances." Johnson v. Tompkins [Case No. 5,416]. Foremost of all should be the tribunals of law, to keep strictly within legal limits. Whilst fearless in the exercise of lawful power, they should be scrupulously vigilant not to exceed the legal boundaries set to their action. They minister at a sacred altar, and with religious fidelity must they be true to their trust. They can yield nothing, and must assume nothing. Like the supreme court of the United States, they "must grasp at nothing—shrink from nothing." In this spirit the courts should always act, and in modern times have generally acted. Hence it is that jurisdictional questions occupy so large a portion of judicial inquiry; and well is it that such has been the fact, for the conclusions thus reached enable others to recur to the past for its calm solution of propositions, which excitements of a subsequent hour might distort or color with passion or prejudice.

The language of Judge Cranch (U. S. v. Bollman [Case No. 14,622]), is especially instructive, because, in the very case in which he gave utterance to such correct thoughts, he was overruled by his colleagues, but sustained, on review, by the United States supreme court: "In times like these, when the public mind is agitated—when wars and rumors of wars, plots, conspiracies and treasons excite alarm—it is the duty of a court to be peculiarly watchful, lest the public feeling should reach the seat of justice, and thereby precedents be established which may become the ready tools of faction in times more disastrous. The worst of precedents may be established from the best of motives. We ought to be upon our guard, lest our zeal for the public interest lead us to overstep the bounds of the law and the constitution; for, although we may thereby bring one criminal to punishment, we may furnish the means by which a hundred innocent persons may suffer. The constitution was made for times of commotion. In the calm of peace and prosperity, there is seldom great injustice. Dangerous precedents occur in dangerous times. It then becomes the duty of the judiciary calmly to poise the scales of justice, unmoved by the arm of power, undisturbed by the clamor of the multitude. Whenever an application is made to us in our judicial character, we are bound, not only by the nature of our office, but by our solemn oaths, to administer justice according to the laws and constitution of the United States. No political motives, no reasons of state, can justify a disregard of that solemn injunction. In cases of emergency, it is for the executive department of the government to act upon its own responsibility, and to rely upon the necessity of the case for its justification; but this court is bound by the law and the constitution in all events. When, therefore, the constitution declares that 'the right of the people to be secure in their persons' 'against unreasonable seizures,' 'shall not be violated,' and that 'no warrants shall issue but upon probable cause, supported by oath or affirmation,' this court is as much bound as any individual magistrate to obey its command."

These truths, though elementary, are too apt to be overlooked. No apology is necessary for recurring to them at this time.

First. As to the right and duty of every court to decide upon the extent of its own jurisdiction, and the duty of every party upon whom process is served to appear in obedience thereto: "Every day and in every court, writs issue at the instance of parties asserting a grievance, and very often when, in truth, no grievance has been sustained. The party assailed comes before the court in obedience to its process. He perhaps questions the jurisdiction of the court. Perhaps he denies the fact charged. Perhaps he explains that the fact, as charged, was by reason of circumstances a lawful one. The judge is not presumed to know beforehand, all the merits of the thousand and one causes that come before him; he decides when he has heard. But the first duty of a defendant, in all cases, is obedience to the writ which calls him into court. Till he has rendered this, the judge cannot hear the cause, still less pass upon its merits." U. S. v. Williamson [Case No. 16,726]. Opinion of Judge Kane. "There are some proceedings in which the want of jurisdiction would be seen at the first blush, but there are others in which the court must inquire into all the facts, before it can possibly know whether it has jurisdiction or not. Any one who obstructs or baffles a judicial investigation for that purpose, is unquestionably guilty of a crime, for which he may and ought to be tried, convicted and punished. Suppose a local action to be brought in the wrong county, this is a defence to the action, but a defence which must be made out like any other. While it is pending, neither a party, nor an officer, nor any other person, can safely insult the court, or resist its order. The court may not have power to decide upon the merits of the case, but it has undoubted power to try whether the wrong was done within its jurisdiction or not. Suppose Mr. Williamson to be called before the

circuit court of the United States, as a witness, in a trial for murder alleged to be committed on the high seas, can he refuse to be sworn, and at his trial for contempt justify himself on the ground that the murder was in fact committed within the limits of a state, and therefore triable only in a state court? If he can, he can justify perjury for the same reason. But such a defence for either crime has never been heard of, since the beginning of the world. * * * The duty of the court to inquire into the facts on which its jurisdiction depends. is as plain as its duty not to exceed it when it is ascertained." 26 Pa. St. 21.

Second. As this court must determine its own jurisdiction, the next inquiry is as to the mode of ascertaining it. Here it is better that the views of this court should be expressed in the language of Chief Justice Marshall, speaking the authoritative conclusions of the United States supreme court; authority which a United States district court, if so disposed, cannot properly disregard. The doctrine, as asserted by him, no American court or jurist can justly question. It is a correct and clear exposition of the law: "Courts which originate in the common law, possess a jurisdiction which must be regulated by the common law, until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction. It is unnecessary to state the reasoning on which this opinion is founded, because it has been repeatedly given by this court, and with the decisions heretofore rendered on this point, no member of the bench has ever for an instant been dissatisfied. The reasoning from the bar in relation to it, may be answered by the single observation that for the meaning of the term 'habeas corpus' resort may unquestionably be had to the common law, but the power to award the writ by any of the courts of the United States must be given by written law. This opinion is not to be considered as abridging the power of courts over their own officers, or to protect themselves and their members from being disturbed in the exercise of their functions; it extends only to the power of taking cognizance of any question between individuals, or between the government and individuals. To enable the court to decide on such question, the power to determine it must be given by written law." Ex parte Bollman, 4 Cranch [8 U. S.] 93.

Third. That written law is found in the act of 24th September, 1789, § 14 (1 Stat. 81), commonly known as the "Judiciary Act," and in the act of 2d March, 1833, § 7 (4 Stat. 634), usually denominated the "Force Bill." The history of each of those statutes is familiar to all, and suggestive of profound thought. The section in the act of 1833, conferring upon United States judges increased power to proceed by habeas corpus, was not by the terms of that act made temporary, whilst many of its other provisions were expressly limited in their operation to the end of the next session of congress then ensuing. The grave questions which have arisen within the last ten years, as to the scope of the powers granted to the United States judges by that act, will be alluded to in another part of this opinion. It is sufficient now, to consider, first, the act of 1789. Before analyzing this act and ascertaining its true construction, it may be well to remark that the case of U. S. v. French [Case No. 15,165], cited by counsel, decides nothing more than was afterwards directly held by the United States supreme court in Ex parte Dorr, 3 How. [44 U. S.] 103, viz.: That when a "commitment" is known to be under state authority, the United States courts and judges have no power to issue the writ of habeas corpus, and hear the cause. In the case of Wilson v. Izard [Case No. 17,810], the United States court took jurisdiction where the petitioner was restrained by authority of his enlistment in the United States service; and similar cases occur each year. In none of those cases is there, it is apprehended, any technical commitment; yet in the many acts of congress upon the subject of enlistment, there may be, in addition to the act of 3d March, 1799 [1 Stat. 749], similar provisions of a special character, conferring jurisdiction upon United States district and state judges, to hear applications for this writ in such matters, or in cases arising under such statutes. As time has not permitted an examination of all those acts, to ascertain what are still in force with reference to the discharge of soldiers from enlistment in the regular army, and as the judiciary act seems perfectly clear, it is not necessary, for the case before the court, to pursue that collateral inquiry. If there be no such special statutes, and Wilson v. Izard [supra], was decided by the United States circuit court for New York, by virtue of the authority granted in the act of 1789, then that case is directly in point. The act of 1789 seems sufficiently explicit, of itself. When the history of this writ, and the views of those who framed the United States constitution and the act of 1789, are considered, there is scarcely room for doubt. The legal controversy leading to the American Revolution, and the persistent demand of the colonists that they were entitled to the privileges of Englishmen, among which they claimed that of the habeas corpus as inestimable in value—"the inheritance of the free born subject"—would induce the belief, that among the first acts passed by those patriotic statesmen would be one securing those privileges to as full an extent, at least, as they had insisted upon them whilst subjects of England. And so they did. In the constitution they inserted a direct prohibition against the suspension of the privilege of the writ of habeas corpus, "unless when in cases of rebellion or invasion the public safety may require it"—being careful to use the very words they had employed during their ante-revolutionary struggle

with England—the privilege of the writ, and not merely the writ itself. They struck deeper than the form, and insisted upon the substance—the underlying principle—the privileges for the vindication of which that writ had been immemorially used. The history of the American colonies, as well as of England, furnishes the amplest commentaries upon the part that writ has performed in every struggle for freedom. The act of 1789 has received the deserved encomiums of all eminent American jurists for its perspicuity and comprehensiveness—second only in those respects to the precise language of the constitution itself. It would be, indeed strange, if in the organization of judicial tribunals, the members of the first congress had overlooked the importance of that writ, or had virtually suspended it, or fatally impaired the privileges it secures in the many and essential cases where arbitrary authority might act without warrant, or "due process of law." And still stranger would it appear when it is remembered, that at its first session that very congress proposed for adoption the first ten amendments to the constitution, the fifth of which declares that "no person * * * shall be deprived of life, liberty, or property, without due process of law"—words which Justice Curtis, delivering the opinion of the United States supreme court in Murray's Lessee v. Hoboken Co., 18 How. [59 U. S.] 276, said "were undoubtedly intended to convey the same meaning as the words 'by the law of the land' in Magna Charta." Still, if the act of 1789, by omission or otherwise, is as narrow in its limitations as contended for, no degree of surprise thereat can supply its omissions or change its terms. It must be taken as it is written, and fairly construed. The 14th section is as follows: "And be it further enacted, That all the before-mentioned courts of the United States shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of habeas corpus, for the purpose of an inquiry into the cause of commitment. Provided, that writs of habeas corpus shall in no case extend to prisoners in gaol, unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify." 1 Stat. 81.

If there had never been a judicial exposition of that act, the student of legal history could hardly mistake its force and effect. The first sentence gives to the courts all the power they possess; and the second vests in the United States judges all the authority they have over the writ. It is well known how earnestly it was once contended that the United States courts, or at least the United States supreme court, had no authority to issue the writ, "except when necessary for the exercise of its jurisdiction" in some case actually pending before it. And as the supreme court, by the terms of the constitution, has no original jurisdiction except in "cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party;" and as the writ of liberty—the habeas corpus ad subjiciendum—can scarcely be applicable to the exercise of its jurisdiction in any case already before it, on appeal; and as it has no appellate power given in criminal cases, it would have followed inevitably from that narrow construction, that it could deliver from unlawful restraint foreign ambassadors, ministers and consuls, but no American citizen. And still worse, upon that construction, the United States circuit or district courts could never use the writ for the great remedial purposes for which it had always existed—no federal court would have the needed power. Having thus construed away the power of the United States courts as to the most beneficial purposes of the writ, the judges of those courts would be left at chambers with an authority which the courts could never exercise, but an authority more limited than any British judge ever had at common law from the days of King John—even under the worst of the Tudors or Stuarts. But the language of the first sentence is not so narrow. The restriction has no application to the writs of habeas corpus and scire facias, but merely to "the other writs" referred to. The power granted to the United States courts by that act is as broad as if it read: they "shall have power to issue the writs of scire facias and habeas corpus agreeable to the principles and usages of law"—principles and usages as well understood as the meaning of the words "due process of law" in the fifth amendment to the constitution. And so on the Trial of Burr [Case No. 14,693], Chief Justice Marshall held: "The principles and usages of law mean those general principles and usages which are to be found, not in the legislative acts of any particular state, but in that generally recognized and long established law which forms the substratum of all the laws of every state."

But is there no limit to the powers of the United States courts? May they override all state process, judgments and decrees, and virtually discharge prisoners in custody for violation of state laws? If there were no provision on the subject in the act of 1789, still the reasonable construction would necessarily be, that the United States courts can take no jurisdiction beyond the range of federal authority—that they must confine their action within the purview of federal jurisdiction, and not interfere with cases belonging exclusively to the states. But the proviso to the second section has always been

held, and with manifest correctness, to limit the courts as well as the judges at chambers. That proviso was for the express purpose of preventing conflicts between federal and state authority — of confining the United States courts and judges within their appropriate spheres. On any other construction, we should have the strange anomaly of a statute conferring upon an individual judge at chambers, a power which congress was unwilling to entrust even to the supreme court of the United States, or to a circuit court. A district court, held by the district judge alone, in open term, could not do what the same judge by stepping down from the bench, could quietly do at chambers, and that, too, in a matter involving the liberties of the American people, within the purview of the United States authority. Any fair construction of the act of 1789, whilst extending the proviso of the second sentence to the whole section, and forbidding federal courts as well as judges from interfering with the legitimate authority of state tribunals, gives to both courts and judges power to inquire into every "cause or commitment under or by color of the authority of the United States;" not narrowing them down to cases of technical or formal arrests by judicial process and leaving them powerless when arbitrary will, assuming to act in the name of the United States, chooses to trample upon every constitutional guaranty for the protection of individual liberty. If process issued from a judicial officer of the United States government, the citizen would have at least the assurance that such officer could not, without the grossest and most palpable violation of his sworn duty, proceed except by "due process of law," yet if he is left remediless where his liberties are trodden down without any legal process whatsoever, he would be delivered over to the tender mercies of every federal officer who chooses to outrage his constitutional rights—his "inheritance as a free-born subject."

Reference was made by counsel to contemporaneous history for aid in construing this act. Such reference is always legitimate where there is any obscurity in the terms employed; and so is the other rule, also invoked, that the use of a technical term in a statute is supposed to carry with it its technical meaning and application. If the act of 1789 is tested by these rules the same result, already indicated, is just as clearly reached. The ante-revolutionary controversies of a legal character, together with the debates in the British parliament upon those questions, furnish ample light to illuminate our pathway. It is not to be supposed that the American statesmen of the Revolution, who drafted the constitution and the act of 1789, were ignorant of the controversy which had just taken place in the British parliament with respect to this writ and its privileges; particularly as they had petitioned and remonstrated from time to time upon the same subject. The following compendious history of that parliamentary struggle, if resort is had to contemporaneous events, will most probably furnish the best guide to what was in the minds of the first congress when the judiciary act was passed: "In the year 1757, the above act of the 31 Car. II. c. 2 (habeas corpus act) came under discussion, in both houses of parliament upon the following occasion. A gentleman having been impressed before the commissioners under a pressing act passed in the preceding session, and confined in the Savoy, his friends made application for a writ of habeas corpus, which produced some hesitation and difficulty, for according to the above statute, the privilege relates only to persons committed for criminal, or supposed criminal matters, and this gentleman did not stand in that predicament. Before the question could be determined, he was discharged, in consequence of an application to the secretary of war. But the nature of the case seeming to point out a defect in the act, a bill for giving a more speedy remedy to the subject upon the writ of habeas corpus was prepared, and presented to the house of commons. It imported that the several provisions made in the above act (31 Car. II.) for the awarding of writs of habeas corpus in cases of commitment, or detainer for any criminal or supposed criminal matter, should in like manner extend to all cases, where any person, not being committed or detained for any criminal or supposed criminal matter should be confined, or restrained of his or their liberty under any color or pretence whatsoever, that upon oath made by such person so confined, or restrained, or by any other person on his behalf, of any actual confinement or restraint, to the best of the knowledge and belief of the person so applying, was not by virtue of any commitment, or detainer for any criminal or supposed criminal matter, an habeas corpus, directed to the person or persons so confining or restraining the party, should be granted in the same manner as is directed, and under the same penalties as are provided by the said act in the case of persons committed or detained for any criminal or supposed criminal matter, that the person before whom the party should be brought, by virtue of an habeas corpus, granted in the vacation time, under the authority of this act, might and should, within three days after the return made, proceed to examine into the facts contained in such return, and into the cause of such confinement and restraint, and thereupon either discharge, or bail, or remand the party so brought, as the case should require, and as to justice should appertain. The rest of the bill related to the return of the writ in three days, and the penalties upon those who should neglect or refuse to make the return, or to comply with any other claim of this regulation. See the bill and the arguments for and against it, in the appendix to 7, Debrett's Debates,

1743–1774. The bill was soon passed by the commons, but in the house of lords it was thrown out at the second reading, and the judges were ordered to prepare a bill to extend the power of granting writs of habeas corpus ad subjiciendum in vacation time, in cases not within the statute of 31 Car. II. c. 2, to all the judges of his majesty's courts at Westminster, and to provide for the issuing of process in vacation time to compel obedience to such writs, and that in preparing such bill, they take into consideration whether in any and in what cases it may be proper to make provision that the truth of the facts contained in the return to a writ of habeas corpus may be controverted by affidavits of traverse, and so far as it shall appear to be proper, that clauses be inserted for that purpose, and that they lay such bill before the house, in the beginning of the next session of parliament." 3 Bac. Abr. Append. to Habeas Corpus.

It should be carefully observed that what thus occurred was almost coeval with the American struggle for independence. The bill which passed the house of commons was at first delayed in the house of lords until the opinions of all the judges at Westminster hall could be had in answer to the celebrated interrogatories propounded to them. Those answers were subsequently made. Upon the strength of the judicial opinions thus given, Lord Mansfield caused the defeat of the bill in the house of lords, upon the ground that everything proposed in the bill was already the law just as indisputably and clearly as if that bill had ripened into an act upon the statute books of the realm. It was thus settled, in the opinion of the British judges and of the house of lords, just prior to the American Revolution, that "the privileges of the writ of habeas corpus agreeably to the principles and usages of law" "extended to all cases where persons not being committed or detained, &c., should be confined or restrained of his or their liberties under any color or pretence whatever." But American courts are no longer left merely to such modes of interpretation. The opinion of the United States supreme court was given upon the fourteenth section of the act of 1789 as early as 1807 by Chief Justice Marshall. Although the main point before that court had reference to its own character as an appellate court, except in the few cases already named; yet from that day to the present, the general views then expressed seem to have been recognized by all courts and judges as putting at rest every dispute about the extent of the power of the United States courts and judges, in cases of original jurisdiction, to issue the writ and inquire into the causes of illegal restraint where said restraint is "under or by color of the authority of the United States." To understand distinctly the views expressed by Chief Justice Marshall, it is necessary to keep constantly before the mind, the fact that the supreme court was considering in what cases that tribunal, as an appellate tribunal, and not a court of original jurisdiction, could issue the writ. As the constitution defined and limited its powers in original cases, manifestly no act of congress could enlarge them; yet the act of 1789 was, in terms, broad enough to give to that court the same powers over this writ as to the circuit or district courts, which possessed a more enlarged original jurisdiction. So anxious were the framers of the act of 1789 not to restrict the privileges of this writ, that they had seemingly given to an appellate court original jurisdiction. Hence the supreme court, defining its own powers under the restrictions of the constitution and not under the act of 1789, limits itself to cases pending in or decided by those courts over which it has appellate or revisory power. It claimed a right to revise—a revisionary jurisdiction—over tribunals inferior to itself, or from whose decisions an appeal might ultimately be to the supreme court. In other cases of commitment—that is where the petitioner was imprisoned by other than United States district or circuit courts, it could not have jurisdiction because it had no appellate or revisory power. It followed logically that it could not issue the writ where there was no commitment by any court; for there would then be no action of a court over which it had appellate jurisdiction, which could come before it for revision. Hence its decisions in the cases of Dorr, 3 How. [44 U. S.] 103, of Barry, in 2 How. [43 U. S.] 65, of Barry v. Mercien, 5 How. [46 U. S.] 103, and Ex parte Metzger, in Id. 176, and In re Kaine, 14 How. [55 U. S.] 103. But in [Ex parte Bollman] 4 Cranch [8 U. S.] 93, and [Ex parte Watkins] 3 Pet. [28 U. S.] 201, that court states with sufficient distinctness its views of the case in which United States courts of original jurisdiction, and United States judges, have power to act, and also the scope of authority they possess. As the opinion of Chief Justice Marshall in 4 Cranch [8 U. S.] 93, is full and demonstrative, the principal portion of it is quoted; with a repetition of the remark that the distinction between courts of appellate and original jurisdiction must be borne constantly in mind whilst considering it:

The only doubt of which this section (14th section of judiciary act) can be susceptible, is whether the restrictive words of the first sentence limit the power to the award of such writs of habeas corpus, as are necessary to enable the courts of the United States to exercise their respective jurisdictions, in some causes, which they are capable of finally deciding. It has been urged that, in strict grammatical construction, these words refer to the last antecedent, which is "all other writs not specially provided for by statute." The criticism may be correct, and is not entirely without its influence; but the sound construction which the court thinks it

safer to adopt, is, that the true sense of the words is to be determined by the nature of the provision, and by the context. It may be worthy of remark, that this act was passed by the first congress of the United States, sitting under a constitution which had declared "that the privilege of the writ of habeas corpus should not be suspended, unless when, in case of rebellion or invasion, the public safety might require it." Acting under the immediate influence of this injunction they must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for, if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted. Under the impression of this obligation, they give to all the courts the power of awarding writs of habeas corpus. It has been truly said that this is a generic term, and includes every species of that writ. To this it may be added, that when used singly—when we say the writ of habeas corpus without addition, we most generally mean that great writ which is now applied for; and in that sense it is used in the constitution. The section proceeds to say, that, "either of the justices of the supreme court, as well as judges of the district court, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment." It has been argued that congress could never intend to give a power of this kind to the judges of this court, which is refused to all of them when assembled. There is certainly much force in this argument, and it receives additional strength from the consideration, that if the power be denied to this court, it is denied to every other court of the United States. The right to grant this important writ is given in this sentence to every judge of the circuit or district court, but can neither be exercised by the circuit nor district court. It would be strange if the judge sitting on the bench should be unable to hear a motion for this writ where it might be openly made and openly discussed, and might yet retire to his chamber, and, in private, receive and decide upon the motion. This is not consistent with the genius of our legislation, nor with the course of our judicial proceedings. It would be much more consonant with both that the power of the judge at his chambers should be suspended during his term, (hence, in this case, the adjournment from the judge at chambers to the court in term,) than that it should be exercised only in secret. Whatever motives might induce the legislature to withhold from the supreme court the power to award the great writ of habeas corpus, there could be none which would induce them to withhold it from every court in the United States, and as it is granted to all in the same sentence and by the same words, the sound construction would seem to be, that the first sentence vests this power in all the courts of the United States; but as those courts are not always in session, the second sentence vests it in every justice or judge of the United States. The doubt which has been raised on this subject may be further explained by examining the character of the various writs of habeas corpus, and selecting those to which this general grant of power must be restricted if taken in the limited sense of being merely used to enable the court to exercise its jurisdiction in causes which it is enabled to decide finally. * * * "

After a masterly analysis of various forms of the writ, he proceeds:

Fourth and last, common writ, ad faciendum et recipiendum "which issues out of any of the courts of Westminister hall, when a person is sued in some inferior jurisdiction, and is desirous to remove the action into the superior court, commanding the inferior judges to produce the body of the defendant, together with the day and cause of his caption and detainer (whence the writ is frequently denominated a habeas corpus cum causa) to do and receive whatever the king's courts shall consider in that behalf. This writ is grantable of common right, without any motion in court, and it instantly supersedes all proceedings in the court below." Can a solemn grant of power to a court to award a writ be considered as applicable to a case in which that writ, if issuable at all, issues by law, without the leave of the court? It would not be difficult to demonstrate that the writ of habeas corpus cum causa cannot be the particular writ contemplated by the legislature in the section under consideration; but it will be sufficient to observe generally that the same act prescribes a different mode for bringing into the courts of the United States suits brought in a state court, against a person having a right to claim the jurisdiction of the courts of the United States. He may, on his first appearance, file his petition, and authenticate the fact, upon which the cause is, ipso facto, removed into the courts of the United States. The only power, then, which on this limited construction would be granted by the section under consideration, would be that of issuing writs of habeas corpus ad testificandum. The section itself proves that this was not the intention of the legislature. It concludes with the following proviso: "That writs of habeas corpus shall in no case extend to prisoners in gaol unless where they are in custody under or by color of authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

This proviso extends to the whole section. It limits the powers previously granted to the courts, because it specifies a case in which it is particularly applicable to the use of the power by courts—where the person is necessary to be brought into court to testify. That construction cannot be a fair one which

would make the legislature except from the operation of a proviso, limiting the express grant of a power, the whole power intended to be granted. From this review of the extent of the power of awarding writs of habeas corpus, if the section be construed in its restricted sense, from a comparison of the nature of the writ which the courts of the United States would, on that view of the subject, be enabled to issue, from a comparison of the power so granted with the other parts of the section, it is apparent that this limited sense of the term cannot be that which was contemplated by the legislature. But the 33d section throws much light upon this question; it contains these words: "And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which case it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion therein regarding the nature and circumstances of the offence, and of the evidence, and of the usages of law." The appropriate process of bringing up a prisoner, not committed by the court itself, to be bailed, is by the writ now applied for. Of consequence, a court possessing the power to bail prisoners not committed by itself, may award a writ of habeas corpus for the exercise of that power. The clause under consideration obviously proceeds on the supposition that this power was previously given, and is explanatory of the 14th section. If by the sound construction of the act of congress the power to award writs of habeas corpus in order to examine into the cause of commitment, is given to this court, it remains to inquire whether this be a case in which the writ ought to be granted. The only objection is, that the commitment has been made by a court having power to commit and to bail. Against this objection, the argument from the bar has been so conclusive that nothing can be added to it. If, then, this were res integra, the court would decide in favor of this motion. But the question is considered as long since decided. The Case of Hamilton, is expressly in point in all its parts; and although the question of jurisdiction was not made at the bar, the case was several days under advisement, and this question could not have escaped the attention of the court. From that decision the court would not lightly depart. U. S. v. Hamilton, 3 Dall. [3 U. S.] 17. If the act of congress gives this court the power to award a writ of habeas corpus in the present case, it remains to inquire whether that act be compatible with the constitution. (Here the distinction is drawn between courts of appellate and of original jurisdiction.) In the mandamus case, Marbury v. Madison [1 Cranch (5 U. S.) 137], it was decided that this court would not exercise original jurisdiction except so far as that jurisdiction was given by the constitution. But so far as that case has been distinguished between original and appellate jurisdiction, that which the court is now asked to exercise, is clearly appellate. It is the revision of a decision of an inferior court, by which a citizen has been committed to gaol. It has been demonstrated at the bar that the question brought forward on a habeas corpus, is always distinct from that which is involved in the cause itself. The question whether the individual shall be imprisoned is always distinct from the question whether he shall be convicted or acquitted of the charge on which he is to be tried; and, therefore, these questions are separated, and may be decided in different courts. The decision that the individual shall be imprisoned, must always precede the application for a writ of habeas corpus, and this writ must always be for the purpose of revising that decision, and therefore appellate in its nature. But this point also is decided in Hamilton's Case, and in Burford's Case [supra]. If at any time the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so. That question depends on political considerations, on which the legislature is to decide. Until the legislative will be expressed, this court can only see its duty, and obey the laws.

Hence the supreme court took jurisdiction of the cause, because the commitment had been made by a United States circuit court, and therefore fell within the appellate or revisory power of the former. It is by not attending carefully to the distinction between appellate and original jurisdiction, that the error is often made, of supposing this decision confines United States district and circuit courts and United States judges, to cases of technical commitments. That this decision, properly understood, goes as far as claimed in favor of issuing the writ where the restraint is under or by color of the United States authority, appears by the following extract from the opinion of the United States supreme court, in the Case of Watkins, 3 Pet. [28 U. S.] 201, pronounced by Justice Story: "No law of the United States prescribes the cases in which this great writ shall be issued, nor the power of the court over the party brought up by it. The term is issued in the constitution as one which was well understood, and the judicial act authorizes this court and all the courts of the United States, and the judges thereof, to issue the writ for the purpose of inquiring into the cause of commitment. This general reference to a power which we are required to exercise, without any precise definition of that power, imposes on us the necessity of making some inquiries into its use according to that law, which is, in a considerable degree, incorporated into our own. The writ of habeas corpus is a high prerogative writ known to the common law, the great object of which is the liberation of those who may

be imprisoned without sufficient cause. It is in the nature of a writ of error, to examine the legality of the commitment. The English judges, being originally under the influence of the crown, neglected to issue this writ where the government entertained suspicions which could not be sustained by evidence; and the writ when issued was sometimes disregarded or evaded, and great individual oppression was suffered in consequence of delays in bringing prisoners to trial. To remedy this evil, the celebrated habeas corpus act of Car. II. was enacted for the purpose of securing the benefits for which the writ was given. This statute may be referred to as describing the cases in which relief is, in England, afforded to a person detained in custody. It enforces the common law. This statute excepts from those who are entitled to its benefit persons committed for felony or treason, plainly expressed in the warrant, as well as persons convicted or in execution." Ex parte Watkins, 3 Pet. [28 U. S.] 201.

Yet the 33d section of that act provides as follows: "Upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death; in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court who shall," &c. By virtue of that provision the supreme court, in the Case of Hamilton, 3 Dall. [3 U. S.] 17, even admitted to bail the petitioner who had been, by a district judge, committed to jail for treason; the highest offence known to the law, and punishable with death. It would appear, therefore, that the privileges of this writ and the powers of the United States courts under it, are greater than were those of English courts and judges under the "habeas corpus act" (31 Car. II.)—as great, in fact, as the British judges and Lord Mansfield contended they were, during the parliamentary struggle already mentioned. It would seem clear that the framers of the act of 1789 had that struggle and its results in mind, and that such was the opinion of Judge Story and of the United States supreme court; for the habeas corpus act is pronounced by that court a mere enforcement of the common law, leaving the privileges of the writ not to depend upon that British statute, but upon rights far above and beyond its provisions. The views of that court seem to be, that in the exercise of original jurisdiction, within the purview of federal authority, the circuit and district courts, as well as judges of the United States, may issue the writ and hear the cause, in all cases where, by common law, it could have been issued in England. In every case that has been before the United States supreme court, where allusion has been made to the subject, that extent of power has been taken for granted, as if beyond all dispute—as if it were a point too well and incontrovertibly settled to be even called in question. Without quoting from all the authorities in favor of that view, from Hamilton's Case, decided in 1795, down to the latest allusion in Howard's Reports, it may suffice to give the remarks of Justice Nelson in Ex parte Kaine, 14 How. [55 U. S.] 146, views from which, so far as this question is concerned, no one of the judges dissented. Justice Nelson thought the supreme court ought to take jurisdiction of the special case then under consideration, contending that a court subject to the revisory power of the former tribunal had given a decision which, in its appellate character, that tribunal could review. Nowhere was the power of United States courts of original jurisdiction doubted. "That case (Hamilton's Case), as understood and expounded in the Case of Bollman, in 1807, which received the most deliberate consideration of the court, and to which the doctrine of Hamilton's Case was applied, held that this great writ was within the cognizance of the court under the fourteenth section of the judiciary act, in all cases where the prisoner was restrained of his liberty, 'under or by color of the authority of the United States,' and no case has held the contrary since that decision, with the exception of that of Ex parte Metzger, decided in 1847, which I have already stated stands alone, but which distinctly admits the power and jurisdiction of the court in the case before us. (The Case of Metzger, turned solely on the question of appellate power.) This writ has always been justly regarded as the stable bulwark of civil liberty, and undoubtedly in the hands of a firm and independent judiciary, no person, be he citizen or alien, can be subjected to illegal restraint or be deprived of his liberty, except according to the law of the land. So essential to the security of the personal rights of the citizen was the uninterrupted operation and effect of this writ regarded by the founders of the republic, that even congress cannot suspend it, except when in cases of rebellion or invasion the public safety may require it. I cannot, therefore, consent to cripple or limit the authority conferred upon this court by the constitution and laws to issue it, by technical and narrow construction; but on the contrary, prefer to follow the free and enlarged interpretation always given when dealing with it by the courts of England, from which country it has been derived. They expound the exercise of the power benignly and liberally in favor of the deliverance of the subject from all unlawful imprisonment; and when restrained of his liberty, he may appeal to the highest common law court in the kingdom to inquire into the cause of it. So liberally do the courts of England deal with this writ, and so unrestricted is its operation in favor of the security of the personal rights of the subject, that the decision of one court or magistrate upon the return of it, requiring the discharge of the prisoner, is no bar to the issuing of a second, or third, or more, by any other court or magistrate having jurisdiction of the case,

and it may remand or discharge according to its judgment, upon the same matters. 13 Mees. & W. 679; 9 Adol. & E. 731; 1 East, 314; 14 East, 91; 2 Salk. 503; 5 Mees. & W. 47. Upon the whole, I am satisfied that the prisoner is in confinement under the treaty and act of congress without any lawful authority. I am of opinion, therefore, that the writ of habeas corpus should issue in the case, to bring up the prisoner."

No question was made as to the power and efficiency of the writ, or as to the jurisdiction of any court not restricted by the constitution to the exercise of appellate power. The only point of difference, it will be observed, was on the appellate question.

Some of the cases cited by counsel have been overruled, and some do not touch the subject under investigation. The case in Paine's Reports [Wilson v. Izard, Case No. 17,810] and the case in 3 Pet. 201, have already been noticed. In no case known and accessible to this court, has it ever been held that United States courts of original jurisdiction cannot issue the writ where a person is held in illegal restraint under or by color of the authority of the United States, whether there has been a technical "commitment" or not. The opinion of Judge Betts, cited by counsel in Barry v. Mercien, 5 How. [46 U. S.] 103, was undoubtedly correct. The legal proposition involved in his decision has long perplexed both federal and state courts. The various branches of that subject have, of late years, undergone elaborate discussion, viz.: Is there in either the federal government or in any state government a power, parens patriae, similar to that existing in England, either to make appointments to charitable uses in certain cases, or to control the custody of children, &c.—and if so in what department of government is the power lodged and to what extent? A very different subject from that now here. The decisions on this jurisdictional question already referred to, though sufficient of themselves, are by no means the most pointed. The case of U. S. v. Green [Case No. 15,256], is passed without especial comment, because the views of Judge Story, then expressed on the principal point considered, were overruled in 3 How. [44 U. S.] 103, although the decision of that eminent jurist on most of the subjects before him, at that time, are still unquestioned law. Ex parte Smith [Case No. 12,968], involved an inquiry into an executive warrant under color of the authority of the United States, and the jurisdiction was upheld by Judge Pope. The doctrines laid down in that case are not wholly inapplicable to the subject before this court; but as more direct decisions are to be found, it is unnecessary to pause for an analysis of that opinion. In Ex parte Jenkins [Id. 7,259]; Ex parte Robinson [Id. 11,935]; U. S. v. Morris [Id. 15,811], and Thomas v. Crossin [5 Clarke [Pa.] 328],—the United States judges or courts not only issued the writ of habeas corpus where there were commitments by state process, but where it did not appear on the face of the warrant that the process was under any color of authority of the United States. That course was held by the learned judges who issued the writs, to be not only permissible under the act of 1833, but to be an imperative duty. They even went behind the terms of those warrants or "commitments," and after proofs, aliunde, decided that as the commitments were illegal and for acts done under the authority of the United States, it was their duty to discharge the prisoners. True, the supreme court of Pennsylvania questioned the jurisdiction of the United States courts in such cases. But as that point is not involved here, it is not necessary to go into any inquiry concerning the scope of the acts of 1833 and 1789 under such circumstances. Suffice it to say, that in each instance where the federal courts have been compelled to act under the law of 1833, so far as is known, they have not failed to exercise and enforce their authority in cases similar to those just mentioned. Judge McLean and Judge Grier, of the supreme court, have given elaborate, convincing and sound decisions upon that subject: the correctness of which Judges Leavitt, Kane, and Miller, of the district courts, have not hesitated to put into practical application, despite local excitement, prejudices and resistance. In the case of U. S. v. Williamson [Case No. 16,725], Judge Kane, of the United States district court for the Eastern district of Pennsylvania, issued this writ where the cause of detainer was not alleged to be under or by color of any process whatsoever, or of the authority of the United States. The petitioner's slaves were seized by respondent, or by a mob at his instigation, as was charged, whilst they were passing through Philadelphia; and were so seized without any process, commitment or color of authority. The respondent of his own motion and by his mere arbitrary act, interfered with and detained from their master, his slaves whilst in transit, and as was contended, in violation of petitioner's rights under the constitution and laws of the United States. That pure and able judge did not hesitate about what his official duty demanded. The writ was issued. The respondent made an evasive if not false return, and was imprisoned for contempt. Subsequently he applied to Chief Justice Lewis, of Pennsylvania, for a writ to procure his discharge; one ground of the application being Judge Kane's want of jurisdiction. Chief Justice Lewis refused the writ. At the following term of the supreme court of that state, a similar application was made, fully argued and considered, but that court also refused to grant him any relief. Although the main point before the supreme court of Pennsylvania was as to the conclusiveness of the judgment for contempt, yet it is evident from the opin-

ions given, and the dissenting views of Judge Knox, that the jurisdictional question was also duly weighed and settled. A brief extract from the opinion of the supreme court of that state by Black, J., will give its general views: "It is argued that the court (United States district court) had no jurisdiction because it was not averred that the slaves were fugitives, but merely that they owed service by the laws of Virginia. Conceding for the argument's sake that this was the only ground on which the court could have interfered—conceding, also, that it is not substantially alleged in the petition of Mr. Wheeler—the proceeding was, nevertheless, not void for that reason. The federal tribunals, though courts of limited jurisdiction, are not inferior courts. Their judgments, until reversed by the proper appellate court, are valid and conclusive upon the parties, though the jurisdiction be not alleged in the pleadings nor on any part of the record. [M'Cormick v. Sullivant] 10 Wheat. [23 U. S.] 192. Even if this were not settled and clear law, it would still be certain that the fact on which jurisdiction depends need not be stated in the process. The want of such a statement in the body of the habeas corpus, or in the petition on which it was awarded, did not give Mr. Williamson a right to treat it with contempt. If it did, then the courts of the United States must set out the ground of their jurisdiction, in every subpoena for a witness, and a defective or untrue averment will authorize a witness to be as contumacious as he sees fit." Again: "I say the writ was legal, because the act of congress gives to the courts of the United States the power to 'issue writs of habeas corpus when necessary for the exercise of their jurisdiction, and agreeable to the principles and usages of law.' A part of the jurisdiction of the district court consists in restoring fugitive slaves; and the habeas corpus may be used in aid of it when necessary." 26 Pa. St. 21.

Without stopping to inquire into the correctness of the reasoning used, or indorsing it in all its length and breadth, the opinion indicates how far jurists think the United States courts can go in upholding federal jurisdiction over this great writ. In the act of 1850 [9 Stat. 462] there is no express provision on the subject, and it is well known that one of the principal objections taken to that statute was in consequence of that omission. If either party could come before a court on that writ, then the questions sought to be reached by the objectors might be brought before the courts in some cases, at the place of capture. Hence that statute furnishes no explanation of the course of Judge Kane, nor was his action based upon its provisions. As will be seen hereafter, he placed his jurisdiction on other grounds. The separate opinion of Judge Lowrie, and the points of dissent by Judge Knox (the latter to be found in Williamson's Case [26 Pa. St. 9]), show that the question of Judge Kane's jurisdiction in issuing the writ was fully before the supreme court of Pennsylvania. Judge Knox took this ground: "That where a person is imprisoned by an order of the judge of the district court of the United States for refusing to answer a writ of habeas corpus, he is entitled to be discharged from such imprisonment if the judge of the district court had no authority to issue the writ." Still he was not discharged. It is true, the court put the case mainly on another question—one sufficient to prevent his discharge—yet the jurisdictional proposition was discussed, and by the chief justice upheld in favor of the United States district court, in that very case. In his opinion, the chief justice expressed the following views: "The habeas corpus is a common law writ, and has been used in England from time immemorial, just as it is now. The statute of 31 Car. II. c. 2, made no alteration in the practice of the courts in granting these writs. 3 Barn. & Ald. 420; 2 Chit. 207. It merely provided that the judges in vacation should have the power which the courts had previously exercised in term time (1 Chit. Gen. Prac. 686) and inflicted penalties upon those who should defeat its operation. The common law upon this subject was brought to America by the colonists, and most, if not all, of the states have since enacted laws resembling the English statute of Charles II. in every principal feature. The constitution of the United States declares that "the privilege of a writ of habeas corpus shall not be suspended unless when in cases of rebellion or invasion, the public safety may require it." Congress has conferred upon the federal judges the power to issue such writs according to the principles and rules regulating them in other courts. Seeing that the same general principles of common law on this subject prevail in England and America, and seeing also the similarity of the statutory regulation in both countries, the decisions of the English judges, as well as of the American courts, both state and federal, are entitled to our fullest respect, as settling and defining our powers and duties. * * * * * * * The district court of the United States is as independent of us, as we are of it—as independent as the supreme court of the United States is of either. What the law and constitution have forbidden us to do directly on writ of error, we, of course, cannot do indirectly by habeas corpus. But the petitioner's counsel have put his case on the ground that the whole proceeding against him in the district court was coram non judice, null and void. It is certainly true that a void judgment may be regarded as no judgment at all, and every judgment is void which clearly appears on its own face to have been pronounced by a court having no jurisdiction or authority on the subject matter. For instance, if a federal court should convict and sentence a citi-

zen for libel, or if a state court, having no jurisdiction except in civil pleas, should try an indictment for a crime, and convict the party, in these cases the judgments would be wholly void. If the petitioner can bring himself within this principle, then there is no judgment against him; he is wrongfully imprisoned, and we must order him to be brought out and discharged."

This case is by no means relied upon as conclusive, or as settling the question now under consideration. It is referred to mainly for the purpose of indicating the thoroughness with which the subject has been debated, and as introductory to the masterly reasoning of Judge Kane himself, when the whole doctrine again came before him for judicial review. That reasoning and his construction of the act of 1789 seem wholly incorrect, to the extent already stated in this opinion. As to the correctness of its application in the Wheeler Case, it is not necessary to determine here. It is sufficient if there is jurisdiction where the petitioner is under restraint "by color of the authority of the United States," as is averred in McDonald's petition. The views expressed by the United States district court for the Eastern district of Pennsylvania, per Kane, J. (U. S. v. Williamson [supra]), are full and conclusive, so far as our present inquiry is concerned; and it is well to give them somewhat at length:

"The writ of habeas corpus is of immemorial antiquity; it is deduced by the standard writers on the English law from the great charter of King John. It is unquestionable, however, that it is substantially of much earlier date; and it may be referred, without improbability, to the period of the Roman invasion. Like the trial by jury, it entered into the institutions of Rome before the Christian era, if not as early as the times of the republic. Through the long series of political struggles which gave form to the British constitution, it was claimed as the birthright of every Englishman, and our ancestors brought it with them as such to this country. At the common law it issued whenever a citizen was denied the exercise of his personal liberty, or was deprived of his rightful control over any member of his household, his wife, his child, his ward, or his servant. It issued from the courts of the sovereign, and, in his name, at the instance of any one who invoked it, either for himself or another. It commanded, almost in the words of the Roman edict, 'de libero homine exhibendo,' that the party under detention should be produced before the court, there to await its decree. It left no discretion with the party to whom it was addressed. He was not to constitute himself the judge of his own rights or of his own conduct, but to bring in the body, and to declare the cause wherefore he had detained it; and the judge was then to determine whether that cause was sufficient in law or not. Such in America, as well as England, was the well-known, universally recognized writ of habeas corpus. When the federal convention was engaged in framing a constitution for the United States, a proposition was submitted to it by one of the members that 'the privileges and benefits of the writ of habeas corpus shall be enjoyed in this government in the most expeditious and ample manner; and shall not be suspended by the legislature except upon the most urgent and pressing occasions.' The committee to whom it was referred for consideration, would seem to have regarded the privilege in question as too definitely implied in the idea of free government to need formal assertion or confirmation; for they struck out that part of the proposed article, in which it was affirmed, and retained only so much as excluded the question of its suspension from the ordinary range of congressional legislation. The convention itself must have concurred in their views, for in the constitution, as digested and finally ratified, and as it stands now, there is neither enactment nor recognition of the privilege of this writ, except as it is implied in the provision that it shall not be suspended. It stands then under the constitution of the United States as it was under the common law of English America, an indefeasible privilege, above the sphere of ordinary legislation. I do not think it necessary to argue from the words of this article that the congress was denied the power of limiting or restricting or qualifying the right, which it was thus forbidden to suspend. I do not, indeed, see that there can be a restriction or limitation of a privilege which may not be essentially a suspension of it, to some extent at least, or under some circumstances, or in reference to some of the parties who might otherwise have enjoyed it. And it has appeared to me, that if congress had undertaken to deny altogether the exercise of this writ by the federal court, or to limit its exercise to the few and rare cases that might peradventure find their way to some one particular court, or to declare that the writ should only issue to this or that class of cases, to the exclusion of others in which it might have issued at the common law, it would be difficult to escape the conclusion that the ancient and venerated privilege of the writ of habeas corpus had not been in some degree suspended, if not annulled. But there has been no legislation or attempted legislation by congress that would call for an expansion of this train of reasoning.

"There was one other writ, which in the more recent contests between the people and the king, had contributed signally to the maintenance of popular right. It was the writ of scire facias which had been employed to vindicate the rights of property, by vacating the monopolies of the crown. Like the writ of habeas corpus, it founded

itself on the concessions of Magna Charta; and the two were the proper and natural complements of each other. The first congress so regarded them. The protection of the citizen against arbitrary exaction and unlawful restraint, as it is the essential object of all rightful government, would present itself, as the first great duty of the courts of justice that were about to be constituted. And if, in defining their jurisdiction, it was thought proper to signalize two writs out of the many known to the English law, as within the unqualified competency of the new tribunals, it would seem natural that those two should be selected which boasted their origin from the charter of English liberties, and had been consecrated for ages in the affectionate memories of the people as their safeguard against oppression. This consideration has interpreted for me the terms of the statute, which define my jurisdiction on this subject. Very soon after I had been advanced to the bench I was called upon to issue the writ of habeas corpus, at the instance of a negro, who had been arrested as a fugitive from labor. It was upon the force of the argument, to which I now advert, that I then awarded the process; and from that day to this, often as it has been invoked and awarded in similar cases that have been before me, my authority to award it has never been questioned. The language of the act of congress reflects the history of the constitutional provision. * * * I am aware that it has sometimes been contended or assumed without, as it seems to me, a just regard to the grammatical construction of these words, that in the construction of these words the concluding limitation applies to all the process of the court, the two writs specially named among the rest; and that the federal courts can only issue the writ of habeas corpus, when it has become necessary to the exercise of an otherwise delegated jurisdiction; in other words, that it is subsidiary to some original or pending suit. It is obvious, that if such had been the intention of the law-makers, it was unnecessary to name the writ of habeas corpus at all; for the simpler phrase, 'all writs necessary, &c.,' would in that case have covered their meaning. But there are objections to this reading more important than any that found themselves on grammatical rules. The words that immediately follow in the section, give the power of issuing the writ to every judge for the purpose of inquiring into the causes of a commitment. Now, a commitment pre-supposes judicial action, and this action it is the object of the writ to review. Can it be, that a single judge, sitting as such, can re-examine the causes of a detainer, which has resulted from judicial action, and is therefore prima facie a lawful one; and yet that the court, of which he is a member, cannot inquire into the cause of a detainer, made without judicial sanction, and therefore prima facie unlawful? Besides, if this were the meaning of the act, it might be difficult to find the case to which it should apply. I speak of the writ of habeas corpus ad subjiciendum, the great writ of personal liberty referred to in the constitution; not that modification of it which applies specially to the case of a commitment, nor the less important forms of habeas corpus ad respondendum, ad faciendum, &c., which are foreign to the question. I do not remember to have met a case, either in practice or in the books, where the writ ad subjiciendum could have performed any pertinent office in a pending suit. There may be such, but they do not occur to me; and I incline very strongly to the opinion, that if the power to issue the writ of habeas corpus applies only to cases of statutory jurisdiction, outrages upon the rights of a citizen can never invoke its exercise by a federal court. If such were indeed the law of the United States, I do not see how I could escape the conclusion, that the jealousy of local interests and prejudice, which led to the constitution of federal courts, regarded only disputes about property; and that the liberty of a citizen, when beyond the state of his domicil, was not deemed worthy of equal protection. From an absurdity so gross as this, I relieve myself by repeating the words of Chief Justice Marshall in Ex parte Watkins, 3 Pet. [28 U. S.] 201: 'No law of the United States prescribes the cases in which this great writ shall be issued, nor the power of the court over the party brought up on it.' Whether, then, I look to the constitution and its history, or to the words or the policy of the act of congress, I believe that it was meant to require of the courts of the United States, that they should dispense the privileges of the writ of habeas corpus to all parties lawfully asserting them, as other courts of similar functions and dignity had immemorially dispensed them at the common law. The congress of 1789 made no definition of the writ, or of its conditions or effects. They left it as the constitution left it, and as it required them to leave it, the birthright of every man within the borders of the States; like the right to air, and water, and motion, and thought; rights imprescriptible and above all legislative discretion or caprice. And so it ought to be. There is no writ so important for good, and so little liable to be abused. At the worst, in the hands of a corrupt and ignorant judge it may release some one from restraint who should justly have remained bound. But it deprives no one of freedom, and divests no right."

The following year (1856) the same subject was considered in the United States circuit court for California, and the opinion given by Judge McAllister. The petition for the writ set out, that the petitioner (Des Rochers) was an alien, that the supreme court of the state consisted of three judges:

that two were essential for the transaction of business; that the petitioner had an important suit pending which his interest demanded should be speedily heard, but that it could not be heard because one of those judges (Heydenfelt) was absent from the state, and because another, the "Hon. David S. Terry is unlawfully restrained of his liberty against his consent, * * * and held by them in unlawful custody, and is not confined in any jail, nor by color of authority of any state, or of any magistrate thereof," &c.; and closed with the usual prayer for the writ, &c. Here it was not even averred that the prisoner was held "under or by color of authority of the United States," nor that there was any technical commitment. It negatived the idea, however, that he was restrained by any state authority. The writ was granted, on the following grounds: "It is an immediate remedy for every illegal imprisonment." 1 Watts, 67. In a word, whenever a person has been deprived of going when, and where he pleases, and restrained of his liberty, he has a right to inquire if that restraint be legal, whether it be by a jailor, constable, or private individual. 2 Ashm. 247, cited in 4 Bac. Abr. 571. * * * This great writ existed for all remedial purposes, not only anterior to the enactment of the habeas corpus act in England, but prior to the time of Magna Charta. In the reign of second Charles, the habeas corpus act was passed, to repel the aggressions of the crown and its minions. Those aggressions clothed themselves in the form of legal proceedings in the name of the crown, and hence the terms of the act were limited to persons confined on criminal process. But the habeas corpus, brought by our ancestors as their birthright, to this country, was the common-law habeas corpus; that great embodiment of a free principle, which, born with the sturdy Roman, preserved by the free Saxon, was so cherished by our immediate sires that they engrafted into our organic law the declaration, "that the privilege of the writ of habeas corpus shall not be suspended, &c. * * * The proposition, then, is established, both by federal and state authority, that in determining upon the nature and character of the habeas corpus mentioned in the constitution and judiciary act of the United States, regard is to be had, not to the limits prescribed by the British statutes, but to the more liberal principles in this particular of the common law by which it is regulated. By those principles it was issued in England to relieve any person from illegal restraint. Its operation in this country should not be less beneficent. It remains to consider to what extent the act of congress, giving to the federal judiciary the power to issue this great writ, has limited and controlled the cases to which at common law it confessedly applies. In doing so, we must bear in mind that we are fixing a construction which is to decide whether the federal courts are to extend to or withhold from persons a great constitutional right, in many cases to which the common law applies. No law, say the supreme court of the United States, prescribes the cases in which this great writ shall be issued, nor the power of the court over the party when brought up by it. The term used in the constitution is one well understood, and the judiciary act authorizes all the courts of the United States and the judges thereof, to issue the writ for the purpose of inquiring into the cause of commitment. While it is evident that the proviso to the fourteenth section limits equally the powers of the courts and judges (admitted to do so by the court in the Williamson Case), it by no means follows that equalizing and restricting their powers as to persons in jail, has denuded them of all power, where they have jurisdiction of the parties, to relieve from illegal restraint, save in cases where the suffering parties are in jail under the authority of the United States. The proviso simply inhibits them from sending the writ to any persons in legal custody in jail, unless there under the authority of the United States. The alien or citizen of another state who is restrained of his liberty by lawless men, who is under no legal restraint, has a right to appeal to the laws of the country for relief. If in jail, or legal custody, not under color of authority of the United States, he is remitted to those laws which placed him there. This is, in my opinion, the true construction of the proviso, in which I am confirmed by the action of Judge Story, and by the opinions of the district judge of the district court of the United States for the Eastern district of Pennsylvania, and the supreme court of that state. It was in exercise of this jurisdiction that Judge Kane issued the writ in the Williamson Case. * * * These views are as sound law as they are eloquently expressed. In the case at bar, the applicant is an alien resident in this place, is not only interested in the matter to the extent that man concedes to sympathy with the oppressed, but is pecuniarily interested to a large amount. He is not in jail, nor in any custody known to the law, but held in restraint against his will, and in direct violation of those laws. Case of Des Rochers [Case No. 3,824]."

This bases the petitioner's right apparently on the ground that he is an alien, interested in the liberty of the prisoner, and that the latter is held under unlawful restraint without any state authority. Nothing at all is said of a commitment. It is well known that he was held by the mere arbitrary will of a mob organized under the name of a vigilance committee, and without any process, warrant, or any other legal authority. It was not considered necessary to the jurisdiction of that court, that there should have been a

technical commitment, nor was it so held in the Williamson Case, nor has it been in any other case where a United States judge acts, or a United States court of original jurisdiction, so far as is known to this court.

Enough has been said, it is hoped, to demonstrate that the question of jurisdiction does not depend, in the slightest degree, upon the fact whether there has been a formal commitment or not, or whether the prisoner is in jail; but the sole inquiry is—whether he is held in unlawful restraint of his liberty "under or by color of the authority of the United States." The petition in this case so avers in express terms, and also negatives by apt words that he is held by any state authority or under any legal process whatever. The case, therefore, comes fully within what is deemed the true rule, and all correct adjudications. Whether the rule was correctly applied by Judge Kane or Judge McAllister, it is not important to discuss; but it is certain, they held it to extend much farther than there is any occasion for, to give this court unquestioned jurisdiction in the case now before it.

Fourth. To remove all shadow of doubt, only one step further need be taken—that is, to determine whether the state courts, (as contended by counsel,) have either exclusive or concurrent jurisdiction. The United States supreme court has settled that point also. It solemnly decided in 1858, that the state courts have no jurisdiction whatsoever where the confinement is under the authority of the United States. The opinion is too clear and important to be omitted. It was pronounced by Chief Justice Taney. The importance of the questions discussed by him, and the force of his reasoning furnish ample justification, for the length of the extract made: "There can be no such thing as judicial authority, unless it is conferred by a government or sovereignty; and if the judges and courts of Wisconsin possess the jurisdiction they claim, they must derive it either from the United States or the state. It certainly has not been conferred on them by the United States, and it is equally clear it was not in the power of the state to confer it, even if it had attempted to do so; for no state can authorize one of its judges or courts to exercise judicial power, by habeas corpus or otherwise, within the jurisdiction of another and independent government. And, although the state of Wisconsin is sovereign within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the constitution of the United States. And the powers of the general government of the state, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States, is as far beyond the reach of the judicial process issued by a state judge or a state court, as if the line of division was traced by landmarks and monuments visible to the eye. * * * The constitution was not formed merely to guard the states against danger from foreign nations, but mainly to secure union and harmony at home, for, if this object could be attained, there would be but little danger from abroad; and, to accomplish this purpose, it was felt by the statesmen who framed the constitution, and by the people who adopted it, that it was necessary that many of the rights of sovereignty which the state then possessed, should be ceded to the general government; and that, in the sphere of action assigned to it, it should be supreme and strong enough to execute its own laws by its own tribunals, without interruption from a state or state authorities. And it was evident that everything short of this would be inadequate to the main objects for which the government was established; and that local interests, local passions or prejudices, incited and fostered by individuals for sinister purposes, would lead to acts of aggression and injustice by one state upon the rights of another, which would ultimately terminate in violence and force, unless there was a common arbiter between them, armed with power enough to protect and guard the rights of all, by appropriate laws, to be carried into execution peacefully by its judicial tribunals. * * * We do not question the authority of a state court or judge, who is authorized by the laws of the state to issue the writ of habeas corpus, to issue it in any case where the party is imprisoned within its territorial limits, provided it does not appear, when the application is made, that the person imprisoned is in custody under the authority of the United States. The court or judge has a right to inquire, in this mode of proceeding, for what cause and by what authority the prisoner is confined within the territorial limits of the state sovereignty, and it is the duty of the marshal, or other person having the custody of the prisoner, to make known to the judge or court, by a proper return, the authority by which he holds him in custody. This right to inquire by process of habeas corpus, and the duty of the officer to make a return, grows necessarily out of the complex character of our government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each within its sphere of action prescribed by the constitution of the United States, independent of the other. But after the return is made, and the state judge or court judicially apprized that the party is in custody under the authority of the United States, they can proceed no further. They then know that the person is within the dominion and jurisdiction of another government, and that neither the writ of habeas corpus nor any other process issued under the state authority can pass over the line of division between the two

sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offence against their laws, their tribunals alone can punish him; if he is wrongfully imprisoned, their tribunals can release him and afford him redress. And although, as we have said, it is the duty of the marshal, or other person holding him, to make known, by a proper return, the authority under which he detains him, it is at the same time imperatively his duty to obey the process of the United States to hold the prisoner in custody under it, and to refuse obedience to the mandate or process of any other government, and consequently it is his duty not to take the prisoner, nor suffer him to be taken, before a state judge or court upon a habeas corpus issued under state authority. No state judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or to require him to be brought before them. And if the authority of a state, in the form of judicial process or otherwise, should attempt to control the marshal, or other authorized officer or agent of the United States, in any respect, in the custody of his prisoner, it would be his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of law against illegal interference. No judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court and judge by whom it is issued; and an attempt to enforce it beyond these boundaries is nothing less than lawless violence. Nor is there anything in this supremacy of the general government, or the jurisdiction of its judicial tribunals, to awaken the jealousy or offend the natural and just pride of state sovereignty. Neither this government nor the powers of which we are speaking were forced upon the states. The constitution of the United States, with all the powers conferred by it on the general government, and surrendered by the states, was the voluntary act of the people of the several states, deliberately done, for their own protection and safety against injustice from one another, and their anxiety to preserve it in full force in all its powers, and to guard against resistance to, or evasion of its authority, on the part of a state, is provided by the clause which requires that the members of the state legislatures, and all executive and judicial officers of the several states, as well as those of the general government, shall be bound, by oath or affirmation, to support this constitution. This is the last and closing clause of the constitution, and inserted when the whole frame of government, with the powers herein-before specified, had been adopted by the convention, and it was in that form, and with these powers, that the constitution was submitted to the people of the several states for their consideration and decision. Now, it certainly can be no humiliation to the citizen of a republic to yield a ready obedience to the laws as administered by the constituted authorities. On the contrary, it is among his first and highest duties as a citizen, because free government cannot exist without it; nor can it be inconsistent with the dignity of a sovereign state to observe faithfully, and in the spirit of sincerity and truth, the compact into which it voluntarily entered when it became a state of this Union. On the contrary, the highest honor of sovereignty is untarnished faith; and certainly no faith could be more deliberately and solemnly pledged than that which every state has plighted to the other states, to support the constitution as it is, in all its provisions, until they shall be altered in the manner which the constitution itself prescribes. In the emphatic language of the pledge required, it is to support this constitution. Ableman v. Booth, 21 How. [62 U. S.] 515."

As then the states have no authority in the cases named, it follows inevitably that, if the United States courts cannot proceed, the liberties of the people are hopelessly at the mercy of all lawlessness and violence, whether exerted by the arbitrary will of one man or many, whenever the oppressor acts under color of the authority of the United States—a condition worse than ever known in England since the days of Magna Charta, and wholly incompatible with the idea of civil or constitutional liberty. So far, however, is it from being true, that such is the deplorable condition of any American citizen, the reverse is the fact. Every one who is illegally restrained of his liberty, under color of United States authority, has the fullest redress in the United States courts. Not only has he a constitutional right to apply for deliverance from illegal restraint, but it is the duty of the court to exhaust all its power to enforce his application.

In whatever light the question is viewed, the conclusion seems, to this court, to be irresistible; and therefore, without a shadow of doubt, it pronounces its jurisdiction in this case to be clear, positive, and ample.

Case No. 8,752.

In re McDONALD.

[1 Lowell, 100.] [1]

District Court, D. Massachusetts. July, 1866.

ARMY—ENLISTMENT—MINORS—HABEAS CORPUS—AUTHORITY OF SECRETARY OF WAR—STATEMENT OF AGE NOT SWORN TO—CONSENT OF FATHER.

1. The power given to the secretary of war to discharge minors unlawfully enlisted in the army, does not take away the jurisdiction of the

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

federal courts to inquire on habeas corpus into the validity of the contract, and to discharge a minor who is improperly held in the service.

2. Whether congress could constitutionally vest exclusive jurisdiction in the secretary, quaere?

3. Whether the oath of enlistment is conclusive evidence of age as against the parent petitioning for habeas corpus, or is only intended for the protection of the mustering officer, quaere?

4. Where the statement of age on the enlistment paper was not sworn to, *held*, it was not an oath of enlistment within the statute of 1862 [12 Stat. 339].

5. Whether a minor under sixteen years old can be lawfully enlisted, even with the consent of his father; and whether one between eighteen and twenty-one years old can be lawfully enlisted without such consent, quaere?

6. Where the minor was less than eighteen at the time of his enlistment, and at the date of the writ, and his father had not consented, and no oath of enlistment was taken, he was ordered to be discharged on his father's returning the advance which the recruit had received.

Habeas corpus to Colonel Wildrick, commanding officer of Fort Independence, in Boston harbor, to test the validity of the enlistment of James McDonald, in the army of the United States. By the return to the writ and the other evidence, it appeared that the boy was enlisted in May, 1866, being then seventeen years and six months old, without the consent of the petitioner, his father. Upon the back of the enlistment paper was a declaration, signed by the boy, declaring his age to be eighteen; there was no jurat, nor was any evidence given that this declaration had been sworn to. The petition was filed about two months and a half after the enlistment, and was the only act or declaration of the petitioner expressing his dissent.

G. W. Searle, for petitioner.

W. A. Field, Asst. Dist. Atty., for respondent.

1. Congress has a constitutional power to enlist minors without the consent of their parents. U. S. v. Bainbridge [Case No. 14,497]; Com. v. Gamble, 11 Serg. & R. 93; Lanahan v. Birge, 30 Conn. 438. 2. The several statutes, construed together, authorize the enlistment of young men eighteen years old or more, without the consent of their parents, and between sixteen and eighteen with consent. (Counsel here cited the acts.) 3. The oath of enlistment conclusively proves that this soldier was eighteen years old. See St. Feb. 13, 1862, § 2 (12 Stat. 339). If not, the father's consent may be inferred from his knowledge and inaction. 4 The only remedy for one who is under the lawful age is by applying to the secretary of war. St. Feb. 24, 1864, § 20 (13 Stat. 10); St. July 4, 1864, § 5 (13 Stat. 380); Ableman v. Booth, 21 How. [62 U. S.] 523; In re Jordan, 2 Am. Law Reg. [N. S.] 749; In re Spangler [11 Mich. 298].

LOWELL, District Judge. A careful examination of the acts of congress regulating enlistments in the army is requisite to the determination of this case; and the more so, because comparatively few decisions are to be found in the books, each case being usually heard in a summary way, before a single judge, whose action is final. The act of March 16, 1802, § 11 (2 Stat. 135), which is the foundation of the whole system, authorizes the enlistment of able-bodied citizens, between the ages of eighteen and thirty-five years; and provides that no one under the age of twenty-one years shall be enlisted or held in the service without the consent of his parent, guardian, or master. During the War of 1812, congress found it necessary to recruit men between eighteen and fifty years old, and to dispense with the consent of parents. St. Dec. 10, 1814 (3 Stat. 146). They took pains to guard against hasty or ill-advised enlistments of minors; for, by section 2, such recruits were to be at liberty to reconsider and withdraw their enlistments at any time within four days after they were made.

On the third of March, 1815 (3 Stat. 224), after the conclusion of peace had become known to congress, an act fixing the military peace establishment of the United States was passed, which repealed that of 1814, for it enacted (section 7) that the several corps should be recruited in the same manner, and with the same limitations, &c., as were authorized by the act of 1802, and one of those limitations was, that only persons between eighteen and thirty-five years old should be enlisted; and another was, that no minor should be either enlisted or held without the consent of his parent. In 1838 a law was passed which repealed so much of the act of 1802 as established a standard of height for enlisted men. St. July 5, 1838, § 30 (5 Stat. 260). The next statute is that of September 28, 1850, § 5 (9 Stat. 507), which makes it the duty of the secretary of war to order the discharge of any soldier who was under twenty-one years at the time of his enlistment, upon evidence that such enlistment was without the consent of his parent or guardian.

Before examining the several acts passed during and since the Rebellion, we may properly review the state of the law up to 1862. It seems clear that the legislation of 1815 adopted or re-enacted the law of 1802, and that congress so understood the case in 1838 and 1850. And yet most respectable authority may be cited to the point, that the consent of parents was unnecessary. 5 Op. Attys. Gen. 313; 6 Op. Attys. Gen. 607; Phelan's Case, 9 Abb. Prac. 286. These opinions, notwithstanding their origin, are of little weight, because the learned attorneys and judges who pronounced them overlooked entirely the act of 1815. They did not construe that statute as not repealing the one of the former

year, but merely failed to cite it, and assumed that there was no legislation after December, 1814.

Against this may be put the plain language of the statute of 1815, the practice of the war department, and a great many decisions of the courts, among which are the following: In re Dobbs, 21 How. Prac. 68; U. S. v. Wright [Case No. 16,777]; In re Keeler [Case No. 7,637]; 10 Op. Attys. Gen. 146; In re Kimball, 9 Law Rep. 500; Bamfield v. Abbot [Case No. 832]. Shaw, C. J., in Kimball's Case [supra], after showing that the presumption was that congress would not undertake to enlist minors without the consent of their parents, says: "In December, 1814, during the darkest period of the last war with England, it being necessary to fill the ranks of the army, an act was passed repealing a previous statute which required the consent of parents and guardians; and providing, with great care, that minors might be enlisted without such consent. This law was repealed in March, 1815, having been in force only about four months." See, besides, Opinion of Jackson, J., 1 Car. Law Repos., 47; Com. v. Downes, 24 Pick. 227; Re Higgins, 16 Wis. 351; State v. Dimick, 12 N. H. 194; State v. Brearly, 2 South. [5 N. J. Law] 555; In re Dew, 25 Law Rep. 538.

It is plain, then, that up to 1862 no minor, whose father was living, could be enlisted in the army without the father's consent. Act Feb. 13, 1862, § 2 (12 Stat. 339), is in these words: "That the fifth section of the act of twenty-eight September, eighteen hundred and fifty, providing for the discharge from service of minors enlisted without the consent of their parents or guardians be, and the same hereby is, repealed: provided, that no person under the age of eighteen shall be mustered into the United States service, and the oath of enlistment taken by the recruit shall be conclusive as to his age." It would seem probable that congress overlooked the act of 1802, which forbade the enlisting or holding of minors without consent, for they do not repeal it in terms. And the act of 1862 is so explicit in repealing merely the fifth section of the law of 1850 that it seems very difficult to construe it as an implied repeal of the principal act regulating enlistments. And this was the view of the war department; for by the army regulations of 1863 (Appendix B, § 16, p. 511) officers are instructed that the act of 1862 prohibits the discharge of minors, but does not authorize their enlistment without the consent of their parents, masters, or guardians. I have seen no later regulations, but it is said that the practice has since been changed, and that minors are now enlisted between the ages of sixteen and eighteen years with the consent of their parents, and above eighteen without consent. This practice is said to be founded on the three latest statutes: St. Feb. 24, 1864, § 20 (13 Stat. 10); July 4, 1864, § 5 (13 Stat. 380); and March 3, 1865, §§ 17, etc. (13 Stat. 489, 490). The first of these authorizes, and the second requires, the secretary of war to discharge all persons who at the time of the application are under the age of eighteen years, upon due proof that they are in the service, without the assent, express or implied, of their parents or guardians; and the third punishes with great severity officers who shall enlist or muster persons under sixteen years old in any case, or those between sixteen and eighteen, without the consent of their parents.

This review of the statutes shows us these inconsistencies: the law of 1802 authorizes enlistments of persons between eighteen and thirty-five, with consent, &c., if under twenty-one. This law has not been expressly repealed. The act of 1862 prohibits the mustering in of any one under eighteen, but gives no remedy for a breach, and makes the oath of enlistment conclusive; the laws of 1864 require the secretary to discharge all persons under eighteen who have been enlisted without consent, notwithstanding the oath; the law of 1865 punishes the enlistment of a minor between sixteen and eighteen unless with consent. So that while there is not upon the statute book any law authorizing the enlistment of persons under eighteen in any case, nor between eighteen and twenty-one without consent, yet the laws of 1864 and 1865 imply that between sixteen and eighteen they may be enlisted with consent, and above eighteen without it, because it is only when the consent is wanting that the secretary is to discharge or the officer to be punished in the first case, and there is no discharge or punishment in the second. I must say that it appears to me a very doubtful question whether a lawful enlistment can be made of any one under eighteen years old, or of any minor without the consent of his father, and I do not undertake to pass upon these questions at this time. I need not decide them, because this recruit was less than eighteen years old, and was enlisted without his father's consent. I say he was less than eighteen years old, because assuming that the oath of enlistment would be conclusive upon the courts, when applied to by the father, which I very much doubt, as well as a conclusive protection to the mustering officer, yet in this case no oath was taken, and therefore the statute cannot apply. See U. S. v. Wright [supra]. The enlistment, therefore, was illegal upon any construction of the statutes.

It is argued for the respondent that the courts have no jurisdiction of this question, because congress has established a sufficient tribunal in the secretary of war, who must be presumed to have exclusive authority. I can see no good reason to suppose that this was the intention of congress. It has always been the right and duty of the war department to discharge persons illegally enlisted. In one of the earliest reported cases of this sort, the point was taken that the ap-

plication should have been made in that quarter; but the learned judge of the Western district of Tennessee said that congress not only had not undertaken to interfere with the privilege of the writ of habeas corpus, but that they could not lawfully do so excepting under the circumstances pointed out by the constitution. U. S. v. Anderson [Case No. 14,449]. And a like remark was made in Keeler's Case [supra]; and there seems to be force in the suggestion. The act of 1850 expressly imposed this duty on the secretary, and all the adjudged cases which arose between that time and the date of the president's proclamation, suspending the privilege of the writ during the war of the Rebellion, are authorities against the respondent's contention. If a statute creates a new right and provides a remedy, the procedure pointed out by the statute must be followed; but the rule is otherwise where a new remedy is given for an old right, unless the intent that it should be exclusive is clear. So far is that from being the case here, that the acts, as I have said, are merely declaratory of what the secretary might and ought to do by virtue of his office, unless expressly prohibited by congress. While the privilege of the writ was suspended, as it was when these acts were passed, this was the only remedy, and it still is often the most convenient; but it would be contrary to all precedent to oust the jurisdiction of the courts, in a matter involving the liberty of the citizen, by a mere implication, from the fact that the legislature has given the appropriate executive departments power to act in the premises, and this during a war when there was, for the time, no other remedy. In most of the dealings of the citizen with the government, it is the province of some department to see that justice is done him; but if it should be denied, or if any dispute arises, the courts must finally determine the matter. Here the relator had his choice of remedies. He might have applied to the secretary, who would have had the power and the will to do him justice; but if he finds it more convenient, he has a right to his writ.

I may here confess to a serious doubt whether, upon the true theory and practice of our mixed government, the state courts ought ever to have taken jurisdiction of these cases. Upon this point, Ableman v. Booth, 21 How. [62 U. S.] 506, and other authorities, cited in argument, are instructive. But the practice is now so well established that only the supreme court of the United States can change it.

I must discharge the prisoner; but, following the rule which the statute of 1864 lays down for the secretary of war, and treating the remedies as truly concurrent, I shall order that the father do first return to the United States the clothing supplied by them to the son, which, as I am informed, is all that has been advanced in this instance. Order accordingly.

Case No. 8,753.

In re McDONALD.

[14 N. B. R. 477;[1] 24 Pittsb. Leg. J. 42.]

District Court, W. D. Pennsylvania. Oct. 24, 1876.

PRINCIPAL AND SURETY — ASSENT TO DISCHARGE OF MAKER OF NOTE — RELEASE OF SURETY — BANKRUPTCY — INTERVENTION BY CREDITORS — CLAIM STRICKEN OUT.

If the holder of a note assents to the discharge of the maker, without the consent of the indorser, this releases the indorser. Creditors will not be allowed to intervene, after the return day, to prosecute specifications filed by a creditor whose claim was stricken out after the filing of such specifications.

[Cited in brief in First Nat. Bank v. Wood, 53 Vt. 493.]

Exceptions to the report of Register Shafer.

KETCHUM, District Judge. J. Sharp McDonald made his note to the order of David A. McDonald, who indorsed it for the accommodation of the maker, and the maker delivered it for value to David Hendrie. J. Sharp McDonald failed to pay the note, and it was regularly protested, and notice given to the indorser, David A. McDonald. J. Sharp McDonald went into bankruptcy, but was not able to pay the required percentum for a discharge. He procured the written consent of the statutory number and value of his creditors, and was discharged. Among those who signed the consent were Hendrie, the holder, and David A. McDonald, the indorser; but without any agreement or consent by the indorser that Hendrie should sign the consent. Hendrie signed the consent before McDonald. David A. McDonald, the indorser, then went into bankruptcy. Hendrie proved the balance of the claim against his estate, and objected to his discharge. David A. McDonald petitions this court to expunge the claim of Hendrie from the list of provable debts.

The register rejects the claim of Hendrie, on the ground that he released the indorser by consenting and contributing to the discharge of J. Sharp McDonald, the maker of the note. Hendrie, the holder, excepts to the report, and, in support of the exception, cites section 5118 of the bankrupt law [Rev. St.] which declares that "no discharge shall release, discharge, or affect any person liable for the same debt, for or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise." And he also urges that, because the indorser consented also to the discharge of the maker, he is estopped from setting this up against his liability as indorser.

I think this section of the bankrupt law, only applies to the discharge in bankruptcy merely, and cannot be held to refer to and have in view any act of the parties affecting a release of liabilities at common law or in equity, and therefore does not affect this

[1] [Reprinted from 14 N. B. R. 477, by permission.]

question. Again, while David A. McDonald's consent contributed to the discharge of J. Sharp McDonald, it did not in any way affect his own liability as indorser to Hendrie, the holder, unless it increased it by leaving him without recourse to the maker. He was under no contract with Hendrie by which he was restrained in law or equity from consenting to J. Sharp McDonald's discharge. But Hendrie, by a well-known principle of law, restraining the holder of the note from doing anything to change the position of the maker, by consenting and contributing to the maker's discharge, ipso facto, released David A. McDonald, the indorser, from all liability on the note. The fact that the claim against the indorser was merged in a judgment regularly obtained makes no difference. The relation of the parties remains the same.

It is objected that the bankrupt, David A. McDonald, is not competent to move to strike off the proof of the debt. He clearly does it in the interest of the creditors, and, in good faith, is bound to see that no debt is paid which is not entitled to payment. He is therefore competent.

The exceptions are overruled and the report of the register confirmed.

PER CURIAM. In re D. A. McDonald, after the decision in the above case, petitions of creditors were filed asking to be allowed to intervene, long after the return day of the rule to show cause why the bankrupt should not be discharged, and to try the specifications of objections filed by D. Hendrie, whose claim to be a creditor was rejected. These petitions, after argument, were dismissed by Judge Ketchum.

Case No. 8,754.

In re McDONALD.

[The case reported under above title in 7 West. Jur. 505, 30 Leg. Int. 232, and 10 Phila. 273, is the same as Case No. 5,073.]

Case No. 8,755.

The McDONALD.

[Cited in The E. A. Packer, Case No. 4,241. Nowhere reported; opinion not now accessible.]

McDONALD, The. See Case No. 13,716.

Case No. 8,756.

The McDONALD.

[4 Blatchf. 477.] [1]

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

PRACTICE IN ADMIRALTY—COSTS — DISMISSAL FOR WANT OF JURISDICTION—COSTS ON APPEAL.

1. The district court, on dismissing a libel for want of jurisdiction, has no power to award costs against the libellant.

[Cited in The Hendrick Hudson, Case No. 6,355; Wenberg v. Cargo of Mineral Phosphate, 15 Fed. 288; Cooper v. New Haven Steamboat Co., 18 Fed. 588; Pentlarge v. Kirby, 20 Fed. 898.]

2. Where the district court dismissed a libel for want of jurisdiction, and awarded costs against the libellant and this court on an appeal by the libellant from the whole decree, affirmed so much of it as dismissed the libel and reversed so much of it as awarded costs, no costs of this court were allowed to either party.

[Followed in Pentlarge v. Kirby, 20 Fed. 901.]

This was a libel in rem, filed in the district court, by Newell Chamberlain and others against the steamboat McDonald. That court dismissed the libel for want of jurisdiction, and awarded costs to the claimant. [Case No. 11,238.] The libellant appealed to this court from the whole decree. This court affirmed so much of the decree of the district court as dismissed the libel for want of jurisdiction [Id. 11,239], and the question now arose as to what decree should be made by this court in regard to costs, the libellant claiming that he should not be charged with costs either in this court or in the district court, and the claimant maintaining his right to recover costs in both courts.

James N. Platt and Gerard & Buckley, for libellant.

Erastus C. Benedict and Burr & Benedict, for claimant.

NELSON, Circuit Justice. It was erroneous in the court below to allow costs on the dismissal of the libel for want of jurisdiction. In such a case, by the settled practice of the supreme court, no costs are allowed. So much of the decree below as awarded costs to the claimant must, therefore, be reversed. As the libellant had a right to come to this court to reverse that part of the decree below which awarded costs against him, I shall not allow costs against him on the appeal, although a part of the decree appealed from is affirmed; and, because he claimed to reverse the whole decree, I shall not allow any costs to him on the appeal.

MACDONALD (BANK OF THE UNITED STATES v.). See Case No. 925.

McDONALD (BIRDSALL v.). See Case No. 1,434.

Case No. 8,757.

MACDONALD v. BLACKMER et al.

[4 Ban. & A. 78.] [1]

Circuit Court, D. Massachusetts. Dec., 1878.

PATENTS—DELAY IN APPLYING—DATING BACK.

The complainant applied for a patent in 1873, which was granted September 29th, 1874. She testified that the invention was made in 1861. There was nothing improbable in her testimony, and no contradictions or circumstances were prov-

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

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

ed to bring it into doubt, excepting the time which was permitted to pass before the patent was applied for, and that delay was plausibly explained. *Held*, that the invention should date back to 1861.

[Cited in Macdonald v. Shepard, Case No. 8,767. Followed in Macdonald v. Sidenberg, Id. 8,768.]

[This was a bill in equity by Helen Marie Macdonald against S. M. Blackmer and others for the alleged infringement of a patent skirt protector. There was a decree in favor of plaintiff (Case No. 8,758), after which the court, upon a rehearing, allowed defendants to file a supplemental answer and take evidence. The case is now heard upon the original papers, together with the supplemental answer and new evidence taken.]

Benj. F. Butler, for complainant.
Jabez S. Holmes, for defendants.

LOWELL, District Judge. After an interlocutory decree had been entered for the complainant, Judge Shepley entertained a petition for a rehearing, so far as to permit the respondents to file a supplemental answer, setting up a patent which had come to their knowledge after the former hearing, and which they considered important, not only on the state of the art, but as rendering the complainant's patent void. The decree was not set aside, but the fact of the patent, and whatever evidence was necessary in connection with it, were permitted to be introduced into the case.

The hearing now has been on the question of vacating the decree, and rendering one for the respondents. The plaintiff's patent, granted September 29th, 1874, No. 155,534, is for a skirt protector, as a new article of manufacture, bound with or composed of enameled cloth, or other waterproof material.

A skirt protector, in this sense, means a strip of the described material made and sold by itself, and intended to be sewed to the rear part, and on the inside of a skirt which would otherwise touch the ground, and, by extending a little below the edge of the skirt, to protect it from dirt and wet. The patent says, that protectors of "wigan," which is a different material and not so useful as enameled cloth or a waterproof material, were old. Two months after the grant, the patentee disclaimed skirt facings as old.

The patent now introduced was granted to Thomas B. De Forest, January 15th, 1867, for a binding for skirts, presenting an India rubber or similar flexible edge, which is intended to protect the skirt. This binding, like the facing, is a part of the skirt, and while it undoubtedly acts to protect the remainder of the skirt, is specifically different in its operation and its advantages from a separate piece of cloth intended to be attached to a skirt, and, if an old facing did not destroy the patent, I do not see why an old binding should have that effect.

Again, in the original case, the plaintiff testified that she made her invention in 1861 or 1862, and she gave reasons for not applying for a patent until 1873. There was, on the part of the defendants, evidence which, if believed, proved that the plaintiff was not the first inventor, if her application was the true date of her discovery. The defendants argued that the plaintiff was mistaken or untrustworthy in carrying back her invention, and the complainant argued that the witnesses who spoke of the prior use were not to be believed. Unfortunately, Judge Shepley, while holding that the plaintiff was the original inventor, does not say whether he arrives at this conclusion by believing the plaintiff as to the date of her invention, or by disbelieving the witnesses against her who testified to the protectors which they had seen as early as 1864. One or the other he must have done.

The patent, now produced, cannot be disbelieved, and therefore, on this point, I am obliged to decide whether the plaintiff has proved what she undertakes to prove concerning the date of her invention. It is an embarrassing question. Very few persons were likely to know of the plaintiff's alleged protectors, made in 1861–2 because they were used only by herself, and there is no pretence of any public use or sale. It is probably impossible, at this time, to support, or to contradict, the plaintiff's own statement by direct testimony. There is, however, nothing in it which is improbable, and no contradictions or circumstances are proved to bring it into doubt, excepting the time which was permitted to pass before the patent was applied for, and that delay is plausibly explained. I think it more probable that Judge Shepley, in deciding for the plaintiff, considered her evidence on this point to be true, than that he discredited the considerable body of proof tending to show an anticipation by others.

Mr. Leggett, commissioner of patents, expressed the opinion that the plaintiff's invention was made in 1861 (Macdonald v. Chase, 6 O. G. 359); and I am of the same opinion. The DeForest invention, therefore, was later than that of the plaintiff.

Decree to stand.

[For other cases involving this patent, see note to MacDonald v. Blackmer, Case No. 8,758.]

Case No. 8,758.

MACDONALD v. BLACKMER et al.

[9 O. G. 746.]

Circuit Court, D. Massachusetts. April 4, 1876.

PATENTS—SKIRT PROTECTOR—INFRINGEMENT.

The patent of plaintiff sustained, and decree for injunction and account against defendants. No legal principles involving construction of patent law involved, in the opinion of the court.

[Cited in Macdonald v. Shepard, Case No. 8,767; Macdonald v. Sidenberg, Id. 8,768; Macdonald v. Shepard, 4 Fed. 229.]

[This was a bill in equity by Helen Marie Macdonald against S. M. Blackmer and others for the alleged infringement of patent No. 155,534, granted to H. M. Macdonald, September 29, 1874.]

George E. Betton, for complainant.
Browne & Holmes, for defendants.

SHEPLEY, Circuit Judge. Since the disclaimer, which was filed before the date of the bill in this case, the claim of the complainant is limited to that only which was described in the specification of her patent—viz., "as a new article of manufacture, a skirt-protector, having a fluted or plated border bound with or composed of enameled cloth or other water-proof material." I see no reason to doubt that she was the first and original inventor of this article, as distinguished from a skirt-facing, which is an entirely different article, and from a skirt-protector, which being made of wigan or similar material, was substantially useless for the purpose, as compared with the complainant's invention.

Decree for injunction and account, as prayed for in the bill.

[NOTE. Upon petition of respondents, a rehearing was granted, and they were permitted to file a supplemental answer. The decree was not set aside, but the fact of the patent and the evidence thereto necessary were permitted to be introduced. Upon the original papers, supplemental answer, and evidence, the case was again heard, and the decree for plaintiff allowed to stand. Case No. 8,757.]

[For other cases involving this patent, see Macdonald v. Shepard, 4 Fed. 229, 10 Fed. 919, and Case No. 8,767; Macdonald v. Sidenberg, Id. 8,768.]

Case No. 8,759.

McDONALD et al. v. The CABOT.

[Newb. 348.] [1]

District Court, D. Louisiana. Nov., 1844.

ATTORNEY AND CLIENT—PROCTOR—SUIT FOR FEES—SETTLEMENT BY PARTIES INTER SE.

1. A suit by a proctor in the admiralty for his costs or fees, is a familiar proceeding in the admiralty tribunals both in this country and in England.

2. Where wages due from a master to the seamen, are seized under a process of garnishment from a local court in the hands of the former, at the very time that a suit for a penalty and wages brought by those seamen against the master, is pending in the United States district court sitting as a court of admiralty, it is the duty of the master not to pay over the money before the expiration of the legal delay for the return of the garnishment, without the knowledge of the proctors in the admiralty suit. A payment under such circumstances will render the master responsible for the costs of the opposing proctor, if the latter has thus been prevented from receiving them from his own clients in the ordinary way.

3. Negotiations for the adjustment of a suit in admiralty should be conducted in the presence of the proctors of the parties, as they have a personal and legal weight and a direct responsibility to the court.

In admiralty.

McCALEB, District Judge. The libel in this case was filed on behalf of a portion of the crew of the ship Cabot, claiming from the captain of said ship the penalty which they allege he had incurred, in consequence of putting them on a short allowance of provisions on the voyage from Dieppe and Bordeaux to the port of New Orleans. The amount claimed is $144. Three of the libelants, Alexander Gent, George Coffin and James Frost, also claim the sum of $198 as wages, which they allege to be due. The claim for the penalty for being subjected to a short allowance of provisions, is based upon the provisions of the act of congress of July 20, 1790, § 9 [1 Stat. 135], being an "Act for the government and regulation of seamen in the merchant service." I have attentively examined the testimony taken before the commissioner and introduced in evidence on the trial of the cause, and can find no just grounds for sustaining the first allegation of the libel. The testimony of McDonald, who was examined before the court, shows that on the voyage from Bordeaux to this port the crew were put on a short allowance of meat: that they did not have for a whole day more than enough for one meal; but that they did not trouble themselves to see to the weighing of the meat, and supposes that if they had tried they could have got more: that for eight or ten days before they arrived at the port of New Orleans, they had no meat, because not being able to get enough they did not trouble themselves to get any. This evidence is entirely disproved by the concurrent testimony of the first and second mate and the steward of the ship. They show that the ship had on board an abundance of provisions, more than sufficient for the passengers and crew: that the crew were put on an allowance of meat, but not on short allowance, each man having been allowed a pound and a half per day, which is the usual allowance. I shall, therefore, dismiss without further comment this part of the case, and shall now proceed to the main question at issue. The wages demanded by the libelants, or so much thereof as were really due, have been paid by the master after the libel was filed, out of court, and out of the presence and without the knowledge of the proctor who brought the action. This suit is now prosecuted by that proctor for the recovery of his costs. It is a proceeding familiar to the admiralty tribunals of this country and in England.

In this case, it appears from the evidence, that the wages due from the master to the libelants, were seized in the hands of the former under a garnishment from one of the associate city courts of this city. Immediately on the institution of the suit in that court against the libelants, they confessed judg-

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

ment. The master, upon receiving the garnishment, acknowledged himself indebted to the seamen for wages. The service of the garnishment was made on the 7th instant. On the afternoon of the 8th instant the money was paid to the deputy marshal of the city court, in the presence and with the approbation of the defendants in the suit, who are also the libelants in the present action. On the 7th instant the libel in the case was filed, and on the morning of the 8th it was served on the master. It was therefore in his hands at the time he paid the money under the garnishment, and he cannot plead ignorance of the fact that the libel was filed; and with a copy of it in his hands, he was not justified in taking for true the representations of the libelants, that they had not libeled the ship. He was not bound to answer the garnishment until two days after he received it; that he was bound to pay the money, will hardly be doubted. The seizure from the city court had created a lien on the amount of wages in his hands which he was bound to satisfy. It was his duty, however, instead of paying the money at the solicitation of the libelants in such unnecessary haste and under circumstances most suspicious, to have communicated the intelligence of the seizure to their proctor to enable him to take such measures against his clients as would save him against an evident attempt to defraud him out of a compensation for his professional services, and to render him liable for the costs of a proceeding which had been instituted at their request and for their benefit. The conduct of this master does not seem to have been characterized by that candor which was due to the court, to say nothing of the proctor of the libelants. Instead of bringing to the notice of the court the fact of the seizure and the payment of the wages under it, a rule is taken by his proctor on the 11th instant (three days after the payment of the money to the libelants, and after they had embarked for a northern port), for them (the libelants) to show cause, on the 13th instant, why they should not furnish security for costs, or have their libel dismissed. This proceeding can be regarded as little less than a mere mockery, when we remember that it was within the knowledge of the master that the means by which the libelants could alone answer the rule had been paid by himself, under an order of court to satisfy a debt or a pretended debt due by them.

I am clearly of the opinion that the settlement of this suit out of the presence and without the knowledge of the proctors, was entirely irregular. It was the opinion of Lord Stowell, expressed in the case of The Frederick, 1 Hagg. Adm. 220, that negotiations for an adjustment of a suit should be conducted in the presence of the proctors for the parties, as they have a personal and legal weight, and a direct responsibility to the court. This principle has been sanctioned by the highest admiralty tribunal in this country, and its maintenance is regarded as indispensably necessary to prevent those deceptions which are commonly practiced upon ignorant seamen, and which they, in turn, are but too apt to practice upon their proctors and upon the officers of court, with the view of avoiding the payment of costs. It is the duty of the court, and it should be the mutual care of the opposing proctors, to preserve the dignity of the profession, by discountenancing everything which is calculated to subject its members to the chance of becoming the dupes of designing litigants. While I have no hesitation in giving them the aid of the principle of law now invoked, to protect them from injury in all cases where proper caution is observed in the institution of suits, which, in their apprehension, are just and proper, I shall feel as little hesitation in making them suffer the consequences of permitting themselves to become the instruments of promoting frivolous litigation, or gratifying a spirit of malignity and oppression. The proctor in this case has proved that he rendered services to the libelants. His compensation for those services has been defeated by the settlement of the case out of court without his knowledge. He has, however, failed to prove the value of those services, and I am unwilling to assume the province of putting an estimate upon them. Instead of referring the case to a commissioner for the purpose of taking proof upon the subject, and thereby subjecting the parties to additional expense and trouble, I will venture to fix a compensation subject to the approval or disapproval of the respondent. Should he object to the amount upon the ground of its being too large, I will order specific proof to be made. I will fix the amount at $25, exclusive of the tax fee allowed by law. This amount, together with the costs of court, I order to be paid by the respondent.

McDONALD (CISSEL v.). See Case No. 2,729.

McDONALD (FOWLER v.). See Case No. 5,002.

McDONALD (FRAZIER v.). See Case No. 5,073.

Case No. 8,760.

McDONALD v. LITTLE.

[Cited in Mayo v. Smith, Case No. 9,355. Nowhere reported; opinion not now accessible.]

Case No. 8,761.

McDONALD v. MAGRUDER.

[3 Cranch, C. C. 298.] [1]

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

CONTRIBUTION—ACCOMMODATION PAPER—SURETIES.

The indorsers of accommodation paper are to be considered as joint sureties, and liable to contribution.

Assumpsit by the last indorser against his immediate indorser of S. Turner's note, dated 15th October, 1823, for $150 at 60 days, payable to the defendant [George B. Magruder] at the Bank of the Metropolis, where it was discounted for the accommodation of Turner. The plaintiff [John G. McDonald], being the last indorser, put his initials to these words, at one corner of the note, "Credit the drawer." The note not having been paid by the maker, was taken up by the plaintiff, who brought this suit against the first indorser. The plaintiff and the maker of the note were both clerks in the office of the secretary of the senate. The cause was tried at December term, 1825.

The counsel for the defendant contended that, as no consideration passed between these indorsers, the plaintiff could only recover upon the principle that joint sureties were liable to contribution. That the words "credit the drawer" were evidence that the indorsers were to be considered as joint sureties.

Mr. Wallach, for plaintiff, prayed the court to instruct the jury that these words were not evidence that the plaintiff and defendant had jointly agreed to become indorsers for the accommodation of Turner; which instruction THE COURT (MORSELL, Circuit Judge, absent) refused to give, and the jury found a verdict for the plaintiff for only half the amount of the note.

Mr. Wallach moved for a new trial, on the ground that the court erred in the refusal of the instruction.

But THE COURT (MORSELL, Circuit Judge, absent) refused the new trial. They thought the memorandum was evidence that the plaintiff never paid the defendant any thing for the note, and therefore the plaintiff could recover nothing from the defendant unless upon the ground that the defendant had agreed to become joint surety with the plaintiff; and that the jury did right in finding a verdict for only half of the amount of the note.

But see Magruder v. McDonald [Case No. 8,965].

McDONALD (MAGRUDER v.). See Case No. 8,965.

McDONALD (MANDEVILLE v.). See Case No. 9,013.

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

McDONALD v. The MONADNOCK. See Case No. 9,704.

Case No. 8,762.

McDONALD v. MOORE.

[Reversing Case No. 8,763, so far as that decree directed the payment of the judgment of M., T. & Co., and the costs of the sheriff on the execution, and affirming it in all other respects. Nowhere reported; opinion not now accessible.]

Case No. 8,763.

MACDONALD v. MOORE et al.

[8 Ben. 579; 1 Abb. N. C. 53; 23 Int. Rev. Rec. 25; 3 N. Y. Wkly. Dig. 461; 15 N. B. R. 26; 24 Pittsb. Leg. J. 83.] [1]

District Court, S. D. New York. Dec. 9, 1876.[2]

VOID CONVEYANCE—GENERAL ASSIGNMENT—LIEN—LEVY—COSTS.

1. On December 28th, 1875, S., being insolvent, made a general assignment of his property to M., in trust to pay creditors without preference. M. took possession of the property, which consisted of a stock of goods. On January 4th, 1876, the firm of M. T. & Co. recovered a judgment in a state court against S., and issued execution to the sheriff, whose deputy, on that day, went to the store where the stock of goods was, and found it locked so that he could not effect an entrance, but, having obtained a ladder, he got up and looked through an open window into the store and saw that there were goods there, and made a memorandum on the back of the execution that he had levied on the stock and fixtures in the store. On January 7th, the sheriff, having received a bond of indemnity, broke into the store and took possession of the goods. On January 5th a petition in bankruptcy was filed against S., on which he was adjudged a bankrupt on the 17th, and, an assignee in bankruptcy having been appointed, a bill in equity was filed by him against S. and M. and M. T. & Co. and the sheriff, to recover the property or its proceeds. In that suit a receiver was appointed, to whom the sheriff delivered the property and who sold it and held the proceeds subject to the decree of the court. M., in his answer, consented to relinquish his trust on being paid his disbursements and expenses. M. T. & Co. insisted upon their right to have the property applied on their execution: *Held*, that the assignment by S. to M. was made when S. was insolvent and had the necessary result of preventing the property from coming to any assignee in bankruptcy of S. who should be appointed, and must be held to have been made by S. with that view.

[Cited in Platt v. Preston, Case No. 11,219.]

2. M. had reasonable cause to believe that S. was insolvent and must be held to have known that S. made the assignment with such view. The assignment, therefore, must be set aside.

[Cited in Wehl v. Wald, 3 Fed. 93.]

3. The assignment, being declared void from the time when it was made, could not prevent M. T. & Co. from acquiring rights against the property of S. by the proceedings which they took.

4. The judgment and execution of M. T. & Co. were valid, and the acts of the sheriff under the execution constituted an actual levy on the goods,

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission. 24 Pittsb. Leg. J. 83, contains only a partial report.]

[2] [Reversed in part and affirmed in part by the circuit court. Case unreported.]

the lien of which would have precedence of the claim of the plaintiff.

[Cited in Re Beisenthal, Case No. 1,236. Cited, but not followed, in Re Steele, Id. 13,345; Re Walker, Id. 17,063.]

5. The sheriff must be paid his poundage, levy fees and keeper's fees; that M. must be paid his disbursements, made before the sheriff took the goods, and $300 to cover his own services and those of his counsel; the costs of M. T. & Co. and of the plaintiff must be paid out of the fund; the amount of the judgment of M. T. & Co., with interest, must be paid to them; and the remainder must be paid to the plaintiff.

[Cited in Re Kurth, Case No. 7,948; Wald v. Wehl, 6 Fed. 169.]

[This was an action by Robert Macdonald, assignee in bankruptcy of David Solinger, against William T. Moore and others.]

Dunne & Carr, for plaintiff.

A. Blumensteil, for Mayer.

J. S. Smith, for the sheriff.

J. H. Hull, for Moore, Tingue & Co.

BLATCHFORD, District Judge. On the 28th of December, 1875, David Solinger, being insolvent, made a general assignment, under the laws of the state of New York, of all his property, to the defendant Mayer, in trust to pay his creditors, share and share alike. Mayer accepted the trust, and took possession of the property on the said day, and complied with the statute as to filing a bond and an inventory. The property consisted of a stock of dry goods in a retail store in the city of New York. On the 4th of January, 1876, the defendants Moore, Tingue & Co. recovered a judgment in a state court against Solinger for $1,508.38, and on the same day an execution thereon was issued to the sheriff, who is a defendant in this suit, and placed in his hands. On the 5th of January, 1876, a petition in bankruptcy was filed against Solinger, whereon he was adjudged a bankrupt on the 17th of January. The plaintiff was chosen assignee in bankruptcy, and an assignment was made to him by the register on the 16th of February following. The plaintiff in his bill claims that he has a title to the property which was embraced in the assignment to Mayer, superior to the claims of Mayer and of Moore, Tingue & Co. and of the sheriff; that the assignment to Mayer was made in fraud of the bankruptcy act; and that the property or its proceeds ought to go to the plaintiff, as assignee in bankruptcy, free and clear of the claims of all the defendants.

Mayer, in his answer, expresses his willingness to relinquish his trust, in favor of the plaintiff, on being repaid his disbursements for counsel fees and other expenses in administering his trust, and his commissions thereunder. Moore, Tingue & Co., in their answer, insist upon their right to have the property applied on their execution as against Mayer and the plaintiff. The sheriff, in his answer, insists on his claim to the property under a lien acquired by virtue of a levy thereon under said execution.

The assignment to Mayer must be held to have been invalid as against the rights of the plaintiff under the bankruptcy act [of 1867 (14 Stat. 517)], although it was an assignment in trust for creditors without preference. It was made when Solinger was insolvent, and it had the necessary result of preventing the property from coming to any assignee in bankruptcy of Solinger who should be appointed, and of preventing such property from being distributed under the bankruptcy act in any proceedings in bankruptcy instituted against Solinger, and, therefore, it must be held to have been made by Solinger with such view, inasmuch as it was made by his affirmative action and could not have been made without such action. Mayer had reasonable cause to believe Solinger to be insolvent, and must be held to have known that Solinger made the assignment with such view, because he must be held to the knowledge that the making of the assignment would have the necessary result above mentioned. The assignment was made within three months before the filing of the petition in bankruptcy against Solinger. The question whether a general assignment in trust for creditors, without preferences, under a state law, is void under the bankruptcy act, is elaborately discussed by Judge Emmons in the recent case of Globe Ins. Co. v. Cleveland Ins. Co. [Case No. 5,486], in the circuit court of the United States for the Northern district of Ohio, and the decision is that it is void. That has always been the law in this circuit.

The assignment to Mayer being set aside, the question arises as to whether the property is subject to a lien under the execution in favor of Moore, Tingue & Co., as against the assignee in bankruptcy. There is nothing to impeach the validity of the judgment and execution. Under the law as settled in the case of Wilson v. City Bank, 17 Wall. [84 U. S.] 473, Vanderhoof v. City Bank of St. Paul [Case No. 16,842],[3] it is not to be inferred from the mere fact that a debtor remains passive and suffers a judgment to be obtained against him and an execution thereon to be levied on his property, that he has any view therein to thereby give a preference to the creditor obtaining the judgment and issuing the execution and causing the property to be taken thereunder. If there be nothing more than such passive non-resistance by the debtor, there is nothing inhibited by the bankruptcy act, however much the creditor may have intended to secure a preference over other creditors in the case of a debtor known to him to be insolvent, and however successful he may have been in securing such preference.

On the same day on which the execution was delivered to the sheriff, the 4th of January, a deputy of the sheriff went with the execution to the store of Solinger, in which

[3] [From 15 N. B. R. 26.]

was the property which had been assigned to Mayer, and of which Mayer then had possession, and, finding it shut up and locked, endeavored in vain to effect an entrance into it. He then obtained a ladder, and, by the use of that, looked through an open fan window over the door, into the store, there being no person inside, and saw that there were goods there, and then made a memorandum on the back of the execution, in pencil, in these words: "Jan'y 4th, levied upon stock and fixtures at 328 Bleecker St.," that being the store in question. From the 4th of January to the 7th, some one acting for the sheriff watched the store, on the outside, to see that no goods were removed, and, on the 7th, the sheriff, having received a bond of indemnity from the judgment creditors, broke into the store and took possession of the goods.

It is contended, for the plaintiff, that no lien could be or was obtained by Moore, Tingue & Co., under their execution, because the goods had ceased to be the property of Solinger, and the title to them, subject to be defeated under the bankruptcy act, had passed to Mayer, by a valid assignment, before the execution was issued, and that then the proceedings in bankruptcy intervened, so that the execution never became operative against the goods, and that, when the assignment is set aside, the goods must pass to the plaintiff free from any lien or claim under the execution. This view is not sound. When the assignment is set aside, it becomes void from the time it was made, as against all persons who, after the time it was made, took steps to acquire rights against the property embraced in it, as still the property of Solinger, and who, but for the obtainment of the assignment, would have secured and enjoyed such rights free from any obstruction. Such rights arrange themselves in order according to their priorities in point of time. This principle applies equally to rights under the bankruptcy act and to rights under the state laws. Nor is this principle inconsistent with the other principle, that, if the assignment is valid except as made invalid by some provision of the bankruptcy act, all acts done under it in good faith and without notice that proceedings in bankruptcy have been taken, are to be upheld.

As between Moore, Tingue & Co. and Solinger, the execution of the former bound the goods of the latter from the time the execution was placed in the hands of the sheriff. The assignee in bankruptcy acquired no rights, in that respect, as against Moore, Tingue & Co., which Solinger did not possess. The assignee in bankruptcy does not occupy the position of a bona fide purchaser. But, even if he did, I think what was done by the sheriff's deputy on the 4th of January, in respect of the goods, constituted an actual levy on them. As the rights of the assignee in bankruptcy relate back only to the 5th of January, when the petition in bankruptcy was filed, it follows that the goods were subject to the lien of the execution when that petition was filed, and that such lien has precedence of the claim of the plaintiff.

After this suit was brought, a receiver of the goods in question was appointed in it by this court, and the goods were delivered by the sheriff to the receiver, and the receiver, by order of this court, sold them at public auction. The net proceeds, $3,783.93, are now in this court to the credit of this suit.

The sheriff claims to be paid the sum of $246.66 for poundage, levy fees and keeper's fees. This amount does not seem to be objected to by any of the parties, but, if it is, it may be further inquired into. Otherwise it will be allowed, and the sheriff will be allowed his costs of this suit, to be paid out of the fund.

Mayer was in possession of the goods for ten days. Then the sheriff took them from him. Mayer will be allowed the disbursements he made before the sheriff took the goods, $147.50, and the sum of $300 to cover his own services and those of his counsel. As between Mayer and the plaintiff, no costs of this suit are allowed to either as against the other.

The costs of Moore, Tingue & Co. in this suit will be paid out of the fund, and so will the costs of the plaintiff. The amount of the judgment of Moore, Tingue & Co., with interest, will be paid, and the remainder of the fund, after the above-named payments are made, will be paid to the plaintiff, to be held and administered by him as assignee in bankruptcy.

NOTE. This decision was reversed by the circuit court, on appeal, July 1st, 1878, so far as it directed the payment of the judgment of M. T. & Co. and the costs of the sheriff on the execution, and was affirmed in all other respects.

McDONALD (NORTH v.). See Case No. 10,312.

Case No. 8,764.

McDONALD v. ORVIS.

[5 Biss. 183.] [1]

Circuit Court, N. D. Illinois. Oct., 1870.

PLEADING—DEMURRER — WRITTEN INSTRUMENT—CHANGE BY ORAL TESTIMONY—UNCERTAINTY —GENERAL ISSUE PLEADED.

1. A plea that the written contract set forth in the declaration is not the contract made by the parties, but is a fraud upon the defendant, is bad on demurrer; it is an attempt to change a written contract by oral testimony, and is also bad for uncertainty.

2. Where the general issue has been pleaded, a demurrer to a special plea cannot be carried back to the declaration. Having tendered an issue of fact, the defendant cannot claim the benefit of a demurrer.

Demurrer by plaintiff [Angus McDonald] to the last plea filed by the defendant [Frank-

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

lin K. Orvis], and setting up, in substance, that the contract, a written one, declared upon was subsequently changed or another contract entered into between the same parties. It reads, "avers that the said last-mentioned contract, as set forth in the declaration, does not set forth the contract as made between the parties, but that the same was drawn up by the plaintiff and is a fraud upon the rights of the defendant."

Waite & Clarke, for plaintiff.
J. B. Bradwell, for defendant.

BLODGETT, District Judge. This plea amounts to an averment that the written contract, or the modification of the original contract, which is set up in plaintiff's declaration, is not the true contract made between the parties, but that it is a fraud upon the defendant.

I cannot conceive that an averment of that kind would allow the introduction of any testimony such as would sustain the averment on a trial of the cause at law. It is, in substance, an attempt to modify or change a written contract by parol testimony. The preceding plea avers that the contract was different from what is set up in the declaration, and concludes with this proposition to offer parol evidence to show wherein it differs. I think the demurrer to the plea is well taken, not only for this cause, but for the cause of want of certainty in the plea itself in not stating wherein it is different. I do not think there is enough certainty in the plea, even if it did not seek to change a written contract by parol evidence.

But it is answered on the part of the defendant that a bad plea is a good and sufficient answer to a bad declaration, which I understand, of course, to refer to a well-known rule of pleading, that a demurrer, when taken to a plea, may be made to reach back to the declaration or pleading where the first defect originated; and under many circumstances that rule is applied, but in this case the declaration contains two counts—a special count on a special promise, and the common counts. The plea purports to answer the entire declaration, and of course if a general demurrer had been introduced to the whole declaration, the demurrer would have to be overruled, because there is one good count in the declaration, the common counts for goods sold and delivered, money lent, &c.

There is also an exception to the rule contended for by the defendant's counsel, which is well recognized, viz.: that a demurrer cannot be carried back to the declaration if the general issue has been pleaded; because if it should, it would enable a party, after having tendered an issue of fact on the declaration, to raise an issue of law by putting in a bad plea. If a party wishes to demur to the declaration, he must do it before he tenders an issue of fact. The proposition is undoubtedly sound where there is not an issue of fact made, but here, inasmuch as the demurrer is general, if carried back, the declaration, as a whole, would be sustained, because it has one good count, and because the defendant has already made an issue of fact on the declaration.

The demurrer must be sustained.

McDONALD, The (PAGE v.). See Case No. 11,239.

McDONALD, The (POAG v.). See Cases Nos. 11,238 and 11,239.

McDONALD (POOL v.). See Case No. 11,268.

Case No. 8,765.

McDONALD v. RENNEL et al.

[21 Law Rep. 157.]

District Court, D. Massachusetts. May Term, 1858.

PRACTICE IN ADMIRALTY—DEFAULT OF GARNISHEE—COMPULSORY PROCESS—ANSWER.

1. On default of one summoned as garnishee in admiralty, the libellant is not entitled to execution in personam against him. The thirty-seventh rule of the supreme court provides for compulsory process only to compel the garnishee to answer.

2. After such default, the garnishee is not entitled as of right to put in an answer, except to state facts which have occurred since the default.

3. Such answer may be allowed in the discretion of the court, and in this case was so allowed, on condition that the libellant might take issue upon it, and that the garnishee should stipulate with sureties to pay whatever the court should allow.

In admiralty.

C. G. Thomas, for libellant.
Codman & Johnson, for garnishee.

SPRAGUE, District Judge. This suit, and four others of a similar character, were brought against the captain of a ship, and the owner was summoned as garnishee. The garnishee appeared by counsel, but made no answer, and execution was awarded against him in the usual form, on application of the libellant, with affidavits that the garnishee had admitted that he held funds belonging to the respondent. Thereupon the garnishee came and moved a supersedeas, and that he might be permitted to answer and deny his liability as garnishee. The libellant claims that he is entitled to execution in personam against the garnishee, and that the latter cannot, after his default, be allowed to show a want of funds. A stay of execution was awarded, and a hearing has been had on these questions.

1. The garnishee process is not derived from the custom of London, nor from local legislation, but is a remedy in admiralty, standing on its own grounds. The custom of London and the trustee process are somewhat analogous, and so far as the analogy

holds, we may derive some aid from the practice under them.

But we must be governed here by the rules of the supreme court of the United States, which are founded on the legislation of congress and the general admiralty law, and it is only where these fail that aid can be sought in other quarters.

There are two rules of the supreme court which refer to this process, the second and the thirty-seventh; the latter of which is alone applicable to the present case. It provides that the garnishee shall be required to answer as to funds of the defendant in his hands, and also to such interrogatories concerning them as the libellant may propound, "and if he shall refuse or neglect to do so, the court may award compulsory process in personam against him." If he admit funds, he shall hold them liable to answer the exigency of the suit. The libellant contends that under this rule he is entitled to execution in personam against the garnishee. I do not think so. The rule only means that compulsory process will issue to compel the garnishee to answer, not to pay the debt, and therefore he is not subject to execution. The libel itself only claims the effects of the respondent in the garnishee's hands, and the libellant can have no more than he claimed.

2. The garnishee's motion to be allowed to answer, is put forward, first, as a matter of right, and second, as addressed to the discretion of the court.

He claims its allowance of right:

(1.) On the ground that execution cannot issue until an answer has been made; because the thirty-seventh rule of the supreme court allows compulsory process to obtain an answer, and this is useless if the libellant can proceed without an answer. For why allow compulsory process to obtain an answer, if execution may be awarded on default? But a default does not necessarily give all the effect of a disclosure. Execution is not usually awarded without some evidence of a debt due the respondent, and cases may be supposed where no debt could be proved without the evidence of the garnishee himself. The existence of such a rule, therefore, is not enough foundation for the doctrine contended for by the garnishee.

(2.) He claims that on his refusal to pay the execution and a summons to show cause, he may of right put in an answer. But I do not think this can be allowed in admiralty, though perhaps it might in the state courts under sci. fa. against a trustee. He has been once ordered to make answer and has refused. He cannot be allowed a second opportunity to state the very same facts. If any facts had occurred since his default, he might show them; but he cannot put in the very same answer which he might have given before. As matter of right, therefore, the garnishee's motion must fail.

But he also addresses it to the discretion of the court. The libellant put in affidavits that the garnishee admitted funds when the suit was begun, and afterwards admitted specific amounts. The garnishee now presents affidavits that no such admissions were made, and that he only said he was uncertain whether he owed the respondent or not. He also offers affidavits that the libellant's counsel told him that the matter could be adjusted without his going into court, and the libellant offers counter affidavits.

Under these circumstances, I shall allow the answer; but with the condition that the libellant may take issue upon it, and that the garnishee shall put in stipulations with sureties to pay whatever the court shall allow.

McDONALD (ROBBINS v.). See Case No. 11,884.

Case No. 8,766.

MACDONALD v. SAGINAW VAL. & ST. L. R. CO.

[2 Am. Law T. Rep. (N. S.) 29.]

Circuit Court, E. D. Michigan. Nov., 1874.

REFERENCE—REPORTING TESTIMONY—BILL OF EXCEPTIONS—RAILROAD CONSTRUCTION CONTRACTS—DAMAGES.

[1. The Michigan referee law (Comp. Laws, c. 186) makes no provision for preserving or reporting the testimony, and the only way in which it can be got before the court is by exceptions to its admissibility, or to the finding of facts, and then having it, or so much of it as may be necessary to show the pertinency of the exceptions, embodied in a bill of exceptions, duly settled and certified by the referee. Therefore, testimony merely filed with the report, without any bill of exceptions, cannot be considered, and the exceptions to the report must be determined solely upon the facts as found therein.]

[2. A railroad construction contract provided that, if the constructor failed for 10 days to increase his force after being notified by the company's engineer to do so, the latter might put on a force of its own, or relet the job, and charge the expense, if any, to the contractor. *Held* that, in case of such failure, the company's only remedy was to pursue the course thus pointed out; and having in fact put on a force of its own, and been allowed the full expense thereof, it had no right to receive additional damages.]

[This was an action at law by MacDonald against the Saginaw Valley & St. Louis Railroad Company to recover for work and labor done and materials furnished under a contract. Heard on exceptions to the report of a referee.]

The declaration consists of the common counts for goods, wares, and merchandise sold and delivered, work and labor done, and materials furnished, and money due on account stated. The defendant's notice of defence under the general issue sets up that the goods, wares, and merchandise, work and labor, materials and money, constituting plaintiff's claim as set up in his declaration, were sold and delivered, done, furnished, and paid out by the plaintiff in part performance by him of an agreement in writing between the parties for the construction by the plain-

tiff of defendant's railroad, which contract is fully set out in the notice. The defendant then alleges non-performance on the part of the plaintiff in not completing the work by the time specified in the contract, in abandoning the work while a large portion of it remained undone, and in doing what was done in an unworkmanlike, negligent, and imperfect manner, to defendant's damage a specified amount; which damage, in addition to fifteen per cent. of estimates of work, &c., claimed to be provided for in the contract as stipulated damages, the defendant claims to recoup against plaintiff's claim to the amount thereof, and asks for a judgment for the balance in his favor. The notice also alleges several matters by way of set-off. The issue thus joined was referred by consent to Hon. Sanford M. Green, under chapter 186 of the Compiled Laws of Michigan, and the referee has made and filed his report. No exceptions appear to have been taken before the referee, and there is no bill of exceptions accompanying his report. After the filing of the report, however, exceptions to the conclusions of law stated in the report were filed in behalf of defendant. The exceptions appear in the opinion of the court. The referee's conclusions of law stated in the report as deductions from the facts found by him, which are also stated, are: First, that the plaintiff is entitled to have allowed to him as a just claim against the defendant the several items specified, amounting in the aggregate to $54,486.20, subject, however, and subject only, to deductions for several specified items, amounting in the aggregate to $41,638.72, leaving a balance due the plaintiff at the time of the commencement of the suit of $12,874.28, which last mentioned sum, together with $1,236.59 for interest thereon from December 26, 1872, to May 11, 1874, making in all $14,083.87, the plaintiff is entitled to recover of the defendant as his damages in this action; second, that the defendant is not entitled to recoup for or on account of damages for any non-performance on the part of the plaintiff.

Theo. Romeyn, for exceptions.

O. F. Wisner, contra.

LONGYEAR, District Judge. Several of the exceptions appear to be based upon what is claimed to have been the evidence before the referee, aside from and independently of his findings of facts as stated in his report. There appears in the files in the case a mass of writing, indorsed as filed of the same date as the filing of the report, purporting to be testimony of witnesses in this case. It is not signed by the witnesses, nor is it anywhere referred to or mentioned in the report, or in any manner certified or authenticated by the referee, as the testimony upon which he acted; and of course there is no evidence that it is all the testimony adduced before him. But even if all these had been supplied, the returning and filing of the testimony with the report would have been without authority of law, and have constituted no part of the record or foundation upon which the court could base any opinion or action in deciding exceptions to the report. The referee law makes no provision for preserving or reporting the testimony, and the only means by which it can be got before the court in any case is by exceptions before the referee to its admissibility, or to the finding of facts by the referee, and then having it, or so much of it as may be necessary to show the pertinency of the exceptions, embodied in a bill of exceptions duly settled and certified by the referee, and returned by him with his report. The supreme court of Michigan, in People v. Wayne Circuit Judge, 18 Mich. 483, 489, say: "The referee law makes no provision for preserving the testimony. In case a party insists, before a referee, that there is no evidence tending to maintain a case, undoubtedly he raises a question of law, which will enable him to require a report showing what the testimony was, and this would be done by exception." There being no bill of exceptions returned with the referee's report, the court, in deciding the exceptions in this case, must be confined exclusively to the finding of facts by the referee as stated in his report.

The first, second, and third exceptions are to the referee's conclusions of law, that the defendant was not entitled to recoup for damages. The non-performance complained of in the notice, and on account of which a right to recoup was claimed was: First, in not completing the job by the time agreed on; second, in abandoning the job before completion, leaving large portions of the work undone; third, in doing imperfectly what was done.

The facts found by the referee bearing upon these points are: (1) That defendant being unable to furnish the iron for the track until after the time limited in the contract for the completion of the work, it was mutually understood between the parties that the work was not required to be prosecuted with reference to its being completed within such time, and that no specific time was afterwards agreed on. (2) That "said plaintiffs commenced the work under said written contract by or before the middle of September, 1871, and prosecuted the same from that time until some time in November, 1872, when the officers of said company, in its behalf, directed the plaintiff to quit the work, and he did so." (3) The report is silent as to the quality of the work done. Certainly, under such a state of facts, the referee could come to no other conclusion of law than that arrived at by him, that the defendant was not entitled to damages for the causes named in the notice. The time fixed by the contract for its completion was waived; the work was abandoned by plaintiff by defendant's own direction, without its being made to appear that it was on account of any fault

on the part of the plaintiff; and it does not appear that the allegation that the work done was imperfect was sustained. The first, second, and third exceptions are overruled.

The fourth exception is to the referee's "omission and refusal" to allow the defendant any damages for plaintiff's failure to increase his force in July and August, 1872, as he was notified and directed to do by defendant's engineer. The contract itself (which is set out in full in the report) makes provision as to what was to be done in such case. The provision is, in substance, that in case of such failure on the part of plaintiff for ten days after such notice, the defendant might put on a force of its own, or relet the job, and charge the expense or loss, if any, to the plaintiff. Plaintiff had ten days in which to comply with the notice, and, of course, no damages could be claimed for non-compliance during that time; and after that time defendant had it in its power to avoid damages by putting on a force of its own or reletting the job, and charging the plaintiff with the expense or loss occasioned thereby; and I am of opinion that this was all the defendant could claim of the plaintiff for a non-compliance by him in that respect. The report shows that defendant did put on a force of its own, and that the referee has allowed the full amount of the expenses thereof. The fourth exception is therefore not well taken, and the same is overruled.

The fifth exception was abandoned at the hearing.

The sixth exception is to the "omission and refusal" of the referee to allow the defendant the fifteen per cent. specified in the contract as liquidated and settled damages. The contract provides for estimates at stated times, of work done and material furnished, and for the retention by defendant of fifteen per cent. of such estimates until full performance of the contract on the part of the plaintiff; and that in case of plaintiff's failure to perform, the said fifteen per cent. should be retained by defendant as liquidated and settled damages; and it is to these provisions that the sixth exception relates. What has been said in answer to the first, second, and third exceptions is fully applicable and constitutes a complete answer to this. The sixth exception is therefore overruled.

The seventh exception is "to the omission and refusal of the referee to adopt the award and decision and estimates of the engineer of the defendant as final and conclusive between the parties, in the absence of any proof of fraud or mistake on his part." The report is silent as to whether the findings of the referee of the amount allowed the plaintiff were or were not based upon estimates by the engineer, and as to whether any such estimates were or were not in fact before him. There is therefore an entire absence of anything in the report to which this exception can be given any application. The seventh exception is therefore overruled.

The eighth and tenth exceptions are based upon what the testimony before the referee is claimed to prove or disprove. For reasons stated in the commencement of this opinion, these exceptions cannot be considered, and they are therefore overruled.

The ninth and only remaining exception is "to the conclusion of the referee that the claim of the plaintiff was subject only to the deductions specified in the report." This exception is but a restatement in general terms of what had been already specifically stated in preceding exceptions concerning defendant's claim for damages; and it has therefore been disposed of adversely in what has been said as to those exceptions, and the same is overruled.

It results that judgment must be entered on the referee's report. At the hearing on the exceptions, plaintiff's attorneys acknowledged the payment of $2,500, June 13, 1874, and asked that in entering judgment the amount so paid be deducted from the amount reported due. Let judgment be entered overruling the exceptions and confirming the referee's report; and for the recovery by plaintiff of the amount reported, with interest from May 11, 1874, the date of the report, abating therefrom the payment of $2,500, of the date of June 13, 1874, and costs of suit.

Case No. 8,767.

MACDONALD v. SHEPARD et al.

[4 Ban. & A. 343.] [1]

Circuit Court, D. Massachusetts. June, 1879.

PATENTS—DRESS PROTECTOR—ESSENTIAL PART OF INVENTION.

Held, that the "fluted or plaited border" of the complainant's dress protector, for which letters patent No. 155,534 were granted to her September 29th, 1874, is not an essential part of the invention.

[Cited in Macdonald v. Sidenberg, Case No. 8,768; Day v. Combination Rubber Co., 2 Fed. 571.]

[This was a bill in equity by Helen M. Macdonald against John Shepard and others for the alleged infringement of a patent skirt protector.]

B. F. Butler, for complainant.

E. N. Dickerson, for defendants.

LOWELL, Circuit Judge. On this motion for an injunction, the plaintiff's evidence of infringement is somewhat vague; but, on looking at the defendants' affidavits, the exact article sold by them is shown. This article is a skirt protector, within the description of the plaintiff's patent, which was sustained by Shepley, J., Macdonald v. Blackmer [Case No. 8,758], and afterwards held

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

by me not to be anticipated by the De Forest patent [Id. 8,757], unless the "fluted or plaited" border is an essential part of the invention, so that a plain or straight border not gathered into plaits will be without the scope of the patent. This question has caused me much doubt, but, upon looking at the evidence and the arguments in the principal case, on both sides, I do not think that anything turned upon that part of the description. I understand that the fluting or plaiting is merely a part of the finish, proper and, perhaps, necessary, when the skirt to be protected is made of a certain shape, unnecessary when it is of another shape. It seems to me that both parties took for granted, in that case, that a skirt protector, not plaited, would defeat the plaintiff's patent, if proved to have been made before the date of her invention. I certainly so understood it in deciding upon the questions raised by the discovery of the De Forest patent.

The other points presented in the motion have been decided in the case above referred to.

Temporary injunction ordered.

[For other cases involving this patent, see note to MacDonald v. Blackmer, Case No. 8,758.]

Case No. 8,768.

MACDONALD v. SIDENBERG et al.

[4 Ban. & A. 586;[1] 18 O. G. 193.]

Circuit Court, S. D. New York. Oct. 25, 1879.

PATENTS—SKIRT PROTECTOR—INFRINGEMENT—FLUTED OR PLAITED BORDER.

A patent for a skirt protector, in which the article is described as having a fluted or plaited border bound with or composed of enamelled cloth or other water-proof material, is infringed by a protector which does not have a fluted or plaited border, but is like the patented article in all other respects. The cases of Macdonald v. Blackmer [Case No. 8,757], and Same v. Shepard [Id. 8,767], cited and followed.

[Cited in Day v. Combination Rubber Co., 2 Fed. 571; Macdonald v. Shepard, 4 Fed. 229.]

[This was a motion by Helen Marie Macdonald for an injunction to restrain Gustavus Sidenberg and others from the intringement of a certain patent.]

Helen M. Macdonald, pro se.

E. N. Dickerson, for defendants.

BLATCHFORD, Circuit Judge. In the original case against Blackmer [Case No. 8,758], Judge Shepley held that the plaintiff was the first and original inventor of a skirt-protector having a fluted or plaited border bound with or composed of enamelled cloth or other water-proof material, as distinguished from a skirt-facing (which he remarked, was an entirely different article), and from a skirt-protector made of wiggin or similar material, which was substantially useless for the purpose, as compared with the plaintiff's invention. In the original Blackmer Case, the Mackee patent [No. 45,840], of January 10th, 1865, was introduced to defeat the plaintiff's patent; also, the Mandell patent [No. 151,039], of May 19th, 1874, application filed November 26th, 1873. The plaintiff's patent [No. 155,534] was granted September 29th, 1874, on an application filed May 10th, 1873. The plaintiff carried the making of her invention back, in the original Blackmer suit, to December, 1861. Various unpatented devices were introduced in that suit to anticipate the plaintiff's invention, but none of them were earlier in date than December, 1861. The defendants in the Blackmer suit were then allowed to set up the De Forest patent [No. 61,172] of January 15th, 1867, to defeat the plaintiff's patent, by a supplemental answer, and further proofs were taken. Judge Lowell heard the case, and held, on the evidence, that the plaintiff's invention was made in 1861; that the De Forest invention was later, and that the plaintiff's patent was valid. In the Blackmer Case [supra], the defendant's article had specifically a fluted or plaited border.

Subsequently, the case of Macdonald v. Shepard [Case No. 8,767], came before Judge Lowell, in which the defendant's article, though like the plaintiff's in other respects, did not have a fluted or plaited border. Judge Lowell said that it was within the description of the plaintiff's patent, unless the fluted or plaited border was an essential part of the plaintiff's invention, so that a plain or straight border, not gathered into plaits, would be without the scope of the patent. He further said: "I understand that the fluting or plaited is merely a part of the finish, proper and, perhaps, necessary, when the skirt to be protected is made of a certain shape, unnecessary when it is of another shape. It seems to me that both parties took for granted, in that case" (the Blackmer Case, before Judge Shepley) "that a skirt-protector, not plaited, would defeat the plaintiff's patent, if proved to have been made before the date of her invention. I certainly so understood it in deciding upon the questions raised by the discovery of the De Forest patent." An injunction was granted.

The defendants' article, in the present case, does not have a fluted or plaited border, but it is like the plaintiff's article in all other respects. I concur with Judge Lowell in not regarding the fluted or plaited border as essential, in view of the state of the art prior to the plaintiff's invention in Decmber, 1861. The affidavits presented by the defendants in the present case, do not show any article, anticipating that date, like the plaintiff's invention, whether with or without a fluted or plaited border. T. D. Day gives no date earlier than 1865. The article of 1858, which J. Morrison speaks of, was only a facing.

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

His entire affidavit is too vague and general. H. Douglass, as to a skirt-protector of enamelled cloth over a facing, gives, as a date, "as early as 1861." This is not sufficient. R. Hood goes back only to 1865.

An injunction is granted.

[For other cases involving this patent, see note to MacDonald v. Blackmer, Case No. 8,758.]

McDONALD (UNITED STATES v.). See Cases Nos. 15,667–15,670.

Case No. 8,769.

McDONALD et al. v. WHITE.

[1 Cranch, C. C. 149.] [1]

Circuit Court, District of Columbia. Dec. Term, 1803.

EXECUTION—WITHIN WHAT TIME MAY ISSUE.

After the year has elapsed, execution cannot issue here upon a judgment in Maryland, without a scire facias, notwithstanding the 13th section of the act of congress of 27th Feb., 1801 [2 Stat. 107].

[Action by McDonald & Holmes against Jane White.]

Motion by Mr. Peacock to quash a ca. sa.

The judgment was rendered in Montgomery county court in Maryland, in March, 1800. No execution issued in Montgomery. The transcript was brought into this court and the ca. sa. issued 29th September, 1803. By the act of congress of 27th February, 1801, § 13 (2 Stat. 107), upon a transcript of the proceedings and judgment in Maryland filed, execution may issue here and shall be proceeded on in the same manner as if the judgment had been rendered here. But an execution, could not issue upon such a judgment obtained here, without a scire facias.

Execution quashed with costs.

CRANCH, Circuit Judge, declined giving an opinion, having been counsel for the plaintiff in the original action in Montgomery county.

Case No. 8,770.

McDONALD v. WOODRUFF et al.

[2 Dill. 244.] [2]

Circuit Court, E. D. Arkansas. 1871.

LIBEL—PLEADINGS — RESPONSIBILITY OF NEWSPAPER PUBLISHERS—MEASURE OF DAMAGES.

1. In an action for libel against the publishers of a newspaper, it is no justification that the article was copied from another paper, and that it showed this fact on its face.

2. Under the common law system of pleading, this fact may, when available, be used in mitigation of damages under the general issue.

[Cited in Upton v. Hume (Or.) 33 Pac. 813.]

3. One proprietor of a newspaper is responsible for the act of his co-proprietor in publishing a libelous article.

4. Libel defined—respective functions of court and jury in the trial of actions for libel—criticism of official conduct and public officers, extent and limitations upon the right—subsequent libelous articles—measure of damages.

[Cited in Erber v. Dun, 12 Fed. 531, 533.]

[This was an action of libel by McDonald against Woodruff and Blocker.]

W. G. Whipple, for plaintiff.

Garland & Nash, English, Gantt & English, and Watkins & Rose, for defendants.

PER CURIAM. In an action against the defendant as the publisher of a newspaper, for the publication of an article, libelous in its nature, concerning the plaintiff, a plea setting up that the article in question was first published in another designated newspaper, and that it was simply copied into the defendant's paper as an item of news, and that the article as copied showed that it was thus copied or taken from the other newspaper, is demurrable; these facts are available under the common law system of pleading, which prevails in this court, in mitigation of damages under the general issue, but in themselves are not pleadable in bar. Such is the weight of authority, and this view seems to us better supported by reason and principle than the opposite one. 2 Greenl. Ev. § 424, and cases cited; Romayne v. Duane [Case No. 12,028].

The cause was subsequently tried before DILLON, Circuit Judge, and CALDWELL, District Judge, and a jury. The plaintiff was the supervisor of internal revenue for the district embracing Missouri, Arkansas, and the Indian Territory. His official conduct in proceedings against tobacco manufacturers in the Indian country (see U. S. v. Tobacco Factory [Id. 16,528]; The Cherokee Tobacco, 11 Wall. [78 U. S.] 616) called forth an article stated to have been written by Col. Boudinot, reflecting severely upon the plaintiff. This article, first appearing in another newspaper published in or near the Indian country, was copied by the defendants into the Daily Arkansas Gazette, of which they were the proprietors. The article was of considerable length, but in it were expressions referring to the plaintiff as "a self-convicted liar," "a stupid ass," "he is in the pay of the St. Louis tobacco manufacturers." No plea of justification was filed, and on the trial no evidence was offered to show any fraudulent or corrupt official conduct on the part of the plaintiff. The evidence being in, and the argument concluded, the circuit judge, with the concurrence of the district judge, charged the jury, as follows:

DILLON, Circuit Judge. 1. This is an action of libel. The declaration contains two counts. The one charges the alleged libelous article was published by the defend-

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

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

ants of the plaintiff as a private citizen. The other charges that the same libel was published of the plaintiff in his public capacity as supervisor of internal revenue. The defendants plead not guilty. This makes it incumbent on the plaintiff to prove the publication as alleged by the defendants of the article or words alleged to be libelous; the fact that the article or words referred to the plaintiff; his official character, so far as damages are asked, in respect to his official character, and the defendants' alleged malicious intention in the publication of the article or publication complained of as libelous. If the defendants were the proprietors of the newspaper named in the declaration, called the Daily Arkansas Gazette, and if the article containing the words alleged in the declaration was published therein while the defendants were such proprietors, the allegation of the publication is established, and one of the proprietors of a paper is liable for what is done by the others in publishing libelous articles upon individuals.

2. If you find the fact of the publication by the defendants proved to your satisfaction by the evidence, you will next consider whether the article published related to the plaintiff, and is libelous in its character. At the present day the law in relation to libel is "that the judge is not bound to state to the jury, as a matter of law, whether the publication complained of, and sued for, is a libel or not; but the proper course is for him to define what is a libel in point of law, and leave it to the jury whether the publication falls within that definition, and as incidental to that, whether it is calculated to injure the reputation of the plaintiff." 2 Greenl. Ev. § 411.

Accordingly, it becomes the duty of the court to define what is, in law, a libel. This we do in the language of the supreme court of the United States: "Every publication in print, which charges upon or imputes to any person that which renders him liable to punishment, or is calculated to make him infamous, odious, or ridiculous, is a libel, and implies malice in the author or publisher. Proof of malice in such publications is not required of the plaintiff; justification, excuse, or extenuation, if either can be shown, must proceed from the defendant." [White v. Nicholls] 3 How. [44 U. S.] 291.

It is your duty to determine whether the publication sued for in this action falls within this definition. The plaintiff selects certain parts of the article, and charges it to be libelous. In determining whether the publication was or was not libelous, as above defined, you are to consider the whole publication—take it by the four corners and consider it in all its parts, in order to determine the meaning and purpose, character and effect of the particular words complained of.

3. Malice is essential to make a publication a libel; but in law, every publication which falls within the definition of libel above given, is, in law, presumptively malicious. Malice has, in law, a meaning not exactly the same in all respects with its common signification. Malice, in its common acceptation, means ill-will against a person; but in its legal sense, means a wrongful act done intentionally, or without just cause or excuse. Malice, in law, is not the same thing as malice in fact. Malice, in law, is implied from wrongful and unjustifiable acts, done on purpose or without just or legal excuse.

4. There is a wide difference between publications relating to public and private individuals. Every person and every newspaper may fairly criticise the action or official conduct of public men or public officers; so far there is no liability; but neither a person nor newspaper can make such comments or criticism a vehicle for malice or the indulgence of private spite; nor impute to public men or officers such conduct as disgraces or dishonors them; or make charges against them which have this effect, unless they are able to justify or prove them to be true, and made in good faith and for good ends.

5. If you find that the publication alleged in the declaration was made by the defendants as therein alleged, and that it was libelous in its character, as a libel is before defined, you will have occasion to consider the question of damages; and in its consideration your attention should be directed to all the circumstances of the case. Malice is essential to the action; but malice, as above explained, is of two kinds—legal or implied malice, and actual malice: that is, personal spite or ill-will. The amount of damages (if the plaintiff, in an action for libel, is entitled to recover) depends, where no special damage is shown (and evidence of no special damage has been produced in this case), upon the degree or intensity of the malice, legal or actual. You can derive no aid in assessing damages from the results of other cases, for it is quite impossible, in the nature of things, that any two actions for libel should be exactly alike.

The circumstances and the distinctive character of the case before you are to be considered. It must be evident to you, that if the defendants are liable at all, the amount of their liability is, or may be, very different from what it would have been if they had written the article instead of having copied it (as it is conceded they did) from another journal. Not that a newspaper, even in the way of news, can copy without liability an article that is libelous in its nature upon an individual or public officer, for this cannot be done. So, if an article, libelous in its character, is copied from another paper, there is a liability therefor, but such liability would be greater if it was published by the defendants from actual ill-will or actual malice toward the plaintiff, than if no such ill-will or actual malice existed. Whether there was any actual malice or ill-will is a question of

fact for you to decide from all the evidence and all the circumstances before you. Publishing a copied article, if libelous in its character, is not justifiable, but the fact that it is copied may be considered in mitigation of damages. If you find from all the circumstances that there was no malice on the part of the defendants towards the plaintiff, inducing or actuating the publication complained of, then you can give no damages on account of such malice; but if the publication was made, and is libelous, the law presumes malice, and the action cannot be defeated, and the legal malice thus presumed cannot be rebutted by evidence which negatives the existence of any malice in fact.

The court repeats: The amount of damages depends essentially upon the degree of malice, express or implied, but want of actual malice is no defence to an action for the publication of an article which is, in law, a libel. As the amount of damage depends upon the degree or intensity of the malice, you must consider what were the motives which actuated the defendants, or either of them, in the publication of the article and the circumstances under which the publication was made. To throw light upon this, the plaintiff has introduced certain other articles subsequently published by the defendants in their paper concerning him. You must understand that you can give no damages in this action on account of those subsequent publications. You can only consider them in connection with the inquiry as to the motives with which the publication sued for was made, and to show malice, or the degree thereof existing at the time the original article was published.

With these general rules to guide juries in assessing damages the law leaves the amount to their sound judgment, reasonably, fairly, and dispassionately exercised. This it does from necessity. If one man owes another so many dollars, or has taken from him so much property, or has broken a specific contract, there is something to measure (as the law expresses it) the amount of the damages or the recovery. But in an action of this kind the law is unable to furnish you with any definite rule to measure the damages. It confides it to the sound, temperate, deliberate, and reasonable exercise of your functions as jurymen. The law leaves the jury at liberty to find and return such damages as they think right and just, but this is not a wild, unrestrained, communal liberty, to be arbitrarily exercised, but the higher and better kind of liberty, viz: Liberty restrained by reason and moderated by justice.

The jury returned the following verdict: "We, the jury, find for the plaintiff, and assess the damage at one dollar."

As subsequent libels constitute distinct and substantive causes of actions, proof thereof cannot be admitted to affect the damages, but only as bearing on the question of malice: Beardsley v. Bridgman, 17 Iowa, 290, 1864.

McDONALD (ZEREGA v.). See Case No. 18,212.

Case No. 8,771.

In re MACDONNELL.

[11 Blatchf. 79.] [1]

Circuit Court, S. D. New York. April 12, 1873.

EXTRADITION—MANDATE FROM EXECUTIVE—COMMISSIONER—WORDS OF TREATY—WARRANT—HABEAS CORPUS—ADJOURNMENTS.

1. Whether a commissioner has jurisdiction to entertain proceedings for the apprehension of an alleged fugitive from the justice of a foreign government, with a view to his extradition under a treaty for that purpose, until a mandate or authority for his apprehension has been granted by the executive department of the government of the United States, quere.

[Cited in Re Kelley, Case No. 7,655; Re Stupp, Id. 13,563; Castro v. De Uriarte, 16 Fed. 96.]

2. The warrant for the arrest of the alleged fugitive, in this case, *held* sufficient.

[Cited in Ex parte Lane, 6 Fed. 36.]

3. In describing the offence charged, the warrant may follow the words of the treaty.

[Cited in Castro v. De Uriarte, 16 Fed. 95.]

4. It is not necessary that the complaint on which the warrant is issued should set forth the issuing of a mandate by the executive for the arrest of the fugitive.

5. If such mandate is a necessary prerequisite, it is sufficient for it to describe the offence charged, in the very terms of the treaty. The complaint, in this case, *held* sufficient.

[Cited in Re Adutt, 55 Fed. 378.]

6. It is not proper to resort to a habeas corpus, to review, during the progress of proceedings before the commissioner, decisions on questions as to evidence, made by the commissioner.

7. In extradition cases, the commissioner may, in his discretion, grant reasonable adjournments, in the course of hearing the evidence, to enable testimony to be produced.

[Cited in Re Wadge, 15 Fed. 866; Re Ludwig, 32 Fed. 774.]

On the 2d of April, 1873, a petition was presented to the Honorable LEWIS B. WOODRUFF, circuit judge, on behalf of George Macdonnell, stating that he had been arrested by the marshal of the United States for the Southern district of New York, and was now illegally held and restrained of his liberty; and that his arrest and detention were under color of a warrant issued by Joseph Gutman, Jr., a commissioner appointed by the circuit court for that district, and of certain proceedings pending before such commissioner, touching a charge against the petitioner, of having committed the crime of forgery within the kingdom of Great Britain and Ireland. The petition alleged the illegality of the proceedings, and of the arrest and detention, upon various grounds, which it is not necessary here to state, and it prayed a writ of habeas corpus to be addressed to the marshal, requiring him to produce the body of the petitioner. Another petition was, at the

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

same time, presented, praying that a writ of certiorari be issued, addressed to the said Joseph Gutman, Jr., commissioner, requiring him to return the proceedings had or taken before him, upon which the said warrant of arrest was issued, and which constituted the cause of the imprisonment, with all the testimony taken before him. Thereupon a writ of habeas corpus was issued to the marshal, and a writ of certiorari was issued to the commissioner. The writs were returnable on the 7th of April, 1873, on which day the marshal produced the prisoner before the circuit judge, at his chambers, and made return to the habeas corpus, that he arrested and held the prisoner by virtue of the warrant annexed to his return, issued by Joseph Gutman, Jr., United States circuit court commissioner, and the commitment to the custody of the said marshal, on the adjournment of the proceedings before the commissioner to the 8th of April, 1873. The substance of the warrant is stated in the opinion of the circuit judge. To the writ of certiorari the commissioner made return, the substance of which, together with the mandate of the president of the United States, upon the requisition of the British minister, the complaint made to the commissioner by the British consul general, the warrant of arrest, the proceedings on such arrest, the adjournments, the examination of witnesses, and the testimony taken, are also stated in the opinion, so far as material. To the return of the marshal the prisoner interposed an answer of a somewhat mixed nature, combining demurrer, plea, and traverse, and subsequently added a further supplemental allegation. The averments of the answer were: (1) "That the warrant and commitment are, and each of them is, insufficient in law to authorize and warrant the restraint and custody of the relator, by him, the said respondent" (the marshal). (2) "That the said warrant and commitment are, and each of them is, not sufficient in law to warrant such detention and custody of the relator, for the following reasons, to wit: First. The magistrate had no jurisdiction to issue the warrant, because no sufficient complaint had been presented to him at the time the warrant was issued. Second. The complaint upon which said warrant was issued does not make out a case against the said relator, giving jurisdiction to the commissioner. Third. The said complaint and warrant contain no description of any specific offence alleged to have been committed by the relator, and embraced within the treaty of extradition between the government of the United States and the government of Great Britain. Fourth. The said complaint, upon which said warrant was issued, does not show that any requisition, previous to the making thereof, had been made, under the authority of the British government, and that the authority of the government of the United States had thereupon been obtained for the apprehension and committal of the relator. Fifth. The commitment referred to in the return aforesaid is based upon an insufficient complaint and warrant, issued without jurisdiction by the said commissioner had for that purpose. Sixth. The said complaint, the said warrant, and the said commitment, are informal, illegal and otherwise, as hereinbefore set forth, not sufficient in law to justify the detention and custody of the said relator by the said respondent." The supplemental allegation was, that "the mandate of the president of the United States, upon the requisition of the British government, does not describe the offence alleged in the complaint herein." The return of the commissioner to the writ of certiorari, with the documents and proceedings thereto annexed, were produced and made a part of the proceedings under the habeas corpus.

Charles W. Brooke, for prisoner.

Charles M. Da Costa and Francis F. Marbury, for the British government.

WOODRUFF, Circuit Judge. In announcing my conclusion upon the application for the discharge of the prisoner, I shall not occupy time in a preliminary history of the proceedings before myself, or before the commissioner, as might be proper if I were preparing a report of the matter, or an entire record, in order to give a complete history of the case. The argument, involving a review of every step in the proceedings, and each document and process, is so recent, that counsel are quite familiar with each, and, to some extent, the statement of the reasons for my conclusions will furnish occasion to recite the substance of whatever is important to make those reasons intelligible.

It is not, in the present case, necessary, that I should express an opinion upon the proposition which is at the foundation of the argument on one branch of the claim made in behalf of the prisoner, namely, that a commissioner has no jurisdiction to entertain proceedings for the apprehension of an alleged fugitive, until authority for that purpose has been granted by the executive department of the government of the United States. See the Treaty with Great Britain, of August 9, 1842 (8 Stat. 576, art. 10); Act Cong. Aug. 12, 1848 (9 Stat. 302). Mr. Justice Nelson, in the case of Ex parte Kaine [Case No. 7,597], affirmed the proposition, and made the absence of such authority at the time of the institution of the proceeding one of the grounds upon which he discharged the prisoner, notwithstanding the president, on the report made to him of the facts found by the commissioner, and the evidence thereof, had so far ratified what had been done as to issue his warrant for the surrender of Kaine to the authorities of the British government. In this decision he conformed to the dissenting or minority opinion expressed

by him, with the concurrence of Chief Justice Taney and Mr. Justice Daniel, in Re Kaine, in the supreme court. 14 How. [55 U. S.] 103. That opinion stood opposed to the opinion delivered by Mr. Justice Catron, with the concurrence of Justices McLean, Wayne and Grier, to the effect, that the commissioner acts, in receiving a complaint, issuing his warrant for the arrest, and taking and certifying the proofs, by a jurisdiction expressly conferred upon him by law, by the treaty, and by the act of congress; that his power and authority, in these particulars, exist independently of any mandate or command of the president, to be obtained in advance of such proceeding; and that, whatever may be the requirement of the acts of the British parliament on that subject, the congress of the United States did not think it necessary to the dignity of the nation, the protection of the accused, or on any other ground, and, especially, in view of the inconvenience which it involved, and the great facility it afforded for the escape of the fugitive, and for defeating the purposes of the treaty, to require that the aid of the president should be invoked until the preliminary inquiry had been made before a magistrate. They go still further, and insist, that to hold the contrary is to permit an interference by the executive with the judiciary, against the intent, principles and legal effect of our system of government, which make the action of the judiciary, in the discharge of all functions properly judicial, independent of executive interference; while, on the other hand, the act of surrender, after, by a judicial inquiry, the facts are ascertained, is confessedly an exercise of political power, to which the president alone is competent. The supreme court of the United States, at that time, consisted of eight judges. The opinion of four of the judges was not sufficient to result in authoritative adjudication. Mr. Justice Nelson's opinion was sustained, on all points, by Chief Justice Taney and Mr. Justice Daniel; and Mr. Justice Curtis declined expressing an opinion upon the merits, on the ground that the supreme court had no jurisdiction of the matter, as it was then before them. The proposition, therefore, stood, at that time, as the opinion of three judges of the supreme court, on the one hand, and four judges on the other, not authoritatively adjudicated. Mr. Justice Nelson, therefore, when the Matter of Kaine was continued, before him, under the writ which he had originally allowed [Case No. 7,597], felt himself at liberty to be governed by the views he had expressed in the supreme court. The Cases of Veremaitre [Id. 16,915], Kaine [Id. 7,598], and cases referred to therein, and Heilbronn [Id. 6,323], and others, reported and unreported, show, that the district judges in this circuit had acted upon, and concurred in, the views of the four judges of the supreme court, above stated; and the practice before commissioners had conformed thereto, down to the decision made by Judge Nelson.

The two cases of Henrich [Id. 6,369], decided by Judge Shipman, and of Farez [Cases Nos. 4,644, 4,645], decided by Judge Blatchford, are placed distinctly on the authority of Judge Nelson's decision in the Case of Kaine [supra], so that it may properly be said, that this claim on behalf of the prisoner rests on that opinion, supported by the concurrence of Chief Justice Taney and Justice Daniel, and disaffirmed by Justices Catron, McLean, Wayne and Grier, and the opinions and practice of the district judges. I advert to these particulars for the purpose of bringing together, in brief, the history of the subject, and of stating the extent of the authority in this circuit, upon which the proposition urged on behalf of the prisoner rests. What has been the ruling or practice, on this subject, in other circuits of the United States, counsel have not advised me by reference to any cases there decided.

The counsel for the British government insist, that the terms of the treaty (8 Stat. 576, art. 10), and, especially, the act of congress of August 12, 1848 (9 Stat. 302), passed to carry the treaty into effect, operate to confer the jurisdiction, and that, at the instance of the proper officer of the British government, the designated magistrate may, and must, upon complaint made, issue his warrant to arrest the alleged fugitive, according to the terms of the statute, which, confessedly, does not expressly suggest that any prior action of the executive is to be invoked; and they further insist, that, in the conflict of opinion above referred to, they have a right to call on me to act upon my own opinion of the true construction of the treaty and of the act of congress, in the particular thus in contest. It is, of course, not doubted, that, before any surrender can take place, the proceedings before the commissioner, with all the proofs taken, must be submitted to the executive, and that the final question, whether the case made is such as to require the surrender, may be considered by the president, without whose warrant no surrender of the fugitive can lawfully be made. I repeat, however, that it is not necessary for me to decide, in this case, to what extent I am bound by the decision made, or the opinion declared, in Kaine's Case, nor that I should express an opinion upon the question itself, for the reason, not only that the mandate of the president was procured, and delivered to the commissioner, before he acted in this matter at all, but also, because, in my judgment, the objections here made to the actual proceedings had by or before the commissioner, may be considered and decided upon a concession, for all the purposes of this case, that such mandate, or other authorization by the president, was necessary.

I. I proceed, therefore, first, to the enquiry: Is the warrant, in virtue whereof

the respondent herein made the arrest, sufficient, on its face, to justify him in arresting and detaining the alleged fugitive? On that question I entertain no doubt. It may be conceded, for the purposes of this question, that the commissioner by whom it was issued acted therein in exercise of a special jurisdiction, of such sort, that, to justify the marshal in making the arrest, every fact necessary to the jurisdiction of the commissioner to issue such a warrant must appear upon its face. The warrant distinctly refers to the treaty between the United States and Great Britain, and the act of congress of 1848, for giving effect to that treaty, as the basis of the proceedings before the commissioner. It recites and certifies, that the commissioner is specially appointed to execute the act of congress referred to. It further recites, that, upon the application of the envoy extraordinary and minister plenipotentiary of Great Britain, duly accredited to the government of the United States, made under the 10th article of the said treaty, for the arrest of George Macdonell, otherwise Macdonnell, charged with the crime of forgery, and with the utterance of forged paper, at the city of London, in that part of the kingdom of Great Britain and Ireland called England, between the 22d day of January and the 28th day of February, 1873, (referring, also, to the recited complaint, for further particulars of the alleged offence,) a mandate was issued by the department of state, on the 13th day of March, 1873, under the seal of the state department, signed by the secretary of state, and directed to any commissioner specially appointed to execute the aforesaid act of congress. It further recites, that, under the said treaty, complaint has been made before him, (the said commissioner,) that one George Macdonell, otherwise Macdonnell, did, heretofore, between the 22d day of January and the 28th day of February, in the year 1873, at the city of London, in that part of the United Kingdom of Great Britain and Ireland called England, and within the jurisdiction of her said Britannic majesty, together with one Edwin Noyes, now in custody, in the said city of London, and Frederick Albert Warren and George Bidwell (now fugitives from justice,) commit the crime of forgery, and the utterance of forged paper, to wit, did feloniously, in said city, and at the time aforesaid, forge and utter, well knowing the same to be forged, two several acceptances of two several bills of exchange, each for the payment of one thousand pounds sterling, lawful money of Great Britain and Ireland aforesaid, with intent thereby to defraud the governor and company of the Bank of England, a corporation duly created by, and existing under, the laws of the United Kingdom of Great Britain and Ireland aforesaid, and did conspire together to commit the said offence, with intent to defraud the said governor and company of the Bank of England; and that the said George Macdonell, otherwise Macdonnell, is now seeking an asylum within the territory of the United States. After these recitals the warrant proceeds to command the marshal to arrest the said George Macdonell, otherwise Macdonnell, and bring him before the commissioner, in order that, pursuant to the directions of the said mandate, the evidence of criminality of the said George Macdonell, otherwise Macdonnell, may be heard and considered, and, if found sufficient to sustain the charge, that the same may be certified, together with all the proceedings, to the secretary of state, that a warrant may issue for the surrender of the said George Macdonell, otherwise Macdonnell, pursuant to the said treaty. The warrant is under the hand and seal of the commissioner, who, with his signature, certifies to his special authority to execute the act of congress mentioned.

Passing, for the moment, the suggestion, that neither the complaint nor warrant sufficiently describes an offence within the treaty, the warrant, in the fullest manner, meets every possible requirement of the law. It shows, on its face, every fact which is even here claimed to be requisite to the jurisdiction of the officer, that such jurisdiction has been regularly and formally invoked, for the arrest of the alleged fugitive, and it declares, in terms, the special authority upon which the proceeding is based, to wit, the treaty, the act of congress, and the appointment of the officer to execute the law. It declares the demand of the foreign government, the mandate of our own, and the offence charged. The description of the offence might, in my opinion, for all purposes of insertion in the warrant of arrest, have followed the words of the treaty. The reference to the treaty and the act passed to carry it into effect, identifies the charge with the treaty itself, and makes a charge of the offence of forgery import, per se, a charge of the offence of forgery mentioned in the treaty. This is all that is essential to jurisdiction of the subject-matter. It is not necessary that the particulars required to be proved, in order to establish the offence mentioned in the treaty, should be specified in the warrant; nor is it any part of the province of the warrant to disclose the details, in order that the prisoner may be notified of those details. Forgery is the offence for which the treaty provides, that, it being charged, the magistrate shall proceed. The warrant, reciting the other jurisdictional facts, declares that, "on complaint to the officer, 'forgery' is charged," &c. If there were no other detail or specification, I should hold, that, for all the purposes of the warrant of arrest, this was sufficient.

It follows, that there is no defect in the warrant, and that it is sufficient, on its face, to justify the marshal in arresting and holding the prisoner. Hence, if there be any illegality in the proceeding, or want of juris-

diction in the commissioner to detain the prisoner in custody for taking of proofs, it must be sought in the proceedings brought up by the certiorari.

II. The return to the certiorari shows, that, on the 18th of March, 1873, Edward Mortimer Archibald, Esq., her Britannic majesty's consul-general at the port of New York, presented to the commissioner the mandate issued by the department of state of the United States, annexed to the deturn, and, at the same time, made the complaint, upon oath, which is also annexed.

The mandate is addressed to any justice or judge of the several courts therein named, or to any commissioner specially authorized to execute the acts of congress of August 12, 1848 (9 Stat. 302), and of June 22, 1860 (12 Stat. 84), and recites, that, pursuant to the tenth article of the treaty of the 9th of August, 1842 (8 Stat. 572), between the United States and Great Britain, for the mutual delivery of criminals, fugitives from justice, in certain cases, Sir Edward Thornton, accredited, &c., * * minister plenipotentiary of her Britannic majesty, has made application to the government of the United States, for the arrest of George Macdonell, charged with the crime of forgery on the Bank of England, and alleged to be a fugitive from the justice of Great Britain, and who is believed to be within the jurisdiction of the United States, and that it appears proper, that the said George Macdonell should be apprehended, and the case examined, in the mode provided by the acts of congress aforesaid, and declares, that, to the end that the above-named officers, or any of them, may cause the necessary proceedings to be had in pursuance of said acts, in order that the evidence of the criminality of the said George Macdonell may be heard and considered, and, if deemed sufficient to sustain the charge, that the same may be certified, together with a copy of all the proceedings, to the secretary of state, that a warrant may be issued for his surrender pursuant to said treaty, the secretary of state certifies the facts recited. This mandate is dated March 13th, 1873, is authenticated by the seal of the department of state, and is signed by the secretary.

The mandate having recited the application of the British government for the surrender of George Macdonell for the crime of forgery, under and in pursuance of the treaty, the complaint itself begins by appropriate reference to that application, that is to say, it is entitled, "In the matter of the application for the extradition of George Macdonell, otherwise Macdonnell, under the treaty between the United States and Great Britain;" and thereupon, upon oath, the complaint charges, that one George Macdonell, otherwise Macdonnell, did, heretofore, between the 22d day of January and the 28th day of February, in the year 1873, at the city of London, in that part of the United Kingdom of Great Britain and Ireland called England, and within the jurisdiction of her said Britannic majesty, together with one Edwin Noyes, now in custody, in the said city of London, and Frederick Albert Warren and George Bidwell, (now fugitives from justice,) commit the crime of forgery and the utterance of forged paper, to wit, did feloniously, in said city, and at the time aforesaid, forge and utter, well knowing the same to be forged, two several acceptances of two several bills of exchange, each for the payment of one thousand pounds sterling, lawful money of the United Kingdom of Great Britain and Ireland, aforesaid, with the intent thereby to defraud the governor and company of the Bank of England, a corporation duly created by, and existing under, the laws of the United Kingdom of Great Britain and Ireland, aforesaid, and did conspire together to commit the said offence, with the intent to defraud the said governor and company of the Bank of England; that the said George Macdonell, otherwise Macdonnell, is a fugitive from the justice of Great Britain, and did, on the 8th day of March, in the year 1873, sail, on board the steamship Thuringia, bound for the port of New York, for the purpose of seeking an asylum within the territory of the United States; and that the crime of which the said Macdonell, otherwise Macdonnell, has so as aforesaid been guilty, would justify his apprehension and commitment for trial for such crime, if the same had been committed within the said Southern district of New York, or within the jurisdiction of the district court of the United States for the Southern district of New York.

The commissioner further returns, that, upon such mandate and complaint, he issued to the marshal the warrant for the apprehension of the said alleged fugitive, of which warrant he annexes a copy, the substance of which has been above stated; that, on the 20th day of March, 1873, the said George Macdonnell was brought before him, in the custody of the said marshal, and that, on being advised of the charge against him, he desired an adjournment, upon which the commissioner adjourned the examination to the 25th of March, 1873, committing the prisoner, meanwhile, to the custody of the marshal; and that, on the 25th of March, 1873, the said George Macdonnell was brought before the commissioner, was attended by counsel, and proceedings were had, which appear by the record thereof annexed, whereupon the proceedings were adjourned to the 8th of April, 1873, at 12 o'clock, noon, and meanwhile the prisoner was committed to the marshal, to be then produced.

The record of the proceedings shows, that, on the 25th of March, the counsel for the prisoner moved to dismiss the complaint and warrant, upon grounds not materially unlike those urged on the present hearing; that three witnesses were examined, whose tes-

timony is given; and that, in the course of the examination, a document was produced and put in evidence, against the objection of the counsel for the prisoner, which purported to be a warrant issued March 8th, 1873, by the lord mayor of London, for the arrest of George Macdonnell, charged with having forged, in the month of February last, two bills of exchange, for one thousand pounds each, which warrant the counsel for the prosecution claimed to be sufficiently proved to entitle it to be read in evidence. The record states, that, thereupon, the counsel, "Mr. Da Costa, applies, on affidavit, for adjournment, and states that depositions duly certified are en route. Mr. Brooke (counsel for the prisoner) objects to adjournment, and applies for discharge of prisoner. Mr. Da Costa, stating that depositions had been received which had not been duly certified under the act, Mr. Brooke demands names of witnesses whose depositions are under way." "Adjourned, under objection, to April 8, 1873, at 12 m., and defendant remanded to the custody of the marshal." It is proper to add, that the several commitments of the prisoner to the custody of the marshal, to be produced on the days to which the examination was adjourned, appear by the marshal's return to the writ of habeas corpus.

Upon the papers and proceedings thus returned by the commissioner, several objections are now made, on behalf of the prisoner, which, it is claimed, go to the jurisdiction of the commissioner, and point out such defects that the whole proceeding before him is without jurisdiction and void, and, therefore, require me to discharge the prisoner from custody. Without giving the precise language of the several objections, they may be briefly stated as follows: The commissioner had no jurisdiction to issue the warrant, and has no jurisdiction to hold the prisoner for the purpose of taking proofs, because—

First. The complaint made to the commissioner does not show that, prior to the making thereof, any requisition had been made under the authority of the British government, and that the authority of the government of the United States had thereupon been obtained for the apprehension and committal of the relator.

Second. Neither the complaint, nor the mandate which was presented to the commissioner, sufficiently charged the prisoner with any specific offence, within the treaty of extradition, to give to the commisioner jurisdiction.

1st. The first objection, of course, assumes, that the prior authority of the government of the United States was necessary before the commissioner could exercise any jurisdiction in the matter, and it pushes the doctrine of the case holding that proposition one step further, that is to say, that the complaint made to the commissioner, of the offence charged, and to be inquired of, must itself state that such mandate had issued on the application of the foreign government; and that it is not sufficient that the fact exists, that the mandate has issued to the commissioner, upon due application, and has been placed in his hands, but the complaint of the commission of the offence must state that it has issued.

Certainly, nothing in Ex parte Kaine [Case No. 7,597], warrants this claim. So far as it is supposed to be sustained by express prior adjudication, an observation of Mr. Justice Blatchford, in In re Farez [Id. 4,644], is relied upon. The observation is in these terms: "As the proceeding is a special proceeding, I think it is necessary, not only that the complaint made to the commissioner, upon which the warrant is asked, should show that such a requisition has been made upon the government of the United States, and such authority obtained from it, but that those facts should also be set forth on the face of the warrant. As the first warrant contained no such allegation, it is not valid." He was discussing the validity of the warrant, not the sufficiency of the complaint. His proposition was, that, in a special proceeding of this kind, it is necessary to the justification of the marshal that all facts essential to the jurisdiction of the commissioner should appear on the face of the warrant. If the expression used by him must be taken to import that it is equally essential that the requisition and mandate should be averred in the complaint, it was not called for by the point actually decided. I am not at all satisfied that such was the intention. The observation itself and other parts of the case indicate, that all he meant was, that it is not enough that it is found in the complaint; that it must appear in the warrant, that the requisition has been made and the mandate issued; and that its presence in the complaint will not cure the defect in the warrant. If the observation means more than this, I must withhold my concurrence.

The language of the learned counsel for the prisoner, in treating of the indispensable necessity of such requisition and mandate, to give the commissioner jurisdiction, calls such mandate "the commission of the officer," pro hac vice. If that be so, then the point now taken is this: A complainant must set out in his complaint which he presents to the officer, the authority of the officer to receive it. This is not required in ordinary complaints of crimes under state laws or the laws of the United States. It is enough, that the complaint avers a crime, and that such complaint is made to an officer who has legal authority to receive and act upon it. The act of 1848, to give effect to the treaty, in terms declares, that the officers named are severally vested with power, jurisdiction and authority, "upon complaint made, under oath or affirmation, charging any person found within the limits of any state, district, or territory, with having com-

mitted, within the jurisdiction of such foreign government, any of the crimes enumerated or provided for by any such treaty or convention, to issue his warrant," &c., &c. The allegations of the complaint are addressed, and may be wholly addressed, to the commission of the offence. That is all that the statute requires. It is all that the reason and good sense of the proceeding requires. The party complaining, having found a proper officer, an officer having actual and legal jurisdiction, may properly address himself to such officer, not averring, but assuming, such jurisdiction. This is in analogy to other proceedings in courts of justice. True, the complainant ought, in some form, to lay before the commissioner all facts necessary to invoke, and warrant the exercise of, the jurisdiction; but, that is all. What the commissioner does, upon complaint of those facts, will depend, for its validity, upon his jurisdiction to act on those facts, and that may become the subject of objection, inquiry and proof. This was manifestly the view of Judge Nelson himself, when he decided the case of Ex parte Kaine [supra], although he did not particularize the forms of procedure. On proof that authority had been given by the president for the arrest of Kaine, he offered to withhold the discharge, and proceed himself to take evidence which might warrant the surrender, clearly showing how that learned judge, in the administration of this law, as in other cases, while tenacious of all that he deemed material either to the right observance of law, or to the preservation of the dignity and honor of the government, or essential to the protection and safety of parties charged, did not allow himself to be carried away by undue and needless regard for the mere forms of proceeding. I infer, from what is stated at the conclusion of his decision in Kaine's Case, that, had counsel been able to show, that, before any proceedings were taken for the arrest of the alleged fugitive, the authority of the president had, in fact, been given, he would have taken the proceeding, as it then stood, on the arrest already made, and received proofs which might result in the surrender of the fugitive.

In the present case, moreover, the proceeding before the commissioner may, properly, be regarded as a single, connected proceeding, of which each of the steps forms a part, and all, together, constitute a complete record of jurisdiction. The mandate of the government of the United States was presented to the commissioner, showing the requisition of the British government for the extradition of George Macdonell, in pursuance of the treaty, and calling upon the commissioner to cause the necessary proceedings to be had in pursuance of the acts of congress referred to, in order that the "evidence of the criminality of the said George Macdonell may be heard and considered, and, if deemed sufficient, may be certified * * * and that a warrant may issue for his surrender, pursuant to said treaty." This, (if, as here claimed, essential to the jurisdiction of the commissioner,) was the very first step in the proceeding, and became a part of the record thereof. The complaint then follows, entitled in the very matter of the requisition and mandate, that is to say, "In the matter of the application for the extradition of George Macdonell, otherwise Macdonnell, under the treaty between the United States and Great Britain." This appropriately connects the complaint with the requisition already shown by the mandate, establishes complete identification, and becomes the next step in the record. The two papers together establish complete jurisdiction. I do not mean to be understood that this reference, in the complaint, in terms, to the requisition and mandate, was indispensable. I have above said the contrary; but it was appropriate and is quite sufficient.

2d. The second objection, as argued, embraces several particulars: (1) That the mandate does not describe, with sufficient particularity, an offence within the treaty; (2) that the complaint, on which the warrant of arrest was issued, does not sufficiently describe such offence; (3) that the descriptions of the offence, as contained in the mandate and complaint, do not, on their face, sufficiently appear to be identical; and (4) that there is a variance between the requisition and mandate, on the one hand, and the complaint and warrant, on the other, in this, that the requisition and mandate describe the offender as "George Macdonell," while the complaint and the warrant describe the offender as "George Macdonell, otherwise Macdonnell," so that, by reason of the variance in this respect, non constat that the prisoner is the person for whom requisition was made, or to whom the mandate relates.

(1) There is no especial form prescribed by law, in which the governement of the United States shall (assuming it to be necessary) give its authority to the commissioner to proceed in the matter. It is enough that the government recognizes the application of the foreign government, and gives authority for institution of proceedings for the ascertainment of the facts alleged to bring the case within the treaty. It is enough that the authority, when given, describes the particular charge to be investigated, in the very terms of the treaty, in aid of the execution whereof the proceeding is directed. Hence, if the government sees fit to describe the subject-matter in general terms, as a charge of "murder," or a charge of "forgery," that is sufficient, designating, of course, the alleged offender and fugitive to be proceeded against. Such language in a mandate which is, in terms, issued in pursuance of the treaty, imports that it is a charge of murder within the treaty, or a charge of forgery within the treaty. The authority it confers is for the investigation of the charge of an offence

within the treaty. That the mandate authorizes, and not the investigation of any other or different offence. Whether the proofs, when given, to establish such an offence within the meaning of the treaty, sufficiently warrant a commitment, it is for the commissioner to consider and report to the executive.

(2) The sufficiency of the complaint was discussed on the argument very much as if it were a question of its sufficiency as a pleading; and the reasons assigned for the objection were, mainly, such as are apt to require definiteness, particularity, and the absence of all variance, upon the most technical rules of pleading. Such technical precision is not required in a complaint, for the mere purpose of jurisdiction to proceed thereon. For, be it remembered, that the point under consideration is, that the commissioner had not jurisdiction to proceed, on such a complaint, to the issuing of a warrant; and it is argued, that the present complaint fails to give such jurisdiction, because it does not describe the alleged forged instruments with sufficient particularity as to date, names of the persons whose acceptances were forged, and the times of payment thereof. The complaint does state, that the alleged offender "did, heretofore, between the 22d day of January and the 28th day of February, in the year one thousand eight hundred and seventy-three, at the city of London, * * * within the jurisdiction of her said Britannic majesty, * * * commit the crime of forgery and the utterance of forged paper, to wit, did feloniously, in the said city, and at the time aforesaid, forge and utter, well knowing the same to be forged, two several acceptances of two several bills of exchange, each for the payment of one thousand pounds sterling, lawful money of the United Kingdom of Great Britain and Ireland, * * * with intent thereby to defraud the governor and company of the Bank of England, a corporation duly created by and existing under the laws of the United Kingdom of Great Britain and Ireland aforesaid." What follows in regard to conspiracy, I regard as of no importance to the present question. If it does not strengthen the case made against the accused, it may be regarded as surplusage, and certainly does not change or alter the meaning or effect of what I have cited from the complaint. The question is, does what I have thus cited show a case of forgery, within the treaty? Not whether it would constitute an indictment free from special exception. I have no hesitation in saying that it does charge the crime of forgery at the common law, however it may fail to describe it with the particularity required in a formal indictment for the offence.

I do not deem it necessary to question what is said touching the requisites of the complaint in this respect, in Re Henrich [Case No. 6,369], or in Re Farez [Id. 4,644]; but I am of the opinion that the description of the offence here does satisfy the requirement of the act of 1848, which authorizes the officer to issue his warrant "upon a complaint charging any person * * with having committed * * any of the crimes enumerated or provided for by such treaty."

To the suggestion, that it may be true, and may appear, when the specific instrument is produced, that the prisoner had authority to sign the name or names alleged to be forged, it must suffice to say—that is matter of defence—the subject of proof. Enough for the complaint, that it shows a prima facie case of forgery.

So, to the suggestion, that, between the days named there may be a large number of acceptances, each of which would answer the description in this complaint—every possible conjecture on the subject need not be excluded by the terms of the complaint. It would be possible to suggest the same thing, if the complaint named a precise date, with names, and when payable, &c., or even gave a copy of the bills of exchange. Enough, as already said, that the complaint makes a prima facie case; that is to say, this is enough to give jurisdiction to the commissioner. It is in that aspect alone that I am considering it.

That the party should be fairly apprised of the charge made, and with such fullness as is reasonably necessary to enable him to meet the investigation, may be conceded; but that appertains, after jurisdiction is acquired, to the conduct of the proceeding, and there is no danger that, for all the purposes of the inquiry, whether he ought, upon the proofs, to be committed, the investigation will not furnish him with that information, in respect to any detail not contained in the complaint as it now reads. It is the duty of the commissioner to proceed with entire fairness towards the prisoner, in every respect. The presumption is that he will do so. It is sufficient for the question before me, that he has jurisdiction for that purpose.

(3) The mandate and the complaint are in perfect harmony. I have already said, that I deem the mandate sufficient. It is no ground of objection, that the complaint is more specific than the mandate. Upon the assumption that the mandate was necessary, and required the officer to receive the complaint, there arises the legal inference, that the complaint made refers to, and charges, the same offence. Upon the argument submitted, whenever the complaint embodied more details than were given in the mandate, it could be successfully insisted, that they did not appear to be identical, and, therefore, jurisdiction did not appear by the complaint.

(4) As to variance between the mandate and the complaint and warrant, because, in the former, the alleged offender is called "George Macdonell," and, in the latter "George Macdonell, otherwise Macdonnell," I think there is nothing in the objection. The warrant, as already seen, recites the requisi-

tion and mandate, and shows, unequivocally, that the warrant is issued in pursuance thereof, and that it directs the arrest of the alleged offender named therein. The suggestion in the nature of an alias, contained therein, does not describe a different person, but seeks to aid in his complete identification. I do not doubt that the alias designation might, if it were of any importance, be regarded as surplusage; but it cannot properly be construed as indicating another person. Identity of name raises the presumption of identity of person.

Like observations are pertinent to the supposed variance in this respect between the mandate and the complaint, which, as already suggested, form parts of the same record.

Finally, I must decline considering the matter not alleged by way of plea or traverse to the return of the marshal, but urged on the argument, namely, that the commissioner has already, in the progress of his proceeding, received in evidence a document which was not legally admissible. If that suggestion were well founded, it would not defeat his jurisdiction. What may be the effect of the reception of the evidence, if it were deemed inadmissible, even whether, in case the facts were otherwise clearly proved, it would have any effect to avoid the finding of the commissioner, it is unnecessary now to say. The decision in Re Farez [Case No. 4,646], is to the effect, that an error of that description does not defeat the jurisdiction of the commissioner, or invalidate the arrest upon the warrant, or entitle the prisoner to be discharged. Besides, it is in no case proper to resort to the writ of habeas corpus, or to a succession of such writs, from day to day, for the purpose of reviewing the interlocutory decisions of the commissioner upon questions of that nature.

To the suggestion, that the commissioner had, when the writ was in this case applied for, granted an adjournment to enable the counsel for the foreign government to produce testimony, and that the commissioner was thus unjustly and unreasonably protracting the investigation, when, in fact, up to that time, there had, as claimed, been no legal evidence produced, I must say, that the conduct of the inquiry is committed to a sworn public officer, and his power to grant adjournments, at the instance of either party, is unquestionable. Often, it is indispensable to a just inquiry, and may often be necessary for the protection of the accused from an unfounded charge. The commissioner must exercise a just and reasonable discretion on that subject. The ends of justice, on the one hand, and the rights of the accused, on the other, cannot otherwise be preserved. Should that discretion be abused, the prisoner can, doubtless, have relief, but no such abuse at present appears. The practice in analogous cases, in the state wherein the proceedings are conducted, is said, in one of the cases referred to, to be a guide to the commissioner in the conduct of the investigation. If this be so, then it is quite pertinent to refer to a familiar practice, sanctioned by the courts of this state, where persons charged as fugitives from justice are sought to be returned to another state. Not only is the arrest made, and the accused held for examination, and time allowed for the purpose, but they are even held for a reasonable time, to enable the complaining parties to procure the necessary requisition for their delivery to the executive of the state from which they have fled; and the practice is also familiar, where persons are charged with crime within the state jurisdiction, and the examination is pending, to adjourn the same from time to time, and, when such persons have been brought up on habeas corpus, they have been remanded, to the end that such examination may be continued to a conclusion. It will, also, be found, that the practice of granting reasonable adjournments has obtained heretofore in all extradition cases; and there is no reason, either of favor to the prisoner, jealousy of the foreign government, or otherwise, why it should not prevail in those cases as well as in cases of crime alleged to have been committed in violation of our own laws.

What I have said seems to me to embrace, either expressly or by implication, all the grounds upon which the discharge of the prisoner is claimed, and I cannot regard them as sufficient. Let the prisoner be remanded to the custody of the marshal, to be held under the warrant of arrest and the commitments of the commissioner, that the proceedings on the inquiry into the criminality of the prisoner may be continued, and let the writs of habeas corpus and certiorari be discharged.

[NOTE. The case was heard by the commissioner on April 24, 1873. and the prisoner discharged for insufficiency of evidence, but he was held by the marshal upon a second warrant of arrest, issued upon a new executive mandate, which had been issued in the meanwhile. Upon this new warrant he was committed, and subsequently a warrant for his surrender to the agents of the British government issued. Thereupon the prisoner sued out a new writ of habeas corpus, which was heard in this court upon June 3, 1873; and the prisoner again remanded. Case No. 8,772.]

Case No. 8,772.

In re MACDONNELL.

[11 Blatchf. 170;[1] 18 Int. Rev. Rec. 11; 5 Leg. Gaz. 236; 5 Leg. Op. 105.]

Circuit Court, S. D. New York. June 3, 1873.

EXTRADITION — SECOND WARRANT OF ARREST — FOREIGN WARRANT AND CERTIFICATE — HABEAS CORPUS — CERTIORARI — SUFFICIENCY OF EVIDENCE BEFORE COMMISSIONER.

1. Observations on the power of the court to issue a writ of certiorari, in a case under a

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

treaty providing for the extradition of fugitives, and on the effect of a warrant of surrender, issued by the president, as a supersedeas of such a writ.

2. While the relator was lawfully held in custody, under a valid warrant of arrest, in an extradition case, and the inquiry thereunder was being proceeded with, a second warrant, on a new complaint, for a distinct offence, for his extradition, was issued. Afterwards, he was discharged from the arrest under the first warrant, for want of sufficient evidence to justify his commitment, and he was thereafter arrested under the second warrant: *Held*, that the latter arrest was not invalid.

3. Under section 2 of the act of August 12, 1848 (9 Stat. 302), as supplemented by the act of June 22, 1860 (12 Stat. 84), copies of depositions taken in London, before the lord mayor of London, and certified under his hand to be copies of the depositions on which he issued a warrant of arrest against the person charged, and further certified by the minister of the United States in Great Britain to be so authenticated as to entitle them to be received for similar purposes by the tribunals of Great Britain, are competent evidence in an inquiry under a warrant of arrest, in an extradition case.

4. A court, or a judge, issuing a writ of habeas corpus, in an extradition case, does not sit as an appellate tribunal, to review the proceedings which have taken place before a commissioner, as upon allegation of error.

[Cited in U. S. v. Brawner, 7 Fed. 87; Re Wadge, 15 Fed. 866; Ex parte McCabe, 46 Fed. 366.]

5. If the commissioner acquired jurisdiction of the subject-matter, and of the prisoner, the prisoner may be legally held, although the commissioner, in conducting the inquiry, committed an error in the reception of evidence.

6. The adjudications in this circuit considered, as to the power and duty of the court, on habeas corpus and certiorari, to entertain the question of the sufficiency of the evidence before the commissioner, to warrant the commitment for surrender.

[Cited in Ex parte Perkins, 29 Fed. 908; Re Ezeta, 62 Fed. 982.]

7. No case has held that, because some evidence was introduced which was not legal or competent, or because the court, upon a review of the evidence, was of opinion that it would have come to a different conclusion upon the evidence, therefore the proceedings were illegal, and the prisoner should be discharged.

[Quoted in Re Stupp, Case No. 13,563.]

This case came before the court on the 2d of June, 1873, on writs of habeas corpus and certiorari. The prisoner [George Macdonnell], was produced by the marshal, in obedience to the writ of habeas corpus addressed to him, returnable to this court. By the return to the writ it appeared, that the prisoner was held in custody under a warrant issued by United States Commissioner Gutman, committing him to the custody of the marshal, for surrender to the authorities of Great Britain, pursuant to the treaty of August 9, 1842 (8 Stat. 572), upon a charge of sundry specified forgeries, and the utterance of forged paper; and that, since the issuing of the writ, a warrant from the secretary of state of the United States had been received by the marshal, directing him to surrender the prisoner to the agents of the British government. The said commissioner, to whom the writ of certiorari was addressed, returned a copy of the proceedings had before him, upon which he made the commitment of the prisoner for surrender, and that he had made his report of the proceedings to the executive of the United States, upon which the warrant of the secretary of state had since issued. The prisoner had previously been proceeded against, pursuant to a requisition of the British government, and a mandate of the executive issued thereupon, on the 13th of March, 1873, under a complaint made before the same commissioner, March 18th, 1873, charging the crimes of forgery and the utterance of forged paper, to wit, certain two bills of exchange, for £1,000 each, on which a warrant was issued by him on that day. Under that warrant the prisoner was arrested and held. The proceedings upon that complaint were continued until the 24th of April, 1873. In the meantime the validity of the proceedings had been examined, under writs of habeas corpus and certiorari [Case No. 8,771], before Judge Woodruff, and their validity affirmed, and the prisoner returned to the custody of the marshal. On the 23d of April, 1873, a second warrant of arrest was issued by the same commissioner, founded upon another mandate of the executive, issued on the 8th of April, 1873, and another complaint made to the commissioner by the British consul-general, charging the prisoner with the crimes of forgery and the utterance of forged paper, to wit, with forging and uttering eleven separate bills of exchange, which were particularly described, with date, time, place, amount, &c., &c. Such warrant of arrest was delivered to the marshal on the same day, April 23d, and the prisoner (then in custody under the prior warrant) was notified thereof. On the 24th of April, the counsel conducting the prosecution under the first proceedings announced to the commissioner that they had no further evidence to offer under such previous proceedings, and the commissioner thereupon, deeming the evidence then before him insufficient to justify a commitment, discharged the prisoner from the said prior warrant of arrest. The prisoner was, however, detained by the marshal under and by virtue of such second warrant of arrest, and proofs were thereupon taken, which resulted in the warrant of commitment for surrender under which he was held to await the action of the executive, at the time the present writ of habeas corpus was issued, which warrant of commitment was soon after followed by the warrant for his surrender to the agents of the British government, mentioned in the return to the writ. The prisoner answered the return to the habeas corpus, insisting therein upon the illegality of the proceedings, the discharge from the former arrest, as an acquittal, the errors of the commissioner in admitting incompetent evidence, and the insufficiency of the proof to warrant his commitment, and claiming to be discharged from custody. Some other facts,

and the grounds urged by his counsel in support of his claim to be discharged, appear in the observations of the court in announcing the decision.

Charles W. Brooke, for prisoner.

Clarence A. Seward and Charles M. Da Costa, for Bank of England.

Francis F. Marbury, for British consul.

James C. Carter, for marshal.

Before WOODRUFF, Circuit Judge, and BLATCHFORD, District Judge.

WOODRUFF, Circuit Judge (on the 3d of June, the counsel for the prisoner having been fully heard on the previous day), stated the conclusions of the court, orally, as follows:

The court have given such attention to this case, during the progress of the argument, and in the interval since the adjournment, as seemed to us due to its importance, to the earnestness and zeal with which the claims on behalf of the prisoner have been urged upon our attention, and to the gravity of some of the questions which have been agitated—such as seemed to us to be necessary to a safe and right conclusion upon the questions involved, having due regard, also, to the rights of the citizen, and a proper respect to the foreign government, and the good faith of our own, in the execution of its treaty. The result is, that we do not think it necessary to hear the counsel for the prosecution, upon the questions either of law or of fact, which were raised and discussed herein by the counsel for the prisoner. Nor do we think it necessary, on this occasion, at least, to consider the grounds upon which the court is moved, in behalf of the prosecution, to quash the writ of certiorari. Ex parte Van Orden [Case No. 16,870]; In re Martin [Id. 9,151].

The conclusions which we have reached upon the points urged in behalf of the prisoner, render it unnecessary that we should say anything of the power of the court to issue the writ of certiorari, in a case arising under a treaty providing for the extradition of fugitives, or of the effect of the warrant of the president for the surrender of the prisoner, upon the proceedings, as a supersedeas, if a writ of certiorari has been properly issued. It is, however, proper to say, that the power to issue such a writ, in cases of this description, has been frequently affirmed and exercised; and that the warrant of surrender, issued by the government of the United States, for the delivery of the prisoner to the agents of the demanding government, has not, so far as we can discover, or are advised, been heretofore held a conclusive bar to further inquiry into any questions which may properly be raised upon a return of the whole proceedings. On that subject we go no further, because, assuming that the writ was properly issued, and that the warrant for the surrender of the prisoner should have no effect to preclude further inquiry, and no effect to render valid proceedings which could not otherwise be sustained, our conclusion is, that the grounds upon which the discharge of the prisoner is sought under these writs, ought not to prevail.

Without discussing all the questions that have been raised by counsel, at great length, or attempting to review all the arguments, or seeking to array against them, in any considerable detail, reasons for not giving them the force which they seem to possess in the mind of the counsel by whom they were urged, we shall content ourselves with disposing of the objections substantially in the order in which they were presented.

The first practical question, as expressed by the counsel, in the course of his argument, is, whether the arrest of the prisoner in this proceeding was a legal arrest. The facts out of which that question arises appear, by the return to the certiorari, to be these: A mandate had been issued by the president, directing proceedings against the prisoner, in compliance with a requisition by the government of Great Britain, and a complaint had been made before the same commissioner, at an earlier day, in which the charge of forgery by the prisoner was made, that charge being only particularized by the statement that he had been guilty of forgery, in the making of two certain bills of exchange for one thousand pounds each, with intent to defraud the governor and company of the Bank of England. Upon that complaint a warrant had been issued for the arrest of the prisoner, he had been arrested, and inquiry into the question of his criminality in the matter thus charged had begun. The question whether, in the proceedings had upon that complaint, the commissioner, and the marshal who executed his warrant, acted legally, had been brought under judicial inquiry, and the proceedings and warrant had been pronounced by one of the judges of this court, after full argument, legal.

Still entertaining the views which governed that decision, we are bound now to pronounce that arrest and that detention legal—legal then, and legal always. So that, on the 24th of April, before the discontinuance of the proceedings under that arrest, (or, to use the other form of expression, before the discharge of the prisoner from that arrest,) he was held in legal custody. While he was in that custody, the warrant of arrest now in question was placed in the hands of the marshal; and thereafter, on the following morning, on the suggestion of the prosecuting counsel that they had no further evidence to offer in support of that prior charge, (and, plainly, upon the face of the proceedings, because the evidence produced did not establish that charge sufficiently to warrant any other result,) the commissioner discharged the prisoner from that arrest. It is now argued, that, by some legal retroaction, the

discharge of the prisoner from that arrest establishes, and establishes conclusively, that he was, up to that time, held under illegal arrest. That reasoning we cannot affirm. All that that decision affirmed was, that the demanding government, or those who represented the demanding government, in that prosecution, had failed to establish the charge; but, down to the time of that decision, the detention of the prisoner was legal, as had already been pronounced, and as we still affirm. To hold now, that the discharge of the prisoner from arrest under that charge, for want of sufficient evidence to justify his commitment, operated retroactively, to make the precedent holding and arrest illegal, is to hold, if it be extended, as the principle of the argument must extend it, to other and kindred cases, that, whenever a party once charged with crime has been arrested and subsequently discharged, whether for informality, for want of proof, on verdict, or on other legal grounds, ipso facto, all who were actors in the previous arrest were trespassers, and liable to be proceeded against as such, as if the arrest and all prior proceedings were void ab initio. No such result is due to the fact that the prisoner, having been arrested, is discharged from custody. Such a doctrine, we think, would be fruitful of mischief that could not be tolerated. It, therefore, is not true that the arrest on the present warrant was illegal, because the prisoner was, at the time it was issued to the marshal, illegally detained; and, if so, that branch of the argument fails, and must be overruled.

It is, however, suggested, that, the prisoner being in custody under a warrant of arrest, if the view we have just discussed, be not taken, then he was in legal custody; that it was irregular to issue another warrant of arrest, and place it in the hands of the marshal; and that, if proceedings against him, with a view to another or subsequent charge were to be instituted, it ought to have been done by a detainer lodged with the jailer, and not by a warrant of arrest delivered to the marshal. Without entering into the discussion of a mere question of practice, it is enough to say, that we are of opinion that such a technical objection has no place in proceedings for the execution of this treaty, and has no application to this subject. The prisoner had not then been committed to any jail. He was kept in the custody of the marshal, who used such place of safe keeping as was available to him, and the new warrant of arrest must necessarily be delivered to the marshal. Such new warrant operated to make it the duty of the marshal to detain the prisoner to await proceedings under it.

It was insisted, that the decision of this court in a former case involved, as a necessary result, a proposition which, if maintained, rendered the arrest under the present warrant illegal. In the case of In re Farez [Case No. 4,644], before this court, on habeas corpus, the opinion was expressed by the judge, that, while in the custody of the court, by virtue of a writ of habeas corpus, a prisoner was to be protected against arrest upon a new warrant, and, obviously, because it was a direct interference with the power of the court then engaged in inquiring whether there was ground for detaining the prisoner under the subsisting arrest; and that the court owed it to itself, and to its necessary power to exercise its own jurisdiction, to see to it that no prisoner in its custody, held on habeas corpus, was withdrawn from it pending the proceeding. Such a case has no application to the present point. The prisoner was not in the custody of any court. He was held by a ministerial officer, with a view to an inquiry into a charge of crime, and there was nothing inconsistent with the course of that inquiry, that another warrant of arrest, issued by the same commissioner, directing that he be brought before him, should be placed in the hands of the marshal, to the end that an inquiry might be had upon a fresh charge. It was not held, in the Case of Farez, that a new warrant of arrest was invalid, because issued pending the proceedings on habeas corpus, but only, that, while the prisoner was in the custody of the court, it could not be executed, so as to withdraw him from that custody. So, here, the present warrant of arrest was not invalid because issued while the prisoner was held under a prior warrant. In the most favorable view that can be taken, it operated, when he was discharged from the prior warrant, to require the marshal to detain him in custody. No power of any court was invaded. There was no conflict with any requirement or duty of any court to see to it that its jurisdiction was not interfered with. That case, as we think, has no application to the subject before us; and we, therefore, hold, that there was nothing in the circumstances relied upon, which invalidates the arrest and detention under the second warrant.

The discussion of the point last considered was deemed, by the counsel for the prisoner, to involve the question whether, in truth, this second arrest was or was not for the same charge. The counsel hereupon insists, that, upon the same charge for which the prisoner was first arrested, he was not liable to a second arrest, not only for the reasons above referred to, but because the discharge from the first arrest operated as an acquittal, and that, therefore, if we do not sustain the grounds for discharge already considered, the prisoner must, nevertheless, be discharged, unless the second arrest was based upon a charge of a distinct offence. That the second arrest was for the same offence as the first, is claimed by the prisoner's counsel, upon, in substance, this reasoning: Inasmuch as the treaty of extradition (8 Stat. 576, art. 10) provides, that, upon the requisition of the demanding government, setting forth that

the alleged fugitive is charged with the offence of forgery, he shall, in the manner pointed out in the treaty, be surrendered to the demanding government, for trial, therefore, if forgery be charged, it, ex vi termini, means all forgeries up to that time committed; and, therefore, although it may be true, that a second application or requisition for surrender proceeds upon an allegation of the forgery of distinct and separate instruments, there is therein, nevertheless, but the charge of forgery, and it is, therefore, the same offence, because forgery was charged in the first requisition. The fallacy of that view of the subject is quite apparent, when it is suggested, that every forgery is an offence; that, as there may be several forgeries, so there may be, and so there are, several offences; and that there may be as many indictments, as many trials, as many convictions, and, we add, as we think is the necessary consequence, as many demands of surrender, and as many proceedings preliminary to surrender, as there are instruments forged, or, in other words, in the view that we take of the subject, as there are offences. It is unnecessary to add, that there need not be so many warrants of surrender, for the obvious reason, that, when the prisoner has been once surrendered, a further warrant of surrender would be useless, and, therefore, the executive need not be called upon to make more than one, unless, perhaps, for some cause, the first warrant of surrender had not been executed. In that case, a second warrant of surrender might be issued.

The requisition, mandate and complaint under which the second warrant of arrest was issued, and under which the proceedings now in question were taken, charge the prisoner with forging and uttering eleven different bills of exchange, each specifically described. The first proceeding related to two bills of exchange, described in such general terms that, while they may answer the description of two of those named in the second proceeding, they are not clearly identical therewith, and the other nine are plainly distinct and separate forgeries. It is, however, insisted, that the discharge from arrest under the first warrant was such an acquittal as precluded another arrest under the second warrant. The reasons which we have given for our view of the other points, in the order in which they were presented by the counsel, lead necessarily to the answer which we give, decidedly, that it has no such legal effect. Not only so; we purposely refrain from even affirming, or admitting, that, if the offence charged had been identical in both complaints, the prior discharge would have operated as a necessary legal bar to a subsequent arrest, commitment and surrender, when the demanding government was able to produce proper evidence to sustain it. Be that as it may, we do hold, that such discharge has no legal operation or effect upon proceedings for the surrender of a fugitive, based upon complaint of a distinct offence. The executive may be called upon to guard against abuse, or against oppressive proceedings. The executive may, perhaps, be justified in saying to the demanding government: "You have had your day. You have had your opportunity. We have, in good faith, given you the benefit of the instrumentalities pointed out in the treaty, in order to effect the surrender of the alleged fugitive whom you demand; but we will see to it that needless or vexatious prosecutions be not indulged in." On the other hand, we unhesitatingly say, that, if the government be satisfied that a failure to procure a surrender in the first instance was due to circumstances explainable, consistently with good faith, and consistently with proper respect to our government, and the case be such as properly appeals to the sense of justice which this government always entertains, a further mandate may be issued on a second requisition, and the proceedings that will follow, conducted by the judicial officers of the government, will be legal. Indeed, on that subject, we apprehend, that the magistrate before whom the prisoner is brought has no right to entertain the question. And, in reference to this point, we add, that there is no necessary legal obligation, on the part of the demanding government, to place in its original requisition all the offences of which it may suppose that the fugitive has been guilty. What may, in fairness and candor, be due between the two governments, and whether the president would grant further and successive mandates, where the proceedings were rendered unnecessarily vexatious, by withholding the information which the demanding government possesses, and so instituting several successive prosecutions, when one is sufficient, is, we think, a question for the executive, and not for the court or the commissioner.

The next point in the order of the discussion was, that, if the proceedings before the commissioner thus far be held to be legal, the prisoner should, nevertheless, be discharged from custody, because the commissioner, in the conduct of the inquiry into the criminality of the fugitive, received incompetent evidence. The supposed illegal evidence consists of depositions of two classes. The first class embraces depositions which are certified to have been taken before the lord mayor of London, before a warrant of arrest, which forms a part of the documents produced on the hearing before the commissioner, was there issued. The other class consists of depositions which were taken successively on two supplemental informations and inquiries, at dates subsequent to the issuing of that warrant of arrest.

In respect to the first class, it seems to us sufficient to refer to the language of the acts of congress under which these proceedings have been conducted, and to state that the necessary construction of those acts involves

the correctness of the commissioner's ruling in this respect. We think we might place the decision of that point upon the act of August 12, 1848, alone (9 Stat. 302); but, under that act, as supplemented by the act of June 22, 1860 (12 Stat. 84), it seems to us that there can be no reasonable doubt. Section 2 of the act of 1848 provides, that, "in every case of complaint as aforesaid," (referring to proceedings under a treaty for the extradition of criminals,) "and of a hearing upon the return of the warrant of arrest," (issued by the magistrate), "copies of the depositions upon which an original warrant in any such foreign country may have been granted, certified under the hand of the person or persons issuing such warrant, and attested, upon the oath of the party producing them, to be true copies of the original depositions, may be received in evidence of the criminality of the person so apprehended." It will be seen, that the principle upon which this act proceeds is, that evidence which, in the foreign country, was held sufficient to authorize the arrest of the fugitive, ought to be received as evidence here upon the same charge. But, to identify that evidence and show that the documents produced do contain the evidence received in such foreign country, they must be authenticated as true copies. The authentication which this statute contemplates is a certificate under the hand of the person or persons issuing such warrant, and attestation, upon oath, that they are true copies of the original depositions. That these depositions are certified under the hand of the person issuing the warrant in the case now before us, to wit, the lord mayor of London, is not questioned.

Congress, in 1860, evidently conceiving that exigencies might arise, doubtless knowing that exigencies had arisen, in which there was difficulty in furnishing seasonable oral proof by the oath of the party producing the depositions, provided, in the act of 1860, that such depositions, or copies thereof, if they shall be properly and legally authenticated, so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, shall be received in evidence. Here, again, congress recognizes the propriety of receiving in evidence here depositions which are so authenticated as to entitle them to be received for similar purposes by the tribunals of the foreign country. Such depositions are, in their nature and by express terms, made admissible here. Had the act stopped there, the question arising on the offer of such depositions would not be—are such depositions admissible, but, are they so authenticated that they are entitled to be read in the foreign country for similar purposes? How are the tribunals of this country to be advised of the sufficiency of the authentication? That question might have created embarrassment had the act of congress gone no further. Should oral proof be taken? What official certificates from the foreign tribunals, or government, or officers, would establish it? To relieve all doubt or embarrassment, the act declares what may be taken as proof, and conclusive proof, of such authentication, which the court must recognize, and by which that fact is established, in these words: "The certificate of the principal diplomatic or consular officer of the United States, resident in such foreign country, shall be proof that any paper or other document so offered is authenticated in the manner required by this act." It seems to us, that that removes all doubt from this question. Such certificate is not merely evidence, it is proof of such due authentication. The certificate of our minister at the court of St. James was produced before the commissioner. That certificate is unqualified, in its certification, that the depositions are authenticated in the manner required by the act, to wit, so authenticated as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party is alleged to have escaped. It seems to us that that certificate is, in its nature, a judicial act, which neither the commissioner nor this court can disregard or overrule. Moreover, that certificate states, on its face, that it is given and made under and pursuant to the provisions of the act of 1860. It may, therefore, be regarded, by its reference thereto, as incorporating the act itself, so far as the details of its requirements are involved in the certificate. It follows, that, in regard to the first class of depositions, there is no room to hesitate, in affirming the correctness of the ruling of the commissioner in receiving them as evidence.

It is suggested that this construction of the acts of congress involves an interference with the rights of the prisoner, as creating a species of evidence which the treaty did not contemplate. 8 Stat. 576, art. 10. We are aware, that, by the terms of the treaty, the proof which the government of the United States is bound, and which alone it is bound, to respect, as creating an obligation on its part to surrender a fugitive, is such evidence of criminality as, according to the laws of the place where the fugitive or person charged is found, would justify his apprehension and commitment for trial, if the offence had been there committed. In the first place, this language has especial reference to the degree, quantum, or weight of the evidence, rather than to the instruments of evidence themselves; and an act of congress prescribing what instruments or vehicles of evidence shall be received, and how they may be authenticated, is in no inconsistency with the treaty. But, more than this—it was just as competent, as a question of power, for the government of the United States, by act of congress, as it was competent in the treaty itself, to say upon what evidence of criminality it would perform the stipulations

in the treaty; and, therefore, when congress declared, by their act, for the guidance of judicial officers, what shall be admissible to establish criminality, in the inquiry which, by the terms of the treaty, the government is bound to institute, they made their enactment the law of the place where the prisoner is found, for all the purposes of the proceedings under the treaty. Therefore, it is true—technically and literally true—that the evidence by which the prisoner in the present case has been charged, so far as it conforms to the provisions of the act of congress, was evidence competent, in its nature, to justify any conclusion which is properly deducible therefrom, in the place where the prisoner was found, and where he was apprehended.

As to the supplemental depositions, taken after the warrant was issued, their admissibility depends entirely upon the construction of the act of 1860. There are two grounds upon which we may hold that their admission does not invalidate the proceedings had before the commissioner in this case. If the construction which we have intimated of the act of 1860, namely, that the certificate of the principal diplomatic or consular officer of the United States, resident in the foreign country, is proof, plenary and conclusive, that the documents offered in evidence are so authenticated that they are entitled to be received for similar purposes by the tribunals of England, be correct, then, by the terms of the act of 1860, it was the duty of the commissioner to receive them in evidence; and they were competent, because so pronounced by the diplomatic officer to whom that question is referred by the act of congress itself. If it were profitable, we might occupy time in suggesting reasons for the enactment, showing its propriety and its convenience; and we might even go further, (if it were proper for the court to attempt to justify an act of the supreme legislature,) in support of the construction of the act of 1860, above stated. But we do not think that is necessary; and for the further reason, that, without resting the disposition of this case, in any respect, upon the conclusive effect of the certificate of the American minister, we are of opinion, that, even though the second class of depositions were inadmissible, their reception furnishes no ground for the discharge of the prisoner.

The arguments urged upon our attention proceed very much upon an assumption, which is entirely erroneous, to wit, that, in this proceeding, under the writ of habeas corpus, we are sitting as an appellate tribunal. That is not our relation to the commissioner. A judge issuing a writ of habeas corpus, or a court issuing a writ of habeas corpus, in these cases, is exercising an independent and original jurisdiction, with a right to inquire, doubtless, whether the prisoner is legally held. What shall be the scope and extent of that inquiry, has been very much controverted in the courts of this circuit. We say, on that subject, first, that we are not sitting as an appellate tribunal, for the purpose of reviewing the proceedings before the commissioner, as upon allegation of error. This is not a writ of error. The inquiry here is not to be conducted upon the rigid, technical rules applicable to a writ of error, which is in the same proceeding. Sometimes, it is true, a writ of error is called a new suit, but, in its relation to the subject-matter, and in its ultimate result, it is so connected therewith, that it may be properly called a continuation of the same proceeding. It may result in reversing. What then? If the case is one which calls for it, a venire de novo may be had, which reaches back to the point where the error occurred which requires the proceedings to be reversed. If the decision is one of affirmance, it then adds an additional record sanction to what the inferior tribunal has done. This proceeding has no such relation to the proceedings of the commissioner. The question to be determined upon habeas corpus, in these cases is, as we apprehend—is the prisoner rightly held, or is he to be discharged? If the commissioner, having acquired jurisdiction of the subject-matter, and of the prisoner, commits an error in the reception of evidence, it does not follow, by any legal rule, that his proceedings are to be held for naught, and void for error. The prisoner may, nevertheless, be legally held.

Our conclusion in regard to the case, as it stands upon the evidence, calls upon us to say, that, whether the supplementary depositions were or were not admissible, the prisoner is legally held. Without those depositions the proofs justify the conclusion of the commissioner, and his commitment of the prisoner for surrender.

This brings us to notice the questions of fact, in relation to which what we have to say will be very brief. It is claimed, that, even with the evidence that we have last adverted to, a case was not made out justifying the commitment of the prisoner. Before, however, discussing that point, we desire to call attention to the state of the adjudications in this circuit. Three views have been taken of the power and duty of the court, on habeas corpus and certiorari, to entertain the question of the sufficiency of the evidence to warrant the commitment for surrender.

It was held, and held successively for many years (In re Veremaitre [Case No. 16,915]; In re Kaine [Id. 7,598]; In re Heilbronn [Id. 6,323]; Ex parte Van Aernam [Id. 16,824]), that, if it appeared to the judge or to the court issuing the writs, that the commissioner had acquired jurisdiction, by a conformity of the proceeding to the requirements of the treaty and the acts of congress, and that he had not exceeded his jurisdiction, that was an end to inquiry; that, whether the evidence received by him was sufficient or insufficient, was a question to be determined

by him; that no tribunal had been provided by the treaty, and no jurisdiction had been given by any act of congress, to any judge, magistrate, or court, to review that decision; that the only review possible was a review by the executive, to whom the proceedings had before the commissioner were to be returned; that the executive had power to examine for himself, and determine whether a case had been made within the treaty, and whether a case had been made which called upon him, as executive of the government of the United States, to surrender the fugutive; and that, as this special jurisdiction in a special proceeding not theretofore within the jurisdiction, original or appellate, of any court or magistrate of the United States, had been conferred by law upon the magistrate acting under the act of congress, and as it was made his duty to certify his conclusions as the basis of executive action, without giving any right of appeal, in any form, to any other magistrate or to any court, there was no appeal and no supervisory authority to be exercised, except by the executive.

The next stage in the history contained an opinion which is supposed to go one step further. We may say, without disrespect to the decision itself, in any wise, that the decision in which the opinion was pronounced (In re Kaine [Id. 7,597]), had other grounds upon which it was deemed to be called for. The decision was, that the commissioner never acquired jurisdiction; but the opinion, nevertheless, went further, and held, that, in the case under consideration, there was no competent evidence before the commissioner, that is to say, there was no legal evidence upon which the commissioner could act, for, if the evidence was not competent, it was not legal; that, if there was no competent evidence before the commissioner, the proceedings before the commissioner were to be treated, whenever presented to any other tribunal, as an arbitrary act of commitment, upon mere complaint; and that the question became, therefore, a question of law, not a question of fact, before the court, on habeas corpus, whether a commissioner could, upon complaint, issue a warrant of arrest, and, upon the appearance of the prisoner before him, commit him for surrender. With that view of the subject, and with the assertion of the right to inquire, upon habeas corpus, whether the proceedings of the commissioner had been, in that sense, legal, or, in other words, whether he had not departed from his jurisdiction, which was a jurisdiction to inquire into and ascertain facts, and not to declare facts without any evidence before him, we are not disposed, at present, to raise any controversy.

The next step in the consideration of this subject elicited the opinion (In re Henrich [Id. 6,369]), that the court, acting in the proceedings instituted by habeas corpus and certiorari, was not confined to the mere inquiry whether there was any evidence; but that, if it could see that there was a substantial defect of evidence, it might and ought, not necessarily to discharge the prisoner, but to hold that the warrant of commitment was illegally granted.

That view of the subject was followed, in its next step, or perhaps, in its consequence, by the holding (In re Farez [Cases Nos. 4,645, 4,646]) that it was not the duty of the court to discharge when an error in rejecting evidence for the prisoner had been committed, but to remand, that the error might be corrected, and the proofs be continued, if it was so desired, to the end that the facts might be ascertained, and that, if the prosecuting government were able, it might yet establish a case against the prisoner. Indeed, in the previous case to which we have referred, to wit, where the judge was of opinion that there was no legal evidence (In re Kaine [supra]), he offered, upon announcing the conclusion that he had reached, to detain the prisoner, to the end that the inquiry might proceed, the defects be supplied, and proper and competent evidence be produced before him.

In no view of the subject, therefore, should we be called upon to discharge the prisoner, upon the idea that the evidence was not sufficient. No case has yet gone so far as to say, that, because some evidence was introduced which was not legal or competent, or because the court, upon a review of the evidence, was of opinion that it would have come to a different conclusion upon the evidence, therefore, the proceedings were illegal and the prisoner should be discharged. The inconveniences and the evils of such a rule, applicable to this subject, are so great, that the assertion and maintenance of that view of the meaning of the treaty might be assailed as evidence of bad faith. It has been deemed settled by the law of England, and the doctrine has been reiterated in this country, that a determination of one judge, or a determination of one court, touching a question of discharge under habeas corpus, is not a bar to the issuing of another writ by another court, or by another magistrate, and that, practically, a person neld in detention may have successive writs of habeas corpus, so long and so often as he may find a judge or a court to whom he may address his petition. That practice, applied to this subject, works this result. If the judge or the court, in these cases where extradition is sought, is at liberty, on habeas corpus, to weigh the evidence before the commissioner, and inquire whether they would have reached the same conclusion, the result is, that the finding of the commissioner, and the findings of successive courts and judges issuing successive writs of habeas corpus, so long as judges can be found, instead of having any force or effect, can be assailed, and assailed again, until, at last, perhaps, some doubting mind may be found, who will say, "I would have reached a different conclusion upon the evidence," and thereupon discharge the pris-

oner. To that view of the duty of the court, touching the weight of evidence before the commissioner, we cannot subscribe. We are not called upon, by any decision heretofore made, to assert any such rule. We feel conscious, not merely of the inconvenience, but, as we apprehend, of the great injustice, that would result from any such construction of the treaty and the acts of congress. Even in the case most relied upon (the Henrich Case [supra]), notwithstanding what is stated in the previous portion of the opinion, the conclusion of the court leaves this question open to consideration, and, as we think, in the form and manner in which we have stated our views; for, although the power is there asserted to reverse or overrule a proceeding before a commissioner, for the want of sufficient evidence, still it is stated that it is not to be done upon slight grounds.

Assuming, nevertheless, for the purposes of this case, that inquiry into the evidence is open to us, in these proceedings, we are brought finally to the question whether, upon the evidence, a case is made out which would justify the commitment of the prisoner for trial. We have carefully examined the evidence in its details, enlightened by the views urged upon us by the counsel for the prisoner, and we are constrained to conclude, that the commissioner, (even without the testimony in respect to which exception was taken,) would have been derelict in his duty if he had not made the commitment for surrender which he was called upon by the prosecuting parties to make. This is not a trial of the prisoner. Much that was urged upon us, much that was urged touching the admissibility of evidence, much that was urged with regard to the sufficiency of the testimony, proceeded upon the principles which govern a court and a jury when the question of guilt or innocence is finally to be determined. A fugitive is not to be surrendered upon slight grounds. There should be reasonable evidence, reasonable cause to believe, and, in conformity with the case last referred to, we might go further, perhaps, and say, that there should be such prima facie case made by proof. as, being submitted to the jury, and being found by them to sustain the charge, would make it the duty of a court to sustain the verdict. Such testimony, we think, is found in this case. We are, therefore, not called upon to say anything more touching the power or the duty of the court to examine and weigh the evidence. If such be our. duty, we find it sufficient. If, there being some evidence tending to establish the prisoner's criminality, we are not to review the finding of the commissioner upon the weight of the evidence, the result in this case is the same.

The objection has been urged, by the counsel for the prisoner, that it is not sufficiently proved that the lord mayor of London had jurisdiction to issue a warrant of arrest, or to take the depositions in the first instance. (Opinion of four judges of the supreme court, in Ex parte Kaine, 14 How. [55 U. S.] 115.) If what we have said in regard to the provisions of the act of 1860, touching the certificate of our minister plenipotentiary, be adopted as the rule of decision, that disposes of this question; for, in that case, his certificate that the depositions which are offered are so authenticated as to entitle them to be read in the courts of that country, is the conclusive test of the admissibility of the evidence before the commissioner here. But, we are of opinion that the jurisdiction of the lord mayor is sufficiently established. It is not necessary that we should refer to the statute of Edward III., which defined and conferred the powers of justices of the peace in England, or inquire to what extent the tribunals of this country are at liberty, or are bound, to take judicial notice of the existence of such officers, from that period down to the time of our Revolution, or to recognize the existence of their jurisdiction and authority, and to dispense with proof that such officers have jurisdiction to keep the peace, and, as magistrates, to arrest, on charge of crime, and hold to bail, and detain for trial. Much might be said, it seems to us, in support of that view of the subject, and to sustain the jurisdiction of the lord mayor, who appears, by these proceedings, to be a justice of the peace, without any other proof whatever. But, we think, that, if evidence is necessary, evidence was produced competent to prove it. We have, in the testimony, the affirmative fact that he is the chief criminal magistrate of the city of London. That is testified under oath. There was no cross-examination, there was no inquiry into the sources of the witness' knowledge, and nothing offered in impeachment of the verity of what was testified. The certificate of the government of Great Britain, in any form, would have told no other tale. At least, it establishes that he is, in fact, in the exercise of the power and authority of the chief criminal magistrate of the city of London. It might be plausibly suggested, were it not for some things that have been said in former cases, that, when the act of congress of 1848 provided that the depositions on which a warrant had been granted in the foreign country, certified by the person issuing such a warrant, might, when proved to be true copies, be received in evidence, there was no room for inquiry here into the jurisdiction of that person. We do not, however, propose to go so far. We do say, that the proof adduced before the commissioner, in connection with the certificate of the lord mayor, and the authentication or certification, ample and full as it is, by our minister, completes the chain of evidence, and sufficiently establishes the jurisdiction of that officer.

To conclude, we find nothing that will justify our further interference with the custody of the prisoner, under the warrant of

commitment by which he is held, subject to the warrant of the executive for his surrender. The prisoner is remanded to the custody from which he was taken, and the writs are discharged.

NOTE. On the 23d of May, 1873, writs of habeas corpus and certiorari, on the relation of Macdonnell, were issued by Mr. Justice Fancher, of the supreme court of New York, directed to the United States marshal and to Commissioner Gutman, returnable at the court of oyer and terminer, June 4th, 1873. On that day, the marshal did not produce the body of the relator, but, through his counsel, made return, that he held the relator under a warrant issued by Commissioner Gutman, pending proceedings for his extradition, on the application of the British government, charged with the crimes of forgery and the utterance of forged paper; that such proceedings had been made the subject of review by the United States circuit court, on writs of habeas corpus and certiorari; and that, after such review, the relator had been remanded by the federal court to the custody of the marshal, to await the issuing of the warrant of the executive for his surrender to the British government. After hearing Charles W. Brooke on behalf of the relator, and James C. Carter on behalf of the marshal, Mr. Justice Davis delivered the decision of the court, orally, as follows: "The application now made is in the nature of a motion to regard the marshal as in contempt for not making the proper return to the writ by producing the prisoner. Although counsel do not put it in that form, it amounts substantially to that; and the question is, whether, upon the proceedings and the return now before the court, it is the duty of the court to issue an attachment, under the statute, to compel the marshal to produce the body of the prisoner. There is no doubt whatever of the power of the state courts, in all cases where persons are deprived of their liberty within their territorial jurisdiction, to issue the writ of habeas corpus, for the purpose of inquiring into the cause of the detention; and that power is applicable to all cases where it does not appear upon the face of the petition for the writ, that the case is one either extra-territorial, or exclusively within the jurisdiction of some other tribunal. I assume that the petition in this case did not show to Mr. Justice Fancher, who issued this writ, any fact clearly establishing that this prisoner was held by a jurisdiction which precluded the state court from investigating the cause of detention. It, therefore, became the duty of the judge to issue the writ, and it became the duty of the marshal so far to obey it as to make known to the court, in proper form, over his official signature, the cause of the detention of the prisoner by himself.

Case No. 8,773.

In re MACDONNELL.

[See Case No. 8,772.]

Case No. 8,774.

McDONNELL v. RAILROAD CO.

[Cited in Hopkins v. St. Paul & P. R. Co., Case No. 6,690. Nowhere reported; opinion not now accessible.]

McDONNELL (SACKET v.). See Case No. 12,202.

Case No. 8,775.

In re McDONOUGH.

WHITE v. RAFTERY.

[3 N. B. R. 221 (Quarto, 53);[1] 1 Chi. Leg. News, 361; 16 Pittsb. Leg. J. (O. S.) 110.]

District Court, W. D. Missouri. June Term, 1869.

BANKRUPTCY—PREFERENCE—PURCHASE BY CREDITOR—KNOWLEDGE OF INSOLVENCY—EQUAL DISTRIBUTION IN BANKRUPTCY.

1. When a creditor has reasonable cause to believe his debtor insolvent, purchases goods of him, and such debtor makes the sale with a view of giving a preference, the transaction is void, and the assignee in bankruptcy of such insolvent may recover the value of the goods from such creditor.

[Cited in Graham v. Stark, Case No. 5,676; Martin v. Toof, Id. 9,167.]

2. The sale cannot be declared void unless the purchaser had reasonable cause to believe the seller to have been insolvent when he made the sale, and reasonable cause means a state of facts which would put a prudent man upon inquiry as to the condition of the person from whom he purchases.

[Cited in Singer v. Sloan, Case No. 12,899.]

3. Neither local inclinations nor the employment of the process of state courts can longer be successfully employed to thwart or defeat the equal distribution of an insolvent debtor's estate among all his creditors, regardless of their locality.

[In the matter of John R. McDonough, a bankrupt, and of Henry K. White, assignee, against Thomas J. Raftery.]

Woodson, Vineyard & Young, for plaintiff.

Hall & Oliver and W. Judson, for defendant.

KREKEL, District Judge. This is an action brought by the assignee under the first clause of the 35th section of the bankrupt law [of 1867 (14 Stat. 534)], to recover property, or the value thereof, alleged to have been conveyed by the bankrupt to defendant Raftery, with a view of giving him, the said Raftery, a preference. The testimony in the case tends to show that Raftery, an old merchant, on the 1st day of July, 1867, sold his stock of general merchandise to McDonough, after inventory taken, at upwards of eight thousand dollars; that he received in payment four thousand dollars, and two notes of equal amounts due in six and twelve months, Lysaght and McGee becoming securities; that McDonough rented the house in which the goods purchased were kept, of Raftery, the owner; that after keeping store until about November 1, 1868, McDonough sold the stock of goods on hand to Raftery in a lump, and without taking an inventory, for the round sum of five thousand dollars, one thousand three hundred and fifty dollars of which was to be paid on balance of the last of the notes given for original purchase-money, which was unpaid and under protest; eight hundred dollars to bank

[1] [Reprinted from 3 N. B. R. 221 (Quarto, 53), by permission.]

on overdrawn account; five hundred dollars in cash, and balance in short, negotiable paper. Prior to making the purchase, Raftery had incidentally learned that McDonough was owing upwards of one thousand six hundred dollars to the jobbing house of Tootle, Fairleigh & Co., of St. Joseph. Raftery was well acquainted with the business of McDonough, and on intimate terms with both McDonough and Lysaght, the security for McDonough, and who had had at one time charge of McDonough's business while he was sick. McGee, the other security for McDonough, had been released on notice of his liability on note referred to. A number of witnesses testified that McDonough was considered solvent at the time of sale, that he was in good credit, and had no other property than the stock of goods.

The insolvency of McDonough is admitted, and the first question to be decided is, had Raftery any claim against McDonough, or was he under any liability for him? The last of the two notes given in consideration of the original purchase had been assigned by Raftery to a bank, and when it became due Raftery, in order to avoid protest, waived it by appropriate indorsement on the note. This created a liability on the part of Raftery for McDonough. The next inquiry is, had Raftery reasonable cause to believe McDonough insolvent when he made the purchase; for, unless this was the case, the sale cannot be declared void. "Reasonable cause to believe," in this connection, means a state of facts or circumstances which would lead any prudent man to the making of inquiries. Raftery knew of the protested note, and, to indicate his own view as to his liability on it, he secures the payment in the trade. He knew of the indebtedness of one thousand six hundred dollars to Tootle, Fairleigh & Co.; he knew of the overdrawn bank account; he knew that the stock of goods had gone down from eight thousand dollars and upwards to five thousand dollars in sixteen months. These facts were well calculated to put Raftery upon inquiry, and, had he made any whatever, he could not have failed to learn the actual condition of McDonough, for one-half of his creditors reside in St. Joseph. The books of McDonough would at once have disclosed his condition; and is it unreasonable that purchasers, under circumstances such as surrounded this case, should be required to make reasonable efforts to learn the condition of the persons with whom they deal? It will not do to ask protection on account of ignorance, when a very small amount of inquiry would have given all necessary information. Raftery, in the opinion of the court, had reasonable cause to believe McDonough to be insolvent at the time of the transfer under consideration. To make the transaction void, it must also be done by the debtor with a view to give a preference. McDonough certainly knew his own condition of insolvency. His acts of satisfying the Raftery note in the trade, and afterwards distributing portions of the proceeds among his St. Joseph creditors exclusively, too plainly indicate his intention in the matter to admit of doubt.

The court is asked that, should the judgment be unfavorable to defendant, he be allowed, by way of reduction, whatever amount was paid by McDonough out of the proceeds of sale to creditors, or, at least, so much thereof as they ratably would have been entitled to on an equal distribution of the estate. The equitable view underlying this argument cannot be made available in this proceeding, for the direction of the law is that the transfer shall be void, and the assignee may recover the property or the value thereof from the person receiving or to be benefited by it. There is also the further objection that it would permit the debtor to make the distribution of his estate, a matter which the bankrupt law prohibits. The question whether those who have received payments should refund, and to whom, the court does not undertake to decide, it being outside of the case.

It may not be improper here to remark that neither local inclinations nor the employment of the process of state courts are longer successfully to be employed to thwart or defeat the equal distribution of an insolvent debtor's estate among all his creditors, regardless of their locality.

The conclusions the court has arrived at are, that McDonough, at the time of the transfer, was insolvent; that a liability from him to Raftery existed, and that he made the transfer with a view to prefer Raftery; and instead of the provisions of the bankrupt law. The value of the goods is shown by the appraisement of Raftery, and other evidence, to be at least four thousand five hundred and ninety-two dollars and five cents, and judgment will be rendered against him for that amount with costs.

M'DONOUGH, The (JOHNSON v.). See Case No. 7,395.

McDONOUGH (WHITE v.). See Case No. 17,552.

Case No. 8,776.

In re McDOWELL.

[6 Biss. 193;[1] 10 N. B. R. 459; 6 Chi. Leg. News, 413.]

District Court, N. D. Illinois. Sept., 1874.

BANKRUPTCY—COMPOSITION MEETING — MISTAKES —SECOND MEETING.

As a general rule a bankrupt should abide by the decision of a composition meeting duly held; but if it clearly appears that the object of the meeting failed by reason of the mistakes or misinstructions of attorneys for creditors, the court may order a second meeting.

In bankruptcy.

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

McClellan & Hodges, for petitioners.
T. S. McClelland, for respondents.

BLODGETT, District Judge. Upon the application of the debtors, an order was made in this case calling a meeting of their creditors, to be held before one of the registers of the court, on the 26th day of August last, for the purpose of considering and acting upon a proposition for a composition. The register reported that the meeting was duly held; that the debtors were in attendance and submitted their proposition to pay thirty cents on the dollar in full satisfaction and discharge of their debts; that the creditors in attendance, represented by their attorneys, were twelve in number, three of whom voted in favor of accepting said proposition, and nine, by their attorneys, voted against accepting the same. The debtors now apply for another meeting, and state in substance, by their petition, that the attorneys who represented the creditors voting against said proposition at said first meeting, did not understand the wishes of their clients, and had not so fully investigated the affairs of the debtors as to be properly advised in the premises. It also appears from the statements of the attorneys who represented said dissenting creditors at said meeting, that certain members of their respective firms had had the matter of this proposed composition specially in charge and were fully informed of the facts, and had determined to vote in favor of the debtors' proposition, but that said members of the attorneys' firms were out of the city at the time the meeting was held, and the partners who attended and represented said creditors, not finding among their papers any instructions from their clients or absent partners, voted pro forma against the proposition.

As a general rule, I think that when a debtor has had a meeting of his creditors duly called and held, and has had his proposition for a settlement duly considered and passed upon, he should abide by the decision then had, and not be permitted to annoy creditors by requiring their attendance at further meetings. But in this case it clearly appears that the object of the meeting failed, by reason of the failure to properly instruct the attorneys who represented the dissenting creditors, and I shall therefore direct another meeting to be called for the purpose of again considering and acting upon the debtors' offer for a composition.

While, as I said before, I would not allow a practice which would vex creditors with meetings after they had intelligently acted upon a debtor's offer, yet I think the court should afford all proper facilities for correcting mistakes, or enabling the parties most interested to carry out their wishes in the premises. Here both the debtor and the dissenting creditors are willing a second meeting should be called, and I can see no valid reason why it should not be done.

Case No. 8,777.

McDOWELL v. BLACKSTONE CANAL CO.

[5 Mason, 11.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1827.

PAYMENT—SEVERAL CONTRACTS — ON ACCOUNT—HOW APPLIED.

Advances made on account generally, for work done under several distinct contracts, some of which have not been completed, must be applied in the first place to the extinguishment of the amounts due on the contracts which have been completed, and not of those which have not been completed.

[Cited in Gass v. Stinson, Case No. 5,262.]
[Cited in Early v. Flannery, 47 Vt. 256.]

Assumpsit on several counts. (1.) On a special agreement for excavating and embanking sections Nos. 11 and 12 of the Blackstone canal, at 10 cents per cubic yard for excavation, &c. &c. (2.) For labour and services generally. (3.) For work and labour by a person as agent of the plaintiff [John McDowell]. There were several other counts, which the plaintiff discontinued before the trial. Plea, the general issue.

At the trial it appeared in evidence, that sundry sums of money had been advanced, from time to time, by the canal company to the plaintiff, for which he had given receipts, acknowledging the same to be advances on account generally. It also appeared in evidence, that the plaintiff had entered into several distinct contracts for the excavation &c. of several sections of the canal, in Nos. 11 and 12, and No. 14. The two former contracts had been completed; but No. 14 had never been completed by the plaintiff. The advances made exceeded the sums due for the contracts for the excavation &c. of Nos. 11 and 12, if they were applied to that purpose. The work on No. 14 was going on in connexion with the other work between December, 1825, and March, 1826, when part of the advances were made. No. 14 however was left by the workmen unfinished, and they abandoned the completion of that contract. The principal question was in what manner the payments by way of advance were to be applied.

Mr. Randall, for plaintiff.
Mr. Whipple, for defendants.

STORY, Circuit Justice. It is the opinion of the court, that the advances being made on general account, and being so stated in the receipts, are to be applied in the first place to extinguish the amounts due upon the contracts which have been completed, and upon which alone the plaintiff has entitled himself to receive payment. They therefore go to discharge the amounts due for the completion of the contracts for the excavation and embankment of sections Nos. 11 and 12. But the work and labour upon section No. 14 was done under an entirely new and distinct con-

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

tract, and that contract has never been fulfilled by the plaintiff so as to entitle him to any payment. On the contrary, his workmen have abandoned the job and run away. The advances therefore cannot be applied by the plaintiff in part payment of this contract, though made between December, 1825, and March, 1826, while the whole work on all the sections, Nos. 11, 12 and 14, was going on, for the decisive reason, that no man has a right to apply advances to a contract, when he has no claim to any money as earned under that contract. The money advanced is more than sufficient to pay all that is due, under the contracts for sections Nos. 11 and 12; and therefore we think it must be so applied in point of law, and the plaintiff, not having sued on the contract for section No. 14, is not entitled to recover in this action. Indeed it appears, that No. 14 has been since finished by other persons, upon a new contract with the corporation, at an extraordinary expense.

The plaintiff submitted to a discontinuance.

McDOWELL (DONALDSON v.). See Case No. 3,985.

McDOWELL (GRISAR v.). See Case No. 5,832.

McDOWELL (LORILLARD v.). See Case No. 8,510.

McDOWELL (McCALL v.). See Case No. 8,673.

McDOWELL (UNITED STATES v.). See Case No. 15,671.

McDUEL (HARRINGTON v.). See Case No. 6,108.

McDUELL (UNITED STATES v.). See Case No. 15,672.

Case No. 8,778.

In re McDUFFEE.

[2 Hask. 76; [1] 14 N. B. R. 336; 9 Chi. Leg. News, 40.]

District Court, D. Maine. Aug. 24, 1876.

BANKRUPTCY—NOTARIES—ACKNOWLEDGMENT OF CREDITOR.

Notaries public have authority to take the acknowledgment of creditors to their powers of attorney.

Question certified by Mr. Register Fessenden. Can notaries public lawfully take the acknowledgment of creditors to their powers of attorney relative to bankrupt proceedings?

FOX, District Judge. Upon this question there is a conflict of authority, the later opinion being that of Brown, J., in Re Butterfield, [Case No. 2,248], sustaining such an acknowledgment. This opinion meets with my approval; but in order that there shall be an uniformity of practice in the first circuit, I have conferred with Mr. Justice Clifford, and am authorized to say that he concurs with Judge Brown. The power of attorney is accepted and ordered to be filed.

[1] [Reported by Thomas Hawes Haskell, Esq., and here reprinted by permission.]

Case No. 8,779.

McELHENNY v. FIRST NAT. BANK OF ASHLAND.

[7 Wkly. Notes Cas. 115.]

Circuit Court, E. D. Pennsylvania. April 26, 1879.

EQUITY—PRACTICE—COSTS OF MASTER—BY WHOM PAID—JURISDICTION — CONFLICT — JUDICIARY—EXECUTION — PAYMENT BEFORE RELIEF GRANTED.

1. The United States circuit court, having appointed a master to investigate the affairs of a national bank, defendant in a creditor's bill in equity filed for discovery and other appropriate relief, upon allegations of fraud by the officers of the corporation, has jurisdiction of the suit after the subsequent appointment of a receiver by the comptroller of the United States government.

2. Master's costs ordered in such a case to be paid by the receiver of the bank, his services having been beneficial to the corporation.

Rule to show cause why the costs of the master should not be paid by the defendants. The facts were these: On the 15th of January, 1878, the complainants filed a bill in equity on behalf of themselves, as well as of other creditors who should come in, against the First National Bank of Ashland, Robert Gorrell and William Torrey, and the directors of the bank, alleging that they were holders of stock in the bank defendant of which Gorrell was president, and Torrey the cashier; that the defendants Gorrell and Torrey had grossly mismanaged the affairs of the bank, had fraudulently appropriated certain of its assets to their own private uses, and were still directing its affairs in an improper and fraudulent manner; that in July, 1877, the bank had gone into voluntary liquidation, and had closed its affairs with the comptroller of the currency, by depositing legal tender notes to the extent of its outstanding circulation and withdrawing the government bonds given to secure the same. The bill also alleged that the bank was still indebted to its depositors alone in about $30,000, and prayed discovery, a receiver, an account, and an injunction restraining the defendants, Torrey and Gorrell, from interfering with, or in any way disposing of the assets. Answers were filed by the defendants, and on a motion for the appointment of a receiver the court (Cadwalader, J.) appointed John P. Hobart, Esq., as master, to investigate the affairs of the bank, and report its condition to the court; to ascertain what, if any, material errors or omissions had occurred in the report of the examiner, already

appointed by the comptroller of the currency, and for this purpose directed that he should have access to the books and papers of the bank. Subsequently to the appointment of this special master, a receiver of the bank was appointed by the comptroller of the currency, whereupon he was made by amendment a party defendant to the bill. A lengthy report of the condition of the bank was subsequently filed by the master, and his charges in the matter, including the expenses of an expert accountant employed by him, amounted to several hundred dollars. The bill was still pending, and no relief other than the discovery mentioned had been decreed. A rule was first taken by him upon the plaintiffs to show cause why they should not at that stage of the case, pay his costs. This rule was discharged upon depositions showing the poverty of the plaintiffs, that the master's services had been beneficial to all the stockholders, and that in consequence of the investigation set on foot by this bill, there had been a thorough overhauling of the affairs of the bank by the receiver, appointed by the United States comptroller, which had resulted in the recovery of large sums of money by the receiver. Thereupon the master took this rule upon the defendants to show cause why these costs should not be paid out of the assets of the bank in the hands of the receiver.

A. Sydney Biddle and Hughes & Farquhar, for the rule.

It will be argued that this court has no jurisdiction since the appointment by the comptroller of a receiver, and that the payment of these costs is on that account beyond the control of this court. No objection is made to the amount, but it is said that, as the case is substantially at an end, the plaintiffs are to pay the costs. We admit that no further proceedings are likely, as, though the bill is still pending, the relief sought for is being administered by the receiver, who is, in a proper way, winding up the bank's affairs. But the services were beneficial to him, and the relief we wanted, i. e. discovery, was decreed us. The plaintiffs do not care to take the bank's affairs out of the hands of the present receiver, though the court could doubtless, in its discretion, do so, having obtained jurisdiction of the bank's affairs, through this bill, before that of the government accrued by the appointment of its receiver, which was subsequent to the filing of the bill. See as to this: Bank of Bethel v. Pahquioque Bank, 14 Wall. [81 U. S.] 383; Case v. Terrell, 11 Wall. [78 U. S.] 203; Kennedy v. Gibson, 8 Wall. [75 U. S.] 505.

THE COURT now called upon George R. Kaercher and Charles M. Swain, contra.

These costs should be paid by the complainant, as it was upon their application that the master was appointed, and he discovered nothing more than what the examiner previously appointed by the comptroller of the currency had already reported. If any of the defendants are to be charged with the costs it should be Torrey and Gorrell, whose acts in the matter made the investigation necessary. The comptroller of the currency has sole jurisdiction of the matter, and when a receiver had been appointed by him, the jurisdiction of the court ceased.

McKENNAN, Circuit Judge. Do you admit the propriety of the amount of the charge?

Yes, but we are not bound to pay it.

BUTLER, District Judge. Were not these services beneficial to the operation in enabling the receiver to get in the assets with greater ease? Did not the bank directly benefit by them?

We admit that. But this court has no jurisdiction. The compensation is wholly within the receiver's discretion, since his appointment by the executive of the government.

Eo die. Rule absolute.

Case No. 8,780.

In re McELRATH.

In re EASTON.

[2 Dill. 460.] [1]

Circuit Court, D. Minnesota. 1873.

RAILWAY TARIFF ACT OF MINNESOTA—INSTRUCTIONS TO RECEIVER.

1. Directions of the court to its receiver in possession of and operating the Southern Minnesota Railroad, in respect to conforming to the state statute regulating freight and passenger tariffs.

[Cited in La Crosse Railroad Bridge, Case No. 7,969.]

2. Petition of a shipper, whom the receiver had charged more than the statutory rate, to be allowed to sue the receiver in this court in respect of such excess, granted.

The Southern Minnesota Railroad Company is in the hands of a receiver, appointed by this court, November 7th, 1872, upon the bill of complaint of Samuel B. Ruggles and Albon P. Mann, trustees, to foreclose certain mortgages executed to them in trust to secure the payment of its bonds. The reasons for the appointment of a receiver are given in the opinion of Nelson, J., which will be found reported at length in the Internal Revenue Record for 1873 (page 29), and in the Chicago Legal News, 1872. The bill is still pending in this court. On March 6th, 1871, the legislature of the state of Minnesota passed an act prescribing the maximum rates which railway companies in the state may charge for carrying freights and passengers therein. [Laws Minn. 1871, p. 61.] This act has been held constitutional by the supreme court of the state. At the June term, 1873,

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

the receiver presented a petition to the court, praying, among other things, for instructions in regard to the rates of transportation to be charged, under the act of the legislature of 1871. At the same time a petition was presented from J. C. Easton, a heavy shipper over the company's line of road, asking permission to sue the receiver for over-charges of freight under that act. Affidavits of Mr. Drake and Mr. Thompson, showing the practical effect of the act of 1871, were submitted to the court.

H. J. Horn and Gordon E. Cole, for trustees.
Geo. L. Otis, for receiver
Mr. Heard, for Mr. Easton.

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

DILLON, Circuit Judge. The Southern Minnesota Railroad Company is in the hands of a receiver, appointed by this court, in a proceeding by the trustees of its bondholders, to foreclose the first and second mortgages for near five million of dollars on the property and franchises of the railroad company.

The suit cannot be determined at this term, and the receiver, two days since, made application to the court for directions as to his duty in operating the road to conform to the statute of the state, of March 6, 1871, regulating the tariff of prices or rates to be charged for the transportation of freight and passengers on all railroads within the state. This statute fixes maximum rates which may be charged, and prohibits, under penalties, the taking of any greater rates. It appears by affidavits on file that none of the railroad companies in the state have obeyed the statute, and that they place their refusal to conform to it on the ground that it is an unconstitutional invasion of their chartered rights. It is contended to be unconstitutional in two respects: 1st. Because it is wholly beyond the legislative power (the right not having been reserved when the charters were granted) to prescribe the compensation which the companies shall charge for the services they render. 2d. Because, if the legislature has the power to prevent discrimination against the public, it has no power unjustly to discriminate against the companies, and require them to render services for an inadequate compensation; and in support of this position affidavits are filed to show that the tariff or schedule of prices fixed by the state statute does discriminate against certain productions and localities in favor of others, and in many instances requires services to be performed at much less than the actual cost to the company.

If Mr. Drake is not mistaken as to the practical effect of the act of March 6, 1871, it would seem that the act was not very carefully considered, but the courts cannot of course overthrow a statute because it may be unreasonable, but only because it is unconstitutional. And in respect to the Southern Minnesota Railroad Company, a showing is made that if the receiver shall conform to the statute throughout it will have the effect to reduce the earnings of the road (which are already insufficient to pay the running expenses and interest on its bonded debt) $150,000 per annum. It is, indeed, stated as the opinion of the receiver, that the receipts, under the tariff fixed by the state, would be insufficient to maintain the road in repair and pay operating expenses.

It is shown to us that quite recently the supreme court of the state has sustained the validity of this state legislation, at least to the extent to which the question of its validity was before it for its decision; and that an appeal from its judgment is being prosecuted without delay to the supreme court of the United States. At the same time that the receiver applied for instructions, one J. C. Easton presented his petition to the court for its permission to sue the receiver to recover freight charges paid in excess of the rates allowed by the statute of 1871.

These two applications are before us for disposition. The petition of Easton for leave to sue the receiver is of easy disposition, and the requisite leave is granted, and the parties advised to make, if possible, an agreed case, so that an early determination can be had. The other petition presents difficulties which have not a little embarrassed us, since what ought to be done by the receiver depends upon the question of the constitutional validity of the railroad tariff statute of the state. The court will hesitate before pursuing or sanctioning a course which will bring it in antagonism to the public policy of the state; and if the only question involved was whether the state legislation infringed some peculiar provision of the constitution of the state, we should regard it our duty freely to accept as correct and final the authoritative determination of the supreme court of the state. But evidently here the main question is whether this legislation infringes rights of the companies which are under the protection of the constitution of the United States.

The federal constitution protects all contracts from legislative or judicial invasion on the part of the states, and legislative charters are contracts within the meaning of the constitution; and the question is whether this legislation does invade chartered rights of the companies. This is a federal question, one whose ultimate solution and final settlement rests, and rests alone, with the supreme court of the United States. Upon such a question the decisions of the state courts have a persuasive or argumentative, but no binding or authoritative, force.

In the short time which has elapsed since that question was presented, the court has had no opportunity for its investigation, nor will it have the requisite time before it adjourns. It does not desire in an informal way to prejudge the momentous question here involved.

It is evident that a direction to the receiver to conform in all things to the statute of the state would very injuriously affect the creditors of this company, which is already insolvent, and from such a direction no appeal would lay, nor could any relief be had if it were erroneous. On the other hand, if no direction is made, and if the receiver shall continue the same course hitherto pursued, all the funds will be in the hands of the court, and the court will be open to allow parties aggrieved by the charges to apply to sue the receiver, or have the excess beyond the statute rate refunded.

For the present, therefore, until the question shall be decided by the supreme court of the United States, or until it shall have been decided by us in the regular way, in the case which we have authorized to be brought against the receiver, or in some other case, or until we shall have had opportunity to investigate the question with the aid of arguments, we make no further order. We decline to order the receiver to disregard the state law, but we do not make, at present, any more peremptory order than the one above indicated. We add that there is always a presumption in favor of the validity of an act of the legislature, and that the receiver would be well justified, until further order, in following the state statute, in all instances where the rates fixed by it were reasonable and fairly compensatory to the company. The receiver will form fair and impartial judgments in this matter, and if, while the subject remains before us for further consideration, he is of opinion that the rates fixed by the statute are unjust, and that they are unreasonably low and will not compensate for the services required, he is at liberty to act in such cases, for the time being, under the direction and advice of the trustees, who are the parties having the most at stake in this matter. It must not be implied that we have any fixed opinion or impression that there is any middle ground between the absolute right of the companies on the one hand to fix their own compensation, and the absolute right, on the other, of the legislature to prescribe their compensation. But fair and just rates while the matter is sub judice will actually injure no one, and as the court has control of the funds in the hands of the receiver, and the power, as it will have the inclination, to restore any moneys which may turn out to have been improperly received, the course above indicated seems to be the best practicable temporary disposition of the receiver's petition. A final determination of the question will not be unnecessarily delayed, and when reached the directions to the receiver will be made to conform to it.

Upon the foregoing announcement being made, the trustees for the bondholders stated that an agreed case was about being made to be submitted at this term, to test the validity of the act of March 6, 1871.

Case No. 8,781.

McELRATH v. McINTOSH et al.

[Brunner, Col. Cas. 559;[1] 11 Law Rep. 399; 1 Hayw. & H. 348.]

Circuit Court, District of Columbia. Nov. 21, 1848.

GOVERNMENT OFFICERS—POWER OF COURTS TO ENJOIN—MINISTERIAL ACT.

The courts of the United States have no authority to enjoin the officers of the government against performing any merely ministerial act, nor will a mandamus lie to the head of an executive department to compel the performance of an act not merely ministerial, but involving the exercise of judgment.

[Cited in Ex parte Reeside, Case No. 11,656.]

This was a bill for an injunction to prevent Betsey McIntosh from receiving, and the secretary of the treasury and the second comptroller from paying, to her more than one half of her claim of $7,680, awarded to her under the Cherokee treaties of 1817 and 1819. The parties were Hugh D. McElrath, complainant, and Betsey McIntosh, of the Cherokee Nation, residing in the Indian Territory west of the Mississippi, John H. Eaton, of Washington, D. C., and the secretary and second comptroller of the United States treasury department. The bill stated in substance that the respondent, Betsy McIntosh, a white woman, born within the United States, removed to and dwelt in the Cherokee Nation of Indians, where they were residing east of the river Mississippi, and became the head of an Indian family, and thereby became entitled under the treaties of 1817 and 1819, between the United States and the Cherokee Nation of Indians, to a reservation of six hundred and forty acres of land, including her buildings and improvements, by electing to remain in the United States and become a citizen thereof, and by filing her name accordingly in the office of the Cherokee agent of the United States in due form, as required by the eighth article of the said treaty of 1817. And afterwards, under the treaty of the 29th of December, 1835, concluded at New Echota, and the supplementary articles of 1st March, 1836, she removed with the Cherokees to their country west of the river Mississippi, on Arkansas and White rivers, and became entitled to compensation in money for her reservation of six hundred and forty acres of land and improvements, to be adjudicated by commissioners appointed by the United States, according to the seventeenth article of the said treaty of New Echota; whose award in favor of the claimants is, by the said treaty, declared final against the United States, and to be paid to the several and respective claimants, upon the certificate of the commissioners of the amount due to the several claimants. Notwithstand-

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

ing which, in January, 1845, she had received nothing for her reservation of six hundred and forty acres of land and improvements thereon, and she then employed the complainant, McElrath, to attend to and prosecute her claim, and engaged to pay him a commission of one half of whatever sum might be awarded to her, and accordingly executed a power of attorney to him on the 9th of January, 1845.

[Whereas by the treaties of 1817 and 1819, made and concluded between the United States and the Cherokee tribe of Indians, a reservation of 640 acres of land was reserved to Betsey McIntosh. Now, to the end that the said right may be prosecuted and ascertained before a proper tribunal, I do hereby authorize and empower H. D. McElrath my attorney in fact, for me and on my behalf, to cause said claim to be fairly prosecuted, whether before the Cherokee commissioners, congress, the judicial tribunals, or other department of government as to my attorney may appear fit and proper, and for him to do in the premises whatever and all things I, if present, could do and perform, intending and hereby giving full ratification to all his acts, without the future right of revocation being reserved or retained, revoking and making void all former powers of attorney by me made; and as compensation herewith attached and connected for the labor and services of my said attorney and expense of engaging suitable legal counsel (such as he may think fit) it is agreed and covenanted that he shall receive and be paid one-half of what may ultimately be recovered. The power, also, of substituting any other attorney in fact by him deemed necessary is fully authorized.

[In testimony whereof, I have hereto set my hand and seal, this 9th day of January, 1845.

her
[Betsey X McIntosh. (Seal.)
mark

[Witness:. G. W. Morgan, Wm. S. Holt.][2]

This power was duly acknowledged and certified. The bill further stated that the complainant, by virtue of the authority contained in that power to employ an attorney under him to prosecute the claim, employed the defendant, John H. Eaton, and agreed to give him for his services and agency in the matter one half of the compensation which the defendant, Betsey, had stipulated to give to the complainant, and to that end and effect executed and delivered to the defendant, Eaton, a writing and power. The bill further alleged that by the agency of the complainant and the defendant, Eaton, an award was made by the board of commissioners, on the ——— day of May, 1847, in favor of the defendant, Betsey, for the sum of $7,680, and duly certified by the said commissioners, whereby the complainant and said Eaton became entitled to one half of said sum. That when the certificate of the commissioners was first presented for payment, the second comptroller refused to pay, pretending that the appropriations which had been made by congress for carrying into effect the treaty of New Echota did not embrace Betsey McIntosh's case; and therefore the complainant's attorney, J. H. Eaton, applied to congress, who passed the resolution approved 14th March, 1848, in her favor. That upon presentation of the certificate of the commissioners in favor of the defendant, Betsey, her power of attorney and contract therein contained, and the power given by the complainant to Eaton, the second auditor of the treasury, issued a certificate in favor of the said Eaton for $3,840, being one half the award in favor of the defendant, Betsey; but when that was presented to the second comptroller of the treasury he refused to approve and certify it, and yet continues to refuse, under the pretext that a general order made by the secretary of war in October, 1846, (Exhibit B.), inhibits any money being paid under this power of attorney, and so the complainant is obstructed from receiving as the attorney of the defendant, Betsey, either the whole sum due to her, or his part thereof, and the secretary of the treasury refuses to cause the said certificate to be paid, notwithstanding the appropriation for that purpose remains unexpended. That the power of attorney to the complainants was coupled with an interest, and cannot be revoked by the said Betsey, nor abrogated, nor impaired by the executive officers of the government, nor even by the congress of the United States. That Betsey McIntosh is a white woman, a native citizen of the United States, although residing in the Cherokee country, and therefore not within the order of the secretary of war, which contains the following clause: "Should any Indian or Indians, however, notwithstanding the above determination [to discountenance the practice of obtaining powers of attorney from Indians], persist in giving powers of attorney, no part of the sum which may be recovered thereupon will be paid to the persons holding them, except such an amount as, under the circumstances of the case, may appear to the department to be a fair and just compensation for their trouble and expense. The remainder will, in all cases, be remitted to the agent or sub-agent for payment to the Indian claimant in person."

The bill further stated that the secretary of war had thought fit to make his own valuation of the services of the defendant, Eaton, as the agent and attorney of the defendant, Betsey, and upon his valuation of those services had caused to be paid to the defendant, Eaton, as the attorney of the said Betsey, between one and two thousand dollars, which he received, not in full for his services, but only because the depart-

[2] [From 11 Law Rep. 399.]

ment would pay no more, and therefore he was unwillingly compelled to receive a part only. That application had been made to the defendant, Betsey, to renew or re-execute the power of attorney to the complainant, or to execute a power to the complainant to receive at the treasury of the United States his part of the sum contracted to be allowed to him, and now due to him and to the attorney, J. H. Eaton, which the defendant, Betsey, has declined to do. That the power of attorney, and the agreement and stipulations therein, were given by the defendant, Betsey, and received by the complainant with the intention that they should create, and under the belief that they did create, a specific lien, security, and assignment of one half of the demand of the said Betsey, and of one half of the money which should be allowed her by the United States for her reservation of land; and the complainant positively avers that without such security he would not have adventured his time, money, and services for the said Betsey, who resided with the Cherokee Indians in the far West, had but very little property except her said claim, and that property, so in her possession and visible, was not to be reached by any compulsory process from any court, state or federal, of the United States; that it was well understood by the defendant, Betsey, that the complainant would not undertake to prosecute her claim solely upon her personal responsibility for compensation, but required the lien and security by the specific authority to receive the money; that is, half of the money which should be allowed her for her reservation claim.

The bill prayed that Betsey McIntosh, John H. Eaton, Robert J. Walker, secretary of the treasury, and Albion K. Parris, the second comptroller, may be made parties, and that Betsey McIntosh might be enjoined from receiving out of the treasury of the United States any more than one half of the said certificate so allowed by the commissioner appointed under article 17 of the treaty of New Echota, until the matters of the bill shall be finally heard and decreed; and that the secretary of the treasury and second comptroller be enjoined from paying, or causing or allowing to be paid, unto the said Betsey McIntosh, the sum of $3,840, less by the sum which has been paid to the defendant, John H. Eaton, etc.

[3] [Upon filing the bill, Geo. M. Bibb, for complainant, moved for an injunction as prayed in the bill, and contended:

[1st. That the power of attorney from Betsey McIntosh to McElrath, being coupled with an interest, is an assignment of one-half of her claim, and was a contract which the United States ought to recognize. That as to one-half of the claim, it was money received by the United States for the use of the complainant. It was his money held by them in trust for him.

[2d. That it was a specific lien which followed the fund into the hands of the United States.

[3d. That the secretary of war had no authority to make the rule respecting the payment of money to the attorney of Indians, who have a right to appoint their own attorney. That the power was given before the order of October 1, 1846, and could not be controlled by it.

[4th. That Betsey McIntosh is a white woman, not an Indian, and that she is, therefore, not within the terms of the order.

[5th. That this court has jurisdiction to compel an executive officer of the government to perform any act which it is his duty to perform, if it be merely a ministerial act, not an executive act appertaining to the duties of his office as an executive officer; and that the act of paying this money to the complainant is a purely ministerial act which the official character of the defendant will not exempt him from the duty of performing.

[Ransom H. Gillett, solicitor of the treasury, for the defendants, the officers of the government.

[In the case before the court, the question is simply this: the executive branch of the government has decided that the faithful execution of the law requires that the money appropriated for this claim shall be paid directly to Betsey McIntosh and not to the claimant under the power of attorney; and this court is asked to grant an order prohibiting such payment. The power and jurisdiction of the court over the matter are denied in toto.

[1. This court has no jurisdiction beyond what has been conferred upon it by statute. These statutes are the 13th and 14th sections of the judiciary act (1 Stat. 80–82), the 11th section of judiciary act of Feb. 13, 1801 (2 Stat. 98), so far as that section is not repealed; the 1st, 3d and 5th sections of the act of February 27, 1801 (2 Stat. 103, 105, 106), establishing this court. See 1 Kent, Comm. (6th Ed.) *339, and cases there cited; U. S. v. Coolidge [Case No. 14,857]; U. S. v. Worrall [Id. 16,766].

[2. The writs expressly authorized by the judiciary acts are such, and only such, as are necessary to carry out the jurisdiction conferred upon the court by those statutes agreeable to the principles and usages of law. McIntire v. Wood, 7 Cranch [11 U. S.] 504; Smith v. Jackson [Case No. 13,064]; McClung v. Silliman, 6 Wheat. [19 U. S.] 598; 1 Kent, Comm. 322; Bouv. Law Dict. tit. "Mandamus," and cases there cited.

[3. The writs specified in the judiciary act can only apply to cases in which the court has jurisdiction over the party or the subject matter of the suit, so that the court can punish the party for disobedience, or change

[3] [From 1 Hayw. & H. 348.]

the title to the subject matter of the suit by judicial proceedings. This court has no jurisdiction over Betsey McIntosh in the Indian country, nor over the United States as a corporation, nor the money in the treasury, and therefore has no authority to act upon or control either. McKim v. Odom, 3 Bland, 423, 424; Waller v. Harris, 7 Paige, 167; Iveson v. Harris, 7 Ves. 251; Fellows v. Fellows, 4 Johns. Ch. 25; 3 Daniell, Ch. Prac. 133, 134; Sugd. Vend. 156; Osborn v. Bank, 5 Pet. Cond. R. 764, 768; Story, Confl. Law, 450; Act Feb. 27, 1801, § 5 (2 Stat. 106); Act May 3, 1802, § 1 (2 Stat. 193). See, also, Act Feb. 28, 1839, § 1 (5 Stat. 321), where provision is made concerning absent defendants.

[4. There is no authority in law for a plaintiff to make the United States a party defendant in a suit, or to attach or control their moneys in the treasury, either directly or indirectly. Naming an officer of the treasury in the process, and serving it upon him, will not affect the United States nor their money in the treasury. McKim v. Odom, 3 Bland, 420–424; Op. Atty. Gen. pp. 507–510, 1066, 1103, 1303, 1304, 1425.

[5. The common law of Maryland, even if now in force in this district under the act for organizing the District of Columbia (2 Stat. 104), does not extend the jurisdiction of this court over the executive officers of the government as such; for the laws of Maryland in force at the time of the passage of that act did not authorize their courts to issue writs of injunctions or mandamus against an executive officer of that state, or an officer of the general government. No case of that kind has been cited, and none can be found. By the act of July 15th, 1790, the seat of the national government was transferred to this district on the first Monday in December, 1800. By the 1st section of the act the operation of "the laws of the state within said district shall not be affected by this acceptance until the time fixed for the removal thereof, and until congress shall otherwise provide." The laws of Maryland at the time of the acts of July 16, 1790, and February 27, 1801, contained no provision or authority giving any court in that state jurisdiction over the officers of the executive departments of the federal government. If the courts of that state could not then have exercised such jurisdiction, then no court can now do it, the powers of the courts not having increased. If the supreme or other high court of Maryland had the power claimed, it does not follow that such power is delegated to this court, because it is not provided that this court is clothed with the same power. We may as well say that the first section of District of Columbia act transferred her highest courts here, as to affirm that the jurisdiction was transferred to this court when neither is provided.

[6. Even if the courts have jurisdiction over the officer in any case, such jurisdiction only extends to cases of a ministerial, and not to those of an executive character. The acts which the complainant wishes performed are of an executive character, and therefore this court has no jurisdiction. Kendall v. U. S., 12 Pet. [37 U. S.] 524; McIntyre v. Wood, 7 Cranch [11 U. S.] 504; McClung v. Silliman, 6 Wheat. [19 U. S.] 598; Decatur v. Paulding, 14 Pet. [39 U. S.] 497; 1 Bland, 186–189, 584, in note; Bordley v. Lloyd, 1 Har. & McH. 27; Ellicott v. Levy Court, 1 Har. & J. 359; Runkel v. Winemiller, 4 Har. & McH. 429; Howard v. Levy Court, 1 Har. & J. 558; Williamson v. Carman, 1 Gill & J. 184; McKim v. Odom, 3 Bland, 407; Dig. Md. 1847, tit. "Mandamus," 706, 707; Brashears v. Mason, 6 How. [47 U. S.] 92, 100–102. Ministerial acts are those which are specifically directed by a superior power to be performed by an inferior, in relation to which such subordinate ministerial officer is required to exercise no discretion or judgment. He must literally obey the command and perform the act directed. Executive acts are those which involve discretion or judgment in determining whether the duty exists and whether the law and the usual and appropriate forms have been complied with, and these are acts which are performed by public officers in executing the laws in the ordinary routine of the business of the government. Decatur v. Paulding, 14 Pet. [39 U. S.] 497; Kendall v. U. S., 12 Pet. [37 U. S.] 524. By the act of July 9, 1832 (4 Stat. 564) § 1, and that of June 30, 1834 (4 Stat. 735), the president is authorized to make rules and regulations for carrying into effect all laws relating to the Indian affairs, including accounts. This power he executed through the war department. Williams v. Howard, 1 How. [42 U. S.] 290; Parker v. U. S., 1 Pet. [26 U. S.] 296; U. S. v. Eliason, 16 Pet. [41 U. S.] 291; Wilcox v. Jackson, 13 Pet. [38 U. S.] 490; Holc. U. S. Dig. 220–222. The act of August 7, 1789 (1 Stat. 49), ordains that the secretary of war shall conduct the business of the department in such manner as the president shall from time to time order and instruct. On the 11th of November, 1836, the secretary of war adopted a regulation by which the commissioner of Indian affairs was directed to rigidly examine all claims and accounts, and when in the exercise of a sound discretion he should be of the opinion that the claim was just, that it should receive his sanction and to be passed to the second auditor for settlement; and when contrary to the regulations or instructions, or in his opinion improper or unjust, that he should withhold his sanction and state his objection for the consideration of the accounting officers; but, in all cases of difficulty depending on discretion or authority, that he should take the direction of the secretary of war. Report of Commissioner of Indian Affairs to congress of December 1, 1837.][3]

[3] [From 1 Hayw. & H. 348.]

[4] [Before the money can be obtained from the treasury upon this claim, the following steps must be taken: (1). It must undergo an administrative examination by the commissioner of Indian affairs, under Gen. Jackson's regulations of November 11th, 1836. (2). It must then be examined and settled by the second auditor, under the act of March 4, 1817 (3 Stat. 366), and that of February 24, 1819 (3 Stat. 487, §§ 1, 2). (3). It is then to be re-examined by the second comptroller; and if there is a power of attorney involved in the case, he finally passes upon its validity and effect, and certifies the settlement to the secretary of war, under the act of March 3, 1817 (3 Stat. 367, 368, §§ 9, 15). He decides whether, in his opinion, there is an appropriation out of which the sum due can be paid. The sum allowed is credited on the second auditor's books. (4). The secretary of war on this founds his requisition on the secretary of the treasury. He judges whether it is a proper case to pay, and whether there is an appropriation out of which it may be paid. (5). This requisition is countersigned by the second comptroller, and charged to the appropriation account kept in his office. Act March 3, 1809 (2 Stat. 535). (6). It is then sent to the second auditor, (who acts as his register,) where it is recorded or charged against the person to balance his account. Id. (7). The requisition then goes to the secretary of the treasury, who issues his warrant on it; and the amount is charged on his book of appropriations. He sees that there is an appropriation out of which it can lawfully be paid, and judges whether he can spare the money from the treasury, and whether there are or not other demands upon it, to which good policy and justice require him to give a preference. Act March 3, 1809, § 1 (2 Stat. 535); Act May 7, 1822 (3 Stat. 689); Act Sept. 2, 1789 (1 Stat. 65). (8). It is then taken to the first comptroller, who decides whether there is an appropriation out of which it can be paid, and if so, he charges it to such appropriation, and then countersigns it. Act establishing department of treasury, Sept. 11, 1789 (1 Stat. 66); Act March 3, 1809 (2 Stat. 535). (9) It then goes to the register, who makes the same examination, and if he finds there is such appropriation, he charges that appropriation with it, and countersigns the warrant; and then it is sent to the treasurer. Treasury Act, Sept. 2, 1789, § 6 (1 Stat. 67); Act March 3, 1809, § 1 (2 Stat. 535). (10). If the warrant is in due form, and has the proper signatures showing that all the regulations and forms have been complied with, the treasurer then draws a draft on himself, or an assistant treasurer, and the party receipts it on the face of the warrant. The draft, on being indorsed by the payer, is paid in money. The treasurer never pays to any one but the person named in the warrant. He never judges of power of attorney, but the exercise of his discretion or judgment is confined to the examination of the warrant issued by the secretary of the treasury and the ascertaining whether it conforms to the act of March 3, 1809.][4]

[5][All of the acts of the respective officers through whose hands a claim of this nature has to pass are clearly of an executive nature. None of them can be performed and none declined, without the exercise of the distinguishing characteristic of an executive act; judgment or discretion. Executive officers, appointed by the president, can be controlled in the exercise of their duties only by the president. McClung v. Silliman, 6 Wheat. [19 U. S.] 598; Holc. Dig. p. 571, § 43. The president is beyond the power of any other department except in cases of impeachment. Kendall's Case, 12 Pet. [37 U. S.] 524; Holc. Dig. p. 221. This necessarily results from the power conferred by article 2, § 3, of the constitution, requiring him to take care that the laws be faithfully executed. And if the president can be controlled in the execution of his duties, directly by the judiciary, it is equally clear that he cannot be reached by proceeding against his subordinates. Were the opposite doctrine to prevail, there would no longer be, what was intended by the framers of the constitution, an independent and distinct executive branch of the government; for all acts required of the president in causing the laws to be faithfully executed, are, of necessity, performed through and by his subordinates. The power contended for would enable this court to control the whole machinery of the government. A pension agent could be compelled to pay on a power of attorney to the exclusion of the pensioner in person, even whether such power was made in conformity to the regulations under which the agent was acting or not. The court could direct to whom the money should be paid under our treaty with Mexico. In time of war it might enjoin against supplying the pay, commissary or quartermaster's department, and direct the payment of a debt to the agent of our adversary, to the extent of the entire means in the treasury. This court might even enjoin the salaries of the justices of the supreme court of the United States, or declare that of the president vested in and payable to one of his creditors. It would require officers to perform acts for which it would be the duty of the president to displace them.

[If it is said that there ought to be some control over the executive in the discharge of the various duties committed to that branch of the government, two answers may be given: (1.) The constitution and laws have created no such tribunal. (2.) Judges appointed for life, and not elected by the

[4] [From 11 Law Rep. 399.]

[4] [From 11 Law Rep. 399.]

[5] [From 1 Hayw. & H. 318.]

people, but beyond their reach, are no better qualified for this duty than the executive, who, once in four years submits his acts to the consideration of his constituents.][5]

Before CRANCH, Chief Judge, and MORSELL and DUNLOP, Circuit Judges.

CRANCH, Chief Judge. The first question in natural order is that of jurisdiction. It is, therefore, the first which the court will consider. It is understood, as admitted in argument, that if the act intended to be enjoined be not a merely ministerial act, the court has not jurisdiction to enjoin the officers of the treasury against performing it. This doctrine was first promulgated by the supreme court of the United States in the case of Marbury v. Madison, 1 Cranch [5 U. S.] 165, where Marshall, C. J., says: "If some acts be examinable and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction." And in page 166 he says: "Where the heads of departments are the political or confidential agents of the executive merely to execute the will of the president, or rather to act in cases in which the executive possesses no constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable." And again, in page 170, he says: "The province of the court is solely to decide on the rights of individuals not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are by the constitution and laws submitted to the executive, can never be made in this court." The chief justice then proceeds to show that the act required to be done (the delivery of the commission to Mr. Marbury) was purely a ministerial act, in respect to which the executive had no discretion.

In the case of Kendall v. U. S., 12 Pet. [37 U. S.] 609, Mr. Justice Thompson, in delivering the opinion of the supreme court of the United States, says: "Under the first head of inquiry it has been considered by the counsel on the part of the postmaster-general that this is a proceeding against him to enforce the performance of an official duty, and the proceeding has been treated as an infringement upon the executive department of the government, which has led to a very extensive range of argument upon the independence and duties of that department; but which, according to the view taken by the court of the case, is entirely misapplied. We do not think that the proceedings in this case interfere in any respect whatever with the rights or duties of the executive, or that it involves any conflict of powers between the executive and judicial departments of the government. The mandamus does not seek to direct or control the postmaster-general in the discharge of any official duty, partaking in any respect of an executive character; but to enforce the performance of a mere ministerial act, which neither he nor the president had any authority to deny or control." Again he says: "The executive power is vested in a president; and as far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power. But it by no means follows that every officer in every branch of that department is under the exclusive direction of the president. Such a principle, we apprehend, is not and certainly cannot be claimed by the president. There are certain political duties imposed upon many officers of the executive department, the discharge of which is under the direction of the president. But it would be an alarming doctrine that congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution; and in such cases the duty and the responsibility grow out of, and are subject to, the control of the law, and not to the direction of the president. And this is emphatically the case where the duty enjoined is of a mere ministerial character. Let us proceed, then," he says, "to an examination of the act required by the mandamus to be performed by the postmaster-general; and his obligation to perform, or his right to resist the performance, must depend upon the act of congress of the 2d of July, 1836. This is a special act for the relief of the relators, Stockton and Stokes, and was passed, as appears on its face, to adjust and settle certain claims which they had for extra services, as contractors for carrying the mail. These claims were, of course, upon the United States, through the postmaster-general. The real parties to the dispute were, therefore, the relators and the United States. The United States could not, of course, be sued, or the claims in any way enforced against the United States, without their consent, obtained through an act of congress, by which they consented to submit these claims to the solicitor of the treasury to inquire into the equity of the claims, and to make such allowance therefor as, upon a full examination of all the evidence, should seem right according to the principles of equity; and the act directs the postmaster-general to credit the relators with whatever sum, if any, the solicitor shall decide to be due to them, for or on account of any such services or contract." Again (page 611), the court say: "Under this law the postmaster-general is vested with no discretion or control over the decisions of the solicitor; nor is any appeal or review of that decision provided for by the act. The terms of the submission was a matter entirely in the discretion of congress, and if they thought proper to vest such a power in any one, and especially as the ar-

[5] [From 1 Hayw. & H. 348.]

bitrator was an officer of the government, it did not rest with the postmaster-general to control congress or the solicitor in that affair." Again (page 613), the court say: "The act required by the law to be done by the postmaster-general is simply to credit the relators with the full amount of the award of the solicitor. This is a precise, definite act, purely ministerial, and about which the postmaster-general had no discretion whatever. The law, upon its face, shows the existence of accounts between the relators and the postoffice department. No money was required to be paid, and none could have been drawn out of the treasury without further legislative provision, if this credit should overbalance the debit standing against the relators. But this was a matter with which the postmaster-general had no concern. He was not called upon to furnish the means of paying such balance, if any should be found. He was simply required to give the credit. This was not an official act in any other sense than being a transaction in the department where the books and accounts were kept; and was an official act in the same sense that an entry in the minutes of a court, pursuant to an order of the court, is an official act. There is no room for the exercise of any discretion, official or otherwise; all that is shut out by the direct and positive command of the law, and the act required to be done is, in any just sense, a mere ministerial act."

But the case now before the circuit court of the District of Columbia is very different from that of Stockton & Stokes. This is an application upon a bill in equity filed for an injunction to inhibit the secretary of the treasury and the second comptroller from paying to Betsy McIntosh the sum of $3,840, less by the sum which has been paid to the defendant, John H. Eaton, so that, including the sum so already paid to him, the one half of the said certificate in favor of Betsey McIntosh may be held subject to the final decree of this court. This application is founded upon the supposition that this court may, by its final decree, order the secretary of the treasury to pay to the complainant, McElrath, half the amount of the said certificate, including what has been paid to the defendant, Eaton; for if this court cannot make such a final decree, the injunction, if granted, will be vain and nugatory. This, then, is a question of jurisdiction, and depends upon the question whether the payment of this claim by the secretary of the treasury is an official, executive act, or is purely a ministerial act, as in the case of Stockton & Stokes.

The difference between ministerial acts and executive official acts is clearly stated by the supreme court in the case of Decatur v. Paulding, 14 Pet. [39 U. S.] 514, 515. Mr. Chief Justice Taney, in delivering the opinion of the court, says: "In the case of Kendall v. U. S., 12 Pet. [37 U. S.] 524, it was decided in this court that the circuit court for Washington county, in the District of Columbia, has the power to issue a mandamus to an officer of the federal government commanding him to do a ministerial act. The first question, therefore, to be considered in this case is whether the duty imposed upon the secretary of the navy by the resolution in favor of Mrs. Decatur was a mere ministerial act. The duty required by the resolution was to be performed by him as the head of one of the executive departments of the government in the ordinary discharge of his official duties. In general, such duties, whether imposed by act of congress or by resolution, are not mere ministerial duties. The head of an executive department of the government in the administration of the various and important concerns of his office is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of congress, under which he is from time to time required to act. The court could not entertain an appeal from the decision of one of the secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion or guide and control his judgment or discretion in the matters committed to his care, in the ordinary discharge of his official duties." Again (page 516), he said: "The interference of the courts with the performance of the ordinary duties of the executive departments of the government would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them. The doctrines which this court now hold in relation to the executive departments of the government are the same that were distinctly announced in the case of Kendall v. U. S., 12 Pet. [37 U. S.] 524." Again (page 516), he said: "We have referred to these passages in the opinion of the court in the case of Kendall v. U. S., in order to show more clearly the distinction taken between a mere ministerial act, required to be done by the head of an executive department, and a duty imposed upon him in his official character as the head of an executive department, in which judgment and discretion are to be exercised. There was in that case a difference of opinion in the court in relation to the power of the circuit court to issue a mandamus. But there was no difference of opinion respecting the act to be done. The court was unanimously of opinion that in its character the act was merely ministerial. In the case before us it is clearly otherwise; and the resolution in favor of Mrs. Decatur imposed a duty on the secretary of the navy, which required the exercise of judgment and discretion; and in such a case the circuit court had no right by mandamus to control his judgments, and guide him in the exercise of a discretion which the law had confided to him."

The same doctrines are affirmed by the supreme court in the case of Brashear v. Mason, 6 How. [47 U. S.] 100, where Mr. Justice Nel-

son, in delivering the opinion of the court, says: "We are also of opinion that if the plaintiff has made out a title to his pay as an officer of the United States navy, a mandamus would not lie in the court below to enforce the payment. The constitution provides that no money shall be drawn from the treasury but in consequence of appropriations made by law. Article 1, § 9. And it is declared by act of congress (3 Stat. 689, § 3), that all moneys appropriated for the use of the war and navy departments shall be drawn from the treasury by warrants of the secretary of the treasury, upon requisitions of the secretaries of these departments, countersigned by the second comptroller." And (in page 101) he says: "In the case of Decatur v. Paulding, 14 Pet. [39 U. S.] 497, it was held by this court that a mandamus would not lie from the circuit court of this district to the secretary of the navy to compel him to pay to the plaintiff a sum of money claimed to be due her as a pension under a resolution of congress. There was no question as to the amount due, if the plaintiff was properly entitled to the pension; and it was made to appear in that case, affirmatively, on the application, that the pension fund was ample to satisfy the claim. The fund, also, was under the control of the secretary, and the money payable on his own warrant. Still, the court refused to inquire into the merits of the claim of Mrs. Decatur to the pension, or to determine whether it was rightfully withheld or not by the secretary, on the ground that the court below had no jurisdiction over the case, and therefore the question was not properly before this court on the writ of error. The court say that the duty required of the secretary by the resolution was to be performed by him as the head of one of the executive departments of the government in the ordinary discharge of his official duties; that, in general, such duties, whether imposed by act of congress or by resolution, are not mere ministerial duties; that the head of the executive department of the government, in the adminstration of the various and important concerns of his office, is continually required to exercise judgment and discretion; and that the court could not by mandamus act directly upon the officer, and guide and control his judgment or discretion in matters committed to his care in the ordinary discharge of his official duties. The court distinguish the case from Kendall v. U. S., 12 Pet. [37 U. S.] 524, where there was a mandamus to enforce the performance of a mere ministerial act, not involving on the part of the officer the exercise of any judgment or discretion. The principle of the case of Mrs. Decatur is decisive of the present one. The facts here are much stronger to illustrate the inconvenience and unfitness of the remedy. Besides, the duty of inquiring into and ascertaining the rate of compensation that may be due to the officers, under the laws of congress, no payment can be made unless there has been an appropriation for the purpose; and if made, it may have become already exhausted, or prior requisitions may have been issued sufficient to exhaust it. The secretary is obliged to inquire into the condition of the fund, and the claims already charged upon it, in order to ascertain if there is money enough to pay all the accruing demands; and if not enough, how it shall be apportioned among the persons entitled to it. These are important duties, calling for the exercise of judgment and discretion on the part of the officer, and in which the general creditors of the government (to the payment of whose demands the particular fund is applicable) are interested, as well as the government itself. At most, the secretary is but a trustee of the fund for the benefit of all those who have claims chargeable upon it, and like other trustees is bound to administer it with a view to the rights and interests of all concerned. It will not do to say that the result of the proceeding by the mandamus will show the title of the relator to his pay, the amount, and whether there were any moneys in the treasury applicable to the demand; for upon this ground any creditor of the government would be enabled to enforce his claim against it through the head of the proper department by means of this writ; and the proceeding by mandamus would become as common in the enforcement of demands upon the government as the action of assumpsit is to enforce like demands against individuals."

In the case before this court the secretary of the treasury, in executing the resolution of congress of the 14th March, 1848, was called on by the complainant to pay to him, as assignee of Betsey McIntosh, one half the sum appropriated by that resolution, less the sum already paid to the defendant, J. H. Eaton. The validity and construction of the power of attorney and assignment set up by McElrath, and the applicability and construction of the act of congress of the 29th July, 1846 (chapter 66) entitled "An act in relation to the payment of claims," are necessarily involved in the duty required by the secretary of the treasury to execute the resolution aforesaid of March, 1848. It may be observed, also, that the resolution of the 14th of March, 1848, requires the secretary to pay the money to Betsey McIntosh (herself), not to her executors, administrators, or assigns. That the supposed assignment to McElrath, if it be an assignment, purports to be of only a part of the debt due by the United States, and that the power of attorney to McElrath does not expressly authorize him to receive the money, or any part of it, but purports to be only a power to prosecute the claim to allowance, or judgment; so that, upon these points also, it would be necessary that the secretary, before ordering the payment of the money, should decide whether he could lawfully pay the money to any other person than Betsey McIntosh herself, whether it would not be contrary to the policy of the

law, especially in the case of an Indian claim, to pay a part only of the claim, and he must also decide whether the power of attorney was duly executed. These are all acts of executive discretion, in which the secretary has sought the advice and opinion of the attorney-general of the United States, and can in no just sense be said to be mere ministerial acts. In the exercise of this discretion, this court has no right to guide or control the executive officer, or to entertain any appeal from his decision.

Upon these authorities and by these reasons, this court is satisfied that the payment of the claim of Betsey McIntosh is not a mere ministerial act, but is a duty appertaining to the office of secretary of the treasury, in the discharge of which he has a discretion which this court has not jurisdiction to control; and being of that opinion the court deems it unnecessary, as it would be unavailing, to give any opinion upon the other questions which have been raised in argument.

The court, therefore, refuses to grant the injunction prayed for against the secretary, and second comptroller of the treasury.

Case No. 8,782.

McELROY v. ENGLISH.

[2 Cranch, C. C. 528.] [1]

Circuit Court, District of Columbia. Dec. Term, 1824.

SUNDAY—BILLS AND NOTES—DAYS OF GRACE.

If Sunday be the last day of grace on a promissory note, demand on Saturday is not too soon, and notice on Monday is not too late.

Assumpsit against the endorser of a promissory note. The parties all resided in Georgetown. Sunday was the last day of grace. Payment was demanded on Saturday, and notice given to the defendant on the Monday following.

THE COURT (THRUSTON, Circuit Judge, absent), said the demand was not too soon and the notice not too late.

McELROY (MILLER v.). See Case No. 9,581.

McENTEE (UNITED STATES v.). See Case No. 15,673.

Case No. 8,783.

In re McEWEN et al.

[6 Biss. 294; [2] 12 N. B. R. 11; 7 Chi. Leg. News. 231; 2 Cent. Law J. 233.]

District Court, D. Indiana. Feb. 2, 1875.

BANKRUPTCY — PARTNERSHIP — JOINT AND SEPARATE ESTATE—ASSETS EXHAUSTED IN COSTS —PAYMENT PARI PASSU.

1. When a debt from one partner to a bankrupt firm was incurred by the consent or privity of the other partners, proof of the joint creditors against the separate estate will not be admitted in a court of bankruptcy.

[Cited in Re Lloyd, 22 Fed. 91.]

2. When all the assets of a bankrupt firm are expended in the payment of costs, and there is no fund to be divided among the firm creditors, the firm and individual creditors must be paid pari passu out of the separate estate of each partner.

[Cited in Re May, Case No. 9,328; Re Slocum, Id. 12,951; Re Hamilton, 1 Fed. 812; Re West, 39 Fed. 203.]

[Cited in Harris v. Peabody, 73 Me. 270.]

3. The fund applicable to and used in the payments of costs does not constitute a joint estate within the fair meaning of the bankrupt act [of 1867 (14 Stat. 517)].

The assignees filed a petition in the interest of the firm creditors, for the purpose of obtaining the instruction of the court upon the respective rights of the firm creditors of McEwen & Sons, and the individual creditors of William McEwen, one of the members of such firm alleging: 1st, that the firm assets would not more than pay the costs of settling the estate in bankruptcy; 2nd, that William McEwen was indebted to the firm, as appeared by charges upon the books, to an amount exceeding three hundred thousand dollars; that the firm debts amounted to over $200,000, and William's individual indebtedness to over $150,000, and that his separate estate was worth over $200,000, and that his sons, who were his partners, had no more property than enough to pay their private debts; and that the only estate in the hands of assignees for distribution among creditors is the private estate of William McEwen. The individual creditors appear in opposition to the petition, and file a demurrer thereto.

Harrison, Hines & Miller, for assignee.

McDonald, Butler & Harrington, for individual creditors.

HOPKINS, District Judge. The question raised and discussed on the hearing was, whether upon the facts stated, the firm creditors were entitled to participate with the individual creditors in the distribution of the separate estate of William McEwen? In the first place, the assignees claim the right to prove the debt due from William to the firm, and in that way obtain a fund for distribution among firm creditors.

The petition does not show when the entries were made on the firm books, nor when the debt was created, nor does it show that William withdrew that amount, or any part of it, to defraud the firm creditors, or the members of the firm; nor does it show that the transaction was concealed from the firm, nor that it was not with the consent of all the members of the co-partnership. Neither fraud nor collusion of any kind is alleged.

Upon these facts does that balance constitute a debt in favor of the firm against that partner which the assignee of the firm can prove against him individually? I think, ac-

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

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

cording to the authorities, it does not. The rule may now be considered as well settled, that when the debt from one partner to the firm was incurred by the consent or privity of the other partners, that proof of the joint creditors against the separate estate will not be admitted in a court of bankruptcy. If the party acted fraudulently or with a view to augment his separate estate at the expense of the joint creditors, a different rule would prevail. Story, Partn. § 391; Gow, Partn. 316; Ex parte Smith, 1 Glyn & J. 74; Ex parte Harris, 2 Ves. & B. 210; In re Lane [Case No. 8,044].

The principle upon which these cases rest is, I apprehend, that there can be no such thing as a debt between partners, or between an individual partner and his firm, in respect to partnership matters, until it is settled by a final winding up of the affairs of the firm; and bankruptcy courts have declined to go into such accounting upon the question of proof of debts in bankruptcy proceedings. So I must hold that neither the assignees of the firm, nor the firm creditors have a right upon this ground to prove this claim against the private estate of William McEwen.

There is something like an allegation in the petition that the partnership between William McEwen and his sons was a sham, and made simply for the benefit of William, and to enable him to carry on his private speculations. It is doubtful whether this question can be raised at this stage of the case. They have been treated as partners and adjudged to be bankrupts, as such partners, on the petition of the joint creditors. I doubt the right of the joint creditors to now turn around and allege that they were not such in fact; but if this is not so, I do not think the allegation to that effect sufficiently direct and positive to warrant the court in holding the fact to be admitted by the demurrer. It seems to be stated, inferentially, as the conclusion of petitioners from the other facts in the case, instead of an allegation of an existing fact.

This brings me to the consideration of the meaning of section thirty-six of the bankrupt act, and this is altogether the most difficult question in the case. The petition alleges that the firm have no assets after paying costs of settlement of estate to distribute or divide among the firm creditors, which is admitted by the demurrer and must be considered on this hearing as true.

If they have no assets, it has been settled, for this circuit at least, that the firm and individual creditors can be paid pari passu out of the separate estate. In re Knight [Case No. 7,880]. The counsel for the individual creditors contended that the allegation in the petition that the firm effects would not more than pay the costs was immaterial; that the question was, were there any firm assets? that if there were, it was unimportant whether they were to be applied to the payment of the costs or distributed among the firm creditors; that in either case the firm creditors would be excluded from participation in the separate estate of William McEwen until after the payment of his individual creditors in full; and that it was not essential that there should be a fund, exclusive of costs, to effect such result. If such is the meaning of the act, the firm creditors are without remedy, and may lose their whole demand, while the individual creditors of that member may get their pay in full.

The question is by no means free from difficulty. But after a thorough examination of the authorities upon the subject, I have arrived at a conclusion different from that contended for on the argument by the learned counsel for the individual creditors. In Re Kahley [Case No. 7,594], I held that the word "estate," as used in certain other sections, included the portion to be used in the payment of costs, as well as that to be divided among creditors. But the language of the portions of the act then under consideration differ materially from the language used in the thirty-sixth section. That section requires the assignee to "keep separate accounts of the joint stock or property of co-partnership, and of the separate estate of each member thereof, and then provides, that after deducting out of the whole amount received by such assignee, the whole of the expenses and disbursements, the net proceeds of the joint stock shall be appropriated to the payment of the creditors of the co-partnership, and the net proceeds of the separate estate of each partner shall be appropriated to the payment of his separate creditors." And it further provides that the residue of either estate, after the payment of the debts in the order above mentioned, should be divided among the creditors, firm or private, as the case might be. I think the expression "net proceeds," shows that congress had reference to the estate to be distributed among the creditors, and only meant to exclude one class in case there were some funds for distribution in the class to which such creditors belonged, so that, when all the assets are expended in the payment of costs and there is no fund to be divided, as in this case, among the firm creditors, the firm and individual creditors are to be paid pari passu out of the separate estate of each partner. It then presents the case in the language of Judge Drummond in Re Knight [Case No. 7,880], "that being the only source to resort to the payment of the debt of the firm, it should be appropriated as well to pay the debts due from the firm as from the individual members." What difference is there as to the firm creditors, between no assets and a case where assets are all used in payment of costs? If there is only property enough to pay expenses, they do not get anything; they have no source of payment except from the separate property.

So I think the just and equitable reading of

the statute is that the creditors of a firm are excluded from participation in the separate estate of the members only when there is a fund to be distributed to them, to the exclusion of the individual creditors; that when neither has any advantage in a fund not alike applicable to both, they stand equal, and must be paid pro rata. In Story on Partnership (section 380) it is stated that, "if there is any joint estate, however small it may be, if it is an available joint fund, and not purely a desperate and nominal joint fund, then the joint creditor is excluded; as, for example, if the joint fund is absolutely worthless from the expenses of any attempt to get it in, or if it is pledged beyond its real value, it will be deemed a mere nullity."

I think this language plainly indicates that a joint fund, to exclude the firm creditors, must be beneficial to them. If it costs more than it comes to to get it, it is in no sense an available joint fund within the authorities. [See, also, Colly. Partn. bk. 4, c. 2, § 926.] [2] The lord chancellor in Ex parte Peake, 2 Rose, 54, where the answer to the petition of the firm creditors was that there were joint effects of £1 11s. 6d., said that joint effects to the value of five pounds or five shillings would be an answer to the application, but if the property alleged to exist was in such a situation that any attempt to bring it within the reach of the joint creditors must be deemed a desperate, or in point of expense an unwarrantable attempt, that would authorize a departure from the rule, and allow said creditors to prove notwithstanding such property. And Lord Chancellor Eldon (Ex parte Hill, 2 Bos. & P. [N. R.] 191, note), says, "Joint effects means such as are under the administration of assignees to distribute." In Ex parte Janson, 3 Madd. 229, it is said: "The principle being that while there is any other fund, however small, to resort to, the joint creditors can not prove against the separate estate of one of the parties who has become bankrupt."

These cases were decided under the English bankrupt law, which was similar in the respect under consideration to our own, and, therefore, are important as showing that the English courts recognize the exception to the statute rule in cases where there is no joint fund to resort to, or that is available to the joint creditors, and are very important in settling the proper construction of the section of the bankrupt act under consideration. That section lays down the general rule, as contended for by counsel for individual creditors, but it is to be regarded as subject to the exceptions above stated, and I think the facts alleged in the petition bring this case within the doctrine of these authorities and exceptions.

The counsel for the individual creditors referred to Ex parte Kennedy, 19 Eng. Law & Eq. 150, as laying down a different rule. That case does not appear to be supported by authority. The decision is based upon In re Bridge & Keale, Id., referred to in note. It does not appear that the court in that case decided this question. No opinion is given; simply the order of the court, and it might have been based upon the fact that there was other property besides, to wit: the "brig" therein mentioned, and so not have turned upon the question of costs, as claimed. But without further notice of that case as it is in conflict with the general current of English cases, I cannot adopt its conclusions.

The Case of Marwick [Case No. 9,181], cited to same effect by counsel, does not show that this question was raised, and therefore furnishes no support to this claim. I am also supported in my conclusion by the case of In re Jewett [Id. 7,304]; In re Downing [Id. 4,044]; Bump, Bankr. 188, 189. As before stated, I have assumed the fact that the whole joint estate will be used in payment of the costs of the proceedings in bankruptcy, leaving no joint fund for distribution, nor any funds to be marshaled. I have, as before stated, with considerable hesitation, come to the conclusion that the fund applicable to and used in the payment of the costs of the proceedings does not constitute a joint estate within the fair meaning of the bankrupt act, so as to deprive the firm creditors of participating with the individual creditors in separate estate. To hold that a fund used in payment of necessary costs is to have the same effect upon the joint creditors' rights as if distributed among them, is, in my judgment, a very unjust and unreasonable conclusion, and I cannot adopt it.

I, therefore, overrule the demurrer, with leave to the respondents to put in an answer within twenty days after notice of this decision. If they fail to do so, I direct an order to be entered that the individual creditors of William McEwen, and the firm creditors of McEwen & Sons be paid pari passu out of the separate estate of the bankrupt William McEwen, in the hands of the assignees in this case.

[For an appeal to the circuit court from subsequent proceedings, see 4 Fed. 13.]

McEWEN (BURR v.). See Case No. 2,193.

Case No. 8,784.

McFADDEN v. The ILLINOIS.

[N. Y. Times, Sept. 19, 1857.]

Circuit Court, S. D. New York. Sept. 18, 1857.

COLLISION—WITH DOCK—TOW—NEGLECT TO MIND HELM.

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

The libel in this case was filed by the owner [William McFadden] of the barge Davis Archer, to recover damages occasioned by the

[2] [From 12 N. B. R. 11.]

barge being run into a dock while in tow of the steamboat. The court below declared the steamboat free from fault, and dismissed the libel, from which decree the libelant appealed.

Mr. Cutting, for appellant.
Mr. Van Santvoord, for appellees.

NELSON, Circuit Justice. We are inclined to agree with the court below that the proofs are as strong, if not stronger, that the injury to the tow happened through the neglect of the master of the barge in not attending to his helm in season, as to any improper management of the tug. We think there was nothing in that necessarily leading to the collision if the master of the tow had ported his helm in time. Decree of the court below affirmed.

Case No. 8,785.

In re McFADEN.

[3 N. B. R. 104 (Quarto, 27).] [1]

District Court, W. D. Texas. 1869.

BANKRUPTCY — ASSIGNEE'S BOND — GENERAL — SURETIES—SPECIAL—WIFE AS SURETY.

1. On motion of creditors for an order to have assignee file a new general bond, of which two of the sureties had become bankrupt and the third surety was his wife, conditioned that he would faithfully discharge the duties of the office in every case in which he was or should become assignee, *held*, that a general bond for such purpose is not authorized by the bankruptcy act [of 1867 (14 Stat. 517)], but that an assignee must give special bond in each case where a bond is necessary.

2. By the laws of Texas a wife cannot charge her separate estate by becoming surety on such a bond, and nothing to its worth is added by her execution thereof.

[In the matter of James McFaden, a bankrupt.]

DUVAL, District Judge. The assignee herein, I. K. Williams, and who is also assignee in many other cases in bankruptcy, had not given bond in any special case but had given a bond in ten thousand dollars, conditioned for the faithful discharge of his duties in all cases in which he might be appointed assignee. Upon this bond the assignee's wife and I. W. and W. Flanigan, were sureties. Subsequently the assignee himself (the principal on the bond) and his sureties, the two Flanigans, went into bankruptcy. Under these circumstances exceptions have been taken by the counsel for certain creditors to the bond in question, and discussed before the register, G. W. Whitmore, Esq. These exceptions, so far as it is necessary to notice them, were:

First. That the bond, being a general one, and applicable to no particular case, was not such as the law requires. This exception was overruled by the register.

Second. That the wife of the principal, as one of the sureties on the bond, was not responsible in law thereon. This exception was also overruled by the register.

Third. That the principal and two of his sureties having gone into bankruptcy, another bond was necessary. This exception was sustained by the register, and the assignee was ordered to give bond anew in the sum of ten thousand dollars, to be held applicable to, and cover his responsibility in all cases in which he might be assignee.

The questions arising upon these exceptions, and upon which the register and the creditors differ in opinion, have been certified to me for my decision. In my opinion the law contemplates that an assignee in bankruptcy should give a separate and distinct bond for each case in which he is appointed or elected, provided a bond be needed at all. My impression, however, at the time the assignee gave the bond in question, was different, and that a general bond, such as he had given, would be sufficient to make him responsible in all cases. This impression was so expressed, I believe, to the register, in reply to his verbal inquiry on the subject. But, from a careful investigation of the matter since, I am satisfied this idea was erroneous, and that the law contemplates the assignee should give bond in each case for which he is appointed. The register, I think, is mistaken in deciding that a wife can make herself or her separate property responsible by becoming a surety on such a bond as this. The decisions of the supreme court of this state have determined that the wife cannot charge her separate estate, except for necessaries, and cannot even convey the same by deed, except in the mode provided, for by the statutes. No security, therefore, is added to the bond by her execution of the same. In so far as the decision of the register requires the assignee to give another bond in this case, the same is approved. In other respects it is overruled as being incorrect.[2]

Case No. 8,786.

McFADEN et al. v. The EXCHANGE.

[4 Hall, Law J. 233.]

Circuit Court, D. Pennsylvania. Oct. Term, 1811.[1]

PRACTICE IN ADMIRALTY — SUGGESTION BY DISTRICT ATTORNEY—JURISDICTION—PUBLIC ARMED VESSEL OF FOREIGN SOVEREIGN—EXEMPTION.

[1. The question of jurisdiction, in the case of a public armed vessel in the service of a foreign sovereign, libeled in this country by one claiming title thereto, may be determined upon a suggestion filed by the district attorney, acting under orders from the executive department of the government.]

[1] [Reprinted by permission.]

[2] The bond must be given on the application therefor of any creditor. In re Fernberg [Case No. 4,743]. Yet only the district judge can require its execution. In re Dean [Id. 3,699].

[1] [Reversed in 7 Cranch (11 U. S.) 116.]

[2. A public armed vessel in the service of a foreign sovereign was libeled in this country by one claiming title thereto. *Held*, that neither her service nor character exempted her from the admiralty jurisdiction.]

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

An armed vessel of war, called the Balaou, No. 5, sailing under flag of Napoleon, emperor of France and king of Italy, commanded by the Sieur Bigon, under a commission from and said to belong to that emperor, and to be in his actual service, arrived in the port of Philadelphia, in the month of —— last. Shortly after her arrival, she was arrested, by process from the district court of the United States, upon a libel filed by the plaintiffs, McFaden & Greetham, the substance of which is stated in the opinion of the court. No claim was put in by or on behalf of any person, but the attorney of the United States for this district, by orders from the executive department of the government, filed a suggestion, which also appears in the opinion of the court, the effect of which was to stay further proceedings on the merits, and to submit to the court the question whether it had jurisdiction of the cause, so as to proceed at all into an investigation of the case. The question, therefore, before the court, was not upon the merits, and whether the vessel belonged to the libellants or to the emperor, but whether the court had a right to investigate the matter at all, and to say to whom she belonged. The opinion of the district judge was against the jurisdiction [case unreported], from which opinion the libellants appealed to the circuit court.

Hopkinson & Binney, for libellants, in support of the jurisdiction.

Mr. Dallas, Dist. Atty., against it.

WASHINGTON, Circuit Justice. This is an appeal from the district court, in a case of admiralty and maritime jurisdiction. The libel states that the schooner which constitutes the subject of the suit, called the Exchange, was, on the 27th of October, 1809, the property of the libellants, and was duly registered in their names; that in the same month and year she was fitted out by the libellants, and sailed on a voyage to St. Sebastian, in Spain, and was, in December following, forcibly seized under certain acts of the emperor of France, and, without the sanction of any sentence of condemnation, disposed of in violation of the rights of the libellants and of the law of nations; that the libellants have never transferred their right to the said vessel, and that she is now within the territory and jurisdiction of the United States and the jurisdiction of the court.

To this libel an objection was filed by A. J. Dallas, district attorney of the United States for this district, setting forth that this vessel, which in the suggestion is called the Balaou, No. 5, belonging to the emperor of France and king of Italy, and actually employed in his service, under the command of the Sieur Bigon, upon a voyage from Europe to the Indies, having encountered great stress of weather, had been compelled to enter the port of Philadelphia for repairs, and, having conformed to the law of nations and the United States, was about to depart, when she was arrested by the process of the district court. The suggestion then denies that this vessel had been violently captured from the libellants on the high seas as prize, or otherwise, but asserts that she was seized and the property in her was divested out of the libellants (if they ever had any in her) and vested in his imperial and royal majesty, in a port of his empire, according to the laws of France. Upon the suggestion of these facts, it is then submitted whether the court ought to take cognizance of the cause. The replication, after excepting to the suggestion as not being made by any person claiming the said vessel, supports the allegation of the libel and negatives those set forth in the suggestion. An objection is made to the mode of proceeding in this case. It is contended that no person ought to be admitted to contest the right of the libellants, or to interpose in any manner to prevent a decision upon their rights, but one who claims the property either for himself or on behalf of some other, and that the district attorney has not stated in his suggestion that he claims, or even appears for himself, for the United States, for the French emperor, or any other person.

I understand from the opinion and decree of the judge of the district court that the district attorney, when he filed the suggestion, stated that he did so at the request of the executive department of the general government, to whom an application and representation had been made by the French minister, containing a protest and denial of the allegations of the libel; and further that the suggestion in this case is substantially agreeable to the form usually practiced upon, when the executive department thinks it incumbent on it to give information through the law-officer of the district, to that court, of any matters subject to its judicial cognizance, which come to the knowledge of the executive in the course of its communications with foreign powers or their agents. I do not feel disposed to disturb this practice, being of opinion that the department of our government charged with the care of our foreign relations should be admitted in some way or other to give such information upon subjects which concern the peace of the nation, or which the executive deems essential for the public good to communicate in this way. The proceeding would certainly have been more regular if the reason of filing the suggestion had been stated on the face of it, as the court would certainly not listen to the impertinent and officious suggestions of any person who might think proper to interfere. But the responsible character attached to the public law-officers of the United States

courts forbids the supposition that they act without authority when they declare the contrary to the court. In other countries, communications from the government to the courts of admiralty are generally made in the form and with the effect of mandates, which the judge finds himself compelled to obey. Such is not the present condition of any court in the United States, and I trust never will be. If a legal objection to the jurisdiction of the court appears on the face of the record, it will not be denied but that the district attorney, or any other person as an amicus curiae, may properly point it out. But if the objection arises from facts not so appearing, the district attorney, thus intrusted to file a suggestion, must establish the facts by proof, in the same manner as in ordinary cases between private individuals. Accordingly, that officer in the present case proceeded to support the allegations of the suggestion by exhibiting the commission of the officer commanding this vessel, granted by the emperor of France, authenticated by the depositions of the commander himself, and of the French vice consul.

The evidence has been objected to by the appellant's counsel. It is said that the officer found in possession of the vessel ought not to be admitted by his own evidence to justify and maintain that possession, and that the testimony of neither of the witnesses ought to be regarded, because the libellants were denied the privilege of cross-examining them. The objection to the competency of the Sieur Bigon is certainly not a good one, since he claims no interest whatever in the vessel, and no circumstance has appeared to bring his credit into question. There can be no doubt of the right of the libellants to cross-examine these witnesses, and I must presume (even if the presumption were not supported by the declaration of the district judge) that the privilege of cross-examining was not denied by the court; because if it had been, an exception would certainly have been taken to the opinion. But if an error of this sort had been committed by that court, it might have been required at the trial in this court; yet no attempt was made to examine these or any other witnesses.

The facts which I consider as proved by the evidence in the cause are that this vessel, called in the libel the Exchange, is a public armed vessel, claimed by the emperor of France, in the possession of an officer duly commissioned by the emperor, sailing under the flag of that nation, and now lying in the port of Philadelphia, and the question of law is whether the district court of the United States for this district can take cognizance of a libel filed in that court against this vessel, on the part of the original owner, who has never by any act of his parted with his right to her. The case is highly important, and has been argued with great ability on both sides.

The general rule of the law of nations laid down by the counsel for the appellant is that whatever goods and effects lie within the extent of a country, or are found there, whether movable or immovable, are subject to the authority and jurisdiction of the courts of that country. The rule, as a general one, is admitted. It is certainly supported by the most respectable authority, and is contradicted by none. But it is contended on the other side that a public armed vessel, belonging to a foreign prince, which has committed no offence within the jurisdiction of the country where she is found, forms an exception to the rule. This exception is not to be discovered in the writings of any jurists, foreign or domestic, nor does it appear to be founded in the practice of nations, so far as is recollected by the court, or has appeared from the researches of the bar. Bynkershoek (who has been roughly handled by the counsel on one side, and highly eulogized on the other, but whom all must admit to be a respectable writer on the laws of nations), in stating the general rule, and for the purpose of negativing an exception to or on account of any supposed privilege which sovereigns might claim, lays it down in the clearest terms that the goods and effects of a sovereign, whilst they are within a foreign territory, are subject to the laws of that country and to the jurisdiction of its courts. He considers the privilege of the sovereign to be exempted from the jurisdiction of a foreign tribunal, to be merely personal, and not extending to his goods found there. He proceeds to support this doctrine by the practice of the courts of Holland, at that time amongst the most respectable nations of Europe. It is true that in many of the cases which he cites the government arrested the proceedings; but this only proves that such interference was deemed necessary for reasons of state, to prevent the exercise of jurisdiction by the judicial tribunals, which otherwise would have proceeded in its regular and acknowledged channel. It is said that this author, in his efforts to regulate an exception in favor of a foreign prince, is not supported by any other elementary writer, or by a usage founded on the practice of nations. The answer given to this observation is, I think, a fair one. The doctrine is consistent with the general rule and has for near a century been pronounced by this author as forming a part of the law and practice of nations, and is denied by no writer of respectability, nor by any evidence of a contrary usage. But it is not true that this position has not received the sanction of more modern writers on the law of nations. Rutherford is express. He says "that the right of territory extends the authority of such laws to all questions which relate to the use or private ownership of such movable goods as are within the territory of the nation, and of such immovable goods as are confessedly a part of its territory; whether its own members only are concerned in these ques-

tions or the collective bodies, or the individual members of other nations." In other parts of this chapter he explains the terms "collective body of the nation" to mean the nation itself, or the sovereign power. But it is still contended that though exemption of the sovereign from the foreign jurisdiction in relation to his private effects may be denied by these authorities, still the public armed vessels of the same sovereign stand upon different ground, and that their exemption is not controverted by those writers. It is true that except in some of the cases stated by Bynkershoek, where public armed vessels were arrested, this distinction between the public armed vessels and the private property of the sovereign is not noticed. The general expressions of these jurists embrace both public and private vessels, and if the former are entitled to exception, those who contend for the exception are bound to prove it supported either by authority or by strong and unquestionable reason. How then does this question stand on the ground of reason? What is there in the character of a public armed vessel to withdraw her from the jurisdiction of a foreign court? It is admitted, and such indubitably is the law, that if such a vessel should, within the foreign jurisdiction, do any act which would expose a private vessel to forfeiture, she would not be protected on account of her public character. Why should she not be protected? The answer given by the counsel who endeavors to maintain the exception, and yet who is compelled to admit this qualification of it, is because the offence is committed within the foreign jurisdiction. Then it follows that the reason for the exemption is not founded on the character of the vessel, but on the place where the offence was committed, because the same reason equally applies to a private vessel of the sovereign or of an individual; and if a private vessel would be forfeited, because the offence which produces the forfeiture was committed within the jurisdiction, and would not be forfeited if it were committed elsewhere, and a public armed vessel would equally be forfeited or not, for the same reason, I should like to know what becomes of the distinction which is attempted between the one vessel and the other? It is true that offences are in their nature local, unless rendered otherwise by express statute; but if that statute makes no distinction between public armed and private vessels, the locality of the offence would no more protect the one than the other from the jurisdiction of the foreign courts, both being found within the territory of that nation. How is it with respect to contracts? It is admitted that the property of a sovereign, found within a foreign territory, is as much subject to the jurisdiction of the courts of that country, in a matter of contract, as if it had belonged to a private individual. The goods of a sovereign, found within a foreign territory, may be made liable for liens to which the laws of that country subject them; and I presume it will scarcely be denied that for repairs done in this state to a public armed vessel of a foreign prince she may be proceeded against in the admiralty by the ship-carpenters and material men in the same manner as if she were a merchant vessel. The reason of this cannot be because the repairs were made within this state, because contracts are in their nature transitory. If, then, public armed vessels, no less than the private property, movable or immovable, of a foreign prince, being within the territories of a foreign country, are subject to the jurisdiction of its courts, not only to answer for offences, but in matter of contract, it would seem to follow that the distinction which has been attempted between the public armed vessels and the private armed vessels of a foreign prince is entirely fanciful. It was said, that to lay the arm of the law upon a public armed vessel of a foreign prince is an act of hostility. If so, then the admitted cases where such a vessel may be arrested and subjected to a judicial sentence cannot be well founded in law; for it never can be allowed to courts of justice to commit acts of hostility against foreign nations. This power, in all countries, belongs to some other department of the government, and although the acts of a court may sometimes be the remote cause of a war, just or unjust, on the part of a foreign nation, yet a power to commit a direct act of hostility can never be properly lodged with that department. If, then, the exemption of a foreign prince from the jurisdiction of the courts of a country within whose territories his property is found, is not to be maintained on the ground of his personal privileges, the character of his property, or the locality of the transaction which becomes the subject of judicial inquiry, I am at a loss for a solid ground for excluding the present case from the jurisdiction of the district court.

I am fully sensible of the delicate nature of the question which is here decided, and I feel cheered by reflecting that the error of my judgment, if I have committed one, can and will be corrected by a superior tribunal; for surely a question of such national importance as this is, ought not, and I hope will not, rest upon the decision of this court. I can at the same time truly declare that if I could be so wicked as to decide this case different from the opinion which I must sincerely entertain respecting it, my humble genius and talents would not enable me to give one single reason which my conscience or judgment could approve. It is therefore adjudged, ordered and decreed that the decision of the district court be reversed, and that the decree be remitted to the district court for further proceedings.

[NOTE. The decision of the circuit court was reversed in the supreme court upon appeal, Mr. Chief Justice Marshall delivering the opinion of the court. 7 Cranch (11 U. S.) 116.]

Case No. 8,787.

In re MACFARLAN.

[Betts, Scr. Bk. 95.]

District Court, S. D. New York. 1842.

BANKRUPTCY—DISCHARGE—PRIOR FRAUD.

[Fraud consummated under an assignment for benefit of creditors before, and not in contemplation of, the passage of the act, does not bar a discharge.]

[In the matter of William Macfarlan, a bankrupt. Heard on bankrupt's application for a discharge and exceptions thereto.]

BETTS, District Judge. The two material objections to the bankrupt's discharge are that he has concealed property, and has admitted false and fictitious debts against his estate. The bankrupt presents his application in a novel, not to say an awkward, manner, by giving an exhibit of his individual affairs as they were in 1837, and with but a faint and scanty statement of their actual condition at the present time. That is left very much to implication. It is this method of scheduling his assets and liabilities that involves him in the present contest. He appears to have incurred debts in three different situations: First, as a wine merchant, up to February 25th, 1837, when he assigned his property to Hugh Macfarlan, accompanied by a schedule of his debts, in payment of which his assets were to be applied; secondly, as a member of the firm of Macfarlan & Kennedy, of Baltimore, in 1839 and beginning of 1840; and, thirdly, in his individual capacity, when out of employment, from 1840 to the present time. He refers to and sets forth his debts as they existed at the time of his first assignment, in 1837, and his partnership debts as he left them in Baltimore in 1839, alleging that in both instances property or means were assigned to be applied towards the satisfaction of such debts. This representation of his affairs cannot be construed an averment that those debts are now subsisting and outstanding in the same situation as when he made the assignment, and accordingly the proofs that some of these debts have been since fully paid with his knowledge does not contradict his petition. The creditors should have exacted a more specific statement of his condition at the time his petition was filed, and if he had averred all those debts to be then outstanding the testimony would have met and falsified the assertion. Upon the actual form of the petition the issue taken by the creditors and the proofs supporting it would appear immaterial and irrelevant. The bankrupt's petition seems to have been understood as reiterating the representation of his affairs in 1837 as their true state and condition in 1842, but such is not the language of the petition and schedule, and the party would seem accordingly to have been led off to form a false issue. Supposing a debt wholly fictitious in its origin had been paid in full in 1837 by the assignee under the collusive and fraudulent procurement of the bankrupt, such admission of a false debt would not affect his proceedings under the act. It has relation to matters concocted or completed before the statute came into existence. To bar a discharge under the act, the debt must be set up as one not available against any estate the bankrupt may possess. Similar observations apply to the concealment of property. The concealment, if any, is in the transactions of 1837 or 1838, when it is supposed certain property nominally assigned for the benefit of creditors was applied to the use of the bankrupt, or is now held by the assignee to be hereafter transferred to the bankrupt. There is no proof to support this latter suggestion. Clearly, a fraudulent diversion of property anterior to the passage of the act [of August 19, 1841; 5 Stat. 440, c. 9], and without reference to the probability of such a law, cannot affect a bankrupt if he no longer possesses it, and his proceedings have been fair under the statute. The creditors may have been delayed or defrauded by the manner in which the trust was executed by the assignee in 1837, or he may yet have property which ought to go to their benefit; yet these facts supply no ground of opposition to the application of the bankrupt. In order to bar his discharge, it must appear that there is now existing some property or interest belonging to him which he has withheld from his inventory, or that he has now brought forward and sanctioned as a debt, yet in life some fictitious or false claim. I think the testimony falls short of establishing these facts, but that there were circumstances sufficiently doubtful and suspicious to justify the creditors taking this opposition, and that they ought therefore to be exempted from costs. The objections are accordingly overruled without costs.

Case No. 8,788.

In re McFARLAND et al.

[10 N. B. R. (1874) 381.] [1]

District Court, W. D. Texas.

BANKRUPTCY — PARTNERSHIP — DISSOLUTION — RIGHTS OF CREDITORS—SUBSEQUENT ACTS—PETITION.

1. A partnership dissolved by mutual consent can have no effect upon the rights of creditors then existing, nor upon those who subsequently became creditors, if the members of the firm continued to treat each other in point of fact as partners after the alleged dissolution and to act as such in their business transactions with others.

2. A petition in bankruptcy can still be filed against the members of the firm, as though there had never been any dissolution.

[Cited in Re Gorham, Case No. 5,624.]

The facts are sufficiently stated in the opinion. The petitioners introduced no testimony to prove Mrs. McFarland a partner.

[1] [Reprinted by permission.]

Robertson & Herndon, for petitioners.
Jones & Henry, for respondents.

DUVAL, District Judge. On the 26th day of February, 1874, Richardson & Co. filed their petition praying that H. C. McFarland & Co., a firm alleged to be composed of H. C. McFarland, F. W. Petty, and Lavissa McFarland, might be adjudged bankrupts. The acts of bankruptcy alleged against the debtors are: First. That they, being merchants, had within six calendar months next preceding the filing of the petition, suspended and had not resumed payment of their commercial paper within a period of fourteen days—which commercial paper is particularly described in the petition. Second. That as such merchants, they removed certain of their property from their store-house to avoid its being taken on legal process; and Third. That H. C. McFarland sold and disposed of goods, etc., appropriating the money therefor to his own use without accounting therefor on the books of the firm. Writs of seizure and injunction were issued in accordance with the prayer of the petitioners. On the 14th day of March, 1874, Lavissa McFarland, wife of H. C. McFarland, answered under oath denying that she was then or ever had been a member of the firm of H. C. McFarland & Co. At the same time a like denial of Mrs. McFarland's being a member of the firm was filed by her husband, H. C. McFarland, who alleged further that Felix W. Petty was not then, and had not been since the ——— day of July, 1872, a member of the firm of H. C. McFarland & Co.; but that on that day they had dissolved their partnership and published notice of the same in the Tyler Reporter, and that thereafter Petty's connection with H. C. McFarland was only that of a clerk with stipulated wages, and that since said dissolution the name and style of the house had been H. C. McFarland & Co., though owned solely by H. C. McFarland. The answer to the merits of the petition was also filed by H. C. McFarland and wife, and also a demurrer to its sufficiency.

It appears from the written evidence before me that on the 19th day of April, 1871, Petty sold his interest in the stock of drugs, etc., to McFarland, and by mutual consent the partnership was dissolved. In consideration of such sale, and the sum of two thousand seven hundred and fifty dollars to be paid by McFarland to Petty on or before January 1st, 1872, McFarland was to assume and pay off all the debts due by the firm, and to retain Petty as clerk at thirty dollars per month, so long as by mutual consent he might act as such. In regard to this transaction, the testimony of Petty and McFarland is directly at variance. The former swears that it was a feigned and sham transaction made and entered into to enable him, Petty, to protect himself from a certain security debt, incurred without any valuable consideration to himself, and that in point of fact the partnership still existed, and was never really dissolved. McFarland, on the other hand, swears that it was a real and genuine transaction, and that there was an actual dissolution of the partnership between him and Petty. Admitting that the testimony of one of these gentlemen weighs equally in the balance with that of the other, and that the written agreement referred to, and the note for two thousand seven hundred and fifty dollars, given in pursuance of same, constitutes a transaction binding as between the parties themselves, it can have no effect upon the rights of creditors then existing. Nor can it have any effect upon the rights of those who subsequently became creditors of the firm of H. C. McFarland & Co., provided McFarland & Petty continued to treat each other, in point of fact, as partners, and to act as such in their business transactions with others. That they did so, the evidence is to my mind perfectly conclusive; upon this point, the testimony furnished by the books of the firm, of date subsequent to the 19th of April, 1871, the testimony of Mr. Williams and other witnesses, it seems to me, can leave no doubt whatever. So far as Mrs. Lavissa McFarland is concerned, there is no proof showing that she was ever a partner in the firm; and as she denies it under oath, the proceeding is dismissed as to her. The commission of one, at least, of the acts of bankruptcy charged being clearly proven, I deem it my duty to adjudicate McFarland and Petty, as partners, bankrupts; and it is so ordered and adjudged accordingly.

McFARLAND (AUGUSTINE v.). See Case No. 648.

Case No. 8,789.

McFARLAND v. GOODMAN et al.

[6 Biss. 111;[1] 11 N. B. R. 134; 13 Am. Law Reg. (U. S.) 697.]

Circuit Court, E. D. Wisconsin. June, 1874.

BANKRUPTCY—HOMESTEAD—DECREE—PRIVITY—ESTOPPEL—DOWER.

1. Where a conveyance of the homestead, executed by a bankrupt and his wife, has been set aside at the suit of the assignee in bankruptcy, the homestead rights remain, and the assignee holds subject to them.

[Cited in Re Detert, Case No. 3,829; Re McKenna, 9 Fed. 36.]

2. A decree declaring such conveyance fraudulent and void, and requiring the defendant to convey to the assignee, does not establish title in the assignee under such defendant, nor any privity between them.

[Cited in Blair v. Smith, 114 Ind. 126, 15 N. E. 822.]

3. The conveyance by the bankrupt and wife works no estoppel in favor of the purchaser from the assignee, and he has no title to support ejectment.

[Cited in Fellows v. Lewis, 65 Ala. 343.]

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

4. Dower and homestead rights are governed by the same rules and principles.

[This was an action at law by Henry J. McFarland against Charles Goodman and others.]

James G. Jenkins, for plaintiff.
Levi Hubbell and Wm. P. Lynde, for defendants.

HOPKINS, District Judge. This is an action of ejectment for the recovery of forty acres of land, which is in the possession of and claimed by Gaius Munger and Celia his wife, as a homestead. The validity of that claim is the principal question, and the result of the case depends upon its determination. Under the issue joined herein, it is necessary for the plaintiff to establish his title and right to possession.

Ejectment is a possessory action to the extent that the right of possession to the premises, on the part of the plaintiff, at the commencement of the suit, is essential to a recovery. Title without right of possession is not enough. It is a maxim of universal application in ejectment, that the plaintiff must succeed upon the strength of his own title, and not upon the weakness of his adversary's. So a plaintiff fails unless he shows title in himself, irrespective of the question of the validity of the defendant's title.

The solution of the principal question depends almost wholly upon the effect of the deed of Gaius Munger and wife to Isadore G. Munger, their daughter, bearing date on the 2d day of December, 1869, which was subsequently set aside and vacated, in a suit in equity prosecuted by the assignee of Gaius Munger in bankruptcy, against Isadore, the grantee, on the ground that it was fraudulent as to creditors.

The plaintiff derives title to the land under a deed from the assignee; so, if the bankrupt's homestead right was not cut off by the deed, or if the right to assert it revived and reverted to him and his wife, on setting aside their deed, then his claim of title thereto must fail.

From the evidence, it appeared that the land in question had been occupied by Gaius Munger and his wife as a homestead for over thirty years; that, connected with it, were about four hundred acres more, which had been used as a farm up to the 2d of December, 1869, when they conveyed the whole to their daughter Isadore G., as above stated; that the only money consideration was $100, but it was agreed between them that Gaius and his wife were to continue to occupy the premises as a homestead during their natural lives, and were to be supported by Isadore during their joint lives; that, soon after executing the deed, proceedings in bankruptcy were instituted against Gaius Munger, which resulted in his being declared a bankrupt, and the appointment of an assignee of his estate; that the assignee, soon after his appointment, filed a bill in the district court of this district against Isadore G. Munger, to set the deed aside as fraudulent and void as against the bankrupt's creditors, which resulted in a decree, bearing date on the 5th of February, 1872, declaring said deed to be fraudulent and void as to the creditors of said bankrupt and the complainant, his assignee, and setting aside and wholly vacating it, and declaring that the defendant Isadore, as against the complainant therein, acquired no right or title to, or interest in, the premises, or any part thereof, by virtue of such deed, and declaring that the premises were the property of the complainant as assignee in bankruptcy, and also decreeing that Isadore convey them to the assignee upon demand; but no conveyance had been made by her before the trial of this suit.

There was no question made in that suit upon the homestead question or right of Gaius Munger and his wife, nor was any decision made upon that point therein. After the entry of said decree, an application was made before the district court, sitting in bankruptcy, by Gaius Munger, to have the homestead set off; but it does not appear that any definite decision was ever made upon that application, except that the assignee, in obedience to the instruction of the court, sold the real estate, subject to any legal claim of the said Gaius Munger to a homestead therein; which sale the court confirmed.

The defendant, Gaius Munger, gave notice of his claim to this property, at such sale, as his homestead; and, after the confirmation, the plaintiff, with full knowledge of such claim of Gaius, took the assignee's deed of all the premises conveyed to Isadore, which covered the premises involved in this suit.

The assignee's deed did not contain the reservation or exception as to Gaius Munger's homestead rights, but the counsel for the plaintiff consented on the trial to treat it as containing such exception or reservation. The plaintiff obtained possession of all except the part in controversy here. Gaius and Celia his wife claimed their homestead exemptions under the state laws, and refused to surrender possession of that part.

By the state statute there is exempted to a debtor forty acres of agricultural land, or a quarter-of-an-acre lot in a city or village, owned and occupied by such debtor as a homestead. The owner of such homestead cannot alien it unless his wife join in the deed. The deed of the husband alone is void. Hait v. Houle, 19 Wis. 472 [2 Allen, 203.][2] The separation of the land by a highway running through it, does not defeat the homestead claim, provided it is all in one body. Bunker v. Locke, 15 Wis. 635.

[2] [From 11 N. B. R. 134.]

His right to it as a homestead, up to the time of the deed, is not questioned. The possession, after the deed, continued as before. The agreement that he should so enjoy it, was faithfully kept. That deed being set aside and vacated as to the assignee, the question arises as to the extent of the assignee's interest. Had the assignee any greater interest in the land than he would have had if the deed had not been given?

Section 14 of the bankrupt act [of 1867 (14 Stat. 522)], invests an assignee with the title "to all property conveyed by the bankrupt in fraud of his creditors." Property so conveyed is considered as still belonging to the bankrupt, and passes the same as if the title had not been changed. The assignee takes such property under and by virtue of the bankrupt act, not under or through the grantee; and if he takes title under the bankrupt act, why cannot the bankrupt assert the exemptions and rights secured to him by the act? The 14th section, after providing for an assignment of the property of the bankrupt, declares that there shall be excepted from the operation of the act, such property as is exempt from execution sale "by the laws of the state in which the bankrupt has his domicil," and "that such exceptions shall operate as a limitation upon the conveyance of the property to his assignee." It operates like a general execution, in favor of all creditors, and takes all property subject to levy, and only such as may be made available upon judicial process to the payment of debts of the bankrupt. In re Deckert [Case No. 3,728].

These provisions and restrictions, it seems to me, apply to all property that passes to the assignee under the act, including such as has been transferred to defraud creditors, as well as that where the title is ostensibly in the bankrupt. If so, he takes no greater interest in the one case than in the other. The limitation applies to all he acquires under the bankrupt act, and he cannot be heard to deny the bankrupt's title to property which he receives and claims through and under the operation of the bankrupt law. He cannot deny and affirm the bankrupt's title at the same time. The real estate covered by the annulled deed having been treated as the bankrupt's property, I think it must be considered, as to the plaintiff in this case, as such, and subject to all the rights of the bankrupt and his wife reserved to them by the bankrupt law. This construction gives effect to all the provisions and limitations of section 14, and secures to all parties their rights.

But, in view of the facts of this case, this construction is eminently just, for it was agreed that the grantors, who were old and feeble, should, notwithstanding the deed, occupy this property as their home and be supported there by the grantee during their lives.

The deed, under such circumstances, did not extinguish their homestead rights. Murphy v. Crouch, 24 Wis. 365. That agreement they could enforce, as against their grantee, and a court of equity would set aside the deed in case of her refusal to perform it. So that the equitable right of the bankrupt to this property as a homestead had not been unconditionally surrendered, or placed where he could not enforce it against his grantee, if the deed had not been annulled in the interest of the creditors. But I do not wish to be understood as resting my decision on this ground alone. I think the bankrupt's homestead rights sustainable upon broader and more comprehensive grounds. The deed being set aside, and the creditors restored to their rights as they existed before the deed, upon what principle should the bankrupt be denied his rights, as they were before the deed? In the case of a homestead, there is a peculiar reason for the adoption of this rule. The homestead is exempted for the benefit of the family of the debtor; he cannot deprive them of it without the signature of his wife. To transfer it, requires their joint deed. Her right in it is not simply inchoate, like dower, but present, possessory and indefeasible by her husband. Neither can convey it except by joining with the other in the deed. A defective deed, or deed inoperative and void, as to either, is in my opinion ineffectual and void as to both, and does not convey any title.

It is said that she voluntarily executed this deed with her husband; that she probably knew of his unlawful purpose. Suppose that to be the case, I do not think it alters her rights. The position of a wife is such, and the influence of the husband over her, that she is not held answerable for his frauds.

Homestead laws are now favorably construed by courts, as in the interest of the debtor's family. In support of this proposition, I need only refer to the enlightened decisions of our own state supreme court.

That court has decided that a deed of the homestead cannot be set aside as fraudulent as to creditors; for the reason that, as the creditors had no right to have it applied in payment of their debts while in the possession of the debtor, they could not be defrauded by its conveyance, and could not follow or reach it in the hands of the alleged fraudulent purchaser. Dreutzer v. Bell, 11 Wis. 114; Pike v. Miles, 23 Wis. 164.

If the assignee claimed under this deed, or could claim under it, a different result would follow. But he does not: he acquired the bankrupt's title by operation of law, in hostility to the deed. He has no privity of estate or connection of any kind with the grantee. He cannot maintain it to be both good and bad. The law allows no such paradox. Nor can he enforce the grantee's rights, if she have any, as was contended by the plaintiff's counsel on the trial. I am aware that the decisions of the courts are not entirely in accord on this question; but the conclusion I have reached is not without the

support of many well-considered opinions of other courts, federal as well as state. A different rule might apply to personal property, for the wife in this state has no interest in that, or right to prevent its disposition by the husband, so that the same reason for her protection in the use of that, does not exist; but I do not determine upon that question. This action relates to the homestead exemption, and my decision is not intended to go beyond that question.

Judge Dillon, in Cox v. Wilder [Case No. 3,308], examined this question and the kindred one of dower, and decided that a deed executed by husband and wife to defraud creditors did not bar the wife's dower, nor defeat her right to the homestead under the laws of Missouri. The same doctrine substantially is laid down in Woodworth v. Paige, 5 Ohio St. 70; [Robinson v. Bates, 3 Metc. (Mass.) 40; Vogler v. Montgomery, 54 Mo. 577]; [2] and by Judge Withers, in Re Pratt [Case No. 11,370].

This brings me to the consideration of the effect of the decree in the suit of the assignee against Isadore Munger. If Gaius Munger and his wife had been parties to that suit, and such a decree had been entered, they would have been concluded; but not being parties, they are not affected by it. But if they had been joined in that suit, they could have set up their homestead claim; and, if they had, according to decision in Dreutzer v. Bell, et al., supra, the deed as to the homestead portion would not have been declared void; the title to the homestead portion would have been confirmed in their grantee, and, as between her and the bankrupt and his wife, it was to continue to be their homestead during their natural lives. They, in that case, would have had the full benefit of their right under the statute. But the assignee omitted to make them parties, and took a decree annulling the deed as to the whole land embraced in the deed, without reservation.

The decree doubtless estops Isadore and all persons claiming under her, from ever setting up any title to any portion of the premises, under that deed, as against the complainant and those claiming under him. It, as before said, not only declared the deed void and that she acquired no title under it, but it required her to convey to the assignee all her right and title. This clause, except for some others which most emphatically declare that she acquired no title, might be considered as conceding some title in her; but I think such is not the fair construction. It was inserted for greater caution, and only to quiet the title against the deed; not meaning that she was to transfer an independent substantial title. Thus interpreted, it is consistent and not contradictory, and does not establish any title in the assignee under her, nor any privity between her and the assignee. In the case of Winship v. Lamberton [unreported], referred to by Judge Thurman, in Woodworth v. Paige, supra, the decree set aside the deed as fraudulent as to creditors, and required the fraudulent grantee to convey to assignee or receiver, like the one under consideration. The wife joined with her husband in executing the fraudulent deed in that case as in this, but the court held that neither the deed nor decree barred her dower; that the clause in the decree requiring a conveyance was not meant to pass an independent title, but simply to quiet the title against the deed; and the widow was allowed her dower, notwithstanding she had signed the deed, the court holding that the annulled deed could not be interposed to defeat her dower. If such a deed and decree annulling it, do not defeat a widow's right of dower, upon what ground can it be maintained that they estop the widow from asserting her claim to the homestead? There is nothing in the nature of the rights to cause any difference, and I think if she is not estopped as to her dower-right, she is not as to her homestead.

But there is another difficulty in the plaintiff's way, upon the theory contended for. He is neither a party nor privy to this deed; and the rule is well settled that a stranger cannot set up an estoppel, because there is no reciprocity. Estoppel only binds parties and privies; so that, unless he derives title under the deed, he cannot assert the rights of the grantee under it. Pixley v. Bennett, 11 Mass. 298 [1 Washb. Real Prop. 234; Sears v. Hanks, 14 Ohio St. 298.] [2] Again, in Morton v. Noble, 57 Ill. 176, it is said, "We fully recognize the doctrine, that when the deed from the husband and wife becomes inoperative as to the husband's estate, because made in fraud of the rights of the creditors, * * * or by reason of any wrongful act on the part of the husband, the wife is not barred by the deed." [Citing in support of that doctrine 11 Ill. 384; 13 Ill. 483; 16 Ill. 122, and 23 Ill. 634.] [2]

If this is the true doctrine as to the dower right, and there is no distinction between dower and homestead rights, these authorities effectually dispose of the case. They clearly support the claim of the defendants, Gaius Munger and Celia Munger to the property as a homestead, and decide, that as against the assignee, who took in hostility to their deed, they are not estopped by it; but as against him they can maintain their exemptions, and also that the decree against Isadore does not affect them, and that the assignee does not derive any new title as against them therefrom.

Such being the rights of the parties as against the assignee in bankruptcy, the plaintiff who purchased of the assignee, and with full knowledge of the condition of the estate and claims of Gaius Munger, occupies no better position than the assignee. By the deed he succeeded to the rights of the assignee only;

[2] [From 11 N. B. R. 134.]

[2] [From 11 N. B. R. 134.]

and, as I have determined that the defendants are entitled to their homestead exemption as against the assignee, the title of the plaintiff to this property, it being their homestead, has failed, and the plaintiff has failed therefore to show title to the property in controversy.

I therefore find that the plaintiff is not the owner of the premises described in the complaint, nor is he entitled to the possession thereof; and direct judgment in favor of the defendants with costs.

NOTE. The waiver of the homestead right in favor of a particular creditor does not inure to the benefit of the assignee or other creditors. In re Poleman [Case No. 11,247]. The homestead exemption does not protect a debtor in property fraudulently acquired, and its privileges may be forfeited by fraud. Pratt v. Burr [Id. 11,372].

McFARLAND (RICHARDSON v.). See Case No. 8,788.

McFARLAND (UNITED STATES v.). See Case No. 15,674.

Case No. 8,790.

M'FARLANE v. GRIFFITH.

[4 Wash. C. C. 585.] [1]

Circuit Court, Pennsylvania.[2] April Term, 1826.

COURTS—PRACTICE IN FEDERAL COURTS—FOLLOWING STATE—AT LAW—IN EQUITY.

The doctrine warranted by the supreme court of Pennsylvania, that "the assignee of a bond or mortgage for a valuable consideration, and without notice, stands in no better situation than the assignor, and is exposed to every legal and equitable defence that could be asserted against him," is to be regarded as a rule of decision by this court, under the thirty-fourth section of the judiciary act of 1789 [1 Stat. 92], in all cases at common law; but the rule in equity is quite otherwise; and in an equity suit, the rule of equity, and not that of the state is to be observed.

[Cited in Burt v. Keyes, Case No. 2,212.]

[Cited in Washington v. Pollard, 5 Grat. 452.]

[This was a bill for an injunction by McFarlane against Mary Griffith.]

WASHINGTON, Circuit Justice. This is a bill to be relieved against a bond and mortgage given by the plaintiff to Putnam Catlin, to secure the purchase money for a tract of land sold and conveyed by the latter to the former. The bill states that on the 17th of April, 1815, the plaintiff was in possession of eighty acres of land under an improvement right; on which he had resided for several years, and made many valuable improvements. That about the time above mentioned, Putnam Catlin alleged that he had purchased the large tract which included the above eighty acres of land, of John B. Wallace, and that he would eject the plaintiff, unless he would agree to pay him a consideration for the land he possessed, averring at the same time, that the title of Wallace was indisputable. That being an illiterate man, and supposing this assertion to be well founded, he was induced, under the terror occasioned by this threat, to agree to pay the said Catlin for his land at the rate of three dollars per acre; and having accepted of a conveyance of the land, he executed a bond and mortgage of the same land to the said Catlin to secure the payment of the purchase money, amounting to the sum of $240. The bill then charges, that at the time of this transaction, the right to this tract of land, if any right thereto other than that of the commonwealth or of the plaintiff did exist, was not in the said Catlin, but in the defendant, to whom Wallace had by some instrument or conveyance previously transferred his pretended right, and for whom the said Catlin then acted as agent. But that in fact the title was, and still is in the commonwealth of Pennsylvania, subject only to the pre-emption right of the plaintiff. That Catlin has assigned the before mentioned bond and mortgage to the defendant, without any consideration, but as her agent, and that she is not a purchaser for valuable consideration, but is affected by the knowledge of facts acquired by her said agent, and of the deception practised by him on the plaintiff. The prayer of the bill is, that the defendant may be decreed to deliver up the bond and mortgage to be cancelled, and that she may be enjoined from further proceeding in an ejectment brought by her in this court on the mortgage deed. The answer admits that Catlin did, on or before the 17th of April, 1815, execute and deliver to the plaintiff the conveyance mentioned in the bill, and that the plaintiff did also execute a bond and mortgage to the said Catlin to secure the purchase money of the said land. But the defendant does not admit that the plaintiff had any right to the land previous to the above conveyance to him; on the contrary, she believes that the title to the same was vested in the said John B. Wallace, who conveyed a large tract of land, of which this was a part, to the said Catlin, for the purpose of enabling him to make conveyances thereof to such persons as might contract with him for the purchase thereof. She denies that at the time of the conveyance to the plaintiff, or at any previous time, the right to the land so conveyed was in the defendant, or that she had any claim thereto, either in law or equity, previous to the assignment of the mortgage to her, or that the said Catlin, or the said Wallace, acted as her agent prior to the said assignment. The answer then avers that on the 20th of December, 1817, the said Wallace was indebted to the defendant in the sum of $13,000 and upwards, for so much money before that time lent and advanced to him by the defendant, and that in consid-

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

[2] [District not given.]

eration thereof, the said Catlin did on that day assign to the defendant the before mentioned bond and mortgage, together with other securities, to the amount of $13,000. She believes that neither Wallace or Catlin had any notice of the pretended right of the plaintiff to the land in question, or that there was any title to the same in the commonwealth. She denies that she ever had notice of any such pretended title in the plaintiff, or in the commonwealth, to this land, or of any of the circumstances alleged in the bill to have taken place prior to the conveyance to the plaintiff. The answer then insists upon the protection afforded her as a bona fide assignee or purchaser for a valuable consideration, without notice, in like manner as if it were specially pleaded. To this answer, a general replication has been filed, and a number of depositions have been taken, which it is not necessary particularly to notice. The plaintiff's counsel has rested his case upon the following Pennsylvania decisions: [Swift v. Hawkins] 1 Dall. [1 U. S.] 17; [Wheeler v. Hughes] Id. 23; [Inglis v. Inglis] 2 Dall. [2 U. S.] 49; 2 Yeates, 23, 464, 543; 5 Bin. 232; 1 Serg. & R. 438; 4 Serg. & R. 177; 10 Serg. & R. 140. The defendant's counsel cited Mitf. Eq. Pl. 122, 162, 215; 2 Ves. Jr. 457; 1 Johns. Ch. 213; 2 Johns. Ch. 519. The ground of equity stated in the bill, and relied upon at the bar is, that John B. Wallace, at the time when his agent Putnam Catlin conveyed his land to the plaintiff, had no title to it, and therefore a failure of the consideration is inferred; which, it is contended, discharges the plaintiff from his obligation to pay the purchase money, and consequently entitles him to the equitable interposition of the court to set aside the securities given therefor, even against an assignee who has purchased them bona fide for a valuable consideration, and without notice of the matters of equity charged in the bill. In support of this argument, the plaintiff's counsel relied altogether upon a long and uniform course of decisions of the supreme court of this state; and it must be admitted, that to a certain extent, it is fully maintained by those decisions. The principle which they lay down is, that the assignee of a bond or mortgage, though for valuable consideration, and without notice, stands in the place of the obligee or mortgagee, and is exposed to every legal or equitable defence which could be asserted against them; and that if there has been a failure of the consideration for which those instruments were given, which the defendant is at liberty to prove; such assignee is not at liberty to recover in an action of debt upon the bond, or of scire facias upon the mortgage. The Pennsylvania cases which support this doctrine, turn upon the construction of two acts of assembly of this state, passed in the year 1705. We consider them therefore as establishing the law of this state upon the subjects to which they apply, and consequently, under the thirty-fourth section of the judiciary act of 1789, they are to be regarded by this court as rules of decision in all cases of suits at common law. But this is a case in equity, and must be governed by those rules and principles which prevail in a court of equity; and amongst those there are none better settled than this, that against a bona fide purchaser for a valuable consideration paid, and without notice of those circumstances which form the basis of the plaintiff's equity, the court will take no step, and grant no relief whatever. The reason of the rule is obvious. The defendant, who has innocently paid his money under a well founded confidence in the goodness of the title which he has purchased, has as much equity to be protected, as the plaintiff can possibly have to be relieved against him, and consequently, the equity being equal, this court can do nothing but leave the parties as they are, and refer the plaintiff to such legal remedy as he may be entitled to. If in this case, the plaintiff has been careful enough to provide by proper covenants the means of indemnity in case of defective title to the land conveyed to him, there is the less reason for the extraordinary interposition of a court of equity in his favour. If he has failed to protect himself by such covenants, his neglect can never be made the foundation of an equity proceeding against a purchaser for valuable consideration without notice. In giving this opinion, we do not mean, nor do we in effect controvert the doctrine of the supreme court of this state, which has been referred to. Were this an action at law founded on the bond, we should conform, without hesitation, to the decisions of that court. All we mean to say is, that where the obligor applies to the equity side of this court for relief, it must, upon principles of equity, be denied, if it appear by the plea, or answer of the defendant, that he is a purchaser for valuable consideration paid, without notice of the facts on which the plaintiff's equity is founded. The injunction therefore must be dissolved, and the bill dismissed with costs.

McFARLANE (UNITED STATES v.). See Case No. 15,675.

Case No. 8,791.

McFEELY v. DRYER.

[Cited in Collinson v. Teal, Case No. 3,020. Nowhere reported; opinion not now accessible.]

Case No. 8,792.

McFERRAN et al. v. WHERRY.

[5 Cranch, C. C. 677.] [1]

Circuit Court, District of Columbia. March Term, 1840.

ARREST—UNDER ATTACHMENT—BY CAPIAS—PRIVILEGE—SUITOR IN CAUSE.

If an attachment, under the Maryland act of 1795 (chapter 56) and a capias ad respondendum, be both served while the defendant is attending the court as a party in another cause, the attachment will be ordered to be dissolved upon the arrest of the defendant on the capias, and the defendant will be discharged from the arrest, because privileged as a suitor in another cause.

[This was an action by McFerran and Duncan against Wherry.]

An attachment under the Maryland act of 1795 (chapter 56) was laid in the hands of the Chesapeake and Ohio Canal Company on the 24th of December, 1839. The defendant, being a non-resident, was attending this court as a party in another cause. With the attachment a capias ad respondendum was issued on the same day upon which the defendant was taken; and the marshal returned the attachment "laid in the hands of the Chesapeake and Ohio Canal Company," and returned the capias "cepi." The defendant being brought in by the marshal, moved to be discharged, because, as a suitor in this court, in another cause, he was privileged from arrest during the term, &c. And THE COURT (MORSELL, Circuit Judge, absent,) discharged him from the arrest, and did not require him to enter his appearance in the suit; and ordered the return of the attachment to be quashed, because the defendant was present when the attachment was served; and the defendant could not be compelled to appear, either by capias, or by means of an attachment of his effects, during the term, and while the defendant was thus privileged from arrest as a party.

R. J. Brent now moved THE COURT (THRUSTON, Circuit Judge, absent,) to rescind the order to quash the return of the attachment, and cited several cases to show that the attachment is intended as a means to compel an appearance to the action, and that the attachment cannot be dissolved without special bail.

THE COURT (THRUSTON, Circuit Judge, absent,) refused to rescind the order to quash the return of the attachment; and ordered the attachment to be dissolved. See U. S. v. Stansbury, 1 Pet. [26 U. S.] 573.

McGAUGHEY (PRESTON v.). See Case No. 11,397.

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

Case No. 8,793.

McGAW v. BRYAN et al.

[1 U. S. Law J. 88.]

District Court, S. D. New York. June 29, 1821.

REPEAL OF PATENTS FOR INVENTIONS — FORMS OF PROCEDURE—ACT OF 1793.

[The method intended to be provided in the tenth section of the act of 1793 [1 Stat. 323], relating to the repeal of patents is not that by scire facias or process in the nature thereof, according to the forms of the common law, and with the verdict of a jury, but was rather a summary proceeding intended to take the place of an examination into the merits of the invention before the issuance of the patent, and the remedy could only be invoked during the limited time of three years after the date of the patent. A rule to show cause why the patent should not be repealed was issued by the judge upon motion, accompanied by affidavits showing grounds satisfactory to him. If the patentee did not appear, the rule was made absolute and the patent repealed. If he did appear, the case was fully heard upon its merits before the judge alone upon affidavits or oral testimony, and judgment entered for the party found to be entitled thereto upon the evidence produced. Stearns v. Barrett, Case No. 13,337, disapproved.]

[This was an application under the tenth section of the patent act of 1793 for a rule to show cause why the patent granted June 29, 1821, to Thomas Bryan and William Bryan should not be repealed.]

J. A. Emmet, for complainant.

C. G. Haines, for patentee.

VAN NESS, District Judge. That the question I am now to consider involves serious difficulties is admitted. Wherever it has arisen, it has confounded the ingenuity of the bar, and perplexed the gravest deliberations of the bench. The true meaning of the tenth section of the patent law is indeed a great mystery. The profound obscurity in which, like the oracles of old, it is delivered to us, must continue to perplex the minds of men until a wiser generation shall arise to develope the hidden wisdom, and penetrate the dubious intentions of its authors. To be compelled to expound and to administer in some way a law confessedly incomprehensible, is certainly an unpleasant duty. That the exposition I shall give will afford general satisfaction, I have not the confidence to hope. In a case like this the most laborious ratiocination can produce but a poor result. The field is bare and barren, and presents nothing to aid our skill or labor. An approach to demonstration, I am persuaded, is not expected. Something like a rational exposition will be attempted.

The tenth section of the act of 1793 entitled "An act to promote the progress of useful arts, and to repeal the acts heretofore made for that purpose," is in these words: "Upon oath or affirmation being made before the judge of the district court, where the patentee, his executors, administrators or assigns, reside, that any patent, which shall be issued in pursuance of this act, was obtained surreptitiously, or upon false suggestion,

and motion made to the said court, within three years after issuing the said patent, but not afterwards, it shall and may be lawful for the judge of the said district court, if the matter alleged shall appear to him to be sufficient, to grant a rule that the patentee, or his executor, administrator, or assigns, show cause, why process should not issue against him to repeal such patent. And if sufficient cause shall not be shown to the contrary, the rule shall be made absolute, and thereupon the said judge shall order process to be issued against such patentee, or his executors, administrators, or assigns with costs of suit. And in case no sufficient cause be shown to the contrary, or if it shall appear that the patentee was not the true inventor or discoverer, judgment shall be rendered by such court for the repeal of such patent; and if the party at whose complaint the process issued, shall have judgment given against him, he shall pay all such costs as the defendant shall be put to, in defending the suit, to be taxed by the court and recovered by due course of law." This is not the first proceeding that has been instituted here, under this act, which for the sake of brevity is commonly denominated "The Patent Law." Several rules have within a year or two been applied for and granted; and in every case it was conceded by all the counsel that the hearing on the rule to show cause was final. That was the impression of the court, and no doubt of its correctness was ever expressed at the bar, until after the rule in this case, or the other now under consideration, was obtained. So far forth, therefore, as uniformity in anterior proceedings, and voluntary acquiescence of the counsel employed in them can produce the effect, it is the established practice of this court that the hearing on the rule to show cause is final and decisive between the parties; and that the process which issues, if the rule be made absolute, is in the nature of an execution to enforce the judgment of the court pronouncing the patent void, and to collect the costs.

In this case, however, the court has been pressed to review the course of practice it has hitherto pursued, and to adopt another. It is now contended that the hearing on the rule is not final, and its effect, if made absolute, nothing more than an order that a scire facias issue. That the words of the law afford some support to this view of the subject is readily conceded for they will admit, without violence, any construction which may suggest itself to the ingenuity of counsel, or may suit the feelings or the fancy of the parties. Unfortunately, we are destitute of all precedent but our own on this occasion, and have no judicial exposition of the tenth section of this act except that which is found in the case of Stearns v. Barrett [Case No. 13,337], determined in the circuit court of the United States for the First circuit. The decisions in that court are certainly entitled to great respect and attention; but I cannot accede to the conclusion of the learned judge in this instance, because it is at variance with the deliberate suggestions of my own mind, and not supported by the general principles applicable to the question, and is, in my conception, in direct conflict with the whole course of his own reasoning.

We are examining a statutory provision for the accomplishment of a given object, and yet we are perpetually referred to common law proceedings as the only mode of effectuating the legal purpose of the legislature. If it could be fairly shown that they were at all necessary to carry into effect the ultimate object of the law, I should resort to them without reluctance. No man venerates the common law, as a body of legal rules and maxims, applied and administered by means of safe and salutary forms, more than I do. But I am unwilling to consider all our legislation as necessarily subservient to the principles or practice of that celebrated code, and its application always dependent upon its formalities, often tedious, intricate or antiquated. In England it is expressly declared by statute that the value of patents shall be tried and determined according to the course of the common law. The second section of the act concerning monopolies, &c. (21 Jac. I, c. 3) provides "that all monopolies, letters patent, &c., and the force and validity of them, and every of them, ought to be, and shall be, forever hereafter, examined, heard, tried, and determined, by and according to the common laws of this realm, and not otherwise." Our act contains no direct reference whatever, to the common law, or its course of proceeding, in cases of this sort: But in consequence of the fundamental difference in the principles of the English and American patent laws, and the still wider difference in the manner of granting these exclusive rights or monopolies, has, as I conceive, very wisely, if not necessarily, established a different mode of investigating and determining the validity of a patent. As patents under our law are issued as a matter of course to all who will apply for them, swear they are inventors, and pay thirty dollars, it was natural, and in a great degree requisite, to protect the public against frauds and impositions, that some expeditious summary mode of investigating their merits and trying their validity should be provided. But the tenth section of our act contains the word "process," to which the acuteness of the bar has ascribed all the significance of the express and verbose enactments of the English statute, and a magic influence, which is triumphantly said to draw after it, and secure by adoption, all the statute and common law of England, applicable to this question. I have a profound veneration for the abilities of the gentlemen who have discoursed so eloquently and so learnedly, on the mysterious signification of this comprehensive term. I have often felt their power to fascinate the senses and bewilder the human intellect; but

I trust the habits inculcated by my occupation will enable me to resist their subtleties, and bring to the examination of the subject something like sedate reflection and plain sense.

In attempting to arrive at a just conclusion in this case, it may be useful to examine how far the mode of granting and obtaining patents in England and in this country is similar; and the difference which will be found to exist will facilitate, I think, our efforts to develop the meaning of the tenth section of the patent law, and to penetrate the true intentions of the legislature. In England, patents are grants of favor emanating from the crown. In the United States, they are on a very different footing. Here they are the creatures of the statute. The right to their enjoyment, and the modes of protection against their infringement, are all prescribed by statute. The proceedings to obtain a patent in England are tedious, complicated and expensive. It is prayed for by petition, addressed to his majesty, and presented with an affidavit to support it, at the office of the secretary of state for the home department. The answer to the petition is a reference thereof to the attorney or solicitor general, to consider it, and report what may properly be done in the premises. The report of the attorney or solicitor general, if favorable, must be taken back to the office of the secretary of state, for the king's warrant. The warrant is directed to the attorney or solicitor, and directs a bill to be prepared, which is done at their patent office. The bill, when prepared, goes to the office of the secretary of state for the royal signature. When this is obtained, it is carried to the signet office to be passed, and there a warrant is prepared, directed to the lord keeper of the privy seal, from whom a warrant goes to the lord chancellor, commanding him to cause the letters to be made patent, under the great seal of Great Britain.

During the progress and execution of all these formalities, two formal hearings, at least, can be obtained in opposition to the patent: 1st. The objections may be submitted to the attorney or solicitor general, before a report is made upon the petition, at the instance of either of the parties; he will assign a day to examine the claims of the petitioner, and the nature of the objections urged in opposition to the patent; and after a full hearing and consideration will decide whether to report in favor of or against the prayer of the petition. 2dly. If the decision of the attorney-general be in favor of granting the patent, the party opposing may have another hearing before the lord chancellor, previous to the sealing of the patent, when a more full and formal investigation may be had of the merits of the application, and the objections urged against its success. It is also said by Bridgman, that the issuing of the patent may be opposed, when it comes to the privy seal, which would be a third hearing upon the merits of the petition; although I have met with no case in which it has been had. The course adopted in another stage of the proceeding, supports and fortifies this authority. Those opportunities to contest the rights of the petitioner are obtained by means unknown to our law. They are privileges secured by entering what are called "caveats," the nature and effect of which seem sometimes to have been misunderstood, even in the country where they are in use. They were at times supposed by inventors to secure the right to a patent, although their inventions might be brought into use before they had obtained it; and then that at least they were sufficient to prevent a patent from being granted to another, for the invention to which they referred. But a caveat has no such operation. Its object, as is manifest from its form, is to obtain information of the intention of any other person to take out a patent for the discovery or invention, which in general terms it describes; and it is merely a request that notice of such an application may be given to the party who has taken the precaution to file the caveat. If the anticipated petition be presented, the notice desired is given, and when a time is assigned to hear the objections that may be argued against the patent. At this hearing upon the caveat, all objections to the patent are open, and "the propriety of it must be sustained in every particular." It is finally granted, or not, as the attorney-general or chancellor shall report.

By referring to the act of 1793, it will be seen that most of these formalities are discarded, and this complicated process is much simplified. No means whatever are provided, or opportunities afforded, to contest the novelty or utility, or general merits, of the patent applied for; and it is known that, practically, patents are granted as matters of course, if the applicant complies with the forms of the law, which are nothing more than presenting a petition to the secretary of state, describing the alleged invention or discovery, swearing that he is the inventor or discoverer, and paying thirty dollars for the fees of office. The letters patent, when prepared, it is true, are to be delivered to the attorney-general, who, however, never inquires into the merits of the subject, but merely takes care that the instrument is in due form. The ninth section provides for the appointment of arbitrators, where two or more persons apply for patents at the same time, for the same alleged invention or discovery; but this has no other use or efficacy, than to dispose of a momentary collision; for the parties, it seems, have nothing to do, but to decline an arbitration, and then successively take out patents, in their own names. This was the fact, and the course pursued by the parties to the very case cited (Stearns v. Barrett [supra]), and proves conclusively that the real merits of the applica-

tion never are, and never can be, made a subject of inquiry before the patent issues. That it never was intended to be, is evident from the proceedings and discussions upon the provisions of the bill.

It was originally proposed in congress, to vest the power of granting patents, in the district courts, and to connect with it the English system of proceeding upon caveats; thus affording to the public and particular objectors an opportunity of being heard, in opposition to the application, before the letters issued. This was a most important consideration, entitled to great weight and attention, with the view of protecting the community against fraud and imposition, and from the vexation and oppression incident to numerous and frivolous monopolies. The present arrangement was, however, preferred, and with its adoption was swept away all the law and the reason that sustains the proceeding by scire facias to repeal a patent. It presents scarcely a resemblance in any of its parts, to the model originally in the view of the legislature. Nearly all the formalities and solemnities attendant upon the granting of a patent or monopoly by the crown, were abolished, and the provision in the act of James, directing its validity to be tried and determined according to the course of the common law, was omitted in our statute. It was certainly well and proper that after a petitioner for a grant had successfully passed through three solemn and separate investigations of his claims, that his title should derive from the sanctions thus conferred upon it a good degree of security. It was therefore provided by statute in England that it should not be disturbed, but on an inquiry the most deliberate and solemn known to law; and it seems to me equally required by considerations of expediency and public safety that, when all preliminary inquiries are abolished, and monopolies and patents freely and gratuitously given to all who present themselves in the character of inventors or discoverers, there should be some easy and summary mode of investigating their merits and deciding on their validity. In England, as we have seen, this may be done repeatedly and thoroughly, before the patent goes forth; and I cannot believe, that here it was intended to be wholly dispensed with. Every presumption of reason and of law is against the position that under systems so fundamentally unlike, and circumstances so different, the expensive and dilatory forms of the common law were meant to be pursued in investigations of this sort. During their progress, an impostor or pretender might for a long time harass the community, and for a season reap the fruits of his iniquity and fraud. It is a settled principle that in framing one system after another, the parts omitted are not to be drawn into use by inference, but are abolished unless expressly preserved. The omission of the second section of the statute of James, could not have been accidental. It was too important to be overlooked, and must be presumed to have been discarded, as inapplicable to the new system which was recommended. It must be recollected, too, and as a circumstance entitled to great weight in estimating the intention of the legislature, that the execution of the tenth section of our act is confided to a tribunal which does not ordinarily proceed according to the course of the common law; and, as all the members of the committee that reported the bill were professional men, it must have occurred to them that the power it conferred upon the district court would be exercised after the course of its principal jurisdiction, unless otherwise directed and provided by the act. This circumstance, together with the cotemporaneous proceedings in congress, the radical departure from the English system of granting patents, the omission of the second section of the statute of James, and the total absence of any equivalent provision, press irresistibly upon my mind the conclusion that the proceedings under this section were not meant to be according to the course of the common law, but that it was intended to invest the district judge with a plenary supervision over the legality of patents, as a substitute for the English mode of proceeding upon caveats; that it was deemed inconvenient or impracticable to make the proper preliminary inquiries, in the first instance, at the department of state, and more expedient that they should be instituted upon complaint made in a regular manner before the district judge, in whom it had in the first instance been proposed to vest a discretionary power to grant these letters patent. That a summary inquiry into the nature, novelty, utility, and validity of these grants ought to be somewhere provided for and made, must be obvious to the common sense of the world. No community could long endure a system that exposed it to the perpetual ravages of pretenders, or the incessant contributions of impostors, levied upon articles in common use, or to the vending of dangerous and noxious compositions, unless some prompt and summary mode existed to investigate the fraud and abolish it. The construction of the tenth section of the patent law resolves itself then, as I conceive, into a question of vital importance to the value and safety of the whole system; and the exposition I have hitherto given it is sustained by the most direct and urgent expediency.

Against the weight and pressure, however, of all these considerations, whether resulting from legal deductions or drawn from expediency, I am still urged to the conclusion that the word "process" means a scire facias, and draws after it the whole course of the common law proceedings to repeal the patent. The subject therefore must be pursued, and if it shall be shown that a scire facias cannot in this case be issued upon any principles, or in pursuance of any

practice known to the common law, I shall hope that the refutation of the argument is accomplished. In England the grants of the crown are consummated by the lord chancellor. They are enrolled in the petty bag office, and remain of record in chancery. They may be repealed or vacated. 1st. When the king has granted two patents for the same thing, the first patentee may have process, in the name of the king, to repeal the second. 2d. When a patent has been granted upon a false suggestion, the king can direct process to issue to vacate his own grant; and 3d. When the patent expresses a grant which by law the king cannot make. The appropriate process to repeal a patent in that country, and under their institutions and laws, is a scire facias. A scire facias is a judicial writ, and must, from its form and nature, be founded on some matter of record. To repeal a patent, it must invariably issue out of chancery, because there is the record of the patent, and from that reason alone it can issue from no other court. I have somewhere seen a loose dictum that it may issue from the king's bench, but that is not law. It cannot issue from any court without a record to sustain it. It may go from some other court, if a forfeiture appears there of office; that is, a record that will support the writ. It is even questionable whether the chancellor can make it returnable into the king's bench. If he should do so, perhaps that court would take jurisdiction, but the regularity of that course would at this day be much doubted. The writ is of course and of right returnable into chancery. The issue is there made up, and sent down to the king's bench to be tried. A scire facias to repeal a patent cannot issue at all without the fiat of the attorney-general; without the permission of the crown, sued for by petition, and thus announced by his principal law officer. It must issue, too, in the name of the king, as the source from which, by virtue of his prerogative, the grant proceeded. It never does, and never can issue in the name of an individual complainant or relator, although, upon the petition of a prior patentee, the right to use the king's name will be conceded.

If, then, we are to go out of the statute, and be governed in the use of a scire facias by the principles of the common law and the practice of its courts, upon what authority, it may now be asked, can a scire facias issue in this case? We have not the record of the patent. That is in the department of state. No inquisition nor forfeiture appears by office found in any of the courts. The United States are not complainants, and their law officer has in no way sanctioned this proceeding. These are indispensible prerequisites in proceeding according to the course of the common law, and the absence of them all proves incontrovertibly that upon its principles, and according to its practice, no scire facias can now go forth. By resorting to the common law, we find, it is true, the form of a scire facias to repeal a patent; but I am unwilling at one moment to appeal to that law to enlighten and direct me, and the next violate all its precepts, and disregard all the rules it prescribes. If we go to the common law for the form of the process, we must go to it to ascertain the occasions that authorize and the principles that regulate its use. Every tyro can turn to his books and give us the form of a sci. fa. to repeal a patent; but to what purpose, unless the circumstances of the case justify its use? What avails it to have the form of a fi. fa. or a ca. sa. before you, unless you have a judgment on record to authorize its execution?

The act establishing this court, it is said, gives its power to issue a scire facias. So it does, "agreeable to the principles and usages of law." And it has been proved that "principles and usages" do not authorize it to send forth this writ, as it is called, without some matter of record to support it. This court derives power from the judiciary act to issue this process upon its own records, upon recognizances to revive judgments, and in all cases in which the courts of common law in England could issue it. That is the authority given by the act, and it goes no farther. The English courts can not issue it to repeal a patent; nor can this, unless the power is clearly and expressly given by statute. We are told, too, that although legally and technically the proposed process should be deemed inadmissible, yet something in the nature of a scire facias may be devised, with a view to procure the trial by jury. But if it cannot be done "agreeable to the principles and usages of law," it can not be done at all. From the judicial act we derive no power or authority to invent, model, or make a new and illegitimate thing, such as never yet was thrown before the profession, and profanely call it a scire facias, according to the forms of the common law. It is alleged that the ninth section of the act of '89 provides for the trial by jury of all issues of fact. It certainly does to the whole extent of the jurisdiction it confers; but no rule of construction can extend the operation of that provision to cases not within the purview of the act. It confers limited jurisdiction, and directs how it should be exercised. The power granted by the patent law, is no part of the ordinary or general jurisdiction of the district court. That act invests it with new authority. To its general powers it superadds new and independent jurisdiction; and for the manner of exercising it we must look to the act which confers it. When the proper occasion shall occur, there will, I trust, be neither doubt nor difficulty as to the construction of the act of '89. It should be recollected, however, that the question before us is whether an issue that can go to a jury shall be formed, and how? When that shall be accomplished, there will be no contro-

versy as to the farther course to be pursued. With all my respect for the wisdom that devised the trial by jury, and all my veneration for the important securities derived from that great and salutary institution, I cannot accede to the suggestion that this is a question peculiarly fit to be submitted to the decision of a jury. The validity and legality of patents are questions that involve important distinctions of law, and are so intimately blended with legal considerations as to render them, in my judgment, generally most proper for the exclusive examination of this court.

After due deliberation, and a careful examination of the act, I can find nothing in the section itself, nor in the context, nor in the report of the proceedings of the congress that enacted the law, leading to the conclusion that a scire facias, or process in the nature of a scire facias, according to the forms of the common law, and the verdict of a jury against the patentee, were anticipated or intended by congress as preliminary steps to the process of repeal, which the section directs the district judge to issue. I remain of the opinion that all the judicial authority intended to be given by the tenth section is vested exclusively in the district judge; that the proceeding under it was meant to be summary, and that no other can be had, without more detailed legislative provision on the subject. For there is now no law of the United States to authorize and regulate it, and no practice in England by which it can be justified. The course pursued here is prompt and efficacious, as is obviously required by the nature of the case. It enables the judge with authority analogous to equity powers to effect all that under a different organization, in conformity with the English system, might have been accomplished by scire facias, caveat, or bill in equity. As to the mode of proceeding, I shall maintain the course pursued by Messrs. Ely, Authon and McCoun, in the first case that came before me, and adopt their reasoning in support of it.

It will be seen, by a reference to the section under consideration, in an early stage of these remarks, that upon oath or affirmation made before the judge, that the patent was obtained "surreptitiously, or upon false suggestion," a motion may be made, within three years after it was issued, for a rule that the patentee "show cause why process should not issue against him to repeal such patent." And if the matter alleged shall appear to the judge to be sufficient, it shall be lawful for him to grant the rule. If, in answer to the rule, sufficient cause shall not be shown, it shall be made absolute, and thereupon he shall order process to be issued with costs of suit.

The first obvious remark to be made here is that the process to be issued is process to repeal the patent, not process commanding or summoning the patentee to show cause why it should not be repealed. The phrase, "a rule to show cause," is technical language, and its meaning is therefore to be ascertained from its common legal acceptation. A rule to show cause why a certain thing should or should not be done in the progress of a suit at law, why a defendant should not be discharged on common bail, why bail should not be mitigated; why proceedings should not be set aside; becomes absolute as a matter of course against the party to whom it is addressed, unless he complies with the exigence of the rule; that is, unless sufficient cause be shown, the defendant will be discharged, or the bail will be mitigated, or the proceedings set aside.

The construction contended for on the other side denies to an absolute rule the character of absoluteness, and converts it into an interlocutory rule, effecting nothing absolutely or definitely, but serving merely as the basis for a writ in the nature of a writ of scire facias. Now, a scire facias, though it may vary somewhat in form, is in fact nothing more than a rule or summons to show cause. So that a rule to show cause is to be an anomaly in our judicial proceedings, and means only that the party defendant is to show cause why another rule to show cause should not be served upon him. It is impossible that a construction leading to conclusions so absurd, should be correct.

The rule to show cause is granted upon evidence sufficient, in the opinion of the judge (unless contradicted), to make the patent void. It seems to me to follow inevitably that unless contradicted, it is made void. The rule is made absolute, and the patent made absolutely void, upon the evidence already produced, because nothing effectual has been shown in opposition to it. The construction I am opposing involves another glaring absurdity. The complainant is not only to swear or affirm that "the patent was obtained surreptitiously or upon false suggestion," but must do more, if required; for "the matter alleged must appear to the judge to be sufficient." He must therefore go into the merits of the case, ex parte, before he grants the motion; and when the defendant appears the judge is bound to examine into the merits of the cause he shows, why his patent should not be repealed. A scire facias, or another rule to show cause, with reference to a jury trial, at this stage of the proceedings, and under such circumstances, would reverse the whole order of judicial administration, and subject the decision of the judge, on a matter upon which he was compelled to decide, to the supervision of a jury summoned to re-examine and re-judge the decision already pronounced by the court. This would be a great novelty, to say the least of it; and to the adoption of it I feel some repugnance. The common sense and true law of the section I apprehend to be this: The affidavits on which the motion is founded should not only state that the patent was obtained "surreptitiously and upon false suggestion," but

the particular facts in the case, to which those terms refer, and of which they are predicable. Upon such an application the judge decides whether the matter alleged is sufficient. If it be, he grants a rule to show cause why the patent should not be repealed by process from his court. If the defendant does not appear, the sufficient allegations stand uncontradicted; the rule for a repeal is made absolute, and process of repeal, including authority to levy the costs, is issued. It is equivalent to a judgment by default. If, however, he does appear, the third clause in the section becomes applicable. For what purpose can he appear, except to answer the allegations on which the rule was granted? And how can a scire facias be necessary, commanding him to appear, when he has appeared already? Having appeared, a regular hearing is had upon the merits of the cause shown, which can be no other than whether his title to the patent be good or bad. If it shall appear to the judge that the patentee was not the true inventor or discoverer, or if the cause shown be for any other reason deemed insufficient, then upon this formal hearing a formal judgment shall be rendered by the court for the repeal of the patent; but if the cause shown be sufficient, then judgment shall be given against the complainant for the costs of the defendant.

Upon the appearance of the party, the proceedings should be analogous to those, on other rules of a similar kind. The defendant makes his defence with like weapons, to those brought against him by affidavits. The witnesses may also be openly examined as bail are on a justification. Thus, according to my view, the three clauses of which the section is composed, contains three distinct provisions, and each is made to effectuate a distinct purpose. The first gives the rule to show cause. Under the second, for defects in the cause shown, or the non-appearance of the party, the rule is made absolute, and by reason of his default is declared to be repealed. The third supposes an appearance, and gives a final judgment upon a full hearing in favor of one or other of the parties. This seems to me a plain and regular course of proceeding. I perceive nothing that can throw a doubt over the meaning of the legislature, but the repetition of the word "sufficient," in the second and third clauses of the section. That in the second, it is presumed, was inadvertently inserted. If expunged, the entire section, I think, would be relieved from all doubt. It is certainly worthy of particular observation that, although the act was drawn by three able lawyers, the familiar and well known terms "scire facias" and "trial by jury," do not once occur in the section we have been considering. It is hardly credible that professional men could have avoided their use, if they intended to convey the meaning ascribed to them by the counsel for the patentee. And it is equally preposterous to suppose that they would talk of "showing cause" before a jury, when we all know that this language is technically and professionally appropriated to summary proceedings before the court.

The principles of the former act of 1790 [1 Stat. 109] afford, it is believed, a farther illustration of this subject. The first section of that act directs the petition to be presented to the secretary of state, the secretary for the department of war, and the attorney-general. They, or any two of them, are authorized to cause letters patent to be issued, "if they shall deem the invention or discovery sufficiently useful and important." Thus it was made the duty of these officers to inquire into the utility and importance of the proposed patent before it issued; and the period for instituting a subsequent inquiry, like the present, was limited to one year. The investigations, however, at the departments, necessarily summary, were found inconvenient in practice, and the act now in force abolished them by omitting the words which imposed the duty, but made the patent subject to this mode of examination, for three years after it was granted, as a substitute for the provision in the first act intending, obviously, to preserve the summary character of the inquiry during that period. Why else is the time limited? It could not have been meant to close the door forever after to common law proceedings. No, for three years the inquiry is to be summary, and then the community is left to the other remedies provided by the statute. If this be not the meaning of the legislature, this kind of property is invested with a character and clothed with a sanctity not conceded to any other in the country. The whole course of legislation on the subject has confirmed me in the conviction that it never was intended to abolish all kind of summary inquiry into the validity of these grants, and that the course I have adopted, and the exposition I have given of the tenth section, is in coincidence with the true meaning of the act.

I can but regret that the remarks I have made on this question are unavoidably irregular and desultory. They have been committed to writing during the sitting of the court, and under the embarrassments resulting from the daily pressure of other important business.

McGEE (BRYAN v.). See Case No. 2,066.

Case No. 8,794.

M'GEHEE et al. v. HENTZ et al.

[19 N. B. R. 136.] [1]

District Court, S. D. New York. Feb. 14, 1879.

BANKRUPTCY — PETITION FILED IN ANOTHER DISTRICT—POWERS AND JURISDICTION — PROCESS — COMPOSITION—BANKRUPT AS CUSTODIAN—RIGHT TO SUE.

1. Every district court in the United States has jurisdiction and authority to make all lawful orders and decrees in bankruptcy, although the original petition in bankruptcy was filed in another district, provided that the relief asked is such as cannot be given by the district court where the original petition was filed, because the persons or property sought to be affected by the order or decree are beyond the reach of its process, and that they are within the reach of the process of the district court whose aid is invoked.

[Cited in Re Tifft, Case No. 14,034.]

2. An order made in a composition proceeding appointing the bankrupts custodians of their property does not put them in the position of an assignee, so that they can maintain a suit under section 4979 [Rev. St.].

[Cited in Re Michel, 6 Fed. 709.]

3. The complainants, who are residents of the state of Louisiana, filed a petition in bankruptcy in that district, and proposed a composition, which was accepted and confirmed, and the complainants appointed custodians of their property, and authorized to protect and collect the same for the purposes of the composition and for the benefit of their creditors. The names and address of the defendants, H. & Co., and the amount of the debt due to them, were entered in the schedule annexed to the petition for composition. Within four months prior to the commencement of the proceedings in bankruptcy, the defendants, H. & Co., who were residents of the state of New York, commenced an action against complainants by publication, and attached a debt due to them from M. & Co., also residents of New York, of a less amount than their claim, and subsequently recovered judgment in said action. In a suit brought to obtain an injunction against H. & Co. and the sheriff to restrain their proceedings on the judgment, and for an accounting and payment of the debt by M. & Co., *held*, that complainants were not entitled to relief in injunction; that, as no assignee has been appointed, the lien of the attachment continues, and is preserved by the bankrupt law [of 1867 (14 Stat. 517)]; and that while H. & Co. are bound by the composition as to their claims in personam against the complainants, their rights in rem against the property attached are not affected or impaired thereby.

[Cited in Re Michel, 6 Fed. 710.]

Wm. E. Sleger, for complainants.

Chambers, Boughton & Prentiss, for Hentz & Co.

CHOATE, District Judge. This is a motion for an injunction in a bill in equity. The complainants [Scott] McGehee, Snowden & Violette, were partners in business, residing and doing business at New Orleans, in the state of Louisiana, and on the 27th of May, 1878, they were adjudicated bankrupts, on their own petition, by the district court for the district of Louisiana. On the same day they filed their petition for a meeting of their creditors, to consider a composition proposed by them. The composition proposed was five cents in one year and ten cents in two years. Regular proceedings on the petition were had, which resulted in an order, made Nov. 23, 1878, confirming the composition and directing it to be recorded. The defendants, Hentz, Eastwood and Seman, all of the city of New York, and partners composing the firm of Henry Hentz & Co., are creditors of the complainants, and the names and address and the amount of their debt, about nine hundred and thirty-six dollars, were entered in the schedule annexed to the petition for composition. Within four months before the filing of the petition in bankruptcy, Hentz & Co. commenced an action against the complainants in the supreme court of the state of New York, and procured an order of attachment therein, under which they attached a debt then due to the complainants from the firm of Macauley & Co., also residents of New York, the amount of said debt being six hundred and thirty dollars and fifty cents. In that action, the defendants being non-residents, service by publication was ordered, and judgment was entered in favor of the plaintiffs, Hentz & Co., by default, Oct. 11, 1878, and execution issued to the sheriff of New York for one thousand one hundred and fifteen dollars and twenty-six cents. On the 11th of October, 1878, on their own petition, the bankrupt court in Louisiana made an order appointing and confirming the bankrupts as custodians of all their assets, authorizing them to hold, protect, and collect the same for the purpose of the composition and for the benefit of their creditors. The bill is addressed to this court sitting in bankruptcy, and is brought against Hentz & Co. and the sheriff and Macauley & Co., praying an injunction against Hentz & Co. and the sheriff to prevent their further prosecution of their proceedings on the judgment against the attached property, and as against Macauley & Co. an accounting and payment of said debt due the bankrupts.

It is objected by the defendants that this court has no jurisdiction nor any authority to enjoin the enforcement of the judgment and execution; that the complainants' remedy, if any, is in the district court of Louisiana, or, for the purpose of having the attachment dissolved, if entitled to that relief, in the state court where the judgment was recovered. It seems to be settled, however, that every district court in the United States has jurisdiction and authority to make all lawful orders and decrees in bankruptcy, although the original petition in bankruptcy was filed in another district, provided that the relief asked is such as cannot be given by the district court where the petition was originally filed, because the persons or property sought to be affected by the order or decree are beyond the reach of its process, and where they are within the reach of the process of the district court whose aid is thus invoked. Shearman v. Bingham [Case No. 12,762]; Lathrop v. Drake, 91 U. S. 516.

[1] [Reprinted by permission.]

The case is therefore to be judged as if the original petition were filed in this district. Nor is there any doubt of the subject-matter of the action being within the jurisdiction of the court in bankruptcy conferred by Rev. St. § 4972. The suit relates to the ascertainment and liquidation of a lien claimed by a creditor upon the bankrupt's estate. It is a controversy relating to the adjustment of a claim of priority and conflicting interests between a bankrupt and a creditor, and relates to the disposition of the assets. The jurisdiction is clear enough under section 4972, but I cannot accede to the argument of complainants' counsel that the order appointing the bankrupts custodians of their property puts them in the position of an assignee, so that they can maintain a suit in the district or circuit court under section 4979. That section relates to suits by and against assignees only. The order appointing the bankrupts custodians of the assets seems not to be provided for in the bankrupt law. If it has any force, it may be to give them the powers of special receivers; but even then they are not within the provisions of section 4979. The jurisdiction in this case being in a proceeding in bankruptcy, the court has power to enjoin interference with the property of the bankrupts, if a proper case for relief is made out. Rev. St. § 720, does not prohibit such an injunction. Even if the application should have been by petition instead of bill, the bill may be treated as a petition if the complainant is entitled to relief.

On the merits, however, I think the complainants are not entitled to relief on injunction. The attachment which Hentz & Co. procured was, at the commencement of the bankruptcy proceedings, a lien on the property against which they are now proceeding by execution. Being within four months of the filing of the petition, it was liable to be dissolved if the case in bankruptcy had proceeded in due course to the appointment of an assignee; but, unless an assignee is so appointed, the lien continues, and is preserved by the bankrupt law. In re Clapp [Case No. 2,785]; In re Irons [Id. 7,067]. The cases cited to the contrary in the state courts have not received the approval of the federal courts. Miller v. Mackenzie [43 Md. 404]; Smith v. Engle [44 Iowa, 265]. Now, in the present case, if the appointment of an assignee were in the due course of the proceedings to be anticipated, the creditor having the voidable attachment would, doubtless, pending the question of such appointment, be restrained from enforcing his lien. But, in the present case, the bankrupts and the creditors have elected, as they have a right to do, an entirely different mode of dealing with the bankrupts' estate, and one which excludes the appointment of an assignee. Even without the order of the court making the bankrupts custodians, the proper meaning of the composition agreement is that the bankrupt is left in the possession and control of his property. The bankrupts certainly are bound by the election thus made by them and by the terms of the composition; both they and their creditors have virtually agreed that the bankrupts should retain their property subject to all existing liens. It is suggested that the resolutions of composition may yet be amended by providing for the appointment of an assignee to take and hold the assets pending the payment of the composition, or that the bankrupts may be unable to pay their composition, and so that an assignee may necessarily be appointed. As to the first suggestion, it is a possibility merely, and cannot affect the present rights of the parties, nor would it be proper for the court, in view of such a bare possibility, to stay the proceedings of the lienor in order to enable the bankrupts and the creditors to do what they may never agree to do, and what is entirely at variance with their intentions as expressed in what they have already done. As to the other suggestion, that the composition may be set aside, I think that it is enough to say that the bankrupts and the creditors, having agreed to an arrangement which preserves this lien upon proceedings which imply deliberate choice of remedies based on a careful consideration of their own best interests and the ability of the bankrupts to carry it out, are not entitled to ask that the secured creditor wait two years before realizing on his security upon the bare possibility that the arrangement may fail. They have taken the risk of the arrangement being successfully carried out, and cannot complain if it is treated by other parties in interest as if it were a final arrangement. I see nothing in the case of In re Bayly [Case No. 1,144], decided by Judge Wood, cited by complainants, which conflicts with the views here expressed. In this case the amount of the security is less than the debt secured by it, and the nature of the collateral security is such that there can be no loss or sacrifice of the property of the bankrupts in the application of the collateral to the debt. There is no ground for injunction, therefore, either because the bankrupts' other creditors have an interest over and above that of the secured creditor in the property attached, nor because the assets held by the secured creditor are likely to be sacrificed as by a ruinous sale. It is unnecessary to consider, therefore, whether in this case, if either of these circumstances appeared, an injunction would be proper.

It is insisted by the complainants that Hentz & Co. are bound by the composition, and that they cannot claim more than the composition percentage. This is true of their claims in personam against the bankrupt, but it does not affect or impair their rights in rem against the property on which they hold security. This suggestion is fully answered in the cases cited above.

The view taken of the case makes it unnecessary to consider whether Hentz & Co.

have acquired any new rights in the property attached by their judgment and execution. Injunction denied, and temporary stay vacated.

Case No. 8,795.

In re McGIE.

[The case reported under above title in 2 Biss. 163, is the same as Case No. 4,835.]

McGIE (FITCH v.). See Case No. 4,835.

Case No. 8,795a.

McGILL v. JORDAN.

[18 Reporter, 642.] [1]

Circuit Court, E. D. Pennsylvania. Oct. 21, 1884.

ESTOPPEL BY DEED — AFTER-ACQUIRED TITLE — WARRANTY—INTENTION—MORTGAGE—LAND OFFICE TITLE.

1. Where one undertakes by deed to convey an indefeasible estate in fee-simple he will not be allowed to set up against his vendee, or one claiming under him, a subsequently acquired title.

2. This is the case even where there are no covenants of warranty, if the intention of the parties to the deed as gathered from the words thereof appears to be to convey the entire estate and not merely the estate which the grantor has then therein.

3. Where two tenants in common execute a mortgage and afterwards one of them conveys by the deed his share to the other, the words of the two deeds being apt to express a fee, the grantor and mortgagor will not be allowed to set up against one claiming through the mortgage a title obtained from the land office subsequently to the date of the mortgage.

Motion for judgment non obstante veredicto.

Ejectment. On the trial it appeared that the land in controversy was part of a larger tract known as the "Mount Holly Iron Works Estate," which the Farmers' and Mechanics' Bank in 1846 conveyed to Kropff, who was the plaintiff's grantor, and Geisse for $21,000; that Kropff and Geisse executed a purchase-money mortgage of the said estate to their vendor; that in 1848 Kropff obtained a warrant from the land office for the part in dispute in the present case, as land "unimproved and unclaimed by any other person;" subsequently, on October 28, 1848, Kropff conveyed "all his estate, right, title, and property in the 'Mount Holly Iron Works Estate,'" derived by the deed from the Farmers' and Mechanics' Bank, to Geisse; shortly after this a judgment was obtained on one of the purchase-money bonds secured by the mortgage, and the land sold by the sheriff, to whose vendee the defendants traced their title. The court reserved the question whether the plaintiff were not estopped by the acts of his grantor Kropff from setting up his title, and subject to this reservation there was a verdict for the plaintiff.

John Ryon and Samuel Hepburn, Sr., for plaintiff.

Samuel Hepburn, Jr., and A. Sydney Biddle (with them, J. Rodman Paul), for defendant.

BUTLER, District Judge. The execution of the mortgage and the deed to Geisse are the acts relied upon to invoke the doctrine of estoppel. In Pennsylvania it is well settled that where one undertakes by deed to convey an indefeasible estate in fee-simple, he shall not thereafter be allowed to set up a subsequently acquired interest against his vendee or those claiming under him. The reason upon which this rule rests is obvious. Having induced the vendee to part with his money upon the assurance imported by his act, the vendor should not thereafter be allowed to deny its truth, but should be treated as acquiring the outstanding interest for the vendee's benefit. The rule has its foundation in equity, and does not depend upon covenants contained in the deed. The avoidance of circuity of action has little if anything to do with it; and much of the intricate learning of the common law found in the older cases, respecting estoppel by deed, has become unimportant, if it ever had a place in the jurisprudence of this state. If, by the terms of the conveyance, no matter by what name called, the vendee is justified in believing that the estate conveyed is a fee-simple, indefeasible, common justice requires that the vendor shall not thereafter be allowed to deny that he conveyed such an estate. Chief Justice Tilghman, as early as 1816, in McWilliams v. Nisly, 2 Serg. & R. 514, says: "The case stands thus: James McWilliams sells and conveys land to which he has no title, and afterwards acquires title, can his heirs recover against his grantee? It appears to me that, in such case, they would be estopped by their father's act from denying his title; and if there were occasion for further assurance equity would compel them to make it." The same thing, in effect, is repeated in Brown v. McCormick, 6 Watts, 60. In Tyson v. Passmore, 2 Barr [2 Pa. St.] 124, the doctrine was again applied. Here the purchaser's rights depended upon articles of agreement to convey. Ejectment was brought to enforce specific performance. Of course, no covenants for title were involved. Nevertheless, an after-acquired title to a part of the land, in which the defendant had no interest at the time of contracting, was held to inure to the plaintiff's benefit. Root v. Crock, 7 Barr [7 Pa. St.] 378; Steiner v. Baughman, 2 Jones [12 Pa. St.] 106; Clark v. Martin, 13 Wright [49 Pa. St.] 299, are to the same effect. These cases show that the application of the doctrine of estoppel by the courts of this state depends, not upon covenants in the conveyance, but upon the intention of the parties (as gathered from their language) to convey

[1] [Reprinted by permission.]

the entire estate in the land; and further show that no particular form of expression is necessary to indicate this intention. In Smith, Lead. Cas. p. 471, Judge Hare, in treating of the doctrine as understood and applied in this state, says: "In Pennsylvania, where covenants of general warranty are comparatively unknown, a conveyance is held to estop the grantor from setting up any interest which he may subsequently acquire in opposition to his own deed. Hence, while some of the decisions have been based on the idea that a specific covenant or recital is necessary to create an estoppel, there are others which go farther and take the ground that every grant carries with it, prima facie, a presumption that the intention was to confer a good title to the land, and preclude the grantor from relying on an after-acquired title, in derogation of his deed, which must prevail, unless there is something special and restrictive in the words employed, authorizing a narrower interpretation." The same learned author, when considering the doctrine of estoppel, without special reference to its administration by the courts of this state, says: "In a number of the more recent decisions it has been held that the question is one of intention; and while a warranty may be restricted by its own terms, or those of the deed in which it is inserted, a deed without warranty may operate as an estoppel, in order to prevent a failure of the purpose with which it was executed." The fair result of the more recent cases would seem to be that whenever the terms of the deed or of the covenants it contains show that it was meant to convey an absolute and indefeasible title, and not merely the interest which the grantor had at the time, it will pass every estate and interest which may vest in him subsequently, whether the warranty be general or special, or though it may contain no warranty at all. These decisions abandon the technical ground taken in the earlier cases, that the estoppel grows out of warranty, and rest it on the broader basis of giving effect to the intention of the parties as expressed in the deed. This is the doctrine of the federal courts, as well as of the courts of Pennsylvania, in which state the land in question is located. In Van Rensselaer v. Kearney, 11 How. [52 U. S.] 297, it was held, that "if a deed of conveyance, expressly or by implication, affirms that the grantor has and conveys a fee-simple in the land, his heirs are estopped from denying that he had the estate, and passed it to the grantee, and this may appear by any part of the deed, or by other writings referred to therein." It will be observed that, in this case, a tenant for life, merely, conveyed the land without any express covenants or recitals whatever. In French v. Spencer, 21 How. [62 U. S.] 228, it was decided that where a grantor expressly or impliedly sets forth that he is seised of an estate which he purports to convey, he and all claiming in privity with him are estopped to deny that he was so seised at the time he conveyed. Such we understand to be the doctrine of estoppel, as applicable to the case before us. As we have seen, Kropff and Geisse executed a defeasible deed or mortgage of the tract of land known as the "Mount Holly Iron Works Estate," conveying it to the bank as security for bonds given the latter for purchase-money; and Kropff, two years later, executed a deed conveying his undivided half part of the tract to Geisse. Do these acts estop him from setting up the title subsequently obtained from the state, against the defendant, claiming under the judgment afterwards obtained, and the sale thereon? That the language of the mortgage, and of the subsequent deed to Geisse, aptly describe and purport to convey a fee-simple in the land,—in other words, to convey the entire property, free of all claims or charges of every kind and from every source, is, we believe, clear. The words "grant, bargain, and sell" import the conveyance of a fee-simple, indefeasible, with special warranty. These words are found in the granting clause of each of the instruments referred to, and the language of the habendum in each, "to have and to hold to the grantee, his heirs and assigns forever," is consistent with this import, and inconsistent with any other. That the warranty is special is not important, as we have already stated. There is no implication from a vendee's acceptance of a special warranty that he takes the land subject to defects of title, or incumbrances created by others than his grantor. It is true, that if he fails to discover an existing defect or incumbrance of this description, before payment of the purchase-money, he may be without means of relief. But if the discovery be made before payment, he may set up the defect or incumbrance as failure of consideration, and successfully interpose it to an action for the purchase-money. This is well settled. Steinhauer v. Witman, 1 Serg. & R. 438; Roland v. Miller, 3 Watts & S. 393; Murphy v. Richardson, 4 Casey [28 Pa. St.] 292; Lighty v. Shorb, 3 Pen. & W. 447. It cannot be seriously doubted that the parties to each of the instruments referred to understood that the lands described were conveyed in fee-simple, free from charge or claim of every character. The reference to quit-rents and money due the commonwealth, found in old conveyances of the title, are deemed immaterial. They did not inform, nor tend to inform, the bank or Geisse, or the sheriff's vendee, of the continued existence of such incumbrances. The absence of reference to them in subsequent conveyances was sufficient to justify a conclusion that they had been discharged. Kropff's acts in conveying as he did were an implied declaration that no charges or incumbrances existed. The case of Skinner v. Shannon [unreported], cited by the plaintiff, has no application to the facts of this case. There the land was conveyed expressly subject to an incumbrance; the amount of which, the court says,

must be presumed to have been deducted from the purchase-money. The purchaser not only had notice of the incumbrance, but agreed to assume and pay it.

The plaintiff attaches importance to the fact that the sheriff's sale was not in pursuance of scire facias on the mortgage, but was under a judgment recovered on one of the bonds which the mortgage secured. In this, however, we cannot agree with him. Under the laws of this state the proceeding on the bond, and the sale in pursuance of it, discharged the mortgage. It was but another method of foreclosure; and the sale therefore transferred to the purchaser precisely what he would have taken if the creditor had proceeded by scire facias. A different view would deprive the creditor of a valuable part of his security. The purchaser took, therefore, the same estate that he would have taken if the mortgage had been an indefeasible deed, executed directly to him; and the consequences to Kropff are in all respects the same as if he had so executed it. But the result is not different if we look alone to the effect of Kropff's act in conveying the land to Geisse. The title of the sheriff's vendee is, of course, referrible to this deed, as well as to the mortgage. This latter deed, also, as we have seen, contained an implied assurance to Geisse and the sheriff's vendee that Kropff had at the time, and that he transferred, an indefeasible title in fee-simple. Judgment for the defendant, notwithstanding the verdict.

Case No. 8,796.

McGILL v. SHEEHEE.

[1 Cranch, C. C. 49.] [1]

Circuit Court, District of Columbia. Jan. Term, 1802.

PLEADING AT LAW — REPLICATION WITHDRAWN — DEMURRER SUBSTITUTED.

The plaintiff, in slander, may have leave to withdraw his general replication and file a general demurrer, and the court will give the defendant leave to change his plea.

Leave was given to the plaintiff to withdraw his general replication to the defendant's special justification, and file a general demurrer. The defendant had also leave to withdraw his plea, and offer another plea by Tuesday next.

[See Case No. 8,797.]

Case No. 8,797.

McGILL v. SHEEHEE.

[1 Cranch, C. C. 62.] [1]

Circuit Court, District of Columbia. Jan. Term, 1802.

COSTS—CONTINUANCE—ATTACHMENT.

If judgment be rendered against the defendant in a cause which has been continued at the costs of the defendant the court will not issue an attachment against the defendant for the costs of the continuance.

Motion for an attachment of contempt against the defendant, for not paying the costs of a former continuance, the cause having been continued, at October term, at the cost of the defendant. The cause had been tried at this term, and judgment for the plaintiff. Motion overruled.

[See Case No. 8,796.]

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

McGILL (UNITED STATES v.). See Cases Nos. 15,676 and 15,677.

Case No. 8,798.

In re McGILTON.

[3 Biss. 144; 7 N. B. R. 294; 29 Leg. Int. 332; 5 Chi. Leg. News, 1; 20 Pittsb. Leg. J. 29.] [1]

Circuit Court, W. D. Wisconsin. Sept. Term, 1872.

BANKRUPTCY — SALE BY ASSIGNEE — JUDGMENT LIEN — EFFECT OF CONFIRMATION — JUDGMENT CREDITOR AT SALE — PROCEEDINGS BY CREDITOR.

1. Where an assignee petitions to sell real estate of the bankrupt, subject to certain specified liens, and it is so ordered, a sale by the assignee free from all liens does not devest the lien of a previous judgment creditor, no reference having been made in either the petition or order to any liens other than those specified.

[Cited in Re Cooper, Case No. 3,190.]

[Cited in Beall v. Walker, 26 W. Va. 747.]

2. If the report shows a sale free and clear of all incumbrances except those named, a simple confirmation by the court is not equivalent to an authority, and does not discharge such liens. To effect that it must expressly appear that knowledge of this excess of power exercised by the assignee, was brought to the knowledge of the court, or that the report was ratified as such.

3. Presence of judgment creditor at the sale by his counsel, would not estop him, there being no authority to sell free and clear of his judgment.

4. It is competent for the court in bankruptcy to authorize a creditor to proceed in the usual way to collect his debt, if that course seems best for the estate.

[Cited in Phelps v. Sellick, Case No. 11,079.]

This was a revisory petition, under the second section of the bankrupt act, filed by Samuel A. Jewett, a purchaser of real estate at assignee's sale, to set aside an order of the district court, authorizing Robert Corbett, a previous judgment creditor of the bankrupts, to proceed upon his execution, and satisfy his judgment out of the property sold by the assignees to Jewett.

Finches, Lynde & Miller, for petitioner.

By the rules of construction uniformly adopted by the courts, as to contracts, statutes, and orders and decrees, the order of sale in this case was the same in its im-

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 20 Pittsb. Leg. J. 29, contains only a partial report.]

port and meaning as if it read subject to the incumbrances therein named, and free and clear of all other incumbrances. If it was not intended to sell free and clear of all incumbrances except those named, why were any named? If the assignees were to sell the property subject to incumbrances, they had full authority by virtue of the bankrupt law [of 1867 (14 Stat. 517)], without any application to the court. In re McClellan [Case No. 8,694]; In re Mebane [Id. 9,380]; Kelly v. Strange [Id. 7,676]. It was only necessary to apply to the court for an order of sale where it was sought to sell the property free and clear of incumbrance, and it was for this purpose the application was made to the court, and the order of court obtained to sell subject to certain incumbrances. The mention of these incumbrances in the order of sale necessarily negatived all idea that the sale was subject to other incumbrances, upon the familiar maxim, "Expressio unius est exclusio alterius." Allen v. Dykers, 3 Hill, 595; Philadelphia, etc., R. Co. v. Howard, 13 How. [54 U. S.] 340; Wait v. Wait, 4 Comst. [4 N. Y.] 101; Morey v. Farmers' Loan & Trust Co., 14 N. Y. 306; Curtis v. Leavitt, 15 N. Y. 259; Sill v. Village of Corning, Id. 306; People v. Draper, Id. 568; Methodist Episcopal Church v. Jaques, 3 Johns. Ch. 110; Atkins v. Bordman, 20 Pick. 304; Com. v. Kneeland, Id. 230; Jordan v. Dennis, 7 Metc. [Mass.] 591. For what purpose were these incumbrances specifically mentioned, unless it was intended that the sale should be subject to those incumbrances alone? It was evidently the intention of the assignees in making their application to the court, that the real estate should be sold subject to the incumbrances named, and none other. They so announced at the sale, and the property was sold with that understanding to the petitioner, who paid full value therefor. It is a general principle that the district court is possessed of the full jurisdiction of a court of equity, over the whole subject-matters which may arise in bankruptcy. In re Foster [Case No. 4,960]. And supposing that the assignees and the purchaser were mistaken as to the construction of the order, the subsequent confirmation of the sale by the court ratified the sale and confirmed the title in the purchaser. The purpose and object of a master in chancery, or commissioner or assignee in bankruptcy, making a report of their sales to the court for confirmation is to inform the court of the terms of the sale, and the manner in which it was made, that the court may ratify it, if correct, and in accordance with the decree or order of court; and, if not, that the court may refuse to order a deed and set the sale aside, and order a resale in accordance with the original decree. The master or trustee is the mere attorney of the court, acting under a specially delegated authority, and in no case is he authorized to do more than to accept an offer or proposal to contract, which is of no validity unless it be accepted, ratified, and confirmed by the court. It is the court itself, for the benefit of all interested, therefore, who is the vendor in such cases. Anderson v. Foulke, 2 Har. & G. 353; Blasson v. Railroad Co., 3 Wall. [70 U. S.] 207. When one purchases premises at a master's sale, under the understanding expressed at the time of the sale that he was to have a perfect title under the decree, or a title free from all incumbrances except those stated, and the master's deed will not give him such a title, he may be discharged from the obligation of his purchase. Morris v. Mowatt, 2 Paige, 589; Lawrence v. Cornell, 4 Johns. Ch. 545; Seaman v. Hicks, 8 Paige, 658. Assignees in bankruptcy are as much bound as any other description of vendors to show a good title to any property they offer for sale in the ordinary manner. Cooper v. Denne, 1 Ves. Jr. 565, note; McDonald v. Hanson, 12 Ves. 278. Where they contract to sell an estate generally, they are bound as other persons to make a title to the inheritance free from incumbrances. White v. Foljambe, 11 Ves. 337; Pope v. Simpson, 5 Ves. 145, and note 1; 2 Sugd. Vend. (6 Am. Ed.) 152, 153. These decisions are under the English bankrupt law, where the court has no such power as under our law, to sell free and clear of existing liens, and where the assignee is not regarded as the officer of the court, and the sale is not considered, as with us, a sale by the court. But in this case the sale was made by order of the court, by the assignees, under the direction of the court, and all the facts were reported to the court, and special mention made of the fact that the premises were sold free and clear of all incumbrances, except those specially mentioned. The district judge, in his opinion, says that his attention was not called to this clause. But this was not the fault of the purchaser. A party who invests his money on the faith of an order of court should be protected in his investment, and it is not incumbent on him to prove that the court did what it was its duty to do—know what order it was making. He has a right to presume that the court has done right. Bennett v. Hamill, 2 Schoales & L. 577. The jurisdiction of the district court as a court of bankruptcy extends to the collection of all the assets of the bankrupt, to the ascertainment and liquidation of the liens and other specific claims thereon, and to the adjustment of the various priorities and conflicting interests of all parties. The liens sought to be created against the purchaser are judgments against the bankrupt. A judgment lien on land constitutes no property or right in the land itself. A judgment creditor has no jus in re, but a mere power to make his general lien effectual by following up the steps of the law. Massingill v. Downs, 7 How. [48 U. S.] 767; Becker v. Morton, 12 Wall. [79 U. S.] 158; Conrad v. Atlantic Ins. Co., 1 Pet. [26 U. S.] 443. In chancery the general lien of a judgment is controlled by eq-

uity so as to protect the rights of those who are entitled to an equitable interest in the lands or in the proceeds thereof. Ells v. Tousley, 1 Paige, 280; Buchan v. Sumner, 2 Barb. Ch. 165. The order to sell subject to certain incumbrances is equivalent to an order that the purchaser pay those incumbrances out of the purchase money. The court has, therefore, applied the full value of the property in payment of the prior liens, through the purchaser, who, at least, is entitled to be subrogated to the rights of those lien creditors whose liens have been paid. An incumbrancer has no right to complain when the property on which he has a lien is exhausted in the payment of prior liens. But if the court is of opinion that Corbett is entitled to relief, and should be allowed to sell, it should be upon the condition that he will file an offer to bid the premises up to the full amount of all liens prior to that judgment. The universal rule is that the party applying after confirmation of sale to set the same aside (in the absence of fraud) must offer to increase the bid.

John E. Stillman, for judgment creditor.

DRUMMOND, Circuit Judge. The facts in this case are, that John McGilton and his partners were declared bankrupts by the decree of the district court. Assignees were appointed, and made application to the district court to sell some real estate on which were certain liens and incumbrances. The petition to the district court set forth the character and amount of the incumbrances, and asked that they have leave to sell the real estate, subject thereto. The district court thereupon made an order authorizing the assignees to sell the real estate subject to the incumbrances named. No mention in that petition was made of the judgment of Corbett against the bankrupts, nor any other liens than those described in the petition, nor did Corbett have any notice of the application.

Samuel A. Jewett was the purchaser at the sale. Thereupon a report was made by the assignees to the court, setting forth the application, the incumbrances, sale of the property, and purchase by Mr. Jewett; also declaring in the report that the sale was made "free and clear of all other liens and incumbrances, except those named."

The sale was confirmed by the district court. The particular order by which the sale was confirmed is not set out in the petition. The language of the petition is that the report of sale was confirmed; but in the absence of any evidence of the particular phraseology of the order by which the confirmation was made, the inference must be that it was simply an order confirming the sale.

The proceeds of the sale were distributed under the order of the court, exclusively in defraying the costs and expenses. The incumbrances, it should be borne in mind, upon the property, amounted to quite a large sum—over twenty thousand dollars, as stated in the petition—which of course the purchaser had to pay in order to get a title to the property.

After these proceedings took place in the district court, Robert Corbett made application to the district court to obtain satisfaction of a judgment which he had against the bankrupts, and which he claimed was a lien upon their real estate, and asked that it should be paid out of money in the hands of the assignees, or that he should have satisfaction out of the property of the bankrupts. After hearing this application, upon answer made by the assignees, and by Mr. Jewett, the purchaser at the sale, the district court made an order authorizing Corbett to proceed by execution, and have his judgment satisfied against the property. This judgment had been recovered in a state court, against the bankrupts more than six months before proceedings in bankruptcy were commenced.

It is this order which the petitioner Jewett seeks, under the second section of the bankrupt law, to set aside, on the ground that the sale was made of the property free from all incumbrances, and that the purchaser acquired a good title.

It will be observed from the statement which has been made, that the petition of the assignees to the district court simply requested, and the order of the court directed, that the property should be sold subject to the liens specified. It made no reference whatever to any other liens. It was not asked, nor was it authorized, that the property should be sold free and clear from all incumbrances other than those named.

And when the report was made, it contained what was not in the petition, nor in the order of the court, namely, that it was sold free of all incumbrances, except those named. That was inserted in the report, and, as I think, without authority.

Now, under such circumstances, it is clear, if it be conceded that the district court had the right (as to which I give no opinion) to effect the sale of the property free and clear of all incumbrances, by a simple ratification of the language of the report, then it should explicitly appear in the order of confirmation that the report was confirmed, and that the sale, which it is alleged the assignees made free from all incumbrances except those named, was confirmed as such, so as to show that the court acted upon that part of the report, and confirmed the sale by making it free and clear from all other incumbrances.

That would be indispensably necessary, I think, under the circumstances, in order to make it binding upon the court, because it could be only effectual by a ratification brought home to the knowledge of the court of this clause in the report of the assignees.

They were acting under a power. They were bound to follow the instructions of the power. If it was sought to be enlarged the court ought to have known of that enlargement, and ratified and confirmed it as such. Now, there is nothing to show, except what appears upon the face of the record, that this particular part of the report was brought to the knowledge of the court, and that it ratified that part. On the contrary, it is apparent, from the opinion of the district judge in deciding the question, that it was not done.

It is said in the petition that at the sale Mr. Corbett was present by his counsel, and made no objection. It does not appear what action the court took upon this point, or whether there was any proof heard before the court. In other words, it does not appear that the district court considered the question, or decided that Corbett, by being present through his counsel at the sale, and making no objection, was estopped from setting up a claim under his judgment. And therefore this court cannot consider that as a question properly before it for revision. Concede that were so—that by being present at the sale under certain circumstances, and making no objection, he would be estopped—it is sufficient to say that if he were present at the sale, which is denied by an informal answer put in, all that appears is that he was present with the knowledge of the authority which had been given, to sell, subject to certain judgments; and Corbett's judgment was not named in the list, neither in the petition nor in the order of the court, nor in the report of the assignees, nor in the confirmation in any way. And the district court never had any knowledge, it is fair to presume, of this judgment, until the petition was filed by Corbett. So that if he was present at the sale by his counsel, he was present in contemplation of law only with knowledge of those facts which were stated in the petition of the assignees, and in the order of the court. Whether he would be bound by an unauthorized statement made by the assignees at the sale, might admit of serious question.

We must concede that the bankrupt court had control of the property, because it was a simple lien, and the bankrupts owned the property, subject to the lien, and it passed to the assignees as the property of the bankrupts, subject to the lien. Still, if valid and subsisting, it could not be destroyed so long as the property which was bound by it remained under the control of the assignees, and of the court. Now, in the case as it is presented, the court must presume that this lien was a valid and subsisting lien, that it was not in violation of the bankrupt act, and I have no doubt, therefore, that the judgment of the district court was right—that this party is entitled to have satisfaction out of the property of the bankrupts.

It is to be observed that Corbett could not proceed upon his judgment without the consent of the bankrupt court. It is sometimes the case that creditors, who have judgments, proceed to sell the property covered by the lien of the judgment, where it has passed by law to the assignees; but the courts have uniformly held those sales were invalid, if made without authority of the bankrupt court. If it be admitted the court, where there are liens on real property of the bankrupt, can order it to be sold free from the liens, to marshal the assets and pay off the liens, it is equally competent for the court to authorize the creditor to proceed in the usual way to collect his judgment, if that course seems best for the estate.

The decree, therefore, of the district court will be affirmed, without prejudice to the right of the assignees to contest the judgment which Corbett has obtained, if they are advised that it can be done as being in fraud of the bankrupt act, or otherwise invalid.

NOTE. As to the power of the court of bankruptcy to sell property free from liens, the liens being transferred to the funds in court, consult, also, In re Stewart [Case No. 13,418]; In re Barrows [Id. 1,057]; In re Schnepf [Id. 12,471]; In re Salmons [Id. 12,268]; Foster v. Ames [Id. 4,965]. In which latter case the authorities under the act of 1841 [5 Stat. 440] are examined, and declared applicable to the present act. Unless by order of the court, the assignee sells subject to any and all lawful incumbrances. In re Mebane [Case No. 9,380]; Kelly v. Strange [Id. 7,676].

Case No. 8,799.

McGINNIS v. CARLTON.

[Abb. Adm. 570.] [1]

District Court, S. D. New York. Nov., 1849.

ADMIRALTY PRACTICE—SUM LESS THAN FIFTY DOLLARS—COSTS—APPEAL.

1. Although the libellant, in his libel, claims a sum exceeding $50, yet if upon the hearing he admits that an amount less than that sum is all that is due to him, and claims to recover only such lesser sum, he can recover only summary costs on a decree in his favor.

2. The cause would not be appealable to the circuit court in that condition of the demand.

3. This court does not tax plenary costs when the sum in dispute does not exceed $50, although the proceedings are plenary.

This was a libel in personam filed by John McGinnis, against Henry Carlton. The libellant, in his libel, advanced a claim for $55. On the hearing before the commissioner, to whom the cause was referred, the respondent claimed a deduction of $10, the propriety of which was admitted by the libellant. The claim, as litigated before the commissioner, was thus reduced to $45 only. Upon that claim the libellant prevailed. On taxation of costs, however, plenary costs were taxed in his favor, on the ground that the amount

[1] [Reported by Abbott Brothers.]

of his claim, proceeded upon by the libel, exceeded $50. The respondent now appealed from this taxation.

W. Newton, for appellant.
F. C. Bliss, for respondent.

BETTS, District Judge. I think this case was clearly one of summary character. It was not appealable to the circuit court. Act 1803 (2 Stat. 244). The matter in dispute between the parties was less than $50. Rule 165 must be construed in subordination to the terms of the statute, as its design was to operate on those cases which were not appealable under the act.

The supreme court holds that a plaintiff may appeal or bring error, when his suit is for an amount above the limited sum, whatever may be the recovery. Gordon v. Ogden, 3 Pet. [28 U. S.] 33. That is justly so, when the court adjudge in invitum against his demand. But it seems to me that all the determinate character of the libel is taken away, if the libellant himself, on the hearing, admits his claim to be less than $50, although he has put it nominally above that sum in his pleading. It would be sanctioning a measureless abuse to permit parties to encumber, with plenary costs, suits for the most trifling sums by alleging a demand exceeding fifty dollars, when the claim he brings before the court as his actual demand is below that sum.

Congress manifestly designed that the decisions of the district court should be final in cases where the disputed matter was only $50, and not to allow appeals on claims exceeding originally that sum, but which the libellant conceded, on the hearing, had been reduced below it by payments before his action was brought. An appeal does not lie when the matter in dispute is not $50.

If the libellant, on the trial, had persisted in the demand in his libel of $55, and the court had allowed the respondent a charge of $10 against the demand, he might, undoubtedly, take the case to the circuit court, by appeal, to have that judgment rectified. But here, all the proceedings in court show that the real demand in dispute was $45 alone, and the court cannot be blinded by a formality in pleading, to give an advantage to the libellant in the matter of costs, which the judgment he asked and received, demonstrates he is not entitled to. Had the cause been allowed, on the technical frame of the libel, to go into the circuit court, it would, undoubtedly, be regarded as cognizable there only to the end of punishing the libellant by the infliction of costs, for intruding into that court a demand only disputable in the court below.

Congress has appointed no tariff of fees for the government of admiralty courts (See note to Simpson v. Caulkins [Case No. 12,880]). Those tribunals regulate that subject at their discretion. This court directed, by rule 165, that proceedings herein for the recovery of matters in dispute, not exceeding $50, may be summary; and by rule 176, that in causes of that character, the proctor and advocate shall not be allowed to tax over $12 costs. This limitation justly applies, although the form of procedure be made plenary, when it is made manifest to the court that the action is rightly a summary one. In this case the libellant made up and claimed a bill of costs for a litigation in a plenary action, and the taxing officer allowed it to him. From that taxation the respondent appeals. I consider the allowance unauthorized in law, and overrule it. The bill must be retaxed at $12, the amount limited in a summary action.

Order accordingly.

Case No. 8,800.

McGINNIS v. The GRAND TURK.

[9 Pittsb. Leg. J. 257; 4 West. Law Month. 80; 2 Pittsb. Rep. 326.]

District Court, W. D. Pennsylvania. 1862.

SEAMEN'S WAGES — SHERIFF'S SALE — MINORS — RIGHT OF FATHER TO MAINTAIN ACTION—RENUNCIATION—WATCHMAN—MARITIME LIENS.

1. A sheriff's sale of a steamboat does not discharge the lien of sailors' wages. Otherwise, if the wages are due to the owner of the boat.

2. A father may maintain an action, in admiralty, for the wages of his minor children, but it is a right which may be renounced or forfeited.

3. He may renounce it by voluntarily allowing his child to have the exclusive use of the fruits of his own industry; or he may forfeit his right by neglecting to perform those duties which are the foundation of that right.

4. A watchman, not during the navigation of the vessel, nor when she had cargo on board, but exclusively in a home port, at the Marine Railway, and when she was laid up for repairs, has no lien for his wages.

[Distinguished in Wishart v. The Jos. Nixon, 43 Fed. 928.]

5. This is not maritime service. It is the work of a landsman, rather than a sailor. It is completed before the voyage is begun, or after it is ended. It is, therefore, not a maritime contract, which can be enforced in a court of admiralty.

In admiralty.

Mr. Woods, for libellant.
Mr. Barton, for claimant.

McCANDLESS, District Judge. The libellant, a minor, by his next friend, R. B. Cool, sues for wages as a watchman on board the steamboat "Grand Turk," of which Wm. McGinnis, his father, was the owner. The interest of the father was, by a judicial sale and subsequent conveyance, vested in Geo. W. Coffin, who intervened to resist the payment.

As a general principle, it is not denied, that the lien of a sailors' wages is not discharged by a sheriff's sale,—Gallatin v. The Pilot [Case No. 5,199]; but it is contended, that the son being a minor, the wages were due to the father. If this be so, a sale by the

sheriff confers all the title which the defendant in the execution had, and is equivalent to his own deed, with special warranty. The case would then present this bare propcsition: Can a vendor, for a consideration paid, retain a lien against property, which he has thus sold, and delivered, in the hands of his vendee; and that, too, for a debt due by himself to himself? Certainly he cannot, for when a chattel is sold and delivered to the vendee, the vendor has neither jus in re nor ad rem, neither a property in nor a lien on the thing sold. Gallatin v. The Pilot [supra].

In the present case, this all depends upon the relation subsisting between the father and the son. As a general proposition, it is undoubtedly true, that the father is entitled to the earnings of his children during their minority, nor is there any doubt that he may maintain a suit in admiralty for their wages earned in maritime service,—Plummer v. Webb [Case No. 11,233]; but this is not, like the duties of a parent, a right indissolubly attached to the paternal relation. It is a right which may be either renounced by the father or forfeited. He may renounce it, by voluntarily allowing his child to have the exclusive use of the fruits of his own industry, and he may forfeit his right by neglecting to perform those parental duties which are the foundation of that right. The Etna [Id. 4,-542]. The proofs have shown clearly that for two years, the father permitted the son to hire out, receive his own wages, and to have the control of his own actions, and it does not appear that this renunciation of the parental guardianship was attended with any results prejudicial to the minor. If the case depended upon this point, the libellant would be entitled to a decree, for courts of admiralty will always take care of the interests of minors, even against the grasping disposition of their parents.

But there is a bar to a recovery here, which meets us at the very threshold. This is not a maritime contract, which can be enforced in a court of admiralty. The libellant was a watchman, not during the navigation of the boat, or while she had cargo on board, but exclusively in the home port, at the Marine Railway, and when she was laid up for repairs. This was no maritime service. It was the work of a landsman rather than a sailor. It had nothing to do with the navigation of the vessel, no part of the services being rendered while the vessel was in motion. Like the case of McDermott v. The S. G. Owens [Case No. 8,748], decided by my Brother Grier, "the services are performed on a contract which is neither made at sea nor for service to be performed at sea; both (that is the contract and service) were in the port of Philadelphia, and within the county of Philadelphia. The ship was safely moored at the wharf, and was in the actual possession of the owners; the service had no agency in bringing her in; he was not carrying freight." For these reasons (which are quoted from Gil. Ad. Rep. 3), with others, the court decide that a seaman, whose wages have been paid up to the termination of the voyage, but who afterwards remains on board the vessel moored at the wharf, has no claim for services which a court of admiralty will enforce. The service performed here by the defendant as watchman is in no sense maritime. Like that of the "stevedore," "it is completed before the voyage is begun, or after it is ended," and has none of the characteristics of a maritime contract.

The libel is dismissed, with cost.

Case No. 8,801.

McGINNIS v. The PONTIAC.

[5 McLean, 359;[1] Newb. 130; 10 West. Law J. 174.]

District Court, D. Ohio. Oct. Term, 1852.

ADMIRALTY JURISDICTION—OHIO RIVER—SALVAGE—TEMPORARY MASTER — PERIL—ESCAPE—CAUSE OF ESCAPE—COMPENSATION.

1. This court has admiralty jurisdiction over the Ohio river.

[Cited in Seven Coal Barges, Case No. 12,677.]

2. Where a steamboat is in actual peril, and one is requested to take charge of her as master, and save her if possible, with no stipulation as to time or wages, the fact of acting as master, not having been so before, will not deprive him of the right to claim salvage.

[Cited in Spencer v. The Charles Avery, Case No. 13,232; The Connemara, 108 U. S. 358, 2 Sup. Ct. 757.]

3. The fact of peril is to be ascertained from the circumstances surrounding the boat at the time when the salvage service commences, and the fact of escape is not to be taken as proof that there was no peril.

4. The fact that the exertions of the salvor did not save the boat, she being saved by the particular manner in which the ice broke up, does not deprive him of the merit of a salvor, if he encountered the danger, and did all that could be done under the circumstances.

5. There is no fixed rule of compensation. It must depend upon the particular circumstances. It may be a per centage upon the property saved, or a fixed sum to be assessed pro rata upon the boat and cargo. In this case the latter course is adopted.

In admiralty.

T. Walker, for libellant.

C. D. Coffin and A. Taft, for defendants.

LEAVITT, District Judge. This is a libel in personam for salvage, prosecuted by Michael N. McGinnis, against the owners and freighters of the steamboat Pontiac No. 2. The material facts stated in the libel, on which the claim of salvage is founded are, that on the 30th of January, 1852, the steamboat Pontiac, with a valuable cargo, bound for Cincinnati, in ascending the Ohio river, some distance below Louisville, met with a gorge of ice, and was in a condition of extreme peril; that having been deserted by all her passengers, and many of her officers and

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

crew, the libellant, then a passenger on the steamboat Sparhawk, also attempting to ascend the river, and involved in the same gorge, was requested by A. Warden, the master, and William F. Belser, one of the owners of the Pontiac, to take charge of her, and try to save her, the said master and owner, then being about to leave her; and that the libellant did accordingly take charge of her, and with the assistance of some of the officers and crew, saved her from her imminent peril, and brought the boat and cargo safely to Cincinnati. The libellant also avers, that upon the arrival of the boat at Cincinnati, he consented to the delivery of the freight to its several owners and consignees, but retained possession of the boat as salvor, till the 10th of February, 1852, when he was forcibly expelled from her by one of the owners, who refused to make him any compensation for his services, except his wages as master, for the time he was in command. The libellant claims reasonable salvage for assistance rendered the boat. The answer of the owners of the boat and of the cargo, after setting out the circumstances connected with the stoppage of the boat in the gorge of ice, denies that she was in peril; and avers that the libellant was employed to take charge of the boat as master, in the place of Captain Warden, then disabled by sickness, and not as salvor. The answer also denies that the Pontiac was deserted or abandoned at the time the libellant took charge of her, and alleges that she was well provided with men and the means necessary to preserve and protect her; and, that she sustained no damage, and proceeded on her way to Cincinnati, in charge of the libellant, as master, because of the continued ill health of Captain Warden, and his inability to resume the command; and, that the services of the libellant do not entitle him to compensation as salvor.

It is also set up in the answer, that the case made in the libel is not within the admiralty jurisdiction of this court. The facts requiring notice, preliminary to the consideration of the points arising in the case, as established by the evidence, may be summarily stated as follows: In the afternoon of the 30th of January last, the steamboats Ohio, G. W. Sparhawk, Washington, Pontiac No. 2, Milton, and Col. Dickinson, in the order here named, were attempting to ascend the Ohio river, through a narrow opening or channel made through the ice by two boats ahead of them, when the whole body of the gorged ice on both sides of this channel, before stationary, began to move, and in its progress entirely shut up the passage through which the boats before named were ascending; and they became so involved in the ice as to render it impossible to move by the aid of their machinery either upward or downward. The mass of gorged ice, thus set in motion, moved a distance of two or three hundred yards, when it stopped. By this moving of the ice, the Ohio, being ahead of all the other boats, was forced down for some distance; the Sparhawk, being the next to the Ohio, was driven down against the Washington; and such was the force of the collision, that the latter boat was sunk. The Milton was forced against the Col. Dickinson, materially injuring the latter; and, at the same time, the Pontiac was swung round, and driven stern foremost into a crack or opening in the ice, toward the Indiana shore, where she lay when the ice stopped; her bow quartering a little up the stream, and her stern within twenty or thirty yards of the shore. During this movement of the ice, and from the great danger in which all the boats were involved, there was much alarm and consternation among the passengers and crews, which was increased by the cry that the wrecked boat—the Washington—was on fire. The passengers and some of the officers and crews of all the boats, except the Ohio, from which escape was impossible, from the thinness of the ice surrounding her, left the boats in the ice and sought safety on shore. The gorged ice extended for some distance above and below where the boats lay; and, although the natural thickness of the ice, except near the shores, did not exceed six or eight inches, yet as the result of the stoppage of the mass of descending ice, it was so piled up and crowded together, that in some parts of the gorge, it was, as estimated by the witnesses, ten feet, or even twenty feet thick. After the stoppage of the gorge, leaving the Pontiac in the position before described, by the direction of Captain Warden, she was, as far as practicable, made secure in her place by a line or hawser, passed several times from her stern to the shore; and, by his order also, the ice immediately below the boat was cut away, that she might swing in toward the shore when the gorged mass should again start. The libellant, who had for some years been engaged in steamboat service on the river, both as a pilot and master, was a passenger on the Sparhawk. Some time in the afternoon, subsequently to the stoppage of the gorge, as before noticed, by the request of Captain Warden, and the concurrence of William F. Belser, one of the owners of the Pontiac, and then a passenger on her, the libellant consented to take charge of her as master, without any agreement as to compensation, or the time he was to continue in command. Captain Warden and Mr. Belser then left the Pontiac, and did not come on board again that night. Between six and seven o'clock in the evening, the libellant took the command of the boat, and was on duty till morning, giving throughout the night the necessary orders, and attending to the usual duties of a master. About eleven o'clock in the night, from the cracking of the ice above, it became certain it would again shortly be in motion; and, between three and four in the morning, the gorged mass started and passed down without any injury to the Pontiac. In the morning, after relieving her wheel from

the ice which was gorged under and upon it, the boat proceeded on her course upward, in command of the libellant, and arrived at Cincinnati on the 5th of February.

This general view of the evidence will suffice, as opening the way for the consideration of the points arising in the case. It is insisted, in the first place, by the counsel for the respondents, that the libellant, as master of the Pontiac, has no claim for salvage service; having performed no duty that he was not bound to perform in virtue of his official relation to the boat. There is no room to doubt the correctness of the position, as a principle of maritime law, that a master, for any ordinary service in saving his vessel or cargo, cannot assert a claim for salvage. It is well settled, that, "in general, neither the master, nor a passenger, seaman, or pilot, is entitled to compensation in the way of salvage, for the ordinary assistance he may have afforded a vessel in distress, as it is no more than a duty; for, a salvor is a person who, without any particular relation to a ship in distress, proffers useful service, and renders it, without any pre-existing contract, making the service a duty. But a passenger or an officer, acting as such, for extraordinary exertions beyond the line of his duty, has been deemed entitled to liberal compensation as salvage." 3 Kent, Comm. 246; 1 Conk. Adm. 274. In the case before the court, the evidence affords no ground for the conclusion, that the services of the libellant were of such an extraordinary character as to entitle him to salvage, if he is to be viewed merely as the master of the boat, under the usual circumstances of employment as such. But it seems to the court a pertinent inquiry, whether under the peculiar circumstances in which the libellant took charge of the Pontiac, he is within the scope and reason of the rule excluding a master, for ordinary services, from setting up a claim for salvage. The rule is founded on considerations of public policy, and is designed for the protection of the great interests of navigation and commerce. The obvious propriety, not to say necessity, of providing against temptations to place property afloat on the ocean, lakes, or rivers, in a situation of peril, for the fraudulent purpose of asserting a claim of salvage for its protection and safety, led to its adoption. It is a rule, therefore, founded in good sense; and, in all proper cases, should be rigidly observed. But I do not perceive its applicability to the case of this libellant. He was a passenger on another boat, and could have had no agency in bringing the Pontiac into the position of danger in which it is averred she was placed. He was under no obligation to take command of her, or in any way to incur any hazard or render any aid for her protection or safety. He was requested to take charge of the boat, with an injunction to save her if possible, and without any stipulation as to wages or compensation. Do not these circumstances take the case out of the operation of the rule referred to, excluding a master, in ordinary cases, from asserting a claim for salvage service? And may not the libellant be fairly regarded as one who, within the definition before cited, has virtually proffered and rendered useful service to a boat in distress, without any pre-existing contract making the service a duty? So far as motive is concerned, the facts do not allow the presumption that the libellant would voluntarily incur the responsibilities and hazard resulting from his taking command of the boat, for the trifling pecuniary remuneration he would be entitled to as master, at the ordinary rate of wages, for the few days that he would be employed as such. It is therefore consistent with the facts to suppose, that he looked for some compensation for his services beyond the usual pay of a master. In stating, as the result of my examination, that under the circumstances of this case, I do not regard the fact that the libellant was in the position of master at the time the service was rendered, as excluding him from a claim for salvage, it is proper I should say, that I have reached this conclusion, without the aid of any authorities bearing on the point. In looking into the few books on maritime law, which are accessible to me, I have found no case reported, or principle settled, which directly touches the inquiry here involved.

The next point made by the counsel for the respondent is, that the steamboat Pontiac, at the time libellant took charge of her as master, and while he was in command, was not in such a condition of imminent peril as to be a subject of salvage service. It is a well settled principle of maritime law, that "to warrant a claim of salvage, the danger to the property saved must be real and imminent. Mere speculative danger is insufficient; but it need not be such that escape from it by other means was impossible." Talbot v. Seaman, 1 Cranch [5 U. S.] 1; 1 Pet. Cond. R. 229.

In looking into the evidence, it is impossible to resist the conclusion, that the Pontiac was in great danger, at the time, and after the libellant took charge of her. Her position after the moving of the ice in the afternoon, has been before noticed. She lay with her stern toward shore, in a crack or opening in the ice; her bow out, with a slight angle up stream; her stern being made fast to a rock on shore by lines. Several witnesses—of long experience on the river, and familiar with all its perils—say, they considered it certain the whole mass of ice in the river would be in motion during the night. They also state that there was the strongest probability, amounting, in the opinion of some of them to a certainty, that when the ice did start, all the boats in the gorge would be lost. Some of the witnesses state, that the Pontiac, from her position and her heavy freight, was in the greatest danger.

There was danger—some of the witnesses thought it inevitable—that the heavy shore ice would press down against the upper side of the boat and crush her; or, otherwise, the lines with which she was made fast would be broken, and she would be carried down and wrecked upon Rock Island, a short distance below. It appears, too, from the conduct of the passengers on all the boats, that they thought there was the most imminent danger the boats would be lost during the night. All left the boats and went ashore, although the night was very dark with constant rain; preferring to encounter the discomfort of exposure to the inclemencies of the weather—some without any shelter, and some imperfectly protected by tents—to remaining on the boats. As many of the officers and crews of the boats as were not needed for their management, also went on shore. Mr. Belser, one of the owners of the Pontiac, left her as already stated, with a charge to the libellant, in taking command, to save the boat if possible. Captain Warden also, on account of his feeble health, went ashore; giving, as the reason, that remaining on board, in case of accident to the boat, he might be obliged to take to the water, which would, as he thought, endanger his life, in his then condition of bodily ailment. Several witnesses—some of them officers on the Pontiac—state, that no pecuniary consideration would have induced them to stay on board during the night. The event so confidently anticipated in the evening, actually happened during the night. The whole mass of the gorged ice moved about three o'clock, threatening all the boats with destruction. But one, however, the Dickinson, was seriously injured. That the Pontiac was not lost was owing to the fact that the gorge broke first toward the middle of the river, and did not carry with it all the heavy shore ice above her.

This summary of the facts in this case shows, I think, conclusively, that the danger to which the Pontiac was exposed during the night referred to, was not merely speculative, but real and imminent. It is true, it is not proved that but for the service and assistance of the libellant the boat would not have been saved. Yet there can be no doubt that his taking the command of her, under the circumstances, involved great personal peril to himself; and that without his services, the boat and cargo would have been in much greater danger of being lost. Captain Warden, very justifiably, under the pressure of sickness, left her, as did also Mr. Belser, one of the owners. The presence of a master, for the proper management and security of the boat and cargo during the night, was indispensable. And the libellant, in consenting to take charge of her, in her condition of peril, and doing all that could be done for her safety, it seems to me, is not only entitled to the credit of courageous and meritorious conduct, but to a compensation, as for a salvage service. In 2 U. S. Sup. Dig. 731, I find the doctrine asserted, that, "in all cases where services are rendered in saving property in danger of being lost on the high seas, or when wrecked or stranded on the shore, it is, in the sense of the maritime law, a salvage service." The case referred to in the digest is that of The Centurion [Case No. 2,554]. I have not been able to refer to the reports from which the above citation from the digest purports to have been taken. If the principle is truly stated in the digest, it is certainly broad enough to embrace the present as a proper salvage claim. In reference to the amount of the compensation in salvage cases, there is no fixed rule. It is always to be determined by the sound discretion of the court. In the case of The Adventure, 8 Cranch [12 U. S.] 221, 3 Pet. Cond. R. 93, Mr. Justice Johnson, in delivering the opinion of the court, says: "It (the amount to be allowed) must in every case depend upon peculiar circumstances, such as peril incurred, labor sustained, value decreed, etc., all of which must be estimated and weighed by the court that awards the salvage." Again: "As far as our inquiries have extended, when a proportion of the thing saved has been awarded, a half has been the maximum, and an eighth the minimum; below that it is usual to adjudge a compensation in numero." "The reward should be such as not only to afford an ample remuneration to the salvor for the risk of life and property, and for the labor, privations, and hardships encountered, but so liberal as to furnish a sufficient incentive to similar exertions by others." 1 Conk. Adm. 282; The Henry Ewbank [Case No. 6,376]. "If the property saved is of great value, or if it was in a condition apparently hopeless, but for the interposition of the salvors, or if the service was undertaken with alacrity, and executed with a high degree of skill and energy; or if it involved extraordinary peril, or required severe and exhausting labor, the retribution ought to be proportionally liberal. The opposite of either of these circumstances ought, consequently, to produce the opposite effect." 1 Conk. Adm. 285—and the authorities there cited. But this claim of this libellant cannot be viewed as of the highest order of merit, and as entitling him to a high rate of compensation. His conduct was certainly praiseworthy, and such as to give him a fair claim to remuneration beyond the ordinary pay of a master, but there was not the personal risk, exposure, hardship, and labor; nor is there the certainty that the property was saved through his interposition, that will justify a large allowance to him as a salvor. And it may not be improper here to remark, that in salvage claims arising on the western rivers, the precedents of courts administering the admiralty law on the ocean, in regard to the amount of compensation, cannot be safely adopted. In general, the peril of life, in cases of disaster on our rivers, afford-

ing a claim for salvage service, is not equal to those resulting from disasters on the ocean.

Upon the whole view of the case, the court adopt the suggestion of Mr. Justice Johnson, in the case before referred to, and award a compensation in numero, to the libellant, instead of any fixed per centage, or proportion of the value of the property. And this amount is fixed at five hundred dollars, to be assessed upon the boat and the cargo, according to their value at the port of Cincinnati. Upon the question of jurisdiction, the court has only to remark, that the opinion of the supreme court at its last session, in the case of The Genesee Chief v. Fitzhugh, 12 How. [53 U. S.] 443, is regarded as decisive. The decision in that case is authoritative in all the courts of the Union. By it the doctrine is settled, "that the admiralty and maritime jurisdiction granted to the federal government by the constitution of the United States is not limited to tide-waters, but extends to all public navigable lakes and rivers, where commerce is carried on between different states, or with a foreign nation."

McGINNIS (UNITED STATES v.). See Case No. 15,678.

Case No. 8,802.

McGINNITY v. WHITE et al.

[3 Dill. 350;[1] 1 Cent. Law J. 241.]

Circuit Court, D. Nebraska. May Term, 1874.

REMOVAL OF CAUSES FROM STATE TO FEDERAL COURT — ACT OF JULY 27, 1866 — CITIZENSHIP — AMOUNT — REMOVAL BY PART OF THE DEFENDANTS.

1. Under the act of July 27, 1866 (14 Stat. 306), as to the removal of suits from a state court into the federal court, it is sufficient, it seems, as respects citizenship, that the defendant applying for the removal is, at the time of filing his petition therefor, a citizen of another state, and the plaintiff a citizen of the state in which the suit is brought.

[Cited in Jackson v. Mutual Life Ins. Co., Case No. 7,141; McLean v. St. Paul & C. Ry. Co., Id. 8,892; Curtin v. Decker, 5 Fed. 387; Glover v. Shepperd, 15 Fed. 835. Disapproved in La Montagne v. T. W. Harvey Lumber Co., 44 Fed. 647.]

2. It is sufficient in such a case that the matter in dispute exceeds $500 besides costs at the time when the right to the removal accrues and is applied for.

3. One of several defendants sued as co-partners may, if the other requisites exist, have the cause removed into the federal court so far as concerns himself.

[Cited in Steinkuhl v. York, Case No. 13,356; Rawle v. Phelps, Id. 11,588; Goodenough v. Warren, Id. 5,534.]

On motion by the plaintiff [John McGinnity] to remand the cause to the state court because it was improperly removed to this court. The removal was ordered by the state court upon the petition of Francis A. White, one of the defendants. The record shows that the plaintiff commenced his suit in the state court, February 28th, 1870, demanding, in his petition, of the defendants, five in number, as co-partners, $1,000 for work and labor. A summons claiming that amount was served. The defendants separately demurred for misjoinder of causes of action and parties defendant. On the 1st day of April, 1870, the demurrers were sustained and leave given to the plaintiff to amend the petition in forty days. On May 12th, 1870, an amended petition was filed against the same persons as co-partners, and claiming of them the "sum of $445, with interest thereon at ten per cent per annum from January 21st, 1870, * * * for work and labor before that date performed by the plaintiff for the said defendants, co-partners in business as aforesaid." The original petition referred to certain written contracts, but the amended petition does not. On July 22d, 1870, Francis A. White answered separately, traversing the petition, and especially denying that he was a co-partner with the other defendants, as alleged therein. One of the other defendants, G. Frederick White, answered separately to the same effect. The cause was continued, and at the December term, 1870, at the instance of the two defendants last named, the venue was changed to another state court, and in that court the cause was continued from time to time by stipulation until the 11th day of April, 1873, when the defendant, Francis A. White, filed his petition for its removal to the circuit court of the United States for the district of Nebraska, and offering surety, etc. The petition was under the act of July 27th, 1866, and states, inter alia, that "the petitioner, Francis A. White, is now, and since the 19th day of February, 1873, has been a citizen of the state of New Jersey; that the plaintiff is, and was at the time of bringing the suit, a citizen of Nebraska: that the amount in dispute exceeds $500, exclusive of costs; that all the defendants, except David Everest, are citizens of some other state than the state of Nebraska (naming the states); that there can be a final determination of the controversy, so far as concerns the petitioner, without the presence of the other defendants as parties," etc. The petition offers surety, etc., and prays the removal of the suit to this court. The surety was accepted and an order made transferring the cause as prayed. And now in this court the plaintiff moves to remand the same on two grounds: 1. The amount involved does not exceed $500. 2. One of several alleged co-partners made defendants is not entitled to remove the cause, where some of his co-defendants are citizens of the state in which the suit is brought.

Stephenson & Hayward, for plaintiff.

T. M. Marquette, for petitioner for removal.

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

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

DILLON, Circuit Judge. I. The petition for removal was under the act of July 27, 1866 (14 Stat. 306). This enactment copies, in many respects, section 12 of the judiciary act as to the removal of causes into the federal courts, but it makes two important changes in that section; first, in authorizing, in certain cases, the removal by part of several defendants if some are citizens of the state where suit is brought, and others are aliens or citizens of some other state; second, in extending the time in which the application for the removal may be made, down to the trial or final hearing. But as respects the amount in controversy, the language of the judiciary act is retained—"the matter in dispute must exceed the sum of $500, exclusive of costs."

In cases like the present the amount in controversy, for the purpose of the removal, is determined by the declaration or petition. In this case a demurrer to the original petition having been sustained, the plaintiff made his case by an amended petition filed May 12th, 1870, in which he claimed to recover $445 with ten per cent interest from January 21st, 1870. This is the only pleading on the record which defendants were bound to answer, and is the one upon which the defendant who subsequently applied to remove the cause, took issue. At the time when this amended petition was filed, and at the time when the petitioner for the removal of the cause took issue upon it, the sum demanded, including interest, did not amount to $500. But by continuances the cause remained pending in the state court until the 14th day of April, 1873. Meanwhile, to wit, on the 19th day of February, 1873, the defendant, Francis A. White, who was served in Nebraska when the suit was originally commenced, became a citizen of New Jersey. At the next term of the state court thereafter, he applied for the removal of the suit, and by this time, if interest on the sum demanded in the amended petition be included, the amount was more than $500.

Under these circumstances the question is, whether "the matter in dispute exceeded $500," within the meaning of act of July 27, 1866. Under the amendatory act of March 2, 1867 (14 Stat. 558), Mr. Justice Miller has determined that a party to a suit who while it is pending becomes a bona fide citizen of another state is entitled, if the other required conditions are met, to have the case removed. Johnson v. Monell [Case No. 7,399]. As both acts give the right to apply for the removal "at any time before the trial or final hearing of the cause," I can see no difference in this respect between the act of 1866 and the act of 1867, and the reasoning in the case cited seems to be applicable here, and to favor the right of removal. Pending the suit in the state court, the defendant has in good faith become a non-resident of the state of Nebraska and a citizen of another state, and it is this which constitutes the substantial ground upon which the right, under the act of 1866, to the removal is based. If, then, the right to removal accrues upon the party becoming bona fide a non-resident citizen, is it not enough that the total amount then claimed against him by his adversary exceeds the sum of $500? The action being ex contractu, the right to interest follows upon establishing the right to the principal sum, and may properly be included in determining the amount of the matter in dispute. I confess to doubts respecting the soundness of the foregoing view, but have adopted it because it seems to be equally consistent with the language of the act and more consistent with the reason and purpose of it than the opposite conclusion, denying the right to the removal on the ground that the amount was insufficient, when, if judgment should then be rendered by the state court, it would be for a sum greater than that which the act adopts as giving the defendant the right to the transfer.

II. This result makes it necessary to consider the other objection made by the plaintiff to the jurisdiction of this court, which is that the suit in its nature is not "one in which there can be a final determination of the controversy," so far as concerns the party applying for the removal, "without the presence of the other defendants as parties to the cause."

The five defendants are sued as co-partners, for work and labor, and the separate answer of the defendant now before us puts in issue two cardinal propositions in the petition: 1st. That he was a partner with his co-defendants; and 2nd. That the plaintiff is entitled to recover of him the amount claimed.

Under the legislation of congress and of the state of Nebraska, the plaintiff could have maintained an action against one or more of the defendants, and it would have been no cause of abatement that all the co-partners were not before the court.

If all the other defendants had failed to answer, the defendant who applied for the removal could have answered, as he did, for himself, and the issues thus raised would have stood for trial. Why can they not be tried, as well in the federal as in the state court? And when tried, is not the controversy finally determined, so far as it concerns him, as effectually as if all the defendants were in the federal court?

If the plaintiff establishes that the defendant was a partner, and that the firm was indebted to him as he alleges, he recovers of the defendant and takes his judgment, and meanwhile his case proceeds as to the other defendants in the state court. And so, if the plaintiff fails, the defendant has judgment in his favor in the federal court, leaving the plaintiff and the other defendants to their litigation in the state court.

This view of the case encounters the objection that it may compel the plaintiff to liti-

gate in two courts, but that objection obtains in every similar case which falls within the act of 1866, for the express purpose of that enactment is to give the non-resident defendant a right to litigate separately in the federal court, in cases where his rights can be finally determined, which of necessity, as well as by the plain letter of the statute, leaves the residue of the litigation in the state tribunal. Motion denied.

NOTE. "Final determination of controversy" as to the defendants who apply to remove. Bixby v. Couse [Case No. 1,451]; Field v. Lounsdale [Id. 4,769]; (tenants in common). "Final hearing or trial." Dart v. McKinney [Id. 3,583]; Stevenson v. Williams (1873) 19 Wall. [86 U. S.] 572; Waggener v. Cheek [Case No. 17,035]; Akerly v. Vilas [Id. 119]; Boggs v. Willard [Id. 1,603]. Where supreme court of state reversed and ordered bill to be dismissed—held too late to remove under act of 1867. Johnson v. Monell [Case No. 7,399]. Voluntary change of residence pending suit on right of removal. Sands v. Smith [Id. 12,305]. The supreme judicial court of Massachusetts holds that, under Act March 2, 1867, it is too late to remove after a trial has been entered on, although the jury disagree. Galpin v. Critchlow [112 Mass. 339]. But see cases last above cited.

Act March 2, 1867, is constitutional (Chicago, etc., R. Co. v. Whitton, 13 Wall. [80 U. S.] 270), and does not repeal Act July 27, 1866. Fields v. Lamb [Case No. 4,775]. And under act of 1867, all the defendants, not merely nominal, must be entitled to removal. Bixby v. Couse [supra]. In this case it is even said that "they must unite in the petition for removal, or there can be no removal of the suit." See Field v. Lounsdale [supra]; and particularly Case of Sewing Mach. Cos., 18 Wall. [85 U. S.] 553.

Under act of 1866, even as amended by act of 1867, it is not necessary to state "prejudice or local influence" in the affidavit, the ground of removal being citizenship. Field v. Lamb [supra]; Allen v. Ryerson [Case No. 235].

"Amount in controversy." Interest may be included in determining the amount in controversy. Roberts v. Nelson [Case No. 11 907]; King v. Wilson [Id. 7,810] (illegal taxes).

Right of removal depends upon facts as they exist when the suit was brought under Act 1789, § 12 [1 Stat. 79]. Roberts v. Nelson [supra]. And when right is complete it cannot be defeated by amendment or other action of the state court. Kanouse v. Martin, 15 How. [56 U. S.] 198; Ladd v. Tudor [Case No. 7,975]. See Kellogg v. Hughes [Id. 7,662].

Case No. 8,803.

McGLINCHY v. UNITED STATES.

[4 Cliff. 312.] [1]

Circuit Court, D. Maine. Sept. Term, 1875.

CUSTOMS DUTIES—DOMESTIC GOODS BROUGHT BACK — CUSTOM-HOUSE DOCUMENTS — PLEADING — LEAVE TO AMEND — ESTOPPEL — LIMITATION OF ACTIONS—STATE STATUTE.

1. Where goods were withdrawn from a United States bonded warehouse, to avoid the payment of the internal revenue tax thereon, exported from a domestic port, carried beyond the jurisdiction of the United States, and then brought back into a domestic port, they are imported goods, although not actually landed in any foreign port or place.

2. Applications for leave to amend are generally addressed to the discretion of the court, and the ruling thereon is not generally the subject of exception or a writ of error.

3. Documents from the custom-house to prove the withdrawal of goods from a bonded warehouse, and their exportation in a certain vessel, are prima facie sufficient to sustain an allegation in the declaration that such things were done with the goods.

4. Some of the goods removed from the bonded warehouse, and then brought back, were seized by the United States as goods unlawfully imported in a certain ship or vessel without having a manifest on board. *Held*, the record of that proceeding, when offered in evidence, was not an estoppel to the right of the plaintiffs to recover in this case.

5. A state statute of limitations cannot have the effect to bar a right of action on the part of the United States secured to it by act of congress.

6. After suit brought, the time fixed by the statute of limitations for an action to be brought in, expired, and certain amendments were made to the writ after the time limited in the statute. *Held*, that this did not bar the right of action by the plaintiffs, where no new cause of action was introduced by the amendments.

[In error to the district court of the United States for the district of Maine.]

This was an action of debt by the United States, to recover penalties and duties for certain goods unlawfully imported into the United States, and bought by the defendant [James McGlinchy], knowing that the same were so imported. The case was tried in the district court, and a verdict rendered for the plaintiffs. [Case unreported.] Exceptions were taken, and a writ of error was sued out, and the cause removed to this court.

Nathan Webb, U. S. Dist. Atty.

W. L. Putnam, for defendant.

Before CLIFFORD, Circuit Justice, and FOX, District Judge.

CLIFFORD, Circuit Justice. Persons who receive, conceal, or buy goods, wares, or merchandise, knowing the same to have been illegally imported, if the goods are liable to seizure by virtue of any act in relation to the revenue, shall, on conviction thereof, forfeit and pay a sum double the amount or value of the goods so received, concealed, or purchased. 3 Stat. 781. Distilled spirits were, by section 14 of the act of March 2, 1867, made subject to a tax of $2 upon every proof gallon, to be paid by the distiller, owner, or any person having possession thereof, and the same section makes the tax a lien upon the spirits distilled, and upon the stills, &c., and on the lot or tract of land whereon the distillery is situated. 14 Stat. 480. Goods once exported, of the growth, product or manufacture of the United States, upon which no internal revenue tax has been assessed or paid, are made subject to a duty equal to the tax imposed by the internal revenue laws upon such articles, whenever the same are reimported into the United States. Id. 330, § 12. Warehouses are provided by law for the safe-keeping of distilled spirits, and the

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

provision is that such distilled spirits may be stored in such warehouses, without the payment of the internal revenue tax, upon the terms and conditions specified in the act of congress. Id. 155. Provision is also made that such goods so stored may, in certain cases, be withdrawn for exportation without the payment of any such internal revenue tax; but it is expressly enacted that if the goods are subsequently reimported, they shall pay a duty equal to the tax imposed by the internal revenue laws. Id. 330. Pursuant to the provision authorizing distilled liquors to be warehoused, ninety-eight barrels of such spirits, of the product and manufacture of the United States, and subject to the said internal revenue tax, were deposited in a bonded warehouse without having paid the internal revenue tax; and the charge is, that the spirits so deposited were subsequently withdrawn for exportation without the payment of the internal revenue tax, and that the barrels containing the spirits were laden on board the schooner Adele, at Boston, in the district of Massachusetts, and that the same were duly exported from that port for St. Pierre, Miquelon, which is a foreign port or place, and that the schooner, with the spirits on board, regularly cleared from the port of Boston, and sailed from said port, with the spirits on board, for the said foreign port or place. Nothing irregular is imputed in those proceedings; but the complaint is that the said spirits were afterwards clandestinely imported into the port of Portland, without having paid or secured the payment of the internal revenue tax to which the same were subject, with intent to defraud the revenue of the United States, inasmuch as they were secretly and clandestinely landed in the night-time, without the permission of any authorized officer of the customs, whereby the said spirits became liable to seizure by virtue of the laws in relation to the revenue; and the charge against the defendant is, that he did receive, conceal, and buy the said spirits, then and there well knowing that the same had then and there been clandestinely and illlegally imported as aforesaid, with the design to defraud the revenue, without paying or securing the payment of the internal revenue tax to which the spirits were subject. Service was made, and the defendant appeared and pleaded that he did not owe the plaintiffs in manner and form as they had alleged in their writ and declaration. Issue was joined upon that plea, and the defendant also filed three special defences: 1. That the action is barred by the statute of limitations of the United States. 2. That the action is barred by the statute of limitations of the state. 3. That the plaintiffs are estopped from maintaining the action by the record and judgment in the case of U. S. v. Twenty-one Barrels of Whiskey [Case No. 16,568], previously tried in the district court, which goods were part of those seized in this case as hereinafter referred to.

Subsequently the parties went to trial, and the verdict and judgment were for the plaintiffs. Exceptions were taken by the defendant, and he sued out a writ of error and removed the cause into this court for revision. Testimony was introduced by the plaintiffs, showing that one Stanwood and De Long, who pretended to own one hundred barrels of whiskey of domestic manufacture, and which were then in a bonded warehouse, agreed together to withdraw the same from the warehouse for exportation, and to reland the same within the United States, without paying the internal revenue tax; and that they, in pursuance of that agreement, withdrew from the bonded warehouse ninety-eight barrels of the whiskey so deposited there, without the payment of the said tax or duty, and that those identical barrels, with their contents, were laden on board the schooner Adele, bound from Boston to St. Pierre, Miquelon, being a foreign port or place near the island of Newfoundland, and that the said schooner cleared from that port, and actually sailed from the port of Boston on that voyage, with the said barrels of whiskey on board. None of these allegations are much controverted, and the further charge is, that the schooner, instead of going to the port of St. Pierre, came to Long Island, in Casco Bay, and that she there discharged the barrels containing the whiskey, in the night-time, without any permit, leaving part of the barrels there, and the residue on Portland pier.

Evidence was also introduced by the plaintiffs that Stanwood sold and delivered twenty-three barrels of the whiskey to the defendant, and that the defendant paid the seller for the same, well knowing the whole transaction, as more fully set forth in the declaration and the bill of exceptions. Satisfactory proof was also introduced by the plaintiffs, that the defendant subsequently purchased of the same party twenty-seven barrels more of the said whiskey, and that when he purchased and received the same he well knew that the barrels of whiskey so purchased were part and parcel of the said quantity illegally landed as aforesaid in the night-time, without permit. Seasonable objection was taken by the defendant to the introduction of the evidence of the landing of the barrels of whiskey, on the ground that the whiskey was not shown to have been in any foreign port or place, and that such landing was not an importation within the meaning of the acts of congress; but the court overruled the objection, and the defendant excepted, which is the first error assigned by the present plaintiff.

Objection was also taken by the defendant to the admissibility of the evidence, because the declaration, at that stage of the trial, contained only one count; but leave was asked by the plaintiffs, and was granted by the court, to add the two additional counts shown in the bill of exceptions, and the defendant

excepted to the ruling of the court allowing those amendments, which is the second error assigned by the defendant. Certified copies of the withdrawal and exportation entry, with all the certificates on the same, were also offered in evidence by the plaintiffs, to the admission of which the defendant also objected, because no rules nor regulations relative to the withdrawal of merchandise for exportation from bonded warehouses had been proved or read in evidence, and because it had not been proved that the whiskey had been lawfully deposited in a bonded warehouse, or even been in a condition to be withdrawn for exportation; but the court overruled the exception and admitted the evidence, and the defendant excepted, which is the third error he, as plaintiff in error, assigned in this case. Duly authenticated copies of the manifest of the owner, and of the outward foreign manifest, were also offered in evidence by the plaintiffs, to the admission of which the defendant objected; but the court overruled the objection and admitted the evidence, and the defendant excepted, which is the fourth error assigned.

Part of the whiskey delivered in Portland was afterwards seized on due process under the laws of the United States, and was condemned and forfeited; and the defendant offered the record of that proceeding in evidence, and contended that the record estopped the plaintiffs from maintaining the action as set out in his brief statement, but the court ruled otherwise, and instructed the jury that the said record is of no effect as an estoppel in the suit, to which instruction the defendant then and there excepted, which is the fifth error assigned. Widely different views were entertained by the defendant from those assumed by the plaintiffs, and he insisted that, inasmuch as the evidence did not show that the barrels of whiskey had ever been transported to, nor unladen in, a foreign port or place, the facts proved did not show that the same had been illegally imported into the United States, even admitting that the whole theory of fact assumed by the plaintiffs is otherwise correct, and he accordingly requested the court to instruct the jury that there is no evidence that the whiskey was illegally imported into the United States, within the meaning of the act of congress upon that subject. 3 Stat. 782. He also requested the court to instruct the jury that it is incumbent upon the plaintiffs to show that a proper exportation bond was given, and that a regular permit was obtained, before it can be held that merchandise is exported; and that, the plaintiffs not having proved that any such bond or permit was given or obtained, the action, in this case, cannot be maintained; but the court denied both requests, and instructed the jury that the documents from the custom-house, and the parol evidence introduced, if believed, made out a prima facie case that the whiskey had been in a bonded warehouse, and that it was withdrawn for exportation without further proof that an exportation bond and a permit were given or obtained; and that if so withdrawn and transported from the port of Boston in the district of Massachusetts, under a regular clearance for St. Pierre, and the same was conveyed in the schooner directly to Portland, upon the high seas, out of the jurisdiction of the United States, such distilled spirits, on being brought back into Portland, and there landed, became liable to a duty equal to the internal revenue tax unpaid upon the spirits, and, being so liable to duty were illegally imported, if the duty was unpaid; and that the defendant is liable for the double value of the whiskey, if he received, concealed, or bought the same, knowing it to have been illegally imported and liable to seizure, as charged in the declaration. Due exception was taken by the defendant both to the refusal of the court to instruct the jury as requested, and to the instructions given, and those exceptions constitute the sixth error assigned in the record. Evidently the first and sixth errors assigned present substantially the same question, which is, whether such goods exported from a domestic port, even if subsequently brought back and landed in the United States can be regarded for any purpose as imported goods, unless it appears that, subsequently to their exportation, they were actually landed in some foreign port or place.

Cases may arise in which the theory assumed by the defendant would perhaps be correct, as where the vessel containing the exported goods was obliged to put back for repairs in consequence of the unseaworthiness of the vessel, or where she was compelled to return by the death or dangerous sickness of the officers or seamen, or by war or blockade; but where the goods, as in this case, were withdrawn from the bonded warehouse to avoid the payment of the revenue tax to which the same were subject, and were exported with the intent to transport the same back to a domestic port as the means of defrauding the revenue, such a theory cannot be adopted, especially if it appears, as assumed in the instruction given to the jury, that the goods were actually exported, under documents regular in form, out of the jurisdiction of the United States, before the vessel put about, and before the goods were brought back and landed in the domestic port. Such a rule cannot be sanctioned, as it would afford absolute protection to the worst sort of smuggling, and would open the door to innumerable frauds. Fraud is directly imputed in the declaration and the evidence introduced by the plaintiffs warranted the jury in finding that the charge of fraud was fully proved; and in that view of the facts the court is of the opinion that the first and sixth errors assigned must be overruled. 5 Stat. 752, § 9. Application for

leave to amend is in general addressed to the discretion of the court, and consequently the ruling of the court is not subject to exceptions or to a writ of error, and the court is of the opinion that the ruling in that respect, in this case, falls within the general rule, which disposes of the second error assigned. Exception was also taken to the admissibility of the documents from the custom-house to prove the withdrawal of the goods from the bonded warehouse, and their exportation in the Adele, as alleged in the declaration; but it is so manifest that the evidence offered was prima facie sufficient to support the allegations of the declaration, that it does not seem necessary to enter into much discussion upon the subject. Transportation bonds are required for the benefit of the government, nor can the defendant be heard to deny that the goods were regularly exported, even in a case where none such was given, if no other error is shown in the proceeding. Belcherral v. Linn, 24 How. [65 U. S.] 517. Such a bond ought to be required in such a case; but if it was omitted, it would not justify the shipper in violating other provisions of the revenue laws. Authenticated copies of the manifest of the owner, and of the outward foreign manifest, were also admitted in evidence; and the court is of the opinion that those documents were properly admitted, which is all that need be said in respect to the fourth error assigned.

Part of the whiskey was seized and condemned, under the laws of the United States, as goods unlawfully imported on a certain ship or vessel, without having a manifest on board, and the bill of exceptions shows that the defendant offered the record of that proceeding in evidence, as an estoppel to the right of the plaintiff to recover in this case; but the district court instructed the jury that the record was of no effect as an estoppel. Attempt is scarcely made to question the correctness of that ruling, and it is so obviously free from error that it will be sufficient to say that the fifth error assigned must also be overruled. Much discussion of the question of limitation is unnecessary, as it does not appear to be controverted that the original action was commenced in season to avoid the bar, even if the court should sustain the construction of the acts of congress in that regard, which is assumed by the defendant. Nothing need be said in reply to the defence that the action is barred by the state statute, as it is too clear for argument that a state statute cannot have the effect to bar a right of action secured to the United States by an act of congress. Suppose the original action was commenced in season to avoid the bar, still it is insisted by the defendant that the bar took effect before the new counts were filed, and he insists that those new counts introduce new causes of action, which, having been barred at the time the counts were filed, cannot be regarded as any part of the record. Even if that rule be conceded, it would not benefit the defendant, as the court is clearly of the opinion that the counts filed under the leave to amend do not introduce new causes of action, and consequently that the rule assumed by the defendant, even if it be correct, which is not admitted, will not entitle the defendant to a new trial. Both of the new counts were such as the court, in its discretion, might allow to be filed as amendments, and, being such, the ruling of the court, in allowing the same, is not the subject of error. Three years next after the penalty or forfeiture was incurred is the limitation originally prescribed by the act of congress. 1 Stat. 696, § 89. By the act of March 26, 1804, it is provided that any person or persons guilty of any crime arising under the revenue laws of the United States, or incurring any fine or forfeiture by breaches of said laws, may be prosecuted, tried, and punished, provided the indictment or information be found at any time within five years after committing the offence, or incurring the fine or forfeiture, any law or provision to the contrary notwithstanding. 2 Stat. 200, § 3. Beyond all doubt the effect of that provision was to repeal the prior limitation, and to extend the right of prosecuting the offender to five years. Exactly the same limitation is fixed by the act of February 28, 1839, provided that the person of the offender, or the property liable for the penalty or forfeiture, shall, within the same period, be found within the United States, so that process may be instituted and served. 5 Stat. 322, § 4. All these several limitations, except that prescribed by the act of Feb. 28, 1839, are expressly repealed by section 14 of the act of March 3, 1863; and it is clear that the repealing act does not enact any substitute provision in their place. 12 Stat. 741, § 13. No such proviso as that found in the act of 1839 is contained in either of the prior acts, and it may well be that congress intended to repeal the prior limitations and leave the one contained in the act of 1839 in full force, as the latter limitations would afford a remedy if the accused or the guilty property was out of the jurisdiction of the court during the whole period of the limitation. Express repeal of the act of 1839 is not pretended, nor is the implication in that regard so strong as to justify that conclusion. Wood v. U. S. 16 Pet. [41 U. S.] 342; U. S. v. Walker, 22 How. [63 U. S.] 311. Viewed in any light it is clear that the defence set up in the brief statement that the cause of action is barred by the statute of limitations of the United States is not sustained. U. S. v. Shorey [Case No. 16,282]. Successful denial of the following propositions cannot be made: 1. That the spirits in question were subject to an internal revenue tax. 2. That the spirits were deposited in a bonded warehouse without the payment of the internal revenue tax to

which they were subject. 3. That the spirits were withdrawn from the bonded warehouse for exportation and without the payment of such tax. 4. That the spirits were exported from the port of Boston for the purpose of fraudulently relanding the same in the United States, as the means of defrauding the public revenue. 5. That the spirits were not only exported from the port of Boston, but were actually transported out of the United States before the schooner, in which the casks containing the spirits were, actually put back for the purpose of relanding the same, as charged in the declaration. Evidence tending to prove these facts was certainly introduced by the United States, and it must be assumed, in considering the errors assigned, that all these facts have been found by the jury, and if so, it follows, in the judgment of the court, that there is no error in the record. Judgment affirmed.

McGLUE (UNITED STATES v.). See Case No. 15,679.

Case No. 8,804.

In re McGLYNN.

[2 Lowell, 127.] [1]

District Court, D. Massachusetts. May, 1872.

BANKRUPTCY—ASSIGNEES—OBJECTION BY BANKRUPT—HOLIDAYS.

1. A bankrupt has a standing in court to object to the confirmation of assignees of his estate.

2. It is not illegal to hold a court of the United States on a day appointed by the president of the United States, and by the governor of the commonwealth, as a day of thanksgiving.

3. Where a register in bankruptcy held a first meeting of creditors on Thanksgiving Day, and no creditor was shown to have been injured thereby, and no one opposed the appointment of the assignee then chosen and qualified, except the bankrupt, and he had neglected to return the warrant to the register for a change of day, which the register had offered to make, the court refused to set aside the proceedings.

Petition by the bankrupt [James McGlynn] to set aside the appointment of assignees, because the first meeting of creditors was held on the day appointed by the governor of Massachusetts, and recommended by the president of the United States, as a day of general thanksgiving, alleging that seventeen creditors were named in the schedules, to whom were owed $3,451, and that only six of the creditors attended the meeting, and the aggregate of debts proved was $2,154.13; that the register was notified before the meeting was held that it had been called for a holiday; and that some creditors failed to attend by reason of the choice of this day. The answer of the assignees admitted that the meeting was held on Thanksgiving Day, but denied that any creditor had failed to attend on that account; and averred that the bankrupt had been notified by the register in due season before the meeting, that, if he would return the warrant for correction, a new appointment should be made; but the bankrupt neglected so to do. At the hearing, there was no evidence that any creditor was dissatisfied with the proceedings, or had failed to attend the meeting by reason of its being held on Thanksgiving Day.

S. Thomson, for bankrupt.

R. M. Morse, Jr., for assignees.

LOWELL, District Judge. It was made a question in argument whether the bankrupt has a standing in court to make this application. I think he has. It is in the power of hostile assignees to oppress and embarrass the bankrupt; and, while the courts have very properly held that persons intimate and friendly with him might be objectionable on that very account, it has not been denied that the confirmation of assignees who are unreasonably hostile might be opposed by the bankrupt himself. He is bound, by the statute, under a severe penalty, to give notice of any false debt that may be offered for proof; he is, besides, personally interested to see that no false debt is proved, because the creditors have a voice in his discharge; he is interested in the assets in the not unprecedented event of a surplus. His connection with the settlement of his estate is so close that he may object to the appointment of an assignee whom he finds unfit, or to have been irregularly chosen.

The petitioner has not proved that the assignees are unfit or incompetent persons, nor that any creditor wishes a change, nor that any one was prevented from attending the meeting. There is nothing which addresses itself to the discretion of the court under section 18 [of the act of 1867 (14 Stat. 525)] to order a new election. The illegality of the meeting is the only point now insisted on. That question appears to be settled by the case of The Tangier, 23 How. [64 U. S.] 28, and same case, Salmon Falls Manuf'g Co. v. The Tangier [Case No. 12,265], in which it was decided that the fast-day appointed in Massachusetts was not a dies non for merchants and ship-owners. I understand that case to decide that a mere holiday, whether established by usage or by statute, is not binding on persons who do not choose to observe it, unless work is actually prohibited by law, as it is on Sundays. I have not found any act of congress, or of the legislature of the state, which makes work illegal or punishable on Thanksgiving Day. The courts of Massachusetts are not to be held on that day, except for the purpose of entering or continuing cases, instructing or discharging a jury, receiving a verdict, or adjourning. Gen. St. c. 122, § 4. This prohibition does not extend, and could not extend, to the

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

courts of the United States, as such, though, by comity, it would be likely to govern the practice of those courts, as it always has governed mine. So the president's proclamation appears to be rather a recommendation than an order. The bankrupt act (section 48) excludes Sunday, Christmas Day, the Fourth of July, and any day appointed by the president as a day of public thanksgiving, from the computation of time within which any act shall be done under that law, but does not of itself make the holding of court on those days illegal. I conclude, from this review of the law, that there was no positive irregularity in the meeting. The appointment was made by mistake, and the fact was first made known to the register by the bankrupt's attorney, after he had issued his warrant and given it to the bankrupt for service; and the register thereupon offered to change the day, if the warrant should be returned to him for that purpose. This was not done; and the only person who now objects to the proceedings is the bankrupt, who is responsible for them. Acquiescence would not make them valid, if they were void; but, as the question becomes one of discretion, and I find no creditor objecting, no person asking for an adjournment at the time, no imputation made in evidence upon the fitness of the assignees, and it seems probable that this application is intended merely to operate in avoidance of a suit which the assignees have brought against the bankrupt and his wife to set aside a conveyance which is alleged to be fraudulent, in which suit I have heretofore refused to inquire, collaterally, into the regularity of the first meeting of creditors. Under these peculiar circumstances, I do not think I ought to set aside the choice. Petition dismissed.

McGOVERN (HARRIS v.). See Case No. 6,125.

Case No. 8,805.

McGOVERN v. HEISSENBUTTEL.

[8 Ben. 46.] [1]

District Court, E. D. New York. Feb., 1875.

BILL OF LADING—DEMURRAGE—RECONSIGNMENT—USAGE—VARYING CONTRACT.

1. A cargo of coal, shipped at Schuylkill Haven, was brought to New York under a bill of lading, which contained these words: "With shipper's reconsignment option." It provided also for the payment of demurrage "if the cargo be not received within four working days after notice of arrival." On the arrival of the boat at New York, the master gave notice of her arrival to the consignee, who directed him to proceed to New Haven and deliver his cargo. The master denied the right of the consignee to reconsign him to New Haven, and refused to go there; but fifteen days after, he sent the consignee written notice that he was ready to discharge the coal at such place as the shipper should name, according to the bill of lading; whereupon the consignee in writing again directed him to go to New Haven, and sent an order for the towage of the boat. The master accepted this reconsignment, and his boat was towed, at the expense of the consignee, to New Haven and back. At New Haven the master sought, by retaining his cargo, to compel the payment of demurrage for his detention in New York, but finally delivered his cargo. His boat was detained, up to the time of her return to New York, for twenty-six days beyond the four days specified in the bill of lading, and the master brought suit against the consignee to recover demurrage for that time. On the trial the defendant offered evidence that by usage the option mentioned in the bill of lading is exercised by the consignee as well as by the shipper. *Held*, that such usage would be a varying of the written contract and was not admissible in evidence.

2. The master, by accepting the reconsignment of the consignee, waived his right to object; such option could only be exercised by the shipper.

3. The master therefore could not recover demurrage for the period while he was refusing to go to New Haven, or while going there, or while refusing to deliver his cargo at New Haven, and the libel must be dismissed.

In admiralty.

Beebe, Wilcox & Hobbs, for libellant.
Goodrich & Wheeler, for respondent.

BENEDICT, District Judge. This is an action brought by Thomas McGovern, master of the barge Ann Burns, to recover freight and demurrage of the consignee of 165 tons of coal. The bill of lading, dated at Schuylkill Haven, June 24th, 1874, sets forth the shipment by the Philadelphia & Reading Coal & Iron Company, on board the Ann Burns, bound for 23d St., East river, N. Y., with shipper's reconsignment option, instructions at New Brunswick or New York, of a cargo of 165 tons of coal, to be delivered in like order and condition as above received (captain to pay no weighing expenses, extra tonnage, or costs of discharging cargo), at the aforesaid port of New York or port of reconsignment, danger of navigation excepted, to John D. Heissenbuttel, or his assigns, upon payment of freight and demurrage as follows: $1.65 per ton freight, together with demurrage as follows: If a proper berth for said vessel be not procured by the consignees of cargo, and cargo be not received from said boat, within four working days after notice of arrival, not counting day of arrival, the consignees for such day or part of a day thereafter (Sundays and legal holidays not excepted), shall pay the sum of eight dollars for each day.

The bill of lading also states that it is expressly understood that all freight in this bill of lading is exclusive of the cost of discharging, which must be done by the consignees without expense to the boat; also, that the captain is to pay no expense for weighing and the extra towage, and that the towage expenses of boats going beyond New York must be paid to and fro, from the Delaware & Raritan Canal Company's towing limit, by the consignee.

Under this bill of lading the coal in question was transported to the port of New York, and upon arrival there was reported to the

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

defendant on the seventh day of July; whereupon the master was directed by the defendant to proceed to New Haven and deliver his cargo there to E. Barnes & Co. The master denied the right of the consignee to re-consign him to New Haven, and refused at first to go there. Afterward, on the 22d day of July, he addressed the defendant a written notice that he was ready to discharge the coal at such place as the shipper may name, according to the terms of the bill of lading. To this notice the defendant replied upon the same day as follows: "In response to your letter I have again sent towage order to the Eastern Transportation Company, to tow you to New Haven, where you were originally ordered. Report to Barnes & Co., New Haven, for unloading."

The master accepted the reconsignment, and allowed his vessel to be towed at the expense of the defendant to New Haven, and having there discharged his cargo, was then towed back to New York at the expense of the consignee, where he arrived on the 6th day of August, having consumed beyond the four days allowed by the bill of lading in the discharge of the cargo, a period of 26 days dating from the day of his arrival in New York.

He now claims to recover demurrage for these days, of the defendant, upon the ground that under the bill of lading the consignee had no right to re-consign the cargo. Upon the part of the defendants testimony is offered to show that, by usage of the trade, the option mentioned in the bill of lading of this cargo is exercised as well by the consignee as by the shipper. I doubt the competency of such evidence. It seems to me to vary the plain language of the bill of lading. The bill of lading gives an option to the shipper, but gives no option to the consignee. To enlarge by parol evidence the language of the bill of lading so as to include the consignee as well as the shipper, would vary the contract in an important particular. But this question becomes unimportant in this case by reason of the fact proved, that the libellant waived his right to object to the reconsignment made by the consignee, by accepting and obeying the instructions of the consignee to deliver the cargo in New Haven. The acceptance of the direction of the defendant to go to New Haven after the notice sent him of July 22nd was a clear abandonment of the position originally taken, and entitled the defendant to suppose that the master intended to acknowledge his right to reconsign the cargo to New Haven.

In view of such an interpretation of the contract put upon it by the parties at the time, it would be unjust now to hold the defendant liable to pay extra compensation, in the way of demurrage, for the carrying of the coal to New Haven, or to pay for the detention of the vessel while her master was in a posture of refusing to acknowledge a right on the part of the defendant which he afterwards admitted.

If bound by this contract to go to New Haven, upon being so directed by the defendant, the libellant should have gone when first directed. If not so bound, his duty was to discharge his cargo at New York, after notice to the consignee, and hold it for his freight. Nor can he recover for the delay which arose in New Haven, for the boat could have been discharged there without any delay if he had not sought by holding his cargo to force payment of the demurrage which he claimed to have been incurred in New York. The libel must accordingly be dismissed with costs.

McGOVERN (SPAULDING v.). See Cases Nos. 13,217 and 13,218.

Case No. 8,806.

McGOWAN v. CALDWELL.

[1 Cranch, C. C. 481.] [1]

Circuit Court, District of Columbia. June Term, 1808.

PLEADING AT LAW—GENERAL PERFORMANCE—REJOINDER — EXCUSE FOR NOT PERFORMING — DECREE A VINCULO MATRIMONII—ARTICLES FOR ALIMONY.

1. After a plea of general performance, a rejoinder stating an excuse for not performing is bad.

2. A decree for a divorce a vinculo, and declaring that the articles entered into previously for alimony should remain in force, is no bar to an action upon a bond given to perform those articles.

[This was an action at law by McGowan against Timothy Caldwell.]

Debt on bond for performance of covenants for separate maintenance of the defendant's wife. Plea, general performance. Replication, non-payment of annuity. Rejoinder, divorce, and decree for alimony in Vermont. General demurrer and joinder.

Mr. Jones and Mr. F. S. Key, for defendant, contended that the bond is made void by the decree, although he admits that the covenants remain in force. When a person gets a security of a higher nature it merges the lower security. It is the same as if a judgment had been recovered on the bond. The court of Vermont has decreed the execution of the articles; but nothing is said of the bond. The divorce a vinculo matrimonii dissolves all the relation of husband and wife, and all the obligations of that relation. It dissolves not only the primary obligations, but all obligations or contracts founded upon such primary obligations. If the court had decreed a less alimony, or that a smaller sum should be allowed, the bond would have been void. So if a larger sum had been allowed. The court in Vermont, decreed that in lieu of all other alimony, the articles should remain in force as if the decree of divorce had not been made.

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

Mr. Law and Mr. Morsell, in reply. The court in Vermont could not annul the bond, and discharge the surety. Smith v. Buchanan, 1 East, 11. McGowan, the trustee, did not get a higher security. It is not a decree enforcing the articles. The covenants are not void; the consideration has not failed; the consideration was not marriage, but separation. The dissolution of the marriage does not dissolve agreements and contracts of the parties grounded not on the marriage but on the separation. The decree says that the covenants should not lose their effect. The court in Vermont, did not intend to discharge the covenants, or the bond given to secure their performance.

THE COURT (nem. con.) adjudged the rejoinder to be bad; not only as a departure from the plea, but as bad in substance, the bond not being affected by the decree.

Case No. 8,807.

McGOWAN v. CHARTER OAK LIFE INS. CO.

[4 Am. Law Rec. 559.]

Circuit Court, N. D. Ohio. 1876.

LIFE INSURANCE — FORFEITURE BY NON-PAYMENT OF PREMIUMS—WAIVER BY GENERAL AGENT—NOTICE.

[1. The acceptance by a general agent of overdue premiums after the policy has become void for want of timely payment thereof, operates as a waiver of the forfeiture, when the insured has no notice of limitations upon such agent's powers, although in fact they are limited by secret instructions forbidding him to receive such premiums.]

[2. Where the original policy and all renewal certificates thereof have upon them clauses notifying the insured that the agent has no authority to receive past-due premiums, and that an attempt to do so would not be binding upon the company, this operates as notice to the insured; and any payments of overdue premiums will not revive the policy, unless known to, and acquiesced in by, the company.]

[3. Where the agent receives the amount of past-due premiums, and merely holds the money until he can write to the main office and get the renewal certificate with instructions, not accepting or intending to accept the premium as paid until the requirements of the company are complied with, and thereafter, on the failure of the assured to fulfill such requirements, returns the money to him, this will not operate as a waiver, even if the agent has full authority.]

[This was an action by Sarah K. McGowan against the Charter Oak Life Insurance Company to recover the amount of a policy on the life of her deceased husband, William McGowan.]

William McGowan, of Steubenville, Ohio, the husband of the plaintiff, had a policy upon his life in the defendant company to the amount of $2,000, which was taken out in 1866. The premium was payable annually on the first day of June. The premium due June 1st, 1868, was not paid until June 28th, 1868, and upon that date was received by the agent of the defendant, without a health certificate. The premium due June 1st, 1873, was not paid when due, and the general agent of the defendant wrote to McGowan, July 9th, 1873, asking him if he desired to renew his policy. McGowan made no reply until August 28th, 1873, when he mailed to the general agent, who lived at Marietta, Ohio, the amount of his premium by New York draft. The draft arrived at Marietta on September 1st, 1873, during the absence of the general agent from town, but a clerk in his office acknowledged the receipt of the draft by letter of same date, saying he wrote merely to acknowledge the receipt, and that when the general agent returned a proper renewal receipt would be forwarded. The general agent did not return until September 5th, 1873, at which time he took the draft and deposited it to his own private account in bank. Meanwhile, on September 1st, 1873, William McGowan had died. The general agent, not aware of this fact, sent to the home office of the defendant company, to have McGowan's renewal receipt forwarded to him, it having been returned to the home office in July, upon failure of McGowan to pay his premium. The home office forwarded the receipt to the general agent, with instructions not to deliver it till McGowan furnished satisfactory evidence of good health. Thereupon the general agent, still ignorant of the fact of McGowan's death, wrote to McGowan enclosing a health certificate for him to sign and return, when his renewal receipt would be sent him. Hearing nothing from this letter on the 1st of October, 1873, the general agent wrote again to McGowan, enclosing the premium sent by him in August. To this letter the plaintiff replied, refusing to receive back the money, except as a credit upon the amount due under the policy, and demanding payment of the policy, which the defendant refused.

Spencer & McCurdy and Mr. Steubenville, for plaintiff.

Willey, Terrell & Sherman and Mr. Cleveland, for defendants.

WELKER, District Judge, charged the jury: 1st. That the policy of insurance, was the contract between the parties by which their rights were to be governed; and that the policy providing that a failure to pay the premium on the day when it became due would render the policy void, the failure to pay the premium due June 1st, 1873, terminated the policy; but, 2d. That this provision of the policy might be waived by the company; and if waived, and the premium was received after due by one having authority, this would revive the policy; and that, in the absence of any notice to the insured to the contrary, the insured had a right to infer that the general agent of the company had authority to waive non-payment of the premium, and by receiving it after due, to renew the policy, and such act

as between the company and the insured would bind the company, notwithstanding the secret instructions to the agent forbade him to exercise such authority; but, 3d. That if at the bottom of the policy, and also on the back thereof, as well as on all renewal receipts given to the insured since his policy began, there were clauses notifying him that the agent of the company had no authority to receive premiums after due, and that an attempt to do so would not be binding upon the company, such clauses were notices to the insured of the limitations of the authority of the agent in respect of receiving premiums, and being notice to the insured, no payment by him of an overdue premium would revive the policy unless known and notified by the company. 4th. That if the agent simply held the amount of the premium until he could write to the home office and get the renewal receipt and instructions, not accepting or intending to accept the premium as paid until the requirements of the company were complied with, and on failure of McGowan to comply with such requirements, the agent returned the premium. This would not be such an acceptance of the premium as would bind the defendant, even had the agent the fullest authority.

Under these instructions the jury returned a verdict for the defendant company.

Case No. 8,808.

In re McGRATH et al.

[5 Ben. 183; [1] 5 N. B. R. 254.]

District Court, S. D. New York. June 3, 1871.

BANKRUPTCY — RENT OF PREMISES WHILE IN POSSESSION OF MARSHAL.

At the commencement of the bankruptcy proceedings, the bankrupts were occupying premises under a lease. The marshal, under the warrant, took possession of the bankrupt's goods on such premises, and they remained there in possession of the marshal till the appointment of the assignee. *Held*, that, on the facts of the case, the owner of the premises was not entitled to be paid out of the fund, for such occupation.

[Cited in Re Hamburger, Case No. 5,975; In re Ives, Id. 7,116.]

[See Bailey v. Loeb, Case No. 739.]

The bankrupts in this case [William B. McGrath and George B. Hunt] were occupying premises under a lease, at the time of their bankruptcy. When the warrant was issued to the marshal, he took possession, on October 15th, 1870, of the bankrupt's premises and goods, and remained in possession till December 13th, when he surrendered them to the assignee, who removed the goods from the premises, and gave up possession of the premises on the 1st of January, 1871. The landlord thereupon applied to the register for an order that a reasonable sum be allowed to him for the rent of the premises during that period. The testimony of the landlord was as follows: "From the 1st of January, 1871, I let the premises at the rent of $3,500 a year. If I had had possession before, I could have rented the premises. An offer of $3,000 rent was made before the assignee was appointed. If I had had possession of the premises on the 15th of October, I have no doubt I could have rented them for $3,000 within a week. I understand the goods were, very soon after the 15th of October, placed in four or five boxes. These boxes, with a little furniture, was all that was in the premises. They were kept by the marshal to store these boxes and furniture in, up to the time the assignee took possession. At that time I had let the premises at $3,500, possession to be taken on the 1st of January. The possession of the assignee, therefore, from the 13th of December to the 1st of January, did no harm, so far as rent is concerned. Had application been made to me when the marshal took possession, to store these boxes and furniture elsewhere, I should at once have stored them for a nominal sum, or, perhaps, for nothing, for the sake of getting possession of the premises and letting them to other parties."

By I. T. WILLIAMS, Register:

[I, the undersigned register, to whom this case is referred, respectfully certify and report that a claim of Joseph Lee against the said estate has been submitted to me by the respective parties. Upon an application of the said Lee for an order that a reasonable sum be allowed him from said fund for rent of the premises owned by him and heretofore let to and occupied by said bankrupts up to the time of their bankruptcy, to wit: the premises numbered sixty-four and sixty-six Lispenard street, in this city, at a rent of five thousand five hundred dollars per annum. After the bankruptcy, on the fifteenth of October, eighteen hundred and seventy, the marshal took possession of the goods and premises in question, and held them until the fifteenth of December following, when he surrendered to the assignee. It is very clear from the testimony, that the landlord is entitled to rent at and after the rate of three thousand dollars a year, that being the sum at which he could have rented it during these two months during the period the marshal so held it, which rent amounts to about five hundred dollars. I cannot think, under the subjoined testimony, that the estate is liable for that sum. The assignee was present in person and stated that he could not change the facts as sworn to by Mr. Lee, and it was submitted to my decision by both parties. I am unwilling to make the decision indicated above without first submitting the case to the court for instructions as I may do under the decision of Judge Cadwalader, in the case of In re Sherwood [Case No. 12,774]. If the court think my views above expressed are correct,

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

I shall deny the application of the landlord and leave him to his remedy at law.] [2]

BLATCHFORD, District Judge. The register is correct in his conclusion. On the testimony, the landlord ought to have applied to this court immediately after the marshal took possession of the goods and premises, to have the goods and furniture removed and the premises vacated by the marshal. Such motion would have been granted. If he had an opportunity to rent the premises, he should so have represented to this court.

Case No. 8,809.

M'GRATH v. The CANDALERO.

[Bee, 60.] [1]

District Court, D. South Carolina. Oct. 24, 1794.

ADMIRALTY—ILLEGAL SEIZURE—DAMAGES.

Restitution of a vessel and cargo, illegally seized and carried into a French port, was decreed by the admiralty there. This court sustained a suit for consequential damages.

[Cited in The Martha Anne, Case No. 9,146; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (47 U. S.) 432; Mendell v. The Martin White, Case No. 9,419.]

[This was a libel by M'Grath against the sloop Candalero and Henri Hervieux for damages for the illegal seizure of the schooner Polly and her cargo.]

The claimant in this case has produced no evidence, nor attempted to controvert that of the actor. The latter has proved that he is a native and citizen of the United States, and sole owner of an American schooner called the Polly. That on the 5th day of July last this vessel cleared regularly from this port, with a cargo, bound to the island of Providence, having on board all necessary papers. That the cargo was wholly neutral, and so expressed in the clearance, which enumerated every article; and that there was nothing contraband on board. That the Polly, commanded by Noah Wright, and having the actor on board, passed the bar of Charleston on her intended voyage, in company with a private armed vessel of war called the Narbonnoise, fitted under the authority of the French republic, and commanded by the claimant. That they proceeded together at sea about nine leagues, and then, on the afternoon of the same day, the said privateer took possession of the Polly, took out the owner, captain and crew, except one man, and carried the vessel to Port-de-Paix in St. Domingo, as prize. That the clearance and other necessary documents were produced, but entirely disregarded. Upon their arrival at Port-de-Paix, an examination took place in the office of admiralty, and a decree was passed ordering immediate restitution of the vessel and such parts of the cargo as belonged to M'Grath, and a sale of the rest, (which also belonged to American citizens) with a deposit of the money, until the owners should prove their right to the same.

It appears that before redelivery of the schooner to her owner she had been run ashore in a gale of wind, and received so much damage that she was sold for 600 dollars; much less than her previous value. And, there being no market for the owners' part of the cargo, he left it in the hands of the captors, and brings this suit for compensation for the loss he has sustained: 1st. By being carried to a distant port instead of that to which he was bound, and where his cargo would have sold to great advantage. 2d. By the damage done to his vessel, which he was compelled to sell at a very low rate, for want of funds to repair her. 3d. By spoliation of all his cabin and other stores. 4th. By being taken out of his own vessel, and confined for sixteen days on board the privateer. 5th. By the derangement of his affairs, having been kept out of business since August last.

The claim for damages is founded on the law of nations, and on the 22d, 23d, 24th, 25th, and 27th articles of the treaty with France.

The only justification set up by the claimant is 1st. His right, by virtue of his commission to board and search all vessels at sea. 2d. That an adjudication having taken place in the court of the power to whom the captor belonged, this court cannot inquire into the grounds of such decree, but must give full faith and credit to the same; and that if the party has been injured he must apply for relief to the executive power of these states.

The 27th article of the treaty with France regulates the mode of proceeding of their vessels of war and privateers, which, in the present instance was wholly disregarded. Hervieux first enticed this schooner to follow him to sea by an offer to pilot her over the bar, as she had no pilot on board. As soon as she had proceeded above a marine league from the coast she was pursued by the privateer, and two shots fired at her; the lieutenant then boarded her with five others, all armed, carried the captain and papers on board the privateer, and sent a prizemaster and crew on board the prize. Hervieux, on examining the papers, acknowledged their validity, but said that he would carry the vessel into a French port where provisions were wanted, rather than suffer her to proceed to an English one. This was done without the slightest pretext, and in wanton violation of the treaty; for even if she had had contraband goods on board, more than the captor could have received on board his vessel, the 13th article of that treaty provides that, this being the nearest port, the Polly should have been brought in

[2] [From 5 N. B. R. 254.]

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

here, where a proper and speedy remedy would have been afforded.

As to the right of this court to inquire into the adjudication that took place at Port-de-Paix, I am ready to declare that I should not do so with any view to controvert such adjudication; for the sentence of an admiralty court duly constituted must receive full credit in foreign countries. But I am called upon to support that decree. The case from Ld. Raym. 935, is good law, and it is there said by Lord Holt that the sentence of a civil law court in a foreign realm should be executed in England by a court of the same nature, and proceeding according to the same law. Had a suit for damages been dismissed at Port-de-Paix, it might have been a question whether this suit should be sustained. But as the illegality of the seizure was pronounced there, as the action is transitory, and the actor has chosen to seek for compensation in this court, I must say that his suit is properly brought. I think the libel relevant, and fully proved, and shall, therefore, proceed to inquire into the quantum of damages. The principles laid down in Lecaux and Eden (Doug. 575) apply here. Guided by them, and having fully inquired into the loss of time and property, and considered the imprisonment on board the privateer, I adjudge and decree that the claimant pay to the actor 1984 dollars, with costs of suit, and that the privateer remain under attachment till the same be paid.

Loss on vessel	200
Loss of stores	274
Corn, worth at Providence	510
Detention of captain and crew and consequent loss	1000
Dollars	1984

[Subsequently this cause came before the court on a motion to review, but the motion was refused. Case No. 8,810.]

Case No. 8,810.

M'GRATH v. CANDALERO.

[Bee, 64.] [1]

District Court, D. South Carolina. Nov. 10, 1794.

PRACTICE IN ADMIRALTY—TORTS—ATTACHMENT IN REM—MOTION TO REVIEW—ERROR ON FACE OF RECORD.

1. Admiralty courts have jurisdiction to proceed by attachment in rem, for torts.

[Cited in The Bremena v. Card, 38 Fed. 145.]

2. Motion to review a decree must fail after writ of error lodged; and if the exceptions to the jurisdiction might have been taken before the decree passed. Otherwise, if error appear on the face of the record, or if new matter be discovered.

[Cited in The New England, Case No. 10,151.]

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

[This was a libel by M'Grath against the sloop Candalero and Henri Hervieux for damages for the illegal seizure of the schooner Polly and her cargo. The court decided in favor of libelant (Case No. 8,809), and the cause is now heard on a motion to review and to discharge the property attached.]

BEE, District Judge. Out of this motion two points arise for discussion. 1st. Whether this court has jurisdiction to proceed, by attachment, for torts. 2d. Whether, even if they have not, exceptions to the jurisdiction are not now too late.

By the 9th section of the judiciary act this court has exclusive original cognizance of all civil causes of admiralty, and maritime jurisdiction. At common law, an action will lie for seizing, stopping or taking a ship upon the high sea. Le Caux and Eden. Our state courts might, therefore, have exercised such jurisdiction; but the act of congress vests it exclusively in this court, in the first instance. If, then, the present motion succeeds, there would be a right without a remedy. It is not denied that attachment will lie in matters of debt or contract. Why not in cases of tort? If an alien sue here for a tort under the law of nations or a treaty of the United States, against a citizen of the United States, the suit will be sustained. Shall it be otherwise, where the alien is the offender, and one of our citizens the party complaining? The object of the attachment is to secure redress out of the property of the party, when you cannot get at his person. If he comes in time, and gives security, his property may be discharged. In short, I can see no reason for granting what is sought by this motion, and many for refusing it. Even if it were a new question, I should think it one of the cases in which a good judge would choose "ampliare jurisdictionem."

The second point is, whether after decree, and writ of error lodged, this application is not too late. I think it is. The parties themselves proposed to lodge this money as security, subject to the order of the court. At any rate it would have been liable, after the decree had passed. Even under the old practice of stipulation, body and goods were included. And if Hervieux were in custody on capias to fulfil the decree, he could have derived no benefit under the state law of insolvency, by which torts are excepted. It is laid down in Vin. Abr. tit. "Chancery" (Z.) par. 18, that "forgetfulness or negligence of parties is no foundation for a bill of review." "Matters which might have been put in issue in the original cause, shall never be examined on bill of review. Bill of review is allowed only on errors apparent upon the face of the record, or on new matter discovered since the decree." Gilb. Eq. 184.

Case No. 8,811.

M'GREGOR v. INSURANCE CO. OF PENNSYLVANIA.

[1 Wash. C. C. 39.] [1]

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

MARINE INSURANCE—FREIGHT—CUSTOM—TERMS OF POLICY.

1. The alleged custom, in Philadelphia, to strike off one-third of the gross freight, for charges, and to pay two-thirds only to the assured, in a policy on freight, where a total loss has occurred, is unreasonable, and is in direct opposition to the terms of the policy.

[Cited in Randall v. Smith, 63 Me. 107.]

2. Quere, if such an alleged custom were generally known by those interested in its operation, what would have been its operation?

3. The rules of law in relation to the proof, and nature of customs.

[Cited in Folsom v. Merchants' Mut. Mar. Ins. Co., 38 Me. 421.]

Covenant upon a policy of insurance on 12,000 dollars, for the freight of the Hercules from New-York to Hamburg. She was lost near the port of her destination, and the cargo, except a few articles, totally perished. The insurance company, upon notice of the misfortune, adjusted the loss according to the following account, and offered to pay the balance, which the plaintiff refused.

Statement of the Account.

Amount of freight, as per freight list produced by assured.....		$11,659 98
Deduct one-third		3,886 66
		7,773 32
Premium to cover at 5 per cent., 2 per cent. in case of loss, and ½ per cent. commissions for effecting insurance on $8,403 58.....		630 26
		8,403 58
The sum insured by the company was		12,000 00
Over-insured		3,596 42
Insurance company are liable for total loss on.	$8,403 58	
2 per cent. as usual....	168 07	
		8,235 51
And for return premium on $3,596 42, over-insured, at 5 per cent...	$ 179 82	
½ per cent. as customary	17 98	
		161 84
		8,397 35

There will also be a deduction from the above for such proportion of the freight as the insured received on goods saved.

Mr. Levy, for plaintiff, having added the primage to the freight list, demanded the aggregate amount, insisting that provisions for the crew were a charge upon the ship, and that wages were not earned when the ship did not arrive, and consequently could not be charged to the freight.

The defendants' counsel, to justify the statement which they had made, and by which they were willing to settle; called a number of witnesses, who were or had been insurers in Philadelphia, or who had been employed in the adjustment of losses; who stated, the uniform and invariable practice of the offices in Philadelphia, as well as of the private underwriters, had been for many years past, in the case of a total loss of freight insured in an open policy; to strike off from the freight list one-third of the amount, to cover the wages, provisions, and other charges upon the freight, and to add the premium to cover at five per cent. and two per cent.; in other words, that two-thirds of the freight list formed (according to uniform usage in Philadelphia for twenty or thirty years back, and as far back as the witnesses could remember) the nett freight, and was considered as the interest really insurable. The adjusting clerk in the insurance company stated, that where no loss happened, the company would at any time, upon demand, return the premium upon one-third of the freight list, though he recollected but one instance where it was done, or had been demanded. One witness said that he had been concerned in procuring insurances, as well as in underwriting at Lloyd's Coffee-House, in London, for ten years, and that the custom there was the same. The plaintiff lived in New-York, when this policy was effected for him by Mr. Taylor of Philadelphia. Taylor stated, that he never had heard of such a rule being established; that being desired at the office to give his orders for the insurance, he gave them in the words of his principal. Some of the witnesses stated, that they had very frequently advised those who applied to insure, to value their policies instead of having them open.

Mr. Rawle, to show that the construction of policies is controlled by usage, cited Park, Ins. 30, 44, 58, 60. That nett freight is what remains after wages, provisions, and other expenses, are deducted. He cited 1 Abb. Shipp. 228; 1 Magen, Ins. 52; Wesk. Ins. 244; Marsh. Ins. 329, 467, 571, 627.

Mr. Levy contended that the cases cited, are as to the usage of a particular trade, which is not like this case. He cited Park, Ins. 104.

WASHINGTON, Circuit Justice (charging jury). Customs acquire the force of law, because, as they must be ancient, uniform, and reasonable, they must have been generally received, known, and approved. The custom of merchants is founded on general consent

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

and usage practised amongst merchants; and may or ought to be known by all who enter into negotiations within the influence of this law. The usage of a particular trade, is supposed to be known by those who engage in that trade; it is or ought to be equally well known by the person who insures against the risks incident to that trade, as to the person engaging in it. But that which is called a usage, in this case, is nothing more than a rule established by a particular class of men, to control a contract entered into by them with others, not privy nor consenting to the rule; and who are and can be under no legal obligation to know of its existence. It is a law governing this species of contract, different from the general law upon the subject, and varying the general rules of evidence. I will not say, that if both parties consented, the assured might not bind himself to agree to such a mode of adjustment; or that if the assured knew of the rule, and that it was uniform, he would not be bound by it under an implied consent. But I hold it necessary, that notice to the assured of such a rule should be proved, or the evidence should be such that the jury might fairly presume it. The rule in this case is in direct hostility with the plain meaning of the contract, and is intended to make it speak a language totally different from the obvious import of the words. The policy obliges the company to pay the value of the nett freight, and the rule excuses them from this obligation, upon their paying two-thirds of the gross freight. The face of the contract, so far from leading the assured to make inquiries respecting this rule, is calculated to deceive the party into a contrary belief. The rule is unequal and unreasonable, because the same deduction being made whether the voyage be long or short, the indemnity, in two cases exactly alike, except as to the length of the voyage, might be complete in one case, and fall very short of it in the other. If the assured always knew that the rule of the office was not to insure more than two-thirds of the nett freight, he might make it a valued policy, or cover the residue in some other office. The introduction of a very few words into the policy, would remove all inconvenience, by expressing the interest intended to be covered. That the rule is very little known, even by those who have been insured, is clear from the evidence of the adjusting clerk; who can furnish but one instance of a return premium upon the one-third not covered, where the vessel went safe; and yet it is scarcely to be supposed, that if the rule had been generally known, similar returns would not always have been demanded. Upon the whole, I think the plaintiff is entitled to recover one-third of the nett freight, which the jury would adjust.

In conformity with this charge, the jury found a verdict for 11,804 dollars.

Case No. 8,812.

McGREW et al. v. The MELNOTTE.

[1 Bond, 453.] [1]

District Court, S. D. Ohio. June Term, 1861.

COLLISION—BOAT ASTERN—RIGHT OF WAY—COMPETENT WATCH.

1. A boat astern attempting to pass one that is ahead, is held to stricter vigilance and greater precaution than are required of the latter.

2. The boat ahead is under no obligation to give way or to change her course to facilitate the passage of the boat which is astern, and the latter, having a choice of the time and place to pass, incurs all the risk of the attempt.

3. This principle applies with great force and stringency when the boat making the attempt to pass is lightly laden and easily controlled, and the other is moved with difficulty.

4. To entitle the libellants to indemnity for their loss, they must not only show that their adversary is in fault, but that in the management of their boat there was no material error to which the collision can be charged.

5. The absence of a competent and vigilant watch, constantly employed to assist and advise the pilot in his duty, is prima facie evidence of fault in the boat thus deficient.

[Cited in The Ancon, Case No. 348.]

[Libel for damages by Robert McGrew and others against the steamboat Melnotte.]

Lincoln, Smith & Warnock, for libellants.

Dodd & Huston, for claimants.

OPINION OF THE COURT. This is a libel in rem against the steamboat Melnotte, in which damages are claimed for a collision with a coal barge in tow of the steamboat Hornet. The libel is in the usual form, averring that the loss and injury sustained were occasioned by the sole fault of the Melnotte. The answer takes issue on this allegation, and charges that the collision was caused wholly by the faulty management of the Hornet. The depositions of a number of witnesses have been taken by the parties to sustain the theory of the collision insisted on by each; and, as usual in such cases, the evidence on some essential points is in direct conflict. I have carefully considered the evidence, but do not propose to analyze it critically in stating my views. While this conflict in the statements of the witnesses unavoidably involves the facts in some uncertainty, the conclusion I have reached seems to be well sustained by the preponderance of the testimony offered by the libellants, as fortified by the fair presumptions and probabilities of the case. The collision took place about eleven o'clock in the night of April 26, 1860, on the Ohio river, just below the village of Newport, on the Ohio side. The Hornet is a stern-wheel steamboat, then employed as a tow-boat in the transportation of coal from Pittsburg to Cincinnati. At the time of the collision she was descending the river with seven heavily laden barges, five

[1] [Reported by Lewis H. Bond, Esq., and here reprinted by permission.]

of which were near the bow, and two directly in the rear of the five, on either side of the boat. It is not controverted that the Hornet was properly equipped and manned as a tow-boat, and had the proper signal-lights, in good condition, at the time, and also that there was a light placed in the forward part of each of the front or wing barges. The Melnotte is a passenger boat of considerable power and speed, and, at the time of the collision, was also descending the river. A short distance above the village of Newport, she was astern of the Hornet, and attempted to pass that boat, on the Ohio or starboard side, nearly opposite the village. The Hornet, with her barges, being about one hundred feet in width, was descending near the middle of the river, probably a little nearer the Virginia than the Ohio shore, and in the usual place for a down boat. The river at that point is not less than four hundred yards wide, and at the time was in a good stage for navigation, there being at least twelve feet of water in the entire width of the river. It appears that just below Newport there is a projection of rocks on the Virginia side, extending out some twenty-five yards, and nearly opposite these rocks, on the Ohio side, there is a deposit of logs and snags reaching out some thirty or forty yards from the shore, leaving still a navigable width of more than three hundred yards. There appears to have been nothing to hinder the Melnotte from passing down on the larboard or Virginia side of the Hornet, if her pilot had decided to take that side. In passing the Hornet, a little below Newport, and nearly opposite the rocks on the Virginia side, and the logs and snags on the Ohio side, the larboard side of the Melnotte came in contact with the starboard wing barge of the Hornet with such force as to crush in the planks, and cause it to take water rapidly, and, shortly after, to sink. This suit is prosecuted to recover compensation for the injury to the barge, the coal lost as the result of its sinking, and for the delay and expense resulting from the collision.

The theory of the libellants, on which they claim a decree in their favor, is that the Hornet with her cumbrous tow was at the point of the collision, in her right place, near the middle of the river, and pointing straight down the stream; and that the Melnotte, in passing, suddenly veered from a straight course toward the Hornet, and as a consequence of this erroneous movement, was brought in contact with the barge. On the other hand, the respondents set up in their answer, and insist that the evidence proves, that the Melnotte was in her right place, pointed straight down the river, and that the collision was caused by the improper divergence of the Hornet from her line of navigation toward the Ohio shore. It is proper to notice here that this is not the ordinary case of a collision between two boats passing in opposite directions. Both were descending the river. And it was the undoubted right of the Melnotte, being a fast passenger boat, to get ahead of the tow-boat. But the law is well settled, that a boat astern attempting to pass one that is ahead, is held to stricter vigilance and greater precaution than are required of the latter. The boat ahead is under no obligation to give way, or to change her course, to facilitate the passage of the boat which is astern. And the latter, having a choice of the time and place to pass, incurs all the risk of the attempt, and unless the forward boat is guilty of a clear error of navigation, will be responsible for all the consequences of such an attempt. The Governor [Case No. 5,645]. This principle applies with greater force and stringency to a case like the present, where the boat making the attempt to pass is lightly laden, and easily controlled, and the other, from its cumbrous attachments, is moved with difficulty, and requires a good deal of time to effect a change of course. I am not to be understood, in referring to this principle, as asserting or intimating that the Hornet is not responsible for any fault of navigation which may be clearly established by the proofs, leading to the collision which occurred. It is noticed solely as justifying a more rigid rule of accountability as applicable to the Melnotte than applies to the Hornet. For, if from any cause there was difficulty or danger in passing, it was incumbent on the Melnotte to have stopped, and to have waited for a more favorable opportunity to effect her purpose.

I proceed to notice, very briefly, the general bearing and aspect of the evidence on the question, to which of these boats is the fault attributable, by which the libellants have suffered loss. It is a familiar principle of the maritime law, that to entitle them to indemnity for the whole of their loss, they must not only show that their adversary is in fault, but that in the management of their boat there was no material error, to which the collision can be charged. To sustain their claim, the evidence of the master and pilot on watch at the time of the collision, and of one of the crew stationed as a watch on the barges, has been introduced. They swear that the Hornet was in the proper place of a descending boat, pointed straight down the river, and that the Melnotte, just before the collision, veered from her course toward the Hornet, and struck the wing barge, as already noticed. The phase of the occurrence thus presented by these witnesses, leaves no doubt as to which boat was in fault. And, if they are entitled to credit, there can be no hesitation in the conclusion that the respondents' boat was guilty of a palpable error, quite sufficient to charge upon her the responsibility for the damage which has been sustained. But the respondents have introduced the depositions of the pilot and carpenter of the Melnotte, and other persons who were on the boat at the time, to prove that there was no

divergence from her proper line of navigation, and that the collision is wholly due to a change in the course of the Hornet, by which she was turned from her straight course downward, to the Ohio shore, and thus her starboard wing barge was brought in contact with the Melnotte.

Upon these contradictory views of the facts, the question for decision is upon the preponderance of the evidence. And, really, I can see no sufficient ground for the rejection of the testimony of the witnesses for the libellants as untrue or incredible. These witnesses were in the most favorable position to know the exact course and position of the Hornet before and when the collision occurred. They are before the court without any impeachment of their moral characters, and so far as the court can know, have testified with fairness and candor. It would require the most satisfactory opposing evidence, to justify the court in repudiating their testimony. Now, it is true, that they are contradicted by the pilot of the Melnotte, and others on that boat. The pilot swears positively that his boat was heading straight down the river when the collision occurred, and the other witnesses for the respondents state it as their belief and opinion that such was her course. It is to be remarked, however, in regard to all these witnesses, that they seem not to have been apprised of the proximity of the two boats, until they were within some twelve or fifteen feet of each other. The collision occurred almost instantaneously after, and it is not strange that, from the darkness of the night, and the excitement of the occasion, they should have mistaken the position of the boats, at the moment of, and immediately after the collision. But if there is any ground for a doubt, arising from the conflicting statements of the witnesses as to the facts connected with the collision, it is removed by the strong probabilities of the case. These directly sustain the theory of the collision, as claimed by the libellants. It is stated both by their witnesses and those testifying for the respondents, that very shortly before the collision, the Hornet was in her proper place, and pointed straight down the river. The respondents insist that she suddenly changed her course, and veered toward the Ohio side, and thus struck the Melnotte. But she could have had no possible object or motive in such a change of course; and it is exceedingly improbable, that with seven coal boats in tow, rendering it difficult to change her position from side to side, she should have diverged from the course she was pursuing. Besides, it is doubtful, if from the time she is conceded to have been in her right course, to the time of the collision, she could have changed her line of navigation so far as to have been in the position described by the respondent's witnesses, when the collision occurred. Such a movement could not have been made but with great difficulty and a considerable lapse of time. The probabilities, I think, are strongly in favor of the conclusion, that from the darkness of the night, or some other cause, the pilot of the Melnotte was apprehensive of running on the logs or snags along the Ohio shore, and to avoid this suddenly turned his boat toward the Virginia side, and thus struck the barge of the Hornet.

There is another fact which may properly be adverted to, as bearing on the question of fault. It is clear from the evidence that the Melnotte had no sufficient lookout, preceding and at the time of the collision. The master, whose watch it was, was sick and not on duty, and there was no one on the deck as a lookout, but the carpenter of the boat. It was no part of his duty to act in that capacity, nor is there any evidence that he was at all qualified for the duty. It has been often held by the supreme court of the United States, that on boats navigating the western waters, a competent and vigilant watch should be constantly employed to assist and advise the pilot in his duties; and that the absence of such a watch is prima facie evidence of fault in the boat thus deficient. [The Genesee Chief v. Fitzhugh] 12 How. [53 U. S.] 459; [Ward v. Chamberlain] 21 How. [62 U. S.] 570; [Haney v. Baltimore Steam Packet Co.] 23 How. [64 U. S.] 293. If, in the case before the court, the question of fault was left in doubt, by reason of the conflict in the testimony as to the circumstances of the collision, the want of a competent and sufficient watch on the Melnotte furnishes legal presumption that she was in the wrong. I am clear, therefore, in the opinion, that the Melnotte must be held responsible for the injury which has resulted from the collision, and accordingly decree against her for damages. These will embrace the value of the coal lost, the cost of repairing the barge, and the expenses of the steamboat during the time she was delayed, with interest from the time of the collision. The evidence on these points seems to be full and clear, and the decree will be for the sum proved, on the basis indicated.

Case No. 8,813.

In re McGUIRE.

[8 Ben. 452.] [1]

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

BANKRUPTCY—PROOF OF DEBT—REINSTATING JUDGMENT—SURPLUS OF ESTATE.

1. K. recovered judgment against McG., issued execution and collected the amount of the judgment, McG. being afterwards put into bankruptcy, his assignee brought an action against K. and recovered back from him the amount he had collected under his judgment. K. thereafter filed a proof of debt against the estate in bankruptcy, on the judgment, which was objected to by the assignee. It appeared that the assignee had enough money in his hands to pay all the other

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

creditors in full and leave a surplus. *Held*, that the proof of debt filed by K. might stand as against the objection of the assignee.

2. The effect of the recovery of the judgment by the assignee against K., was to reinstate K.'s judgment as against McG., and K. would be entitled to the surplus, to the amount of his judgment, after paying all other creditors in full.

[In the matter of James McGuire, a bankrupt.]

In this case the register certified to the court that one Herman Koehler had proved a claim against the bankrupt's estate for $1,487.25, which was, on the petition of the assignee, ordered to be re-examined; that, on such re-examination, he had ordered the parties to form issues to be certified into court; that on behalf of the assignee the following was submitted, viz.: "Whether, the claimant having recovered a judgment in a state court against the bankrupt (before the filing of the petition for adjudication) and having received satisfaction of said judgment on execution, and it having been adjudicated in this court, in an action brought by the assignee against the claimant, that the said claimant, by means of said judgment, had obtained a preference in fraud of the bankruptcy act [of 1867 (14 Stat. 517)], and the said claimant having paid and satisfied the judgment of this court thereupon, he can now prove a valid claim against the estate of the bankrupt, upon the said judgment recovered by him in the state court." That on behalf of the claimant the following was submitted, viz.: "It further appearing, by the testimony taken before the register, that there is a sum sufficient in the hands of the assignee, with which to pay all the creditors of the bankrupt in full, and that a surplus will then remain to which the bankrupt would be entitled, provided Koehler's claim be not paid; that the judgment recovered by Koehler in the state court has not been paid or satisfied, the amount which was paid by the sheriff upon the execution issued on that judgment having been recovered back by the assignee in the action against Koehler; that there was no actual fraud procured or attempted by Koehler in recovering said judgment against the bankrupt, nor was there any intent on his part, in so doing, to evade or violate the provisions of the bankruptcy act; and that the bankrupt is dead;" and that the question to be determined was, whether, upon these facts, the motion to expunge the claim should be granted.

F. Smyth, for creditor.

W. F. Scott, for assignee.

BLATCHFORD, District Judge. As Koehler does not claim to share with the other creditors who have proved their debts, in the bankrupt's estate, but asks only that, after the other debts are paid in full, he may have the surplus of the assets applied on his debt, it is manifest that the other creditors, and the assignee as representing them, have no interest or concern in the question as to whether the proof of debt made by Koehler should be allowed to stand or not. Whether it stands or not, the amount to be received by the other creditors will be the same. There is enough to pay them in full, if Koehler's claim is not to share in so much as will be required to pay them in full. Therefore, as against any objection which those creditors, or the assignee as representing them, have a right to make, the proof of debt ought to stand. As against the surplus which will be left after paying the other creditors in full, and as against the bankrupt, or his representatives, as otherwise entitled to such surplus, the proof of debt ought to be allowed to stand. The effect of the recovery by the assignee against Koehler, and of the payment thereunder by Koehler to the assignee, was to reinstate the judgment in favor of Koehler against the bankrupt, as between Koehler and the bankrupt, and this court ought not to pay over the surplus in its hands to the bankrupt or his representatives, provided the said judgment is still unsatisfied, but it ought to pay such surplus to Koehler. In the suit brought by the assignee against Koehler, the assignee had no right to recover from Koehler more than the amount necessary to pay in full the creditors other than Koehler. The surplus, as between the bankrupt and Koehler, belonged to Koehler, and ought now to be refunded to him.

Case No. 8,813a.

McGUIRE v. BRISCOE.

[2 Hayw. & H. 54.] [1]

Circuit Court, District of Columbia. June 21, 1851.

MOTION FOR COSTS ON OVERRULING A DEMURRER, AND BILL TO SET ASIDE A SALE AT AUCTION.

1. Where a demurrer to the bill is overruled, or is sustained in part, the court declined to allow costs to either party, remarking that this court has no recollection of requiring the payment of five pounds, required by the statute of Maryland.

2. Where one has knowledge of the insolvency of a party, an agreement to pay him a part of the purchase money of property, held by an assignee under the insolvent laws is void as to creditors.

3. That at a sale under a deed of trust the following circumstance, with others mentioned, was considered of sufficient importance to set aside the sale and decree a re-sale of the property. A party interested in the sale, in the hearing of the auctioneer and the persons attending the sale, stated that he had a deed for the property, and that any person purchasing would be subject to a suit at law; that the sale under the trust deed was a mere legal form to perfect his title.

[This was a bill in equity by Edward McGuire against Richard C. Briscoe. Heard on motion for costs on overruling a demurrer.]

See bill, answer and demurrer as given in this opinion and that of the decision of Judge MORSELL, setting aside a sale at auction under a deed of trust.

[1] [Reported by John A. Hayward, Esq., and George C. Hazleton, Esq.]

Before CRANCH, Chief Judge, and MORSELL and DUNLOP, Circuit Judges.

DUNLOP, Circuit Judge. I think that the demurrer should be sustained as to so much of the bill as seeks to discover how much the defendant paid to Wall and Cascer, and to the legal representative of James McCormick, and to the defendant having warranted McCarthy. And to be overruled as to the failure or refusal of the defendant to pay to McCarthy the balance of the purchase money in goods. See as to multifariousness, Story, Eq. Pl. § 284.

Rule by the court that the defendant put in a further answer to the complainant's bill.

The defendant thereupon put in the following further answer to the complainant's bill: The further answer of the defendant to the original bill of complaint: This defendant, saving and reserving to himself the same benefit of exception to the said original bill as by his former answer to the said original bill is saved and reserved, for answer thereto saith: That he, this defendant, hath fully complied with and satisfied the said McCarthy the full sum of $1500, the purchase money of the said leasehold premises in said bill mentioned; that he hath paid and taken up the said judgments and claims of the estate of James McCormick, also the claims held by Ulysses Ward and Wall and Iasser, which he is ready to release and satisfy to said McCarthy, on his being made secure in his said purchase, and the residue thereof he hath fully accounted for and settled with the said McCarthy, partly in dry goods and partly in debts due and owing to him by said McCarthy for dry goods, which he agreed to allow this defendant on said settlement; and the said McCarthy did, in the month of May or June, 1845, declare himself fully satisfied and content therewith, but this defendant does not know that he can show all the particulars of said settlement, yet offers himself ready to prove by indifferent testimony, if the same shall be denied by said McCarthy, that he did in fact in the said month of May or June, 1845, fully pay and satisfy to him the said balance stipulated by this defendant in and by his said agreement, to be paid for the purchase of the said leasehold, &c.

The following exceptions were taken by the complainant to the above insufficient further answer of the said defendant to his said complainant's bill. For that the said defendant hath not, to the best and utmost of his knowledge, remembrance, information and belief, answered and set forth whether he, the said defendant, "hath supplied and allowed said McCarthy to select any goods from the store of the said Clarke & Briscoe. If so to what amount? and what kind of goods? and produce and set forth a bill of the same." In all of which particulars the said complainant, except to the said further answer of the said defendant as evasive, imperfect and insufficient, and humbly prays that the said defendant may be compelled to put in a full and perfect answer thereto. The complainant thereupon moved for costs on overruling the demurrer and for the penalty of £5 under the statute.

CRANCH, Chief Judge. The demurrer to the defendant's first answer having been sustained in part and overruled in part, I think each party should sustain his own costs incurred by the demurrer, that is that neither party should recover of the other any costs of demurrer. I have no recollection that this court has ever required the payment of the £5 required by the Maryland statute.[2]

The following is Judge CRANCH'S decision overruling the demurrer to the answer:

1. This is a demurrer to the defendant's further answer, because he says that "he does not now know that he can show all the particulars of said settlement." But he says that he "has fully complied and satisfied the said McCarthy the said full sum of $1500, the purchase money of the leasehold premises, in the bill mentioned," and "offers himself ready to prove by indifferent testimony that he did, in May or June, 1845, pay and satisfy to him the balance," &c. This seems to me to be as full an answer as can reasonably be required. I therefore am inclined to think that this last demurrer should be overruled, but without costs. Is the defendant bound to exhibit a bill of particulars of the goods supplied to McCarthy? I doubt whether he is bound.

Bill to set aside a sale at auction.

MORSELL, Circuit Judge. The bill in this case was filed by Edward McGuire as trustee under the insolvent law, appointed in the case of John McCarthy, an insolvent debtor, on behalf of the creditors of said McC. against Richard Briscoe. The bill states that McC., on the 17th of Aug., 1836, purchased of Frederick May, since deceased, a leasehold interest in a lot or parcel of ground in the city of W., numbered 29, in square "B." for the term of 99 years, he paying therefore an annual ground rent of one hundred and fourteen dollars and ninety cents, with the privilege at any time during the said term to purchase the fee-simple title in said premises for the sum of $1915, on which premises said McC. erected a two story brick house at the cost of about $2000; that on the 20th of April, 1844, he conveyed all his interest in said leasehold premises to Edward Simmes and Richard E. Simmes, in trust, to secure

[2] That upon any demurrer or plea being overruled upon argument, or otherwise being withdrawn without leave of the chancery court, the party whose demurrer or plea is so overruled or withdrawn shall pay to the opposite party the sum of five pounds current money, and the costs thereof, and be in contempt until the said sum of money and costs are fully discharged and paid. Act Md. 1785, c. 72, § 25.

the payment of three hundred and ninety-three dollars and thirty-four cents to Ulysses Ward, to whom he was then indebted, with power to said trustees in case of failure to pay the same in 12 months from the date of said conveyance, to sell the same at public auction. That on the 4th of June, 1844, he obtained the benefits of the act of congress for the relief of insolvent debtors within the D. C. [2 Stat. 237], that according to the provisions of said act, he did on the said 4th of June, 1844, convey and transfer to said McG., for the benefit of his creditors, all his property, real, personal and mixed, and all his claims, rights and credits. From the insolvent papers, in which case it appears that the premises aforesaid were returned in his schedule as a part of his real property, and by the certificate of said McG. as trustee, that the same were delivered to him on said 4th day of June, 1844; it further appears thereby that said McC. returned, among those which are stated, several other creditors besides the said Ulysses Ward and Wall and Saggar and Jas. McCormick for whose debt he was imprisoned. The bill proceeds in substance to state and charge that afterwards on Feb. the 17th, 1845, Richard G. Briscoe the defendant, knowing the premises, and conniving with said McC. did fraudulently and with the intent to defraud the said McC. and his said McC.'s creditor, make a secret agreement in writing with said McC., wherein the said Briscoe promised to pay the said McC. the sum of $1500, in consideration whereof the said McC. agreed to convey the premises aforesaid unto the said Briscoe, that the said sum of $1500 was agreed to be paid in manner following: 1st. To pay the said debt of $393.35 and interest thereon due to said Ulysses Ward and secured as before mentioned. 2nd. To pay about $250 and interest thereon due Messrs. Wall and Saggar, for which they had obtained a judgment. 3rd. To pay the sum of about $350 and interest thereon due to one Jas. McCormick, for which the said McC. had obtained a judgment, and the balance, which was computed to be about $300, was to be paid by said Briscoe in such goods as the said McC. should think proper to select from time to time out of the stock of merchandise in the store of said Briscoe. There are some variances between the original agreement exhibited in the case, and as it is stated above in the bill, but it is supposed not materially to effect the principles of law, which will be declared in the decision of the case. The bill avers that the defendant, well knowing the fact that said McC. had no legal or equitable right to sell said premises, entered into the contract aforesaid, with the covenous intent of obtaining the same at an unreasonable sacrifice, to the great detriment of the creditors of said McC., and that at various times after said agreement was drawn up said complainant informed said defendant that said McC. was an insolvent debtor; had no right to enter into said agreement, and that any money he, the said Briscoe might pay said McC. on account of said agreement would be thrown away by him, the said Briscoe. That in pursuance of said agreement, said McC., on the 17th of Feb., 1845, did by deed, duly executed, convey said premises, for the consideration aforesaid, to said Briscoe, and therein empowered said trustees, with the assent of said Ulysses Ward, to convey said premises, free and clear from said trust, or to convey the same subject thereto, that well knowing said deed was a nullity, because of said prior deed under the insolvent law. Said Briscoe covenously, and with intent to defraud said McC. and his creditors, advised and agreed with McC. that neither he, the said Briscoe, nor McC. should pay off the said debt so secured, but should fail so to do, and they cause a sale of said premises at public auction by the trustees under said trust deed, at which said sale, he, said Briscoe, should become the highest bidder, and with a view to prevent said premises from bringing a full and fair price at said auction sale, it was arranged between them that not more than $1000 should be offered for the same, that is, that the said Briscoe should bid the said sum of $1000. In compliance with which arrangement said McC. made known to his friends and acquaintances generally, that he had sold said premises by private contract to said Briscoe, and that the public sale by auction, under said trust deed, was a mere legal form to perfect the title of said Briscoe, which arrangement became publicly known prior to and at the time of said auction sale, which took place on the 17th of May, 1845; said McC. designedly absenting himself. In consequence of the common notoriety of said private sale, many persons refrained from attending the said auction, and of the few who did attend, but one made a bid for the said premises. That said Briscoe, to effect his point at the time of said auction, at the premises aforesaid, and in the hearing of the auctioneer and all the persons then and there attending, publicly declared and stated that he, the said Briscoe, had a deed for the property, and also the lease of Dr. May, meaning the lease executed as aforesaid by said Frederick May, deceased, and that any person purchasing would be subject to a suit at law. In consequence whereof, the said premises, at the lowest cash valuation worth $2000, were struck off to said Briscoe as the highest bidder at said auction for the sum of $730, and on the 8th of July, 1845, the trustees aforesaid executed and delivered a valid deed of conveyance (I suppose as to the form of execution) conveying to said Briscoe all their right and title and interest in the premises. Complainant further charges that after the execution of said last mentioned deed, the said Briscoe, believing himself in condition to carry into effect the fraudulent schemes which complainant charges were being plot-

ted by said Briscoe at the time of the execution of the said private contract, paid off, it is true, the entire debt due, and secured as aforesaid to Ulysses Ward, amounting to about $450; but instead of liquidating the entire debt due by said McC. to said Wall & Saggar and to said Jas. McC., the said Briscoe compromised with them at the rate of fifty cents on the dollar, &c., (to this part of the bill the defendant demurred, and the court sustained his demurrer). The bill charges also that he has failed and refused to permit the said McC., according to the terms of the contract, to take out the sum of $300 in goods as aforesaid, &c., except the sum of about $47. The complainant avers and believes that the object of the defendant, at the time of entering into said contract, was by fraudulent means as aforesaid to purchase the said property, at an unconscionable sacrifice, to the detriment of said McC. and his creditors; that at the time of entering into said contract he well knew that said McC. was an insolvent, and had no interest at law or in equity in the premises, by reason of which actings and doings many of the creditors of said McC. have been defrauded of their just dues.

The prayer of the bill is in the alternative. First, that a resale of the premises may be decreed, and an account taken of the rents and profits thereof during the time said premises have been in the possession, or under the control, or vested in said Briscoe, and that the purchase money arising from said resale may be applied, first to the repayment to the said Briscoe of the monies expended by him in liquidating the said debt due to said Ward, and to so much of the said respective judgments as has been actually paid by him, and legal interest thereon, deducting therefrom the amount received, or that might have been received by said Briscoe, but for his willful default or neglect from said premises. And second, that the balance of said purchase money be paid over to said complainant as trustee as aforesaid, to be by him distributed among the unsatisfied creditors of said McC. pro rata, each in proportion to the amount of his claim, or a decree that said Briscoe shall stand seized of the said premises as trustee for the use of said complainant as insolvent trustee as aforesaid, the said trust to extend to the sum of three hundred dollars, contracted by said Briscoe, to be paid to said McC., in goods as aforesaid, and interest thereon, and to pay any sum of money that may be found to be the difference between the full amount of the judgments aforesaid, and interest thereon contracted, to be paid by said Briscoe for said McC., and the sum of money actually paid in liquidation of said judgments by said Briscoe, and that if the said Briscoe shall not satisfy the said trust by paying the said sums of money to said complainant within a certain time, to be limited by decree, that a sale of said premises may be ordered, &c.

The answer admits the leasehold interest as stated in the bill; denies the enhanced value by improvements as stated by complainant; that it is also true as stated with respect to the existence of the debt due to Ulysses Ward, and that there is also due to him the additional amount of $30, which was also meant and intended to be secured on the same property. He admits the insolvency of McC. as stated, and the conveyance of all his property to complainant as trustee for the creditors of McC. under the insolvent law; admits a constructive notice thereof, but denies that he had any notice in fact at the time of the agreement between him and McC., for the purchase of the premises mentioned in the bill, which agreement is marked defendant's exhibit, No. 1. That said McC. was in the actual employment of said premises, and assured this defendant the said premises were, with the exception of the said deed of trust to Ward, entirely free from any incumbrance. That he has reason to believe, and does believe it to be true, that complainant knew that said McC. was negotiating with defendant, yet stood by and did not in any manner interpose or notify him of his claims upon said property until the agreement between McC. and him was consummated. That although, as appears on the back of the schedule, McC. returned a list of his creditors, there is not and has not been on file in the insolvent proceedings a single claim or demand by any one of the said creditors, nor is there anything there except the said list to show that he was in fact indebted to any of the said persons, nor is there anything to show the amounts. That he is ready to prove that if said McC. was indebted to any of said persons at the time of said insolvent's discharge, that either he, said McC., or some other person, other than said insolvent trustee, hath fully settled the said debts, except said Thos. Griffin and said Bradley & Estep; and that as to said Thos. Griffin, said McC. had then an account in bar against his demand, and that he hath been informed by said McC. that he was about to settle with said Bradley & Estep, at or about the time of said contract. He denied that there are any debts now due by said McC., for the payment or satisfaction of which the holders thereof could or can look to the property conveyed by said McC. to said insolvent trustee; this defence he relies on as if pleaded. He denies all connivance with McC. to defraud the said creditors. That there was no secrecy about the agreement, but that it was as open as contracts for sale and purchase of land usually are, states the agreement, as it appears by exhibit No. 1. That the whole purchase money was to be $1500. That he was left free to make the best terms he could with the respective claimants named in the agreement. McC. was to allow them so much money, without any regard to the amount defendant might give for them. The amount of which

debts and the arrears of taxes due, exclusive of said $300 to be paid in goods to said McC. on the 15th of February, 1845, was $1305.60, which he hath fully satisfied, and hath received from each an assignment. He denies that complainant gave him the notice of McC.'s insolvency, as stated in the bill, until after said defendant had entered into said agreement, and had, under the same, paid a part and given his obligation for the residue of said claims respectively, and received the assignments of them. He believes, as before stated, that trustee was cognizant of the said treaty for said purchase, and had become liable to said parties, and that said amount paid was less than the claims respectively; that the notice given under the circumstances aforesaid was with a view to cheat and defraud the defendant, and to deprive him of his just gains on said contract. He admits the execution of the deed by McC. to him, and believes it was known to complainant before he gave his said notice; claims it was a nullity with respect to the allegations respecting the agreement between him and McC. not to pay off the said debt to Ward; and respecting the bidding at said sale, he avers that the whole statement thereof is a tissue of falsehoods; that for his protection, and as he was advised, he admits that he purposely delayed the payment of said debt, as there was no other mode to protect himself against loss by the fraudulent collusion between the said complainant and McC., and that the said Ward, at the instance of the said defendant, or as his assignee, did require Messrs. E. & R. Simmes, trustees in said deed named, to sell the said property, and the same was accordingly sold and purchased at said sale by this defendant, at and for the sum of $730; denies that there was any agreement between him and McC. limiting the amount of the bidding, or to control or regulate the same; nor that McC. should make known among his friends and acquaintances generally that he had sold said premises by private contract to said defendant, and that the public sale was a mere legal form to perfect the title of said defendant, though if such had been the case the defendant maintains it would have been perfectly fair; nor does he know that the said McC. designedly absented himself from the said sale; nor does he recollect whether he was there or not, but if he was absent there was no understanding or agreement between them that he should be so. He denies that in consequence of the notoriety of the private sale aforesaid many persons refrained from attending said sale. He avers, and is ready to prove, that there was a good company at said sale, and several bids were offered for the property. He admits that he did, at said sale, in presence and hearing of the auctioneer—and he supposes of all others who were present—publicly declare and state in substance what is alleged in the bill; he will not be positive of the words, they were, as well as he recollects, accurately taken down in writing by the auctioneer. He denies that by any contrivance and threats alleged as employed by him, the premises (at the lowest cash valuation worth $2,000), were struck off at said sale and sold to said defendant for $730. He admits that he was the highest bidder at that sum, and that they were struck off to him at that sum. He says they were not worth anything like $2,000 in cash, and that he would never have bought them at $1,500 but for the mode of payment and the prospect of his being able to buy up the claims at less than their full amount. It is also true that the trustees have conveyed the said property to the defendant; also that he has paid off said debt to said Ward, together with the expenses of sale. The following part is a demurrer, which in part was sustained. The amended answer to the part not sustained states that he, defendant, has fully complied with and satisfied the said McC. the full sum of $1,500, and that McC., in the month of May or June, 1845, acknowledged himself fully satisfied and content therewith. The said $300 to be paid to said McC. he hath fully accounted for and settled with said McC., partly in dry goods and partly in debts due and owing to him by said McC. for dry goods, which he agreed to allow defendant, &c.

The agreement between McC. and the defendant Briscoe, for the purchase and sale of the property mentioned in the bill, was entered into on the 15th of February, 1845. It was a leasehold interest for ninety-nine years, renewal forever, in part of lot No. 29, in square B, in the city of Washington, at an annual ground rent of $114.90, with the privilege at any time during the term to purchase the fee-simple title for the sum of $1915, granted to McC. by Dr. Frederick May, on the 17th of August, 1836, one of the terms of which agreement was that McC. should be paid $300 in goods. The deed for the property from McC. to Briscoe was dated the 17th of February, 1845. McC. had been released under the insolvent law of this district, and the complainant appointed trustee for the benefit of the creditors on the 4th of June, 1844, about eight months before. Some of the creditors returned with his schedule are still unpaid. The terms in the deed to the trustee under the insolvent law are coextensive with those used in the law, which are sufficiently comprehensive to transfer any and every interest which the insolvent could have had. The terms are "all my property, real, personal and mixed, to which I am in any manner entitled, in possession, reversion or remainder, and all my rights, claims and credits, of what nature or kind soever." If, therefore, the party grantor in a deed of bargain and sale can transfer or pass only such interest as he has, what interest in the premises had McC., the grantor, at the time of his agreement and deed to the defendant Briscoe? It has been contended that he had

an interest in a resulting trust, which the defendant had a right to think existed at the time, and that he had a right, and did purchase an outstanding incumbrance for the purpose of perfecting his title, and by that means he hath perfected his title; that the creditors so returned by McC. cannot set up or sustain their claim. First, because they have not been made parties to the suit: or second, that their claim to look to the premises for payment has been lost by the laches of the trustee, and the presumption that they were paid.

As to the first objection I think it is sufficiently answered by the 6th section of the insolvent law, which is, "That every trustee may sue for in his own name, any property, or chose in action, assigned to him by virtue of this act." He must be considered as the representative of the creditors, and he has stated in the bill that it is filed on their behalf. See Bank of Washington v. Herbert, 8 Cranch [12 U. S.] 36. Ch. Justice Marshall, in a case under the insolvent law, where a similar objection was made, says: "In reason there can be no difference between this suit, which asserts the right of the creditors in the mode prescribed by law, and an assertion of that right in their own names, nor does the law distinguish between them."

With respect to the second ground. The absence of notice, in fact of the release under the insolvent law, and the misconduct of the trustee. The circumstances as before stated were: (1) That McC., the insolvent, was permitted to remain in the actual enjoyment of the premises, and that he assured defendant that the premises were, with the exception of said deed of trust to Ward, free from any incumbrance, &c. (2) That trustee knew that said McC. was negotiating with defendant, yet stood by and did not in any manner interpose, or notify him of his claim on said property until the agreement was consummated. (3) That the list of creditors returned does not show any particular amount due, nor have any one of them made or demanded any single claim, and that he will be able to prove that they were all paid, &c.

It cannot be deemed necessary, I think, to sustain the claim of the complainant to recover in this case, to show that notice in fact was given to the defendant before he entered into the contract for the purchase of the premises, that McC. had been released under the insolvent law. The only notice required is that which is directed to be given by the judge's order of the application, to be published in some of the newspapers for such time as he may think proper, &c. This, it appears by the insolvent papers, was done by publication in the National Intelligencer, according to law. If he was a creditor, as the proof states him to have been, and resided at the time in the city of Washington, the presumption is very strong that he had notice in fact, which perhaps had escaped his recollection. Be that as it may, he had all the notice which the law requires, and was as much bound as if he had had notice in fact. With this notice he was bound to know not only of McC.'s insolvency, but of the list of creditors returned on the back of his schedule, and although the amount of the debts were not stated, the list stated as much as the law required, and enough to put the defendant on the enquiry of those who could have given him authentic information; it was therefore his own folly to rely upon what McC. told him. With respect to the supposed ground upon which it might be presumed that the trust was extinct, arising from the acts or negligence of the trustee under the insolvent law, in permitting the insolvent McC. to remain in the enjoyment of the premises, and not interposing or notifying defendant of his claims before he had consummated his purchase and become bound to Ward and others for the payment of the debts due to them, though he knew of the negotiation, &c.

It will be proper to advert to what the facts really were as proved (the premises were occupied by two tenants O'Leary and Barber) from the time of the release under the insolvent law to the date of the agreement for the purchase and sale, was, as has been already stated, little upwards of eight months before the trustee could sell. The law required him to obtain the judge's order, and although perhaps the trustee may be chargeable with some degree of negligence, there is no very unreasonable delay. There is no evidence to show who received the rent, or whether any was actually due in the interval. As to the other circumstances, it is not proved that he did know of the negotiation. It is stated only in answer as of the belief of the defendant. It is admitted that he, defendant, had notice before he had paid the obligations which he had come under on account of said purchase. But if the facts were as stated in the answer, and this, instead of being a case of special and resulting trust, were a case of a trustee having general powers, how would the law be? The rule of law is, that regularly no act of the trustee shall prejudice the cestui que trust, but the trustee must especially in equity make good the trust, and into whomsoevers hands the property comes, in case of a breach of trust, it will be charged with the trust, except in a case where having the legal estate, and being in possession, the trustee aliens and conveys the property for a valuable consideration and without notice, and so also as to the incumbrances. Mortgagees for a valuable consideration, and without notice of the trust, are to be considered as purchasers—a mortgage being a specific lien. See 2 Fonbl. Eq. p. 170, c. 7, § 1, and note (a), and the authorities there cited. According to this view it is supposed the trust could not be considered extinct. It may also be observed, as already stated, that the defendant, having knowledge of the insolvent circumstances of McC., the agreement to pay him a part of the purchase money

would make the contract void as to creditors, according to the recent decision of this court.

The next and last point to be considered is what effect is to be given to the sale, by the trustees, under Ward's deed, in trust? It has been contended that the defendant had a right to purchase an outstanding incumbrance to perfect his title, and that the sale by the trustees under said deed, and the purchase at that sale by the defendant has perfected his title. That where the equities are equal, as it respects the claim of two purchasers, the subsequent equitable owner, without notice, is perfectly justifiable in purchasing in the legal title, so as to obtain a superiority, I have no doubt, and having so done a court of equity will never disturb him in his right. But that certainly was not this case, because, according to the principles which I have already endeavored to establish, the defendant had notice, and the insolvent McC. had no present interest that he could pass by a bargain and sale, and because the only legal interest that Ward could convey was subject to the equity of redemption contained on the face of the deed itself, which by operation of law was vested, prior in point of time, in McGuire, the trustee under the insolvent law, for the benefit of the creditors. The right in the equity of redemption being then clearly established in the trustee, for the benefit of said creditors under the insolvent law, it follows that any valid sale and purchase under Ward's deed, either for his own benefit or for that of his assignee, must be something more than a mere formal sale to unite the legal with the equitable interest. Such a sale must have been strictly in compliance with the terms contained in the deed, openly, really and fairly, at public auction to the highest bidder. Was such the character of the sale in the present instance? It was admitted that it was made by the trustees, at the request of the defendant, and that the defendant was to bear the expenses attending the sale; and that neither of the trustees attended the sale, and that they were to have no further trouble with the matter than to sign a deed. The bill states several circumstances of unfairness on the part of the defendant connected with the sale, but which are denied by the answer, and not sufficiently proved. It however charges that Briscoe, to effect his end, at the time of the said auction at the premises aforesaid, and in the hearing of the auctioneer and all the persons then and there attending, publicly declared and stated that he, the said Briscoe, had a deed for the property and also the lease of Dr. May executed as aforesaid by said Frederick May, deceased, and that any person purchasing would be subject to a suit at law. The answer admits the truth of said statement in substance, but as defendant did not positively remember the words, he refers to them as accurately taken down in writing by the auctioneer. The auctioneer states that said Briscoe stated at the time and place aforesaid "that he *had a deed for the property*, as also the lease of Dr. May, *and that the property was sold to perfect his title*, and that any person purchasing would be subject to a suit at law." The words above underscored were run through by two black lines on the auctioneer's book. The proof is that there were about ten or a dozen persons present; that no person bid for the property except O'Leary, the tenant, and the defendant Briscoe. One of the witnesses says, "that what Mr. Briscoe said at the sale had such an effect on his mind, that had he been disposed to bid he would have been prevented from doing so, and he has no doubt it had the same effect on others." He states, however, that he was there merely as a spectator, and with no intention of purchasing the property.

These, it is believed, are all the material facts on this point in the case before the court, and it is thought offer an occasion to make a few general remarks on the subject of sales at public auction. The public is supposed to be deeply interested that such sales should be conducted in good faith and entire fairness; that the articles set up for sale will be so disposed of as to bring the highest price from the highest real bidder which can be obtained; that the owner, whether real or nominal, should not be allowed privately to bid, for then, in the language of Lord Mansfield, "there would be no end of that if the owner might privately bid upon his own goods. No fraud or imposition should be practiced by puffers or persons employed in that or a like character to induce persons to bid, or not to bid. Nothing should be done which might prevent honesty and justice from being done to all interested, by false representations or otherwise. It will be found, from a very early period, that the invariably fixed policy of the law, founded on these principles, has been to throw around those guards which would probably secure that important end, hence the inhibiting restraints imposed, disallowing owners, directly or indirectly, trustees and all agents, public and private, in the relations which vendor and vendee stand to each other, from bidding and purchasing at such sales, thereby effectually to secure a faithful discharge of the duty of trustees and others, without the probability of danger from personal conflicting interests." The modern case of Michoud v. Girod, decided by the supreme court in 1846, 4 How. [45 U. S.] 552, 553, recognizes and approves of those early established principles which I have just stated. In the present case the trustees, instead of acting as they ought to have done, according to the well established law on the subject, surrendered up the whole discharge of the trust and the control and management of the sale to the defendant, not even giving the benefit of their presence; and he, the defendant, by acts and declarations which, according to the views I have taken of the law, were falsely at the time of said sale claimed in amount

to be the owner, and it appears more particularly by the evidence, that he used language on the occasion calculated to deter the few persons who were present from bidding. One of the witnesses present declares that the effect of such conduct on him was such, that had he been disposed to bid he would have been prevented from so doing. This and the other circumstances alluded to may have been the reason why the property was knocked down to him as the highest bidder at the sacrifice of $730. This, I think, was unfair conduct, and sufficient to set aside the sale.

It is decided in a late case of Fuller v. Abraham, 6 Moore, 318, and 3 Brod. & B. 116, that such conduct is sufficient to set aside a sale. The marginal note states the case correctly, and is in these words: "Held that a purchaser did not acquire any property under a sale by auction at which he and his friends were the only bidders, the rest of the company being deterred from bidding by the purchaser stating to them he had a claim against and had been ill used by the late owner of the article," and Chitty on Contracts (page 299), referring to this case and another of Phippen v. Stickney, 3 Metc. 384, says: "It has been decided in a late case that if a purchaser, by unfair conduct, deter other persons from bidding at the sale, and cause the goods to be knocked down to him, he does not acquire any property in the goods."

The following decree was given in this case: This cause standing ready for hearing, and being submitted, the counsel for the parties were heard, and the proceedings read and considered. It is therefore, this 21st day of June, 1851, ordered, adjudged and decreed that the sale made on the 17th day of May, A. D. 1845, of the premises mentioned in the proceedings, be and the same is hereby annulled and declared to be void, and that the deed executed in consequence thereof on the 8th day of July, A. D. 1845, by the trustees, Edward Simmes and Richard E. Simmes, and mentioned in the proceedings, be and the same is hereby annulled and declared to be totally void. And it is further ordered, adjudged and decreed that the said premises be sold; that Walter D. Davidge, of the city of Washington, D. C., be and hereby is appointed trustee to make such sale, and that the course and manner of his proceeding shall be as follows: He shall first file in the clerk's office of this court his bond to the United States in the penalty of $5000, with surety or sureties to be approved by this court or a judge thereof, conditioned for the faithful performance of the trust reposed in him by this decree, or which may be reposed in him by any further order or decree in this cause. He shall then proceed to make sale of said premises at public auction, having first given at least four weeks previous notice by advertisement in the National Intelligencer, published twice a week for said four weeks, of the time and place and terms of sale, which terms shall be as follows: One fourth of the purchase money to be paid in cash, and the residue in three equal payments at six, nine and twelve months from the day of sale, the said deferred payments to bear interest, and to be secured by the bonds or notes of the purchaser, with surety or sureties to be approved by the trustee. And as soon as may be convenient after said sale, the said trustee shall return to this court a full report of the same, with an affidavit of the truth thereof, and of the fairness of such sale annexed. And on the ratification of said sale, and the payment of the whole purchase money, the said trustee shall convey to the purchaser or purchasers, his or their heirs and assigns, the premises sold, with all the right, title and interest therein of the parties to this cause. And the said trustee shall bring into this court the money arising on such sale to abide its future order.

Case No. 8,814.

McGUIRE v. EAMES.

[15 Blatchf. 312; 3 Ban. & A. 499.] [1]

Circuit Court, E. D. New York. Oct. 23, 1878.

PATENTS—VALIDITY—INFRINGEMENT — LICENSE—MOTION FOR INJUNCTION—NECESSITY FOR.

A motion for a preliminary injunction to restrain the infringement of a patent was made six months after it was issued. The answer put in issue its validity, and set up a license to construct and use the machine complained of, granted by the plaintiff before the patent was issued. It was disputed, on affidavits, whether the defendant's machine was so made with the knowledge and consent of the plaintiff, and whether the invention was new, and the defendant was shown to be able to respond in damages: *Held*, that the motion must be denied.

[This was a bill in equity by Thomas M. McGuire against Harvey A. Eames.]

James Ridgway, for plaintiff.

William H. McDougall, for defendant.

BENEDICT, District Judge. This is a motion for a preliminary injunction, to restrain the defendant from using a certain hydraulic power accumulator, upon the ground that it is an infringement upon a patent issued to the plaintiff on the 23d day of April, 1878, and numbered 202,660. The answer filed to the bill puts in issue the validity of the plaintiff's patent, and further sets up a license to construct and use the machine in question, granted by the plaintiff prior to the issuing of the patent upon which he relies. It appears, from the affidavits, that the defendant does not construct machines for the purposes of sale, but did construct the machine complained of, which he is using in the manufacture of hats. The machine was

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, reprinted in 3 Ban. & A. 499, and here republished by permission.]

constructed prior to the plaintiff's application for a patent, and from measurements taken for that purpose from the machine upon which the plaintiff thereafter applied for and obtained a patent. Whether the defendant's machine was so constructed with the knowledge and consent of the plaintiff, is a fact in dispute, there being two affidavits upon this subject, opposing each other. There are, also, affidavits going to show that the plaintiff's machine was not invented by him, but is similar to a machine in use at No. 13 Adams street, for some seven years before the plaintiff's machine was constructed, and one of these affidavits is that of the workman who constructed the plaintiff's machine, and who states that it is, in all essential particulars, like the machine in use at No. 13 Adams street, and was intended to be exactly similar, save only in regard to the position of the weights upon the piston, and that the difference in this respect is not only unimportant, but was suggested by the deponent, and was not the invention of the plaintiff. To this affidavit is opposed the affidavit of the plaintiff, who contradicts the statement of the workman, whom he shows to have been discharged from his employment, and to be hostile and biased. It is conceded that the defendant is able to respond to any claim of damages that is made by the plaintiff. Upon such affidavits as these, it is impossible to grant the plaintiff's application for a preliminary injunction. The patent is recent, its validity is disputed, and the facts upon which the plaintiff's right to an injunction depend are not so clearly made out as to warrant the interposition of the court in this stage of the proceeding. The motion is denied.

[Upon final hearing the patent was declared invalid, and the bill dismissed. 8 Fed. 761.]

Case No. 8,815.

McGUIRE et al. v. The GOLDEN GATE.

[1 McAll. 104.] [1]

Circuit Court, N. D. California. July Term, 1856.

ADMIRALTY—TORTS OF MASTER — PASSENGER—LIBEL IN REM—ACTUAL DAMAGES.

1. The owners of a ship are liable for the torts of the master, when they involve a breach of the passenger contract, and are done while acting strictly within the scope of his employment.

[Cited in Taylor v. Brigham, Case No. 13,781.]

2. The rule of damages in such cases, where recovery is sought on the constructive consent of the owner, must be the actual damages incurred; being innocent of any participation in the tort, the damages are not to be made punitive.

[Cited in Lake Shore & M. S. Ry. Co. v. Prentice, 147 U. S. 101, 13 Sup. Ct. 263.]

[3. Cited in The Yankee v. Gallagher, Case No. 18,124, to the point that where no additional testimony is taken, the appellate court will not readily interfere with the amount of damages decreed by the court below.]

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

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

This is a proceeding in rem for a violation of a passenger contract, arising out of the torts of the master and mariners of the ship. Exceptions were taken to the jurisdiction of the district court of the United States for the Northern district of California, where the libel was filed. The exceptions were overruled by that court, a decree rendered against the respondent [case unreported], and an appeal prosecuted to this court.

Manchester & Hodges, for libelants.
Hall McAllister, for respondents.

McALLISTER, Circuit Judge. As to the power of this court to entertain jurisdiction of a proceeding in rem for the torts of a master, I feel considerable doubt. That the owner is civiliter liable for all violations growing out of the crimes of the master or mariners, will not be asserted. Yet, it is difficult to suppose a crime committed upon a passenger by a master or mariner, which will not involve a breach of the passenger contract. There must be some limit to the owner's liability; but it is not easy to fix a uniform one. There is no case which has drawn such line with accuracy; but the owner's responsibility is limited only by general definitions. An inquiry into the authorities will, I think, show that no case has gone to the extent of sustaining a proceeding in rem for the commission of a crime by a master or mariner, on the ground, solely, that it was a violation of the passenger contract. That there has been a gross violation of the contract in this case, is proved by the evidence; that the obligations of that contract are all that Judge Story has described them to be, in Chamberlain v. Chandler [Case No. 2,575], which was a proceeding in personam against the master, is undoubtedly true. But the question is, whether the liability of the owner is commensurate with the crimes of all in his employ on board his ship, which involve a breach of the passenger contract; and, if not, where is the limit? Certain authorities have been cited by the proctors for libelants. The case of Marshall v. Bazin [Id. 9,125], was a proceeding in rem, it is true; but the cause of the action was one purely of contract,—the failure to carry the passenger after having stipulated to do so. The case of Chamberlain v. Chandler [supra], was a proceeding in personam, and does not touch this question. In Sherwood v. Hall [Case No. 12,777], the principle affirmed is, that the owner is liable where the master shipped a mariner who had run away from another vessel under circumstances amounting to notice that the shipment was unauthorized by his father. It is to be observed, in this case, there was no breach of the peace, no indictable offense. The shipment of the minor was an act done in the course of the master's employment,

for the benefit of the owner; and hence, the assent of the latter may have been implied. The case next cited is that of the Rebecca [Id. 11,619]. It applies exclusively to the lien which the merchant has on the ship for lost goods. Reference was also made to the case of the Phebe [Id. 11,064]. It merely enunciates the principle that the shipper has a lien on the vessel for the due execution of the contract by bill of lading. The object, doubtless, of citing the two foregoing authorities, was to show the liability for the loss of goods by reason of the torts of the master or mariners and they enunciate sound law. It may be admitted, that the reasons which lie at the foundation of the rule commend to the legislature the propriety of extending, to some extent, to passengers the rules which govern the liabilities of ship-owners as to goods; but to do so is not the province of the courts. The next case is that of Dean v. Angus [Id. 3,702], which affirms the doctrine that the owners of a vessel are liable for the wrongful capture at sea by the master, he acting under an authority from the owners to capture. The next case is that of Dias v. The Revenge [Id. 3,877]. This case would seem to militate against the proposition contended for by libelants. The libel in that case was filed to make the owners liable for damages sustained by the underwriters of certain Spanish and Portuguese vessels, for piratical acts of the officers and crew of the Revenge, and the question arose whether the owners of a commissioned privateer are liable, civilly, for the piratical acts committed by the officers and crew of their vessel. The court held, that where an illegal capture as prize of war was made, the owner is liable civilly; but that he is not liable for the piratical acts of the master and officers. The court say: "The liability of those to whom the libelants owe their wrongs, is admitted; their inability to make retribution, if such should be their situation, is a misfortune for which the tribunals of the country can supply no remedy. Those against whom redress is sought in this instance, did not commit, nor in any manner authorize or countenance the spoliation of which the libelants complain. They are, therefore, equally innocent with the libelants, and are equally entitled to the protection of the court." The last decided case cited by libelants, is that of The New World v. King, 16 How. [57 U. S.] 469, which simply decides that a passenger may recover in rem for injuries received from the explosion of a boiler, the result of gross negligence of those on board the steamer and in control of her. No one of the foregoing authorities (and they are all that have been cited), asserts the principle that by varying the form of suing for a breach of the contract, and not directly for the tort,—that the owner is civilly liable for the crimes of the master or mariners, because the commission of them involves the breach of a contract when committed upon the person of a passenger. The proceeding in this case is a libel against the vessel for the breach of contract arising out of assaults and batteries committed by the master and officers of the ship on two of the passengers. The 16th rule of admiralty prescribes, "that in all suits for an assault and battery on the high seas, or elsewhere within the admiralty and maritime jurisdiction, the suit shall be in personam only." Mr. Benedict [Ben. Adm.] (section 309), referring to this rule, considers it as applicable only to a case where the action is technically for an assault and battery as a mere tort; but not applying to cases where the action is brought for breach of contract and the assault and battery constitute the gravamen of the action. I cannot consider this construction very satisfactory; but as it has been published for some time, and has received no contradiction from any court or text-writer, I shall act upon it for the present to the extent this case goes. I have commented more fully on the question of jurisdiction, so that, while the power of the court in this case is affirmed, this decision may not be misapprehended, or extended beyond the case at bar. "I desire that nothing which may be said in the course of these remarks shall be extended to embrace any other case." Waring v. Clarke, 5 How. [46 U. S.] 441. In this case, the testimony ascertains that the ill-treatment of the two passengers, the libelants, by the captain and his officers was inflicted while in the avowed preservation of the discipline and police of the ship. They were acting directly in the employment of the owners. But acting within its scope they exceeded its limits; and, in analogy to the case of Sherwood v. Hall [Case No. 12,777], where the owner was made liable for the abuse by the master of his authority to enlist,—the owners in this case must be made liable for the abuse and excessive use of the authority confided to them. In that case, the assent of the owner might be implied, as the master was acting at the time for the owner's benefit. It cannot be so in this case, to that extent; but upon the best consideration I can give to this case, and in view of the importance of requiring a strict liability of the owner on the passenger contract, my conclusion is, that the exceptions to the jurisdiction were properly overruled by the district court. I should be pleased if the libelants, who are the only party who can carry this case up, claiming as they do more than $2,000, would appeal it. A decision would, in that case, be obtained from the supreme court, ascertaining authoritatively the liability of ship-owners for the torts of masters amounting to a breach of the peace, where they involve a breach of the passenger contract.

The remaining question is the amount of damages decreed by the district court. I am aware that the district judge is well versed as to the rule by which damages are to be adjusted; but am constrained to be-

lieve, that in this case he has taken counsel from the grossness of the abuse by the master of his authority, more than that rule will permit. Ordinarily, this court does not interfere with the amount of damages decreed by the court below. The district judge has the witnesses before him, and therefore has an opportunity of arriving at the truth, not within the grasp of this court, where the testimony is in writing. Where, therefore, no additional testimony is taken, I do not feel inclined to hastily disturb a decree on the point of damages; but where the adjustment of them depends, as in this case, upon the correct enunciation of principles, then the amount loses consideration in the importance of establishing a correct basis on which to rest their adjustment. It is admitted that the owners can only be made liable for such damages as flow directly from the breach of the contract. In an action against the perpetrator of the wrong, the aggrieved party would be entitled to recover not only actual damages but exemplary,—such as would vindicate his wrongs, and teach the tort feasor the necessity of reform. In an action against such, it would, in the language of the district judge, "be the duty of the court to apprise officers of ships that the crews are not on every casual disturbance to be called with capstan-bars to inflict dangerous and indiscriminate blows on unoffending passengers." In such actions, the damages may be inflamed to teach offenders their duty; but not when the proceedings are against the owners for breach of contract, who, in the language of Judge Washington, did not commit or in any manner countenance the wrong, and who, with libelants, are equally entitled to the protection of the law. Such should not be made liable beyond the amount of actual damages, uninfluenced by any considerations of punishing the act of the perpetrator on the ground of breach of contract. Dias v. The Revenge [Id. 3,877]. In the case of the Amiable Nancy, 3 Wheat. [16 U. S.] 558, a libel was filed to recover damages for a marine tort. The court say: "Upon the facts disclosed in the evidence this must be pronounced a case of gross and wanton outrage, without any just provocation or excuse. And if this were a suit against the original wrong-doers, it might be proper to go yet further, and visit upon them in the shape of exemplary damages the proper punishment which belongs to such lawless misconduct. But it is to be considered that this is a suit against the owners of the privateer; upon whom the law has from motives of policy, devolved a responsibility for the conduct of the officers and crew employed by them, and yet, from the nature of the service, they can scarcely ever be able to secure to themselves adequate indemnity in case of loss."

This reasoning is appropriate to the case at bar. The owners are sought to be made liable, by a constructive consent annexed to the contract, for criminal acts of the master and mariners, alleged as the gravamen of the breach of contract done without their knowledge, and of which they are as innocent as the libelants. In an action ex delicto or ex contractu in such a case, the measure of damages should be adjusted to the loss proved to have been actually incurred, uninfluenced by the conduct of the real wrong-doer, who is civilly and criminally liable for his acts to the injured party. In this case, the libelants were steerage passengers on board the Golden Gate. They are represented to be laboring men, without means; and have therefore filed their bill in forma pauperis. In relation to one of them, James McGuire, the district judge says: "He seems to have received a violent blow on his wrist, or that it has been severely strained, which prevents the muscles from being used without considerable pain." The judge proceeds to state, that the physicians assert with considerable confidence that the rigidity of the muscles will be overcome by use, and conclude that for the present he is unable to make much use of it, and that condition must continue under favorable circumstances for a month or two. It is further stated that from the 31st day of May, when the injury was received, until the trial (a period of about three and a half months), the libelant has been practically deprived of the use of his hand; that he was a sea-faring man, and that his last employment was as mate. Now, under the rule I have endeavored to show (this proceeding being against the innocent owner, and not against the original wrong-doer), the actual loss is to be the measure of damages. Apply this rule to the case. Three and a half months intervened between the receipt of the injury and the trial. Add to these, two more months for probable loss of employment by reason of the loss of the use of his hand. We have then, five and a half months; and allowing for loss of wages at $65 per month, we have the aggregate sum of three hundred and fifty-seven dollars and fifty cents. This gives to the libelant wages for the whole period. There is no evidence as to the payment of a doctor's bill, or any other item of expenditure; still, in addition to loss of wages, there are other sources of expense, which, though not directly proved, may be inferred. To meet them, double the amount of wages, add for proctor's fees $250, and we have an aggregate of $965; which will fully cover all actual loss, and amount to compensatory damages. To this libelant, the court below decreed the sum of fifteen hundred dollars.

With regard to the other libelant, Thomas M. Place, it appears from the statement of the district judge "that he received a violent and dangerous blow, without any fault on his part." The blow inflicted no permanent injury, with the exception of a slight scar or indentation on the side of the face. "It must have caused, however (says the judge),

much suffering; and he appears to have been obliged to live on liquids for some time, from his inability to chew hard food." It is evident that the wanton act of the officer in striking the libelant, evidenced as it was by the freedom from fault of the latter, must have entered into the estimate made of the loss of libelant, which was fixed at $600. In fact, the decree is preceded by the statement "that it is the duty of the court to apprise officers of ships that the crews are not, on every casual disturbance, to be beaten with capstan-bars," &c. Now, it is most true that such notice should be given in actions brought against officers themselves; but in actions against innocent owners, while the policy of the law holds them liable for actual damages as proved, these cannot be enhanced to admonish the guilty. There was no proof of actual loss by this libelant, and perhaps against the owners he is entitled to nothing. But he received a violent and dangerous blow without any provocation given, and must have been subjected to some suffering. Seeking a money compensation from a party who had no participation in the matter, I consider $250 a sufficient amount. I am aware that his honor the district judge, is familiar with the distinction to which this court has alluded in the adjustment of damages; but it appears to me, on reading his opinion, that he has been unconsciously, and not unnaturally, betrayed into awarding punitive rather than compensatory damages. A decree must be entered in accordance with the foregoing views, and handed for examination and signature to the judge.

McGUIRE (NICHOLSON v.). See Case No. 10,249.

McGUIRE (SNOWDEN v.). See Case No. 13,150.

Case No. 8,815a.

McGUNNEGLE v. RUTHERFORD.

[Hempst. 45.] [1]

Superior Court, Territory of Arkansas. Oct., 1826.

TAXATION—MODE OF COLLECTING—NON-RESIDENTS—FEES IMPROPERLY RECEIVED—TAX COLLECTOR.

1. The act of 1825 concerning taxes, requiring the "inhabitants" of each township to attend at the place of holding elections, at such time as the sheriff shall designate, to pay their taxes to him, does not apply to non-residents of the state or the township, but only to taxable inhabitants of the township.

2. Penalties may be recovered for fees improperly received by a sheriff and collector.

[Action by G. K. and W. G. McGunnegle against Samuel M. Rutherford, sheriff of Pulaski county.]

Before JOHNSON, SCOTT, and TRIMBLE, JJ.

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

OPINION OF THE COURT. This is an action of debt brought by the plaintiffs, citizens and residents of the state of Missouri, against the defendant, as sheriff of Pulaski county, to recover the amount of certain penalties imposed by law for demanding and receiving certain fees alleged by the plaintiffs to have been illegally collected from them by the defendant.

The following are the facts, as they appear from the agreed case submitted to the court: The plaintiffs own the north-east quarter of section twelve in township six north, and range eight west, lying in Pulaski county. The defendant, as sheriff of that county, on the 1st day of July, 1826, gave thirty days notice by advertisement, as prescribed by the first section of an act of the general assembly of this territory, entitled "An act supplementary to the several laws regulating the collection of taxes," passed 26th October, 1825, that he would attend at the proper places to receive the taxes due from the "inhabitants." That the plaintiffs, as non-residents of this territory and citizens of Missouri, failed by themselves or agents to attend at the place and time designated in the defendant's advertisement, or to pay the taxes due on their tract of land. On the 1st day of September, 1826, the taxes not being paid, their tract of land was advertised in the Arkansas Gazette for sale, agreeable to the provision of the laws, to which the act passed the 26th of October, 1825 [Laws Ark. p. 27] is a supplement. After the above quarter section had been so advertised, the plaintiffs paid to the defendant the taxes, together with 18¾ cents costs for advertising, and 2½ per cent. commission on the amount of the taxes, it being half commission for receiving and paying out money; also one dollar, for levying execution on their tract of land. The plaintiffs, by way of penalty, claim six dollars for the two and a half per cent. commissions, and six dollars for the one dollar charged and paid for levying the tax list as an execution.

The principal question presented to the court is, whether the provisions of the act of 1825, before recited, are applicable to or embrace the case of a non-resident of the territory, or a non-resident of the county where the land lies. We are clearly of opinion that the law does not embrace either a non-resident of the territory, or of the county where the land lies, but has reference solely to the "inhabitants" of the county. The act provides that, for the purpose of collecting the taxes in the several counties of this territory, it shall be the duty of the several sheriffs to give notice, by advertisement in every township, that they will attend at the place where elections are held, on a named day, for the collection of taxes in such township. Whereupon it shall be the duty of such taxable inhabitants, or their agents, to attend and pay to the sheriff the taxes due from such inhabitants. The language here

used is too clear and explicit to leave room for construction. The duty of attending at the place appointed by the sheriff is imposed only on the taxable inhabitants of the township where the land lies, by the very words of the act; and it is not the province of the court to extend it beyond the plain and obvious meaning of the legislature. The second section of the act relates only to those who were required by the first section to attend and pay the taxes due, and in the event of a failure on the part of any of the taxable inhabitants of the township to attend at the place designated in the advertisement of the sheriff, and pay their taxes, the tax list becomes an execution in the hands of the sheriff, who may proceed to make distress on the property of such defaulters. And if he does make an actual levy of the tax list, he is entitled to the same fees as if he had levied an execution, except the allowance of mileage, to which he is not entitled. It follows, therefore, that the plaintiffs are not liable to pay the half commissions, nor the one dollar charged for levying the tax list as an execution; and there must be judgment for plaintiffs.

Case No. 8,816.

McGUNNIGLE v. BLAKE.

[3 Cranch, C. C. 64.] [1]

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

LANDLORD AND TENANT—RENT—PARTIAL EVICTION.

In an action for mere use and occupation, not founded on an express contract for an entire rent, eviction of part is not a bar to the whole action.

This was an action of assumpsit [by Ann McGunnigle against Betty H. Blake] for use and occupation. Plea, eviction of part, in bar of the whole action.

Mr. Wallach, for plaintiff, contended that if Mrs. Blake resumed the occupation, it was a waiver of the eviction, and restored the plaintiff to her right of action. 1 Esp. N. P. pp. 2, 72; 4 Starkie, Ev. 1520, 1521; Smith v. Raleigh, 3 Camp. 513; Stokes v. Cooper, Id. 514; Fitchburg C. M. Co. v. Melvin, 15 Mass. 270.

Mr. Morfit, for defendant.

THE COURT said that in an action for mere use and occupation, not founded on an express contract for an entire rent, eviction of part is not a bar to the whole action; because the plaintiff is entitled to recover damages for the actual use and occupation; and if the defendant was deprived of the use for a certain part of the time, and afterwards resumed the occupation and use of the premises, the jury will consider that circumstance in estimating the damages.

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

Case No. 8,817.

McGUNNIGLE et al. v. SIMMES.

[1 Hayw. & H. 285.] [1]

Circuit Court, District of Columbia. Nov. 10, 1847.

GAMING—ASSIGNMENT OF CERTIFICATE IN PLAY.

M. obtained a certificate for the payment of money from G., the owner and payee, by gambling, and assigned the same to L. and J. The assignment *held* void, as being in violation of the provisions of the act of 9 Anne in relation to gambling.

[This was an action at law by Alexander McGunnigle, Lee & Johnson, use of Johnson & Lee, against Edward Simmes.]

Gillespie had obtained from Eaton and Hubley, commissioners under the Cherokee treaty, a certificate of $2,506. On this, $250 had been paid out on Gillespie's order, leaving due on said certificate $2,256. This certificate came, by endorsement of Gillespie and assignment of one Alexander McGunnigle, into the possession of the plaintiffs, who, through their attorney, made application for payment to the department, or the proper officers thereof. An order from the secretary of war was given to the auditor, who passed the account notwithstanding the objection of said Gillespie, who was making effort to stop the payment. When the account came to the second comptroller it was delayed for some purpose or other. At this stage an injunction was prayed by the said Gillespie from the circuit court to stop the payment of the said certificate on the ground that the same had been obtained by McCunnigle by gambling, and that the said assignment was void. On this injunction the usual bond was given by said Gillespie, and sureties in the penalty of $1,000, that he would prosecute his suit with effect, &c. Shortly after he (Gillespie), without the knowledge of the other party, obtained from the department the amount on his certificate, and immediately dismissed his bill in chancery.

B. S. Cox and J. M. Carlisle, for plaintiffs.

Marbury, May & Bradley, for defendant.

THE COURT permitted the defendant to show that the certificate was obtained by McGunnigle from Gillespie by gambling, and that the statute of 9 Anne, c. 14,[2] in relation

[1] [Reported by John A. Hayward, Esq., and George C. Hazleton, Esq.]

[2] Whereas, the laws now in force for preventing the mischiefs which happen by gaming have not been found sufficient for that purpose: Therefore, for the further preventing of all excessive and deceitful gaming, be it enacted by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons in this present parliament, and by authority of the same, that from and after the first day of May, one thousand seven hundred and eleven, all notes, bonds, bills, judgments, mortgages or other securities or conveyances whatsoever, given, granted, drawn or entered into or executed by any person or persons whatsoever, where the whole or part of the consideration of such conveyances or se-

to gambling, in force here, rendered the assignment utterly void, and the jury was instructed to render merely nominal damages for the plaintiffs.

Verdict for the plaintiffs. Judgment for one cent damages and cost of suit.

Case No. 8,818.

McGUNNIGLE v. WASHINGTON.

[2 Cranch, C. C. 460.] [1]

Circuit Court, District of Columbia. April Term, 1824.

WARRANT—CERTAINTY—VIOLATION OF BY-LAW.

A warrant issued by a justice of the peace for the penalty of a by-law, ought to state all the circumstances required by the by-law to constitute the offence; but the court will disregard all such defects as would be disregarded after verdict in an action of debt or information upon a penal statute.

Four judgments for $20 each were rendered by a justice of the peace against the appellant [Ann McGunnigle], with costs, upon four separate warrants.

1. The first charged that she "did suffer or permit gaming in her house on the 31st of December, 1822, or the 1st of January, 1823, contrary to the act or acts of the said mayor, &c., on that subject made and provided." The second charged that she "did between the 28th of December, 1822, and the 18th of January, 1823, sell spirituous liquor, without having obtained a license from the register, contrary to the act or acts," &c. The third charged that she "did, sometime in the last and present months, suffer gambling in her house, contrary to the act or acts," &c. The fourth charged that she "did, during the present month, sell spirituous liquors by retail without having a license therefor, contrary to the act or acts," &c.

The by-law upon which the two prosecutions for gaming were founded, was that of the 16th of August, 1809, entitled "An act to suppress gaming," by the 2d section of which, it is enacted, "That if any person or persons whatsoever, shall, after the passage of this act, permit any E. O., A. B. C., faro, rolly-bolly, shuffle-board, equality table, or other device, except as aforesaid," (that is, except billiard-tables,) "to be set up, kept, or played, in his, her, or their house, out-house, tavern, or place appertaining thereto, he, she or they shall incur the penalty of $20 for every day or less time that the same is so kept up and maintained, to be recovered before a single magistrate, one half whereof shall go to the informer, and the other for the use of the city council." The by-law upon which the two prosecutions for selling liquor were founded, was that of the 26th of October, 1819, by the 1st section of which it is enacted, that "it shall not be lawful for any person or persons to sell or barter any brandy, rum, gin, whiskey, or other spirituous liquors, mixed or unmixed, wine, cordial, strong beer, or cider, in the city of Washington, without first obtaining a license for that purpose, as required by law, and every person who shall sell or barter as aforesaid, without first having obtained a license therefor, shall forfeit and pay a fine, for each and every offence, of $20; one half thereof for the use of this corporation, and the other half for the use of the informer; provided that nothing, herein contained, shall be so construed as to prevent the brewer, or maker of strong beer, cider, or cordial, from selling the same in quantities not less than five gallons, or to prevent any person from selling spirituous liquors, wines, cordial, strong beer, or cider, in quantities not less than ten gallons." By the 2d section, the mayor (not the register,) is authorized to issue licenses, &c.

THE COURT (THRUSTON, Circuit Judge, absent) decided that these four warrants were too vague and uncertain to support the judgments; and reversed them with costs. And the court said, that the warrant, in such cases, for a penalty of a by-law ought to state all the circumstances which are required by the by-law to constitute the offence; or, in other words, the warrant must contain the charge of an offence. But the court will disregard all such defects as would be disregarded, after verdict, in an action of debt, or information upon a penal statute.

curities shall be for any money, or other valuable things whatsoever, won by gaming or playing at cards, dice table, tennis, bowls, or other game or games whatsoever, or by betting on the sides or hands of such as do game at any of the games aforesaid, or for the reimbursing or repaying any money knowingly lent or advanced at the time and place of such play to any person or persons so gaming or betting as aforesaid, or that shall, during such play, so play or bett, shall be utterly void, frustrate, and of non effect to all intents and purposes whatsoever, any statute, law or usage to the contrary thereof in any wise notwithstanding. Alexander's British Statutes, 689.

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

McGURK (UNITED STATES v.). See Case No. 15,680.

Case No. 8,819.

In re MACHADO.

[3 Ben. 131; 2 N. B. R. 352 (Quarto, 113); 1 Chi. Leg. News, 163; 2 Am. Law T. Rep. Bankr. 53.] [1]

District Court, S. D. New York. Jan. 20, 1869.

BANKRUPT'S OATH—WITHDRAWAL OF OPPOSITION.

Where, after a bankrupt had taken the oath required by the 29th section of the bankruptcy act [of 1867 (14 Stat. 531)], a creditor filed specifications of opposition to his discharge, alleging, among other things, wilful false swearing in the affidavits annexed to the petition and schedules, and afterwards withdrew his appearance in op-

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission. 2 Am. Law T. Rep. Bankr. 53, and 1 Chi. Leg. News, 163, contain only partial reports.]

position and the specifications: *Held*, that the oath of the bankrupt, under that section, ought to be taken anew, after such withdrawal.

[In the matter of John A. Machado, a bankrupt.]

A. W. Speir, for petitioner.

BLATCHFORD, District Judge. In this case, the oath of the bankrupt required by the 29th section of the act was subscribed and taken on the 3d of December, 1868. Specifications in opposition to his discharge were filed on the 4th of January, 1869, by a creditor, alleging, among other things, wilful false swearing in the affidavits annexed to his petition and schedules, in certain particulars. The case then came before me and was ordered to stand for hearing on the specifications, with leave to take testimony. On the 19th of January, 1869, the creditor withdrew in writing his appearance in opposition and the specifications. No new oath of the bankrupt under section 29 is presented. I think, in view of the fact that the 29th section specifies as a ground for withholding a discharge, that the bankrupt, or some person in his behalf, has procured the assent of a creditor to the discharge, or influenced the action of a creditor, at some stage of the proceedings, by a pecuniary consideration or obligation, and that the same ground is made, by section 34, a ground for setting aside and annulling the discharge after it is granted, that, in this case, and in all cases where specifications such as those in this case are put in and are afterwards withdrawn, the oath of the bankrupt required by section 29 ought to be subscribed and taken after the withdrawal. A decision in this case is, therefore, suspended, to allow the defect to be supplied.

McHENRY (UNITED STATES v.). See Case No. 15,681.

Case No. 8,820.

Ex parte McILLWEE.

[3 Am. Law T. 251.]

Circuit Court, D. Virginia. Sept., 1870.

ELECTIONS—QUALIFICATIONS OF VOTERS—THE ENFORCEMENT ACT.

[It was not the purpose of the act of congress of May 31, 1870 (16 Stat. 140), to prescribe the qualifications of voters, or even to alter them, as fixed by the state law, except so far as they were founded upon the distinction of race, color, or previous condition of servitude; and it is therefore no violation of the law to refuse to register a white applicant on the ground that he is not qualified to vote under the state law because of his adherence to or participation in the late Rebellion.]

[This was a hearing at chambers upon the return of a writ of habeas corpus issued in behalf of the petitioner, John H. McIllwee.]

BOND, Circuit Judge. It appears from the return and the evidence in this case that the petitioner is one of the persons appointed under the laws of the state of West Virginia to register those entitled to vote under the election laws of that state. A certain Winfield Scott Alkire, a white citizen of West Virginia, made application on the fifth day of August last to petitioner to be registered, and his application was refused on the ground that he was not qualified to vote under the laws of the state by reason of his adherence to or participation in the late Rebellion. The petitioner was therefore on the affidavit of said Alkire, arrested and brought before a commissioner of the United States for a supposed violation of the act of congress approved May 31, 1870, and by said commissioner, in default of bail, was committed to answer at the next term of the District court.

It appears to me that this case does not come within the purview of the statute in question. That is was not the intention of congress to abolish the laws of the several states which prescribe the qualifications of voters, or even alter them, except so far as they were founded upon the distinction of race, color or previous condition of servitude, is sufficiently evident from the words of the first section of the statute which declare it to relate to "all citizens of the United States who are or shall be otherwise qualified by law to vote." It cannot be doubted that the meaning of this language is, that these citizens shall be qualified to vote by the law of the state or territory in which they offer to poll. That these persons thus "otherwise qualified" shall vote without distinction of race, color, or previous condition of servitude is the purpose and intent of the statute. It was clearly the duty imposed upon the petitioner to inquire into the qualifications of the applicant for registration under the laws of the state of West Virginia, and if he found him "otherwise qualified" he was to register him without distinction of race or color or previous condition of servitude, under the penalty of this act of congress.

The third section of this act of congress relates to those citizens otherwise qualified, who have not been able by reason of the "wrongful act or omission aforesaid" to do the prerequisite act which entitles the citizen to vote. There is no mention of any "wrongful act or omission" in the third section itself, and every rule of construction requires that reference should be had to the previous sections, where we find the "wrongful act or omission" to be the making among citizens "otherwise qualified," a distinction on account of race, color, or previous condition of servitude. It is not pretended that the petitioner refused the application of Alkire on this account, and therefore he is not guilty of the "wrongful act or omission" which makes him amenable to the punishment prescribed in these sections. The twenty-second section of the act under consideration relates to the "officers of any elec-

tion at which any representative or delegate in the congress of the United States shall be voted for." It is not alleged nor was it true, that there was any election of the kind being held, of which election the petitioner was an officer. He was a mere subordinate officer of registration, from whose judgment there was an appeal, by the laws of the state, to a board of registration in review.

The petitioner, in my opinion, must be discharged, because it does not appear that he is guilty of the violation of the act of congress with which he is charged, and for the reason that, for his judgment of the qualification of the applicant for registration under the laws of West Virginia, he is not answerable in the court of the United States. I shall pass an order to that effect.

Case No. 8,821.

In re MACINTIRE.

[1 Ben. 277;[1] 1 N. B. R. 11; Bankr. Reg. Supp. 3.]

District Court, S. D. New York. July 19, 1869.

EXAMINATION OF BANKRUPT— FEES OF REGISTER.

1. Where, at the first meeting of a bankrupt's creditors, notice was given on behalf of a creditor, of an application to be made next day for an order for the examination of the petitioner, and the application was made pursuant to notice, whereupon the register proposed to grant the order on payment by the creditor of one dollar as his fee, and on request certified the question to the court whether the creditor must pay any and what fees: *Held*, that the proposed fee to the register is not provided for by the act [of 1867 (14 Stat. 517)], nor by the general orders in bankruptcy, unless it is covered by the words in rule 30, "For every order made where notice is required to be given, &c."

2. These words apply to cases where previous notice is required to be given to an adverse party of the application for the order, before the order can be made.

3. Under the 26th section of the act, no notice is required to be given of an application to a register by a creditor for the examination of a bankrupt.

4. The examination is not a "meeting" under section 47 of the act, that word in the act always meaning a meeting of creditors.

5. The register is not entitled to the fee of one dollar for making the order in question, nor to any fee for that service.

6. Where a creditor applies for an order for the examination of a bankrupt, he must pay to the register the fees allowed by law for taking the bankrupt's depositions, both on the direct and cross-examination, and the register is not obliged to look in the first instance to the bankrupt, or to the fifty dollars deposited, or to the estate.

[In the matter of James Macintire, a bankrupt.]

In this case a register in bankruptcy certified that the first meeting of creditors was held July 11th, at which notice was given of an application next day for an order to examine the petitioner on behalf of a creditor, and the meeting was duly adjourned to July 12th. On that day, the petitioner attending, a creditor who had filed proof of his claim applied for an order, in pursuance of said notice, for the examination of the petitioner on behalf of the creditor at that time, the petitioner not objecting to the time, but insisting that the creditor must pay the register's fees for the order. The creditor refused to pay any fees, insisting that they must be paid out of the deposit of fifty dollars made by the petitioner with the clerk. The register proposed to grant the order on payment by the creditor of one dollar as the proper fee. At the request of the creditor the register certified the question for the decision of the court. The register, in his certificate, referred to that portion of the fourth section of the bankruptcy act, which provides that the fees of the registers, as established by the act, and by the general rules and orders required to be framed under it, shall be paid to them by the parties for whom the services may be rendered in the course of proceedings authorized by the act. He also referred to that part of rule 29 of the general orders in bankruptcy which provides that the fees of the register shall be paid or secured in all cases, before he shall be compelled to perform the duties required of him by the parties requiring such service. He also stated it to be his opinion that the granting of the order for the examination of the bankrupt having been required by the creditor and not by the bankrupt, the former and not the latter ought to pay the fees for the order. On the part of the creditor it was claimed, that such fees as are connected with the personal examination of the bankrupt are governed by the 47th section of the act; that that section says that such fees shall be paid out of the estate, and have priority over all other claims; that the court may, under rule 29 of the general orders in bankruptcy, exercise its discretion as to the payment of the whole or a part of the fees out of the fund in court; but that, without such direction from the court, the register must look to the fund in court for his fees in such a case as the present; [that the bankrupt is compelled by that section to deposit fifty dollars for that purpose; that that section contemplates that the services of the register in the examination of the bankrupt are services required by the bankrupt, and not by the creditor; that under the 47th section, the register was entitled to charge three dollars for the adjourned meeting of creditors on the 12th of July, such fee to be paid by the bankrupt; that such fee was the only fee the register had a right to charge, there being no provision by which he could exact one dollar from the creditor for entering an order for the examination of the bankrupt; that no such order was required; that there are services of the register specified in the 4th section of the act, which may be required of a creditor, and for which he should pay; but that the act does not contemplate that a

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

creditor shall pay for the register's services in examining the bankrupt for the purpose of seeing whether he has made a proper exhibit of his affairs, when he calls a meeting of his creditors for that purpose; that under the 47th section the bankrupt must pay the register for that service, the three dollars for the meeting of creditors, and also the fees allowed by law for taking his deposition; that section 26 of the act requires the bankrupt at all times to attend and submit to an examination on oath upon all matters relating to the disposal of his property, &c.; that the fees for such examination are provided for by section 47 of the act. The views urged for the creditor are thus fully stated, in order that it may be seen that the question has been considered by the court in all its aspects.] [2]

BLATCHFORD, District Judge. The fee of one dollar proposed to be charged by the register in this case, for making the order for the examination of the bankrupt, is not provided for by the act, and is not at all provided for unless it is covered by the following provision of rule 30 of the general orders in bankruptcy, under the head of "Fees to the Register": "For every order made where notice is required to be given, and for certifying copy of the same to the clerk, one dollar." This provision allows a fee of one dollar for making an order and for certifying a copy of the same to the clerk, in a case where previous notice is required to be given to an adverse party of the application for the making of the order, before the order can be made. That this is the meaning of that provision of rule 30 of the general orders is shown by the language of rule 8 of the general orders. In the present case no notice was required to be given to any party of the application for the order for the examination of the bankrupt, before the order could be made. By the 26th section of the act it is provided, that the court may at all times require the bankrupt, upon reasonable notice, to attend and submit to an examination on oath upon all matters relating to the disposal or condition of his property, &c. An order requiring the bankrupt so to attend and be examined, and service of such order on him a reasonable length of time previously, are necessary; and the form of such order is prescribed by form No. 45 of the forms specified in the schedules annexed to the general orders in bankruptcy. But no previous notice is required to be given to any person of the application to the register by the creditor for the making of the order. It is to be made ex parte, on the application of the creditor. It may also, under section 26 of the act, be made by the register ex parte, on the application of the assignee, or by the register on his own suggestion, without any application. The register was, therefore, not entitled to charge any fee for making the order in this case. There are many specific services which must be rendered by the registers, and for which no specific fee is provided either by the act or the general orders in bankruptcy. Their compensation for such services is covered by the specific fees which are enumerated in the act and the general orders. Thus, the register receives two dollars for issuing a warrant, but no specific fee is provided for the adjudication of bankruptcy, form No. 5, which the register must make before he can issue the warrant. He receives compensation for making the adjudication, in the fee of two dollars which he receives for issuing the warrant. That fee of two dollars is a fee for doing everything (a fee for which is not otherwise specially provided) which results in the issuing of the warrant; and no specific fee is provided for the service of examining the bankrupt's petition and schedules, when such examination results in the withholding of the adjudication of bankruptcy. So, also, the fee of three dollars to the register for an order for a dividend covers all his services, not otherwise provided for, which result in the making of the order for the dividend; and the fee of two dollars to the register for every discharge, when there is no opposition, covers all his services, not otherwise provided for, which result in the granting of the discharge. The making of the order in this case for the examination of the bankrupt, not having any fee specially attached to it, must be considered as compensated by some one or more of the fees which are enumerated.

The fee of one dollar for the order cannot be considered as authorized by the provision of the 47th section, which gives a fee of one dollar for "every application for any meeting in any matter" under the act. The word "meeting," wherever used in the 47th section and elsewhere in the act, means a meeting of creditors such as is spoken of in the 12th, 27th, and 28th sections. The application by the creditor for the order for the examination of the bankrupt cannot be regarded as an application for a meeting of creditors.

As the register was bound to make the order asked for without requiring the payment by the creditor, or any other person, of any specific fee for such order, this decision might properly go no farther than to dispose of that point. But, in view of the positions urged by the counsel for the creditor, it is deemed proper to lay down the following proposition, which is applicable to this case, namely—that where a creditor applies, under section 26 of the act, for an order for the examination of the bankrupt, the creditor must pay to the register the fees allowed by law for taking the deposition of the bankrupt, not only for his direct examination, but for his cross-examination, if any, and the register is not required to look in the first instance for such fees to the bankrupt, or to

[2] [From 1 N. B. R. 11.]

the fifty dollars deposited by him, or to the bankrupt's estate.

[Whether such fees shall ultimately be paid out of the estate, will be a question for consideration hereafter. The clerk will make a certificate of this decision to the register, Edgar Ketchum, Esq.] [1]

Case No. 8,822.

In re McINTIRE.

[1 Ben. 543; [2] 1 N. B. R. 151; Bankr. Reg. Supp. 33; 6 Int. Rev. Rec. 165.]

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

BANKRUPTCY—SERVICE OF NOTICE, FORM NO. 52—REQUEST, FORM NO. 28.

1. When the discharge of a bankrupt is applied for after sixty days from the adjudication, the notice, form No. 52, need be served only on the creditors who have proved their debts, even though it contains a notice of the second and third general meetings of creditors.

2. It is not necessary, in such case, that the request of the assignee, form No. 28, should be furnished to the register.

In this case, at the request of the bankrupt [Charles H. McIntire], the register certified to the court two questions, viz.: (1) Whether, when the discharge is applied for after sixty days from the adjudication, the notice, form No. 52, if containing the notice of the second and third general meetings of the creditors, must be mailed to all the creditors known to the bankrupt, or only to such as have proved their debts; (2) Whether, in applying for the order to show cause why a discharge should not be granted, after sixty days from the adjudication, the bankrupt must furnish to the register the request, form No. 28. The register expressed his opinion, that it was safer to require the notice to be given to all the creditors, and that the request, form No. 28, ought to be furnished.

BLATCHFORD, District Judge. The notice need be mailed only to those creditors who have proved their debts, and it is not necessary that the request of the assignee, form No. 28, should be furnished.

[For subsequent proceedings in this case, see Case No. 8,823.]

Case No. 8,823.

In re McINTIRE.

[2 Ben. 345; 1 N. B. R. 436 (Quarto, 115); 1 Am. Law T. Rep. Bankr. 120.] [3]

District Court, S. D. New York. April, 1868.

BANKRUPTCY—SETTING ASIDE DISCHARGE—LACHES—VAGUE SPECIFICATIONS.

1. Where specifications of objection to a bankrupt's discharge had been filed, which were too vague to be triable, and no application was made to amend them, and a discharge was granted, and the creditor, about a month afterward applied, on petition, to have the discharge set aside, and for leave to file amended specifications: *Held*, that the creditor was chargeable with laches.

2. No specific ground of opposition to the discharge was made to appear in the petition, and the discharge could not be impeached on such vague averments; and, on the evidence, there was no ground to believe that the bankrupt had failed to insert all his property in his schedules, or to deliver it to his assignee.

In this case a discharge [2] was granted to the bankrupt [Charles H. McIntire] on the 24th of February, 1868. About a month afterward, this petition was presented to the court, in behalf of a creditor, praying that the discharge might be set aside, and that the creditor might be allowed to file amended specifications of opposition to the discharge. Specifications of objection had been filed in his behalf, which were, however, too vague to be triable, within the rules laid down in previous decisions of this court. Those decisions were known to the attorney for the creditor, but no application was made in his behalf for leave to amend the specifications, until the present motion was made.

F. C. Nye, for bankrupt.

Salter & Cowing, for creditor.

BLATCHFORD, District Judge. 1. The proceedings in this case were regular, and the discharge was properly granted. The specifications of grounds of opposition to the discharge were too vague and general to be triable. The attorney for the creditor had ample opportunity, after the decisions of the court on the question of the sufficiency of specifications were made, and before the discharge in this case was granted, to apply to the court for leave to amend the specifications, and the facts in evidence show that he was guilty of laches in not doing so, after his attention was called to their probable insufficiency.

2. If there had been no laches in the case, still the petition now presented, that the discharge be vacated, and that the creditor be allowed to file amended specifications and oppose the discharge, sets forth no specific ground of opposition. It is as vague as were the specifications filed. It merely sets forth that the attorney for the creditor believes that, if the case is tried on its merits, it can be shown that the bankrupt has a large amount of personal property which he has not put into his schedule of assets, or passed over to the assignee in the case. Even if this is to be regarded as an averment that the bankrupt had such property when he filed his petition, it is too vague to found any action of the court upon. The discharge would have been granted notwithstanding so vague a specification, and, having been granted, it

[1] [From 1 N. B. R. 11.]

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

[3] [Reported by Robert D. Benedict, Esq., and here reprinted by permission. 1 Am. Law T. Rep. Bankr. 120, contains only a partial report.]

[2] [For proceedings upon notice of application for discharge, see Case No. 8,822.]

cannot be impeached on a petition containing only so vague an averment.

3. I have looked into the testimony of the bankrupt taken before the register in this case, and his testimony taken on the supplemental proceedings in the state court, and can see no ground for questioning the bona fides, fairness or validity of the transfer of his property to his brother, in August, 1862, and no reason to suppose the bankrupt failed to insert, in his schedule of assets, all the property he had at the time, or failed to deliver to his assignee all the property he was bound to deliver to him.

The prayer of the petition is denied.

Case No. 8,823a.

In re McINTIRE.

[2 Hayw. & H. 339.] [1]

Circuit Court, District of Columbia. March 13, 1860.

MOTION TO ADMIT A WILL TO PROBATE.

1. A will to convey land must be perfect, and executed with all the forms and solemnities required by law. No defect in its execution can be aided or supplied by parol proof.

2. A will of personal property must be perfect on its face, or it must appear, if incomplete or defective, that it was intended by the testator that it should operate as his will in its unfinished state, or that he was prevented from completing the contemplated formalities by being overtaken by sickness or some other casualty.

A paper, acknowledged to have been written by the late Mr. Alexander McIntire, and purporting to be his last will and testament, but without date or signature, was presented to the orphans' court for probate. The case having been argued by the counsel for and against the paper as the will of the deceased, the judge gave the following as the judgment of the court.

BY THE COURT. The said paper upon its face purports to dispose of all his estate, real and personal, as his last will and testament. It is proved to have been written by said McIntire, and was found with another paper of his after his death, where it had doubtless been placed by said McIntire, without date, and not signed. Dr. Young, his intimate friend, and physician in his last illness, proved that McIntire said to him that he had made his will.

A will to convey lands must be perfect, executed with all the forms and solemnities required by law, and no defect in its execution can be aided or supplied by parol proof. It is equally true that the same strictness is not required in a will of personal property; but to constitute even a good will of personal property the paper must be either complete on its face, or it must appear if incomplete or defective, that it was intended by the testator that it should operate as his will in its unfinished or imperfect state, or that he was prevented from completing the contemplated formalities by being overtaken by sickness or death, or some other casualty. Plater v. Groome, 3 Md. 143; Tilghman v. Stewart, 4 Har. & J. 173; Barnes v. Syester [14 Md. 507], decided in the June term of 1859, being the will of Virginia W. Mason, propounded for probate, and refused both as to realty and personalty. See the opinion of Lord Loughborough in Mathews v. Warner, 4 Ves. 209.

Alexander McIntire, deceased, was an intelligent man; he understood perfectly well the formalities necessary to make his will effective as to his estate, and it cannot be presumed that he intended this unfinished paper to operate as his will. This paper, therefore, cannot be admitted to probate, and the motion is overruled.

[1] [Reported by John A. Hayward, Esq., and George C. Hazelton, Esq.]

Case No. 8,824.

M'INTIRE'S CASE.

[1 Cranch, C. C. 157.] [1]

Circuit Court, District of Columbia. Dec. Term, 1803.

JUROR—OATH—AFFIRMATION.

Juror not permitted to affirm.

Samuel M'Intire being summoned as a juror in the cause of Whelan v. Whelan [unreported], and refusing to be sworn, although offering to affirm, and stating that he never had been sworn, but had been often affirmed on juries in other states as well as in this court; that he preferred affirming to swearing; that he was not a Quaker, nor attached to any particular religious sect; was ordered into custody of the marshal until the further order of this court. Upon his offering to be sworn without kissing the book, but holding up his hand, he was discharged.

McINTIRE (KEIRLL v.). See Case No. 7,651.

Case No. 8,825.

McINTIRE v. WOOD.

[Cited in U. S. v. Kendall, Case No. 15,517. Nowhere reported; opinion not now accessible. See same case, 7 Cranch (11 U. S.) 504.]

Case No. 8,826.

In re McINTOSH.

[2 N. B. R. 506 (Quarto, 158).] [2]

District Court, D. North Carolina. April, 1869.

BANKRUPTCY—LIENS—JUDGMENT—WITHDRAWAL OF PROOF.

1. The issuing of a writ of fieri facias upon a judgment recorded against the defendant in 1861,

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

[2] [Reprinted by permission.]

does not create such a lien upon his real estate as will be respected and enforced by the bankruptcy court, when the defendant has been subsequently declared a bankrupt so late as 1868.

[Cited in Re Butler, Case No. 2,236.]

2. The register cannot order or permit the withdrawal of a proof of debt after he has passed upon the same, allowed, certified, and transmitted it to the assignees.

In bankruptcy.

BROOKS, District Judge. By the case argued in this cause by D. G. McRae, assignee of Milton McIntosh and Henry Lilly, as creditors of said bankrupt, this question is first presented: "Does the issuing of a writ of fieri facias to the county in which the lands of the defendant are situated, upon a judgment recorded against such defendant in the county court of another county, tested of March term, 1861, and returnable at June term, 1861, of said court, create such a lien upon the real estate of the defendant as will be respected and enforced by the bankruptcy court, the said defendant having been subsequently declared a bankrupt upon his own petition in the month of March, 1868?"

It is now settled in North Carolina that a judgment does not create a lien in favor of the plaintiff, upon the property, either real or personal, of the defendant, nor does the issuing of a fieri facias upon such judgment create a lien. In this respect we are governed by the common law. In many of the states it is different, but it is made so by the statutes of those states. The law is also now different in North Carolina. It was the case long before in this state, that if a plaintiff obtained a judgment, issued his fieri facias, and the same came to the sheriff of a county in which the defendant's property was situated, and the sheriff levied upon such property, that such levy related back to the test term of the execution, and created a lien upon the property levied on, from the beginning of said term, for the satisfaction of the plaintiff's debt. But without a levy, the only execution issued in this case, became a dead process after the return day, to wit, the Monday of June term, 1861. Subsequent to that time the sheriff was not authorized to do anything by that process; and if a year and a day elapsed from the issuing of another execution, the judgment became dormant, so that no fieri facias or other final process could issue without a revival of the same. A federal court is asked to declare that a lien has been created in behalf of the plaintiff Lilly, and to enforce such lien by ordering the assignee to pay to the said plaintiff the proceeds of the sales of the bankrupt's property or sufficient to satisfy his judgment. This the court would do, if by the course pursued by the plaintiff he had by the laws of North Carolina acquired a lien, and had preserved such lien up to the time of the bankruptcy of the defendant. That the plaintiff never acquired such lien I think is very clearly shown in the leading case of Smith v. Spencer, 3 Ired. 256; and this, since the very able and elaborate opinion of Judge Ruffin in that case, has been regarded as the settled law in North Carolina.

It is unnecessary to decide the second question propounded, as it is in effect determined by answer to the first.

In answer to the third question submitted, I state that the register cannot order or permit the withdrawal of a proof of debt after he has passed upon the same, allowed, certified, and transmitted same to the assignee.

McINTOSH (McELRATH v.). See Case No. 8,781.

McINTOSH (SHERWOOD v.). See Case No. 12,778.

Case No. 8,827.

McINTOSH v. SUMMERS.

[1 Cranch, C. C. 41.] [1]

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

CONTRACTS—IN WRITING—NOVATION—ORAL AGREEMENT.

Oral evidence of an agreement that the defendant should retain certain notes as security against other notes, may be given although there be a written agreement to return them on demand.

Trover for sundry notes. Evidence was given of a demand and refusal, the defendant stating that he held them as counter security to indemnify him against his indorsement of a note held by Tafts and Brooks. Evidence on the part of the defendant was produced of conversations between the plaintiff and defendant in which it was agreed, or understood that the latter was to retain the notes for that purpose.

THE COURT instructed the jury that if they should be of opinion that McIntosh had agreed that the papers should be left with Summers for that purpose, then he had a lien on them: and that in such case his refusal was no evidence of a conversion.

Mr. Lee, for plaintiff, moved the court to instruct the jury that an oral agreement to leave the notes in his possession could not control the written agreement to return them on demand. Which instruction the court refused to give; and a bill of exceptions was taken, but the case was never carried to the supreme court, the verdict being for the plaintiff.

Case No. 8,828.

In re McINTYRE.

[See Case No. 8,822.]

Case No. 8,829.

In re McINTYRE.

[See Case No. 8,823.]

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

McINTYRE v. The DUBUQUE. See Case No. 4,110.

McINTYRE (MILLER v.). See Case No. 9,582.

McINTYRE (RICHARDSON v.). See Case No. 11,789.

McIVER (GULICK'S EX'RS v.). See Case No. 5,865.

McIVER (HARTSHORNE v.). See Case No. 6,171.

Case No. 8,830.

McIVER v. KENNEDY.

[1 Cranch, C. C. 424.] [1]

Circuit Court, District of Columbia. July Term, 1807.

PRINCIPAL AND SURETY—ENDORSER—INSOLVENCY OF MAKER—REASONABLE NOTICE—EVIDENCE—DEEDS—NOT RECORDED.

1. Under the laws of Virginia, in an action against the indorser of a promissory note, the plaintiff, to excuse himself for not having first brought suit against the maker, must show him to have been insolvent at the time of bringing the suit; and in order to recover, must have given reasonable notice of the non-payment by the maker; and the jury is to decide whether the notice was reasonable.

2. A deed of land in Maryland cannot be read in evidence unless recorded in Maryland.

Assumpsit upon W. Wilson's note, indorsed by the defendant [James Kennedy], to the plaintiff, as assignee of Gillis' estate. 1st count on the assignment of the note, setting forth that the maker, W. Wilson, was insolvent at the time of the suit brought. 2d count for money had and received.

THE COURT decided, (doubtfully,) that the plaintiff must prove the maker of the note insolvent at the time of bringing the action; that the plaintiff must prove reasonable notice to the indorser, of the non-payment by the maker; and that the jury were to decide whether the notice was reasonable.

THE COURT refused to permit the defendant to read in evidence (to prove the solvency of W. Wilson,) a deed of land in Washington county, Maryland, certified by T. Williams, (who calls himself clerk of Prince William county, in Virginia,) to have been proved in the latter county, but not recorded in Washington county in Maryland, according to the laws of Maryland.

[See Case No. 8,833.]

Case No. 8,831.

McIVER v. MOORE.

[1 Cranch, C. C. 90.] [1]

Circuit Court, District of Columbia. April Term, 1802.

PLEADING AT LAW — NIL DEBET—ACT OF LIMITATIONS—BANKRUPTCY—ASSIGNMENT—AUTHORITY TO SUE—NONSUIT—JUSTICE OF CASE.

The act of limitations can not be given in evidence upon nil debet. The plaintiff being assignee of a bankrupt, must produce the commission and proceedings and deed of assignment. Upon reinstatement of the cause after nonsuit, the court will not permit the defendant to plead limitation, unless on affidavit showing it to be necessary for the justice of the case.

Debt on an accepted order. Nil debet and issue.

E. J. Lee, for defendant, prayed the court to instruct the jury that the acceptance of the order not being dated, and the order being dated September 24th, 1794, and no proof being given of the date of the acceptance, they ought to presume that the acceptance was on the day of the date of the order, and therefore barred by the act of limitations; the writ not being issued until the 5th of September, 1801.

CRANCH, Circuit Judge, inquired whether the act of limitations was pleaded.

E. J. Lee contended that it might be given in evidence on the issue of nil debet, and cited Esp. N. P. 262.

THE COURT said they had decided at last term in Washington, in the case of Gardner v. Lindo [Case No. 5,231],—see that case in the supreme court of the United States, 1 Cranch [5 U. S.] 343,—that the statute of limitations could not be given in evidence on the plea of nil debet to an action of debt on a promissory note; and refused to overrule that decision, it having been made unanimously by a full court; and the court being now not full.

MARSHALL, Circuit Justice, absent.

Upon the motion of E. J. Lee, for defendant, THE COURT instructed the jury that the plaintiff [the assignee of E. C. Dick] must prove himself to be duly appointed assignee, by producing the original commission, and proceedings thereon, or a certified copy thereof, and the original deed of assignment.

The plaintiff became nonsuit, and THE COURT, on his motion, reinstated the cause without costs, and refused the defendant leave to plead the statute of limitations, unless he could show by affidavits that the plea was necessary to the justice of the case.

Case No. 8,832.

M'IVER v. REAGAN.

[1 Brunner, Col. Cas. 240; [1] 1 Cooke, 366.]

Circuit Court, W. D. Tennessee. 1813.[2]

STATUTE OF LIMITATIONS — ADVERSE POSSESSION OF LAND—COLOR OF TITLE.

No claimant is entitled to the protection of the statute of limitations, under a plea of seven years' possession, without he entered under color of title.

The plaintiff [McIver's lessee] relied upon a grant from the state of North Carolina to Stokeley Donelson and William Tyrrill for forty thousand acres of land, dated in January, 1795. On the part of the defendant a

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

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

[2] [Affirmed in 2 Wheat. (15 U. S.) 25.]

grant was introduced covering the land in contest from the state of North Carolina to John Mebane, dated in the year 1800. The defendant had no legal title under that grant; but he had been in possession of the land for more than seven years before the commencement of this suit; and it was endeavored to be shown that he took possession of it with the consent of Mebane. The beginning corner of the land called for in the plaintiff's grant was, until the year 1806, within the Indian boundary; but that part of the land on which the defendant resided was not. Seven years did not elapse between the extinguishment of the Indian title and the commencement of the present action. Two questions arose in argument: First. Whether the act of congress which prevented the running of lines and making of surveys within the Indian boundary did not prevent the statute of limitations from attaching until after the extinguishment of the Indian title. Second. Whether the defendant had such a title as would authorize him to avail himself of the statute of limitations.

Whiteside & Trimble, for plaintiff.
Mr. Grundy, for defendant.

McNAIRY, District Judge. First. The act of congress relied upon by the plaintiff is in the following words: "If any citizen or other person shall make a settlement on any lands belonging, or secured, or granted by treaty with the United States to any Indian tribe, or shall survey, or attempt to survey such lands, or designate any of the boundaries, by marking trees, or otherwise, such offender shall forfeit a sum not exceeding one thousand dollars, and suffer imprisonment not exceeding twelve months." [2 Stat. 289.] In construing the statute of seven years' possession it has always been understood that it can never apply, nor commence running, until the person against whom it is to operate, or those under whom he claims, is invested with a legal title. Until that time, in legal language, no entry or claim could be made. And it is equally clear that if the law imposes a legal disability to bring suit the statute will not apply until the disability is removed. So, if in this case the act of congress had prevented M'Iver from prosecuting his claim, I should be of opinion that he ought not to be at all affected by the possession of the defendant. But I do not consider that this was the case. The object of the act was to prevent a disturbance with the Indians, arising from persons going on their lands and marking trees, and making surveys, with a view to procure titles; but if a corner had been marked before the passage of the act, it surely could not have been intended that the owner might not go upon the land to examine for the corner, and collect such other proof as would enable him to establish his beginning. And, indeed, if there should be any doubt upon that point I consider that under the third section of the act a license might have been procured from the governor upon a proper application for that purpose. Inasmuch, therefore, as there was no legal disability to commence suit in proper time, and as, at most, the act only threw some impediments in the way of procuring testimony, the court is of opinion that the first proposition ought to be determined for the defendant.

Second. It will not be necessary for the court to say much upon the second proposition. A naked possession will not authorize the defendant to avail himself of the statute. Therefore, if the jury should be of opinion that the defendant took possession of the land in contest, as a mere trespasser, without any authority from Mebane, they ought to find for the plaintiff; but if, on the other hand, it appears that the defendant for seven years next before the commencement of the present action was in possession of the land with the consent or approbation of Mebane, the verdict ought to be for the defendant. The jury will determine this matter from the evidence now before them.

Verdict for the defendant.

This case was taken to the United States supreme court on a writ of error, and the judgment of this court affirmed. See 2 Wheat. [15 U. S.] 25.

Cas No. 8,833.

McIVER v. WILSON.

[1 Cranch, C. C. 423.] [1]

Circuit Court, District of Columbia. July Term, 1807.

SETOFF — BANKRUPTCY — NOTE ASSIGNED TO ASSIGNEE.

A bond due from the bankrupt to the defendant cannot be set off against the defendant's note to a third person assigned to the assignee of the bankrupt's effects after commission issued.

Assumpsit on a promissory note of Wilson to J. Kennedy, dated the 15th of October, 1805, at 20 days, indorsed by J. Kennedy to McIver, assignee of the effects of Gillis, a bankrupt. The defendant offered to set off a bond of Gillis to W. Wilson and Roger Coltart, who is dead, dated 15th of September, 1795, and payable the 15th of March, 1796. The note was given since the date of the commission. The declaration is by McIver as assignee of the effects of Gillis.

THE COURT (nem. con.). Clearly, it was not a mutual credit before the bankruptcy, and therefore cannot be set off under the act of congress [of 1800; 2 Stat. 19].

[See Case No. 8,830.]

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

Case No. 8,834.

MACK v. BAKER et al.

[5 Reporter, 492; [1] 5 Wkly. Notes Cas. 212.]

Circuit Court, E. D. Pennsylvania. March 26, 1878.

PROMISSORY NOTE—COLLATERAL SECURITY—HOLDER FOR VALUE.

A holder of a promissory note as collateral security is not a purchaser for value.

Rule for judgment for want of a sufficient affidavit of defence. Assumpsit on a promissory note made by defendants to the order of one Zohn and by him indorsed to the plaintiff. The affidavit of defence alleged that the note was given in renewal of another for which the defendants never received any consideration; that the original note was given to Cummings & Co. to be discounted by them for the defendants' benefit; that it was not so discounted, but was passed by them to Zohn to secure an antecedent debt due him by Cummings & Co.

Harold Goodwin, for the rule. The defence that the note was given to plaintiff as collateral only, although perhaps established in Pennsylvania and New York [Coddington v. Bay, 20 Johns. 637] [2] has been expressly declared invalid by the supreme court of the United States. Swift v. Tyson, 16 Pet. [41 U. S.] 15; Byles, Bills, 124. The renewal of the note implies forbearance of itself a sufficient consideration.

Jos. L. Tull, contra. There is sufficient evidence of fraud to put the plaintiff on proof of having given value. Cummings v. Boyd [83 Pa. St. 372]; Royer v. Bank [Id. 248].

CADWALADER, District Judge. After consideration I do not doubt the correctness of the decision of the supreme court of the state in Royer v. Bank, supra. There is an extra-judicial remark of Story, J., in Swift v. Tyson, 16 Pet. [41 U. S.] 15, in which he holds that the taking of a note, simply as collateral security, is a sufficient consideration and gives the purchaser a better title than the indorser had; but this is no part of the real decision, which is that, where the note is taken in payment, the consideration is sufficient. Where time or indulgence is given, or something done to change the relation of the parties to the original consideration, the case is different, but here the defence is sufficient according to Royer v. Bank. The doubt I had of the case was as to the renewal of the note,—whether that was not equivalent to giving time. It is so generally, unless the ordinary effect is negatived by peculiar circumstances. Here the time given was on the collateral and not on the original debt, and could not suspend the right of action, as has been often decided. It is unnecessary to consider the supplemental affidavit. Rule discharged.

[1] [Reprinted from 5 Reporter, 492, by permission.]

[2] [From 5 Wkly. Notes Cas. 212.]

MACK (POTTER v.). See Case No. 11,331.

MACK (STEVENS v.). See Case No. 13,404.

MACKALL (BANK OF COLUMBIA v.). See Case No. 873.

Case No. 8,835.

MACKALL v. GOSZLER.

[2 Cranch, C. C. 240.] [1]

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

CHECK—ACCOMMODATION — ENTITLED TO NOTICE.

If a man lends to his friend his check upon a bank in which he has no funds, upon the assurance of his friend that he will provide funds there to meet it, and the plaintiff, at the time of receiving it, knew that the drawer of the check, at the time of drawing it, had a reasonable expectation that funds would be so placed in the bank, the drawer is entitled to regular notice of the non-payment by the bank.

[See Baker v. Gallagher, Case No. 768.]

Assumpsit, against the drawer of a check on the Bank of Columbia. The defendant lent his check for $300, on the Bank of Columbia, to Fitzhugh, payable to him or bearer, but had no funds in that bank. Fitzhugh delivered it to the plaintiff, and promised to take it up in ten days; and the plaintiff engaged not to present it to the bank, nor to call on the defendant until the expiration of that period.

THE COURT, (THRUSTON, Circuit Judge, absent,) at the prayer of the defendant's counsel, instructed the jury, that, if they should be satisfied, by the evidence, that the defendant, when he drew the said check, had a reasonable expectation that funds would be placed in the said bank, by Fitzhugh, to meet the check, and that such expectation was known to the plaintiff when the said check was presented to the bank for payment, then the defendant was entitled to regular notice of the non-payment thereof by the bank.

Verdict for the defendant. The plaintiff moved for a new trial upon the ground of misdirection of the jury, by the court, upon the matter of law—and of newly discovered evidence—but the motion was overruled.

MACKALL (THOMAS v.). See Case No. 13,903.

MACKALL (UNION BANK OF GEORGETOWN v.). See Case No. 14,359.

Case No. 8,836.

Ex parte MACKAY.

[3 App. Com'r. Pat. 416.]

Circuit Court, District of Columbia. Dec. 28, 1860.

PATENTS—DEVICE FOR MENDING HOSE—ANTICIPATION.

[A device for mending rents in firemen's hose by clamping the torn edges together between

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

metal plates is not anticipated by a similar device for making preserving cans air-tight.]

[Appeal from the commissioner of patents.]

[Application by John S. Mackay for letters patent for an improvement in mending firemen's hose. The application was denied. Applicant appeals.]

MORSELL, Circuit Judge. The applicant's claim relates to the stopping of holes or rents in firemen's hose, and consists in applying to the hose while in use an instrument or hand machine by which the edges of the leather or material of which the hose is made, that constitute the boundary of the hole or rent are clamped and tightly held between the two parts or plates of the instrument, thereby making the hose as water-tight at the point of breakage as at any other point. The commissioner having by his decision refused to grant a patent, Mackay filed his reason of appeal, which is that the references cited against the claim do not show that holes or rents in hose have ever been stopped as described and claimed by him; and that the refusal of said application is an error. The substance of the report of the commissioner in reply, after stating the claim, is as follows: "Now as stopping a hole is not the proper subject matter of letters patent, the claim here presented, can only properly be regarded as limited to the device employed for that purpose. The references clearly show that the same device precisely is familiar in many other uses, and therefore I cannot but think that the appellant has only made a double use of a well-known invention; and this double use is not patentable." The commissioner refers to my decision in the case of Ex parte Berry [Case No. 1,353] as being apposite to this case.

Such were the proceedings presented by the original papers and documents, with the decision reasons of appeal and report laid before me by the commissioner according to previous notice given of the time and place of hearing said appeal, when said appellant appeared by his attorney, filed his answer in writing and submitted his case.

The ground of the rejection is a double use of a well-known invention, and references are given to air-tight preserver-cans having a device consisting of a single-plate clamp, or a plate of the proper form and dimensions to cover the surface to be clamped, an india rubber packing-ring, and a resisting bar having a rod with a screw thread and clamping nut. When used the plate covers the packing, and is exterior while the resisting bar is interior, and serves simply to hold the clamp-plate in place. The description given of the instrument in the pending case is that it is made up of two thick plates of metal of elliptical form, both plates being thick at the centre and inclining to the edges which are thin and roughened and slightly elevated, the better to hold between them the edges of the hole or rent. These plates are of curved form also so that when applied to the hose the inner surface of that plate, which will be in the hose is convex, and the inner surface of the other plate which will be on the outside of the hose is concave, and the leather or other material of the hose is clamped and held in the line of its circumference. To the under or inner of these two plates is affixed the end of a bar or standard, which passes through a hole in the upper or outer plate; and by means of a screw thread on the outer part of this standard, and a screw nut fitting thereon the two plates are forced together. It will be perceived therefore that there are differences between the references and the instrument of the applicant in form, in dimensions in construction; a change not merely in form, but in substance, so that the one could not be used in the place of the other. The purpose and object,—the one is to resist a most powerful force from within in effectually preventing the escape of water and the form of the instrument is adapted to that end and must also be not only tight but very strong,—the other has no such object or purpose to answer. But if the combination as machinery were admitted to be old, the effect produced, is unquestionably a very great and valuable benefit to the public very far beyond that of the references and this combination has never before been applied or used in the way and for the purpose here described. The invention is therefore new.

For the foregoing reasons, I think there is error in the decision of the commissioner, and the same is reversed; and it is ordered that letters patent accordingly issue to said John S. Mackay as prayed.

Case No. 8,837.

In re MACKAY et al.

[4 N. B. R. 66 (Quarto, 17);[1] 2 Chi. Leg. News, 393.]

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

BANKRUPTCY—DISCHARGE—NO PROPER BOOKS—CASH-BOOK.

Where bankrupts are charged with not keeping proper books of account, and the receipts and disbursements entered in cash-book were unintelligible, *held*, discharges cannot be granted to bankrupts.

[Cited in Re Howard, 10 Atl. 719.]

[In the matter of John Murdock Mackay and John Neilson, bankrupts.]

T. C. F. Buckley, for creditor.

G. C. Barrett, for bankrupts.

BLATCHFORD, District Judge. I have been carefully through more than once the thirteen hundred manuscript folios of testimony in this case, and the various schedules

[1] [Reprinted from 4 N. B. R. 66 (Quarto, 17), by permission.]

and books of account put in evidence, and am compelled to come to the conclusion that discharges cannot be granted to the bankrupts.

The principal specification of objection to their discharge, is, that being merchants and traders within the meaning of the bankrupt act [of 1867; 14 Stat. 517], they have not, subsequently to the passage of the said act, kept proper books of account. Various particulars under this head are stated in the specifications. It is impossible to examine the cash-book of the firm of J. M. Mackay & Co., of which the bankrupts were members, nor to read in connection with it the testimony of the bankrupt Mackay, and not come to the conclusion that such cash-book fails to show, in an intelligible or proper manner, the nature and character of such receipts and disbursements of cash made by the firm as are entered therein, and that it fails to contain many entries of receipts and disbursements of cash that were made by the firm. It is also apparent from the testimony of the bankrupt Mackay, that many receipts and disbursements of cash were made by the firm that were not entered in any book or account, and of which no record was made. These objections are embraced in the specifications, and, upon them, without examining any of the other grounds specified, I am satisfied that it is my duty to refuse discharge.

[Subsequently discharge was, upon the same grounds, refused to John Maxwell Mackay, another member of the bankrupt firm. Case No. 8,838.]

Case No. 8,838.

In re MACKAY.

[4 N. B. R. 67 (Quarto, 17).] [1]

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

BANKRUPTCY—DISCHARGE—PROPER BOOKS OF ACCOUNT.

Where discharge was refused bankrupt for failing to keep proper books of account.

[In the matter of John Maxwell Mackay, a bankrupt. For prior proceedings in this case, see Case No. 8,837.]

T. C. F. Buckley, for creditor.

G. C. Barrett, for bankrupt.

BLATCHFORD, District Judge. Having come to the conclusion, on the evidence, that the bankrupt was, in fact, as a merchant and trader, a member with John Murdock Mackay and John Neilson, of the copartnership firm of J. M. Mackay & Co., a discharge must be refused to him, for the reasons set forth for refusing discharges to those persons; the specifications in opposition to his discharge as a member of said firm, as a merchant and trader, being to the same effect as in respect to them, in regard to the keeping of proper books of account.

[1] [Reprinted by permission.]

McKAY, In re. See Case No. 323.

McKAY, In re. See Case No. 11,978.

MACKAY (ALLEN v.). See Case No. 228.

Case No. 8,839.

McKAY v. CAMPBELL.

[1 Sawy. 374; [1] 2 Abb. U. S. 120; 3 Am. Law T. Rep. U. S. Cts. 186.]

District Court, D. Oregon. Sept. 26, 1870.

PLEADING AT LAW—DUPLICITY—CONSTRUCTION OF FIFTEENTH AMENDMENT—RIGHT TO VOTE UNDER LAW OF OREGON—PENALTY.

1. Duplicity in pleading is forbidden by both the common law and the Code as tending to prolixity and confusion, but under the Code objection to duplicity is to be made by a motion to strike out the pleading rather than by special demurrer as at common law.

2. If a complaint contains more than one cause of action they must be separately stated or it will be liable to be stricken out for duplicity.

3. Under the fifteenth amendment to the constitution and the act of May 31, 1870 (16 Stat. 140), to enforce it, all persons declared citizens of the United States by the fourteenth amendment are entitled to vote in the states where they reside, at all elections by the people, without distinction of race, color or previous condition of servitude; but the several states, notwithstanding the amendment, have the power to deny the right of suffrage to any citizens of the United States on account of age, sex, place of birth, vocation, want of property or intelligence; neglect of civic duties, crime or other cause not specified in the amendment.

4. The power of congress over the subject of the right to vote in the several states is conferred by the fifteenth amendment and is confined to the enforcement of such amendment, by preventing the states from discriminating between citizens of the United States in the matter of the right to vote, on account of race, color or previous condition of servitude.

5. Under the law of Oregon when a person offers to vote and is duly challenged, thereafter his right to vote depends upon his taking the oath that he is a qualified elector as prescribed in section 13 of the election law (Code Or. p. 700), and it then becomes the duty of the judges of election to tender him such oath, and administer it to him, if he is willing to take it.

6. The taking of this oath by the party offering to vote after he is challenged, is a necessary prerequisite to the right to vote within the meaning of section 2 of the act of congress, aforesaid, and a refusal or omission upon the part of the judges to give such party an opportunity to take it, is a violation of such section, if the same be done on account of his race, color or previous condition of servitude, but not otherwise.

7. In an action to recover a penalty under section 2 of the act of congress, aforesaid, it must appear from the complaint, that the plaintiff was a citizen of the United States, and otherwise qualified to vote at the time and place mentioned in the complaint; and that the defendant refused or knowingly omitted to furnish the plaintiff an opportunity to become qualified to vote, as by refusing or knowingly omitting to swear the plaintiff to his qualifications as an elector, when the law of the state made it his duty so to do, and that such refusal or omission was on account of the race, color or previous condition of servitude of plaintiff.

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

[This was an action by William C. McKay against James A. Campbell to recover a certain penalty provided by an act of congress for having been wrongfully prevented from voting. The case is now heard on the defendant's demurrer.]

John H. Mitchell and John C. Cartwright, for plaintiff.

James K. Kelly, for defendant.

DEADY, District Judge. This action was commenced July 1, 1870, to recover a penalty of $500 under and in pursuance of section 2 of "An act to enforce the rights of citizens of the United States to vote in the several states of this Union, and for other purposes," approved May 31, 1870 (16 Stat. 140).

Among other things it is alleged in the complaint that on June 6, 1870, as provided by law, a general election was held in the state of Oregon and county of Wasco therein, at which a representative in congress, and also state and county officers, were voted for and elected, and that on said day and long prior thereto, the plaintiff was a citizen of the United States, and a resident of East Dalles in said county and state, and legally entitled to vote at such election in the precinct aforesaid for all such offices. That on said day defendant was acting as judge of election in said precinct, in conjunction with George Corum and Thomas M. Ward, and as such judge was required by law to receive votes from the electors, and perform other duties required by law of such an officer; and that on said day the plaintiff appeared at the polls in said precinct and offered his vote for Joseph G. Wilson as a representative in congress, and for Joel Palmer for governor of Oregon, and for others for different state officers, and for John Darrah for sheriff of said county, and for others for the different county offices; and that "the defendant combining with the other said judges, unlawfully and wrongfully prevented him from voting, that defendant, confederating with said Ward and Corum unlawfully and wilfully refused his vote—refused to swear him to his qualification as an elector—refused to enter his name on the poll books of said precinct, and refused to enter on record in said book his vote for the different candidates for whom he preferred to vote. All of which duties, though required of him by the laws of Oregon, he, the defendant, wrongfully and wilfully failed and refused to do, though requested to do so by plaintiff—that defendant with said Ward and Corum ordered him away from said polls, and deprived him of his right as a citizen to vote, to his damage. By reason of which unlawful acts of said defendant, so acting and combining with said others, plaintiff has suffered damages; and he, defendant, forfeited and became liable as provided by law to pay said plaintiff therefor the sum of five hundred dollars, for which sum, with costs and allowances as provided by law, plaintiff now asks judgment of the court." On July 8, the defendant demurred to the complaint, and for cause of demurrer alleged: (1) That it did not state facts sufficient to constitute a cause of action. (2) That several causes of action have been improperly united therein. On August 2 and 3 the demurrer was argued by counsel and submitted.

Duplicity in pleading, or the statement of more than one sufficient matter as a ground of action or defense thereto in the same count or plea, is forbidden by the common law and the Code as tending to useless prolixity and confusion. 1 Chit. Pl. 259; Gould, Pl. 220, Code Or. pp. 157, 161, 163. Duplicity in pleading being however only an error in form, at common law the objection had to be made by special demurrer. Chit. Pl. 701; Gould, Pl. 466. The Code having practically abolished special demurrers except in the instances enumerated in title 8 of chapter 1, has substituted the motion to strike out for the special demurrer in the case of duplicity in pleading. It provides (section 103): "When any pleading contains more than one cause of action or defense, if the same be not pleaded separately, such pleading may, on motion of the adverse party, be stricken out of the case." For these reasons, I conclude that as to the second ground stated, this demurrer is not well taken and that the objection should have been made by a motion to strike out the complaint.

As this demurrer must be sustained upon the ground that the complaint does not state facts sufficient to constitute a cause of action, it may be well enough to briefly consider the question of duplicity in the complaint, so that the plaintiff, if he desires to amend, may frame his amended complaint accordingly. The complaint contains but one count or statement of a cause of action, but it is alleged therein that the defendant, in conjunction with the other judges of election, unlawfully and wrongfully prevented the plaintiff from voting for representative in congress and for governor of the state of Oregon, and for other state officers, and for sheriff of the county and for other "county offices." Now, if it was unlawful to prevent the plaintiff from voting for any one of the candidates for these several offices, that, it appears to me, is a separate and distinct cause of action, and should have been separately stated. But the complaint alleges, not only that the defendant prevented the plaintiff from voting for a certain candidate for each of these offices, but that the defendant unlawfully and wilfully refused his vote—refused to swear him as to his qualifications as an elector—refused to enter his name on the poll books—refused to enter his vote, etc. Here are four different acts, in addition to the first one stated, alleged to have been committed by the defendant, each of which are assumed by the pleader to be a distinct violation of the act of congress, and consequently a separate

cause of action. If so, they should have been stated or pleaded separately, so as to avoid the prolixity and confusion necessarily resulting from jumbling them together in one count or statement.

It is a question, whether some of these alleged refusals are sufficient to support an action for the penalty given by the act. It does not appear that the penalty given by section 2 of the act, is given for preventing a person from voting or for refusing to receive or record a vote, but for refusing or knowingly omitting to give full effect to such section. Now, this section substantially provides, that if the law of the state requires any act to be done as a prerequisite or qualification for voting, and by such law, officers are charged with the performance of duties in furnishing to citizens an opportunity to perform such prerequisite, or to become qualified to vote, it shall be the duty of such officers to give to all citizens of the United States an equal opportunity to perform such prerequisite and become qualified to vote, without distinction of race, color or previous condition of servitude. What amounts to a refusal or wilful omission to give effect to this section, upon the part of the state officers, depends upon the duties imposed upon these officers in this respect by the law of the state. Upon examination, it does not appear that the section commands these officers to admit or permit citizens of the United States "to vote without distinction of race, color or previous condition of servitude," but to only give such citizens an equal opportunity to become qualified to vote according to the law of the state and to perform any act which the law of the state may require as a prerequisite —a condition precedent—to voting. The duty which this section enjoins upon the officers is something or anything which the state law requires the officer to do, so as to enable the citizen to qualify himself to vote, and from the nature of things, it must precede, in point of time and order, the act of voting, or anything subsequent thereto. If these suggestions be sound, then none of the acts complained of by the complaint are within the purview of the section, except the refusal to swear the plaintiff to his qualifications as an elector.

The law of this state provides (Code Or. p. 700), that "Sec. 13. If any person offering to vote shall be challenged as unqualified, by any judge or clerk of the election, or by any other person entitled to vote at the same poll, the judges shall declare to the person so challenged, the qualifications of an elector; if such person shall then state himself duly qualified, and the challenge shall not be withdrawn, one of the judges shall then tender to him the following oath: You do solemnly swear, etc. (to the effect that the affiant had all the qualifications necessary to authorize him to vote at that poll). And if any person so challenged shall refuse to take such oath so tendered, his vote shall be rejected.

"Sec. 14. If any person so offering such vote shall take such oath, his vote shall be received, unless it shall be proven by evidence satisfactory to the majority of the judges that he does not possess the qualifications of an elector, in which case a majority of such judges are authorized to reject such vote."

It seems to me that whenever a person offering a vote is challenged, that it then becomes necessary that he should take this qualifying oath before he can be said to be qualified to vote. By the interposition of the challenge it becomes incumbent upon him to perform this prerequisite, to entitle himself to vote. But he cannot take this oath and perform this prerequisite without the judges shall furnish him an opportunity so to do. Therefore, the law of the state makes it the duty of the judges, or one of them, to tender and administer the oath to him. Then comes the law of congress and makes it the duty of the judges to give to all citizens, "without distinction of race, color or previous condition of servitude," the same and equal opportunities to perform this prerequisite—to take this oath—and thereby become qualified to vote. It follows, that a refusal or omission to furnish this equal opportunity to any person seeking to vote, on account of either race, color or previous condition of servitude, is a violation of the act.

As to the first ground of demurrer, I think it well taken. The complaint does not state facts sufficient to constitute a cause of action. The act of congress upon which this action is brought provides for enforcing the amendment to the constitution which declares (article 15):

"Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state, on account of race, color or previous condition of servitude.

"Sec. 2. Congress shall have power to enforce this article by appropriate legislation."

The act also regulates the elections of representatives in congress, in pursuance of section 4, art. 1, of the constitution, which declares: "The times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof; but the congress may at any time by law make or alter such regulations, except as to the place of choosing senators." Sections 2, 3 and 4 of the act, which relate to the enforcement of the amendment to the constitution, give penalties, to be recovered by civil action, against persons who violate them, but violations of that portion of the act regulating the election of representatives in congress are only punishable by indictment or information.

In considering the sufficiency of the complaint therefore, in this action, no special significance can be given to the fact that the

plaintiff offered to vote for a candidate for representative in congress.

By the fourteenth amendment to the constitution, it is declared that:

"Art. 14, § 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. * * *"

This clause of this amendment declares who are citizens of the United States and of the several states respectively. The fifteenth amendment above quoted, declares in effect that citizens of the United States and of the several states shall vote in their respective states at all elections by the people, without distinction on account of race, color or previous condition of servitude. But the amendment does not take away the power of the several states to deny the right of citizens of the United States to vote on any other account than those mentioned therein. For instance, notwithstanding the amendment, any state may deny the right of suffrage to citizens of the United States, on account of age, sex, place of birth, vocation, want of property or intelligence, neglect of civic duties, crime, etc. The power of congress in the premises is limited to the scope and object of the amendment. It can only legislate to enforce the amendment, that is, to secure the right to citizens of the United States to vote in the several states where they reside, without the distinction of race, color or previous condition of servitude. And this appears to be the intention of the act, so far as it relates to the enforcement of the amendment.

Section 1 declares in effect, that all citizens of the United States, being otherwise qualified by law, shall be allowed to vote at all elections by the people in any state, district, etc., without distinction of race, color or previous condition of servitude. Section 2 declares in effect that officers of the state shall furnish all citizens of the United States with the same and equal opportunities to become qualified to vote without distinction of race, color or previous condition of servitude. True, the language of sections 4 and 5, particularly the former, if taken literally would apply to acts and proceedings intended to prevent citizens of the United States from voting whether the same were done or carried on, on account of the race, color or previous condition of servitude of the citizen in question or not. But they ought to be construed so as to harmonize with the unambiguous sections which precede them, and must in any view of the matter, be construed so as to have effect only within the limits of the power conferred by the amendment on congress over the subject.

Upon this construction of the act, to maintain this action I think it would be necessary to prove on the trial: (1) That the plaintiff was a citizen of the United States and otherwise qualified to vote at the time and place mentioned in the complaint. (2) That the defendant refused or knowingly omitted to furnish the plaintiff an opportunity to become qualified to vote, as by refusing or knowingly omitting to swear the plaintiff to his qualifications as an elector, when the law of the state made it his duty so to do, and that such refusal or omission was on account of the race, color, or previous condition of servitude of the plaintiff. If it be necessary to prove these facts to maintain this action, they ought to be alleged in the complaint. Now the complaint is silent as to the reason of the defendant's refusal or omission to swear the plaintiff as to his qualifications as an elector. It may have been for some other reason than on account of his race, color, or previous condition of servitude, and then the plaintiff's remedy, if any, would be found under the state law and in the state tribunals. I know it may be said with much probability that disingenuous judges of election who are violently adverse to and prejudiced against the amendment and the act, may refuse or omit to allow a citizen to qualify himself to vote, ostensibly for some reason not within the purview of the act, but really and in fact on account of his race, color, or previous condition of servitude. But this is a question of fact, and if the evidence is sufficient the jury will be bound to disregard the pretences of the defendant and find according to what appears to have been the fact. Besides, to prevent a failure of justice on this account, it may be necessary and proper to hold in this class of cases, as in many others, that slight proof on the part of the plaintiff as to the reason of the defendant's refusal or omission, is sufficient to throw the burden of proof in this respect upon the latter. The demurrer must be sustained.

The plaintiff had until the first Monday in November to file an amended complaint upon the payment to the adverse party of $20. The same order was made in the following cases brought under the same act, and which, by the stipulation of the parties, were to abide the judgment on the demurrer in this, except that the $20 is to be paid but once: McKay v. George Corum; Same v. Thomas Ward; Peter de Lord v. James Farris; Same v. Daniel W. Butler; Same v. William McAtee.

[Subsequently the plaintiff filed an amended complaint; to this the defendant answered. The parties then filed an agreed statement of facts. Upon this the court entered judgment for the defendant. Case No. 8,840.]

Case No. 8,840.

McKAY v. CAMPBELL.

[2 Sawy. 118;[1] 5 Am. Law T. Rep. U. S. Cts. 407.]

District Court, D. Oregon. Nov. 7, 1871.

CITIZENSHIP — COMMON LAW — PERSONS BORN IN OREGON, BETWEEN 1818 AND 1846 — INDIAN TRIBES INDEPENDENT COMMUNITIES — XIV AMENDMENT—ISSUE OF A BRITISH SUBJECT AND CHINOOK WOMAN.

1. By the common law a child born within the allegiance of the United States, is born a subject thereof, without reference to the political status or condition of its parents.

[Cited in Ex parte Chin King, 35 Fed. 355.]

[Cited in New Hartford v. Town of Canaan, 54 Conn. 41, 5 Atl. 362.]

2. By article 3 of the convention of October 20, 1818 (8 Stat. 249), between the United States and Great Britain, it was agreed that the Oregon territory should "be free and open to the vessels, citizens and subjects of the two powers;" which convention was continued in force until the convention of June 15, 1846 (9 Stat. 869); *Held*, that during the period of such joint occupation, the country, as to British subjects therein, was British soil, and subject to the jurisdiction of the king of Great Britain, but as to citizens of the United States, it was American soil and subject to the jurisdiction of the United States; and that a child born in such territory in 1823 of British subjects, was born in the allegiance of the king of Great Britain, and not that of the United States.

[Cited in Town v. De Haven, Case No. 14,113.]

[Cited in State v. Boyd, 31 Neb. 725, 48 N. W. 739, and 51 N. W. 602.]

3. The Indian tribes within the territory of the United States are independent political communities, and a child of a member thereof, though born within the limits of the United States, is not a citizen thereof, because not born subject to its jurisdiction.

[Cited in U. S. v. Osborn, 2 Fed. 60; Elk v. Wilkins, 112 U. S. 109, 5 Sup. Ct. 49.]

4. The fourteenth article of the constitution of the United States, commonly called the fourteenth amendment, is only declaratory of the common law rule on the subject of citizenship by birth, and therefore does not include Indians or others not born subject to the jurisdiction of the United States.

5. In 1823, and prior thereto, the Chinook Indians were an independent political community, inhabiting the Oregon territory, at and near the mouth of the Columbia river; and in said year the plaintiff was born at Fort George (now Astoria) of a father who was an alien and a British subject, and a mother who was a Chinook Indian; *Held*, that the plaintiff is either to be deemed to follow the condition of his father, and considered a British subject, or that of his mother, and considered a Chinook Indian, but that in either case he was not born a citizen of the United States.

6. At an election held on June 6, 1870, at East Dalles precinct under the laws of Oregon, the plaintiff offered to vote, and his right to do so being challenged, offered to take the prescribed oath as to his qualifications as an elector, but the defendant then being one of the judges of election at said polls, refused to administer said oath to the plaintiff, as he was required to do by the law of the state, on the ground that plaintiff was not a citizen of the United States, but a half breed Indian; *Held*, that whether such refusal was wrongful or not, under the state law, the plaintiff not being a citizen of the United States, is not within the purview or protection of article 15 of the constitution of the United States, or the act of congress, entitled "An act to enforce the rights of citizens of the United States, to vote in the several states of the Union, and for other purposes" (16 Stat. 740), and therefore cannot maintain an action against the defendant on account of such refusal, to recover the penalty given by section 2 of said act of congress.

[This was an action by William C. McKay against James A. Campbell.

[For prior proceedings see Case No. 8,839.]

Joseph G. Wilson, for plaintiff.

James K. Kelly and Orlando Humason, for defendant.

DEADY, District Judge. This action is brought to recover a penalty of $500, given by section 2 of an act of congress entitled "An act to enforce the rights of citizens of the United States to vote in the several states of the Union, and for other purposes," approved May 13, 1870 (16 Stat. 140). It was commenced July 1, 1870, and on September 26 the court gave judgment on a demurrer to the complaint that it was insufficient—because it did not allege that the defendant refused or omitted "to swear the plaintiff as to his qualifications as an elector, on account of his race, color, or previous condition of servitude." The court at the same time ruled that under the election law of the state of Oregon, when a person who is a citizen of the United States offers to vote at any poll therein, and his right to do so is challenged, it becomes the duty of the judges of election at such poll to tender such person the prescribed oath as to his qualification as an elector, the taking of which, after such challenge, is a necessary prerequisite to his right to vote; and that if any judge of election willfully omits or refuses to furnish such person an opportunity to take such an oath, and thereby qualify himself to vote at such poll, on account of race, color, or previous condition of servitude, then he is liable to such person for the penalty prescribed by section 2 of such act of congress. McKay v. Campbell [Case No. 8,839].

On October 29, the plaintiff, upon leave obtained, filed an amended complaint, alleging that the defendant, as judge of a certain election therein mentioned, willfully refused to permit the plaintiff to become qualified to vote thereat, on account of his being an Indian. The defendant by his answer, filed December 7, 1870, alleged that the plaintiff was an alien and not a citizen of the United States, and therefore defendant refused as alleged in the complaint, and not otherwise. To this answer the plaintiff filed a replication, the allegations of which are not material to state.

On February 4, 1871, the parties filed the following statement of facts in the case, which they then and there stipulated in writing should "be taken and considered as the special verdict of a jury therein;" and also that "if the court is of opinion that the law

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

arising thereon is with the plaintiff, then judgment shall be given for him for the penalty for which the action is brought;" but "if the court is of opinion that the law arising thereon is with the defendant, then judgment shall be given for him in bar of the action, and for his costs and disbursements."

"Alexander McKay, the plaintiff's paternal grandfather, was born in Scotland, and emigrated to Canada, where he married Margaret Bruce, a woman having one fourth Indian blood. The issue of this marriage was Thos. McKay, the plaintiff's father, who was born in Canada. About the latter part of the year 1810, Alexander McKay joined the expedition of John Jacob Astor, as a partner of the American Fur Company [2] and sailed from New York in the ship Tonquin, for the mouth of the Columbia river, taking with him his wife and son Thomas, the latter being then about thirteen years of age. They arrived at the mouth of the Columbia in 1811, and soon afterwards Alexander McKay perished by the destruction of the Tonquin. Thomas McKay afterwards entered into the service of the Northwest Fur Company, a corporation organized under the laws of Great Britain, having its principal office in Montreal. The trading post of Astor at Astoria was transferred to this Northwest Fur Company on the eleventh day of October, 1813, and afterwards called Fort George. In 1821, by an act of parliament, the Northwest and Hudson Bay Company were united under the name of the Honorable Hudson Bay Company, and as such held possession and control of Fort George as a trading post from that time until the treaty between the United States and Great Britain in 1846. Thomas McKay married a Chinook Indian woman, and the plaintiff was the issue of that marriage, born at Fort George (now Astoria), in 1823, while his father, Thomas McKay, was in the service of the Hudson Bay Company, and is seven sixteenths white and nine sixteenths Indian blood. Thomas McKay continued in the service of that company until about the year 1835; and his son, the plaintiff, was also in its service subsequent to the treaty between the United States and Great Britain, in 1846. The plaintiff has always lived in Oregon except from 1838 to 1843, while in the state of New York to obtain an education.

"Neither the plaintiff nor his father, nor his grandfather McKay, were ever naturalized under the laws of the United States. The plaintiff resided in Wasco county, Oregon, and in East Dalles precinct in said county, for five years prior to the election on June 6th, 1870. On that day, at a general election, the plaintiff offered to vote at the place of holding elections in East Dalles precinct, where the defendants James A. Campbell, T. M. Ward and George Corum were the judges of election. His right to vote was challenged by one of the judges, when the plaintiff offered to take the oath required by law, as to his qualifications to vote. The judges, or one of them, stated to plaintiff as a reason for not allowing him to vote, that he was not a citizen of the United States, but was a half-breed Indian, and refused to administer the oath to him as to his qualifications, and did not permit him to vote at that election."

Upon this state of facts, counsel maintains that the plaintiff was born in the allegiance of the United States, because he was born in its territory, and is, therefore, a citizen thereof, and was entitled to vote at such election. If the premises are admitted, the conclusion follows. The rule of the common law upon this subject is plain and well settled, both in England and America. Except in the case of children of ambassadors, who are in theory born upon the soil of the sovereign whom the parent represents, a child born in the allegiance of the king, is born his subject, without reference to the political status or condition of its parents. Birth and allegiance go together. 1 Bl. Comm. 366; 2 Kent, Comm. 39, 42; Ingles v. The Sailor's Snug Harbor, 3 Pet. [28 U. S.] 120; U. S. v. Rhodes [Case No. 16,151]; Lynch v. Clarke, 1 Sandf. Ch. 630, and authorities there cited.

Counsel for defendant, while admitting the major premise of plaintiff's proposition, that any person born in the allegiance of the United States, is born a citizen thereof, disputes the minor one, that the plaintiff was so born, and insists that he was born in the allegiance of the crown of Great Britain; because the British subjects in Oregon at the date of the plaintiff's birth, must be presumed to have occupied or dwelt in the country in pursuance of the treaty of joint occupation of June 15, 1846, and therefore as British subjects. Defendant's proposition concerning the allegiance in which plaintiff was born, is based upon article 3 of the convention of October 20, 1818, between the United States and Great Britain, which reads as follows:

"Art. 3. It is agreed that any country that may be claimed by either party on the northwest coast of America, westward of the Stony mountains, shall together with its harbors, bays and creeks, and the navigation of all rivers within the same, be free and open, for the term of ten years from the date of the signature of the present convention, to the vessels, citizens and subjects of the two powers, it being well understood that this agreement is not to be construed to the prejudice of any claim which either of the two high contracting parties may have to any part of the said country, nor shall it be taken to affect the claims of any other power or state to any part of the said country; the only object of the high contracting parties in that respect being to prevent disputes and differences amongst themselves." 8 Stat. 249.

By the convention of August 6, 1827, be-

[2] The true name of this company was the Pacific Fur Company.

tween the same parties, it was provided as follows:

"Art. 1. All the provisions of the third article of the convention concluded between the United States of America and his majesty the king of the United Kingdoms of Great Britain and Ireland on the twentieth of October, 1818, shall be, and they are, hereby further indefinitely extended and continued in force, in the same manner as if all the provisions of the said article were herein specifically recited." 8 Stat. 360.

By article 2 of this convention it is also agreed that either party to it may abrogate said article 3, on twelve months notice to the other after October 20, 1828.

On April 27, 1846, congress passed a "joint resolution concerning the Oregon territory" (9 Stat. 109), by which the president was authorized "at his discretion, to give the government of Great Britain the notice required" for the abrogation of said article 3. In the preamble of this resolution it is recited:—"And whereas it has now become desirable that the respective claims of the United States and Great Britain should be definitely settled, and that said territory may, no longer than need be, remain subject to the evil consequences of the divided allegiance of its American and British population, and of the confusion and conflict of national jurisdictions, dangerous to the cherished peace and good understanding of the two countries." This led to the convention of June 15, 1846, "in regard to limits westward of the Rocky mountains" (9 Stat. 869), by which the forty-ninth parallel of north latitude was made the boundary between the two countries. In the preamble to this convention it is admitted and declared by the parties thereto,—"that the state of doubt and uncertainty which has hitherto prevailed respecting the sovereignty and government of the territory on the northwest coast of America, lying westward of the Rocky or Stony mountains, should be finally terminated by an amicable compromise of the right mutually asserted by the two parties over the said territory."

The place of plaintiff's birth—Fort George—now is, and I suppose in contemplation of law from the American standpoint, was at the date thereof, within the territory or realm of the United States. But as a matter of fact, the title to the country was then regarded as doubtful, unsettled and obscure; and this is apparent from the admissions above quoted from the respective preambles to the resolution and convention of April 27 and June 15, 1846. Even the country itself was regarded by a large portion of the people of the United States as a desert waste, not worth disputing with England about. In February, 1844, when a motion to give notice to abrogate article 3 of the convention of 1818 was being debated in the senate, Mr. Dayton, of New Jersey, read from the columns of the National Intelligencer an article on Oregon, taken from Prentice's Louisville Journal, of which the following extracts are average specimens: "What there is in the territory of Oregon to tempt our national cupidity, no one can tell. Of all the countries on the face of this earth, it is one of the least favored of heaven. It is the mere riddlings of creation. It is almost as barren as the desert of Africa, and quite as unhealthy as the Campagna of Italy. * * * If the United States should ever need a country to which to banish its rogues and scoundrels, the utility of such a region as Oregon will be demonstrated." 13 Cong. Globe, p. 275. He also read from the Christian Advocate of February 7, 1844, as follows: "We have some opportunity, from our position, to found a correct estimate of the soil, climate, productions, and facilities of the country from the Rocky mountains to the Pacific ocean, as we have had a large mission there for several years, distributed in small parties over the territory; and, from all we have learned we should prefer migrating to Botany bay. With the exception of the lands of the Wallamet, and strips along a few of the smaller water courses, the whole country is among the most irreclaimable barren wastes of which we have read, except the desert of Sahara."

Under this state of things as to the title and occupancy of the country, and while his alien father is in the service of a British corporation, then exercising in the territory, by authority of the British parliament, large municipal power, the plaintiff is born within the lines of a post then occupied by said corporation as a place of business and defense. This being so, in my judgment, he was not born in the allegiance of the United States, but in that of the British crown.

The plaintiff being the child of an unnaturalized alien, and unnaturalized himself, cannot claim to be an American citizen, except upon the single ground, that he was born upon the soil, and subject to the jurisdiction of the United States. Nothing that has happened since his birth can add to or take away from the strength of his claim. The treaty of 1846, which definitely acknowledged the country south of the forty-ninth parallel to belong to the United States, contains no provision naturalizing the British subjects living south of that line, who may elect to become American citizens by remaining there, or otherwise. The case turns upon the single point—was the plaintiff born subject to the jurisdiction of the United States—under its allegiance?

Suppose the government of the United States had undertaken to exercise jurisdiction over the plaintiff before the treaty of 1846, when for the first time it actually obtained exclusive jurisdiction over the country? Suppose it had attempted by means of laws applicable to American citizens under like circumstances, to draft or tax him? How natural and forcible would have been the objection: "I am the child of a British father—a natural born British subject. True, I was born in Oregon, but by a treaty stipulation

the country was then, and is now, for the time being, British soil as to a British subject. I was, therefore, born subject to the jurisdiction and in the allegiance of the king of Great Britain, and am as truly a British subject as though I had been born on the banks of the Thames."

When, in 1818, the two governments entered into the treaty of "joint occupation," as it has been aptly called, they thereby agreed that this then unsettled and unknown country, might be occupied by the people of both nations—that it should "be free and open" "to the vessels, citizens, and subjects of the two powers"—without either of them losing their nationality, changing their allegiance, or passing beyond the jurisdiction and protection of their separate governments. As to the British subject and his children born here, the country was for the time being British soil, while to the American citizen and his offspring it was in the same sense American soil. Neither government was entitled to exercise any authority over the citizens or subjects of the other, or to assert the power and rights of a sovereign over them, or their effects, within this particular territory. If, prior to 1846, the plaintiff had died intestate and without heirs, leaving a large amount of personal property in the territory, there is no doubt but that the British crown would have claimed the escheat without a word of objection from the government of the United States.

When it is said that by the common law a person born of alien parents, and in the allegiance of the United States, is born a citizen thereof, it is necessarily understood that he is not only born on soil over which the United States has or claims jurisdiction, but that such jurisdiction for the time being is both actual and exclusive, so that such person is in fact born within the power, protection and obedience of the United States. Generally speaking, the various places in the world are claimed, or admitted for the time being, to be under the exclusive jurisdiction of some particular sovereign or government, so that a person born at any one of them is without doubt born in the allegiance of such particular sovereign or government. But that is not this case—which in this respect is a singular one. Its parallel has not been found in the books. The country of the plaintiff's birth was, at the time thereof, jointly occupied by the citizens and subjects of two governments in pursuance of a treaty to that effect. Under the circumstances, neither government can be considered as exercising general exclusive jurisdiction over the country and its inhabitants. It seems to me, that the only practical and just solution of the problem, is to consider the country for the time being, only to have been in the exclusive jurisdiction of each government as to its own citizens or subjects; and this is the view which congress appears to have taken of the matter in 1846, when, in the preamble to the resolution of April 27, it deprecated "the evil consequences of the divided allegiance of its American and British population," and "the confusion and conflict of national jurisdiction" growing out of the continued joint occupation of the country.

A parallel case may hereafter arise out of the present joint occupation of the island of San Juan, at the head of the straits of Fuca. It is well known that the title to this island is in dispute between the United States and Great Britain, and that in the meantime, in pursuance of an informal convention or understanding between the two governments, the island is occupied by the forces of each. Now, if hereafter the island is given up to the exclusive jurisdiction of the United States, and in the meantime a child of a British subject is born there within the portion occupied by the British forces, could it be considered as born in the allegiance of the United States? Certainly not. The child, although born on soil which is subsequently acknowledged to be the territory of the United States, was not at the time of its birth under the power or protection of the United States, and without these, the mere place of birth cannot impose allegiance or confer citizenship.

Chancellor Kent says (2 Comm. 42): "To create allegiance by birth, the party must be born, not only within the territory, but within the allegiance of the government. If a portion of the country be taken and held by conquest in war, the conqueror requires (acquires) the rights of the conquered as to its dominion and government, and children born in the armies of a state while abroad, and occupying a foreign country, are deemed to be born in the allegiance of the sovereign to whom the army belongs. It is equally the doctrine of the English common law, that during such hostile occupation of a territory, if the parents be adhering to the enemy as subjects de facto, their children born under such temporary dominion, are not born under the allegiance of the conquered." For this latter clause, the author refers to Calvin's Case [7 Coke, 18a] and (note c) quotes Lord Coke as saying in that case: "An alien is a person out of the ligeance of the king. It is not extra regnum, nor extra legem, but extra ligeantiam. To make a subject born, the parents must be under the actual obedience of the king, and the place of birth be within the king's obedience, as well as within his dominion." Now, in 1823, the plaintiff's "place of birth"—Fort George—was no more within the obedience of the United States than is the Tower of London to-day. In Inglis v. Sailor's Snug Harbor, 3 Pet. [28 U. S.] 126, the supreme court, on a certificate of a difference of opinion from the circuit court for the Southern district of New York, held that, as a general rule all persons born in the state of New York prior to July 4, 1776, were born British subjects, but might thereafter elect to remain so or not, and

that all persons born therein after such date, were born citizens of such state, but that Inglis, who was born of a British subject in the city of New York after that date, and while the city was in the actual occupation of the British army, "was born a British subject under the protection of the British government, and not under that of the state of New York, and of course owing no allegiance to the state of New York." The necessary conclusion from the rule announced in this case, is also, that a person to be born in the allegiance of a particular government, must not only be born within its territory, but under its obedience—exclusive jurisdiction and power. Of course it matters not whether the exclusive jurisdiction of the United States was excluded from the place of birth of this plaintiff by force of arms or by treaty with Great Britain. The result is the same in each case.

Articles 14 and 15 of the constitution, commonly called the fourteenth and fifteenth amendments, have been cited by counsel for plaintiff as bearing upon this question of the plaintiff's citizenship and consequent right to vote. The latter simply provides that "the right of citizens of the United States to vote shall not be denied or abridged * * * on account of race, color, or previous condition of servitude." But as to who are "citizens of the United States" this article is silent—it being understood that that matter had been regulated or defined by article 14, § 1, which enacts: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside." Eliminate the words having reference to naturalized citizens, and the clause reads: "All persons born in the United States, and subject to the jurisdiction thereof, are citizens," etc. This is nothing more than declaratory of the rule of the common law as above stated. To be a citizen of the United States by reason of his birth, a person must not only be born within its territorial limits, but he must also be born subject to its jurisdiction—that is, in its power and obedience.

The only other construction of this clause that I can imagine possible, is the following: Taken literally, it does not appear to require that the person should be born "subject to the jurisdiction of the United States;" but if he was born within its territorial limits, whether under its jurisdiction or not, and afterwards becomes subject to such jurisdiction; he then and so long as this status continues, becomes and remains a citizen of the United States. Assuming, as a matter of fact, that the plaintiff was born in the United States, although in the allegiance of the king of Great Britain, this construction of the fourteenth amendment would include him as a citizen, because he is now, and since 1846 has been, subject to the jurisdiction of the United States. But I think such construction fanciful and artificial. It is not to be presumed that the amendment was made to the constitution to change the rule of the common law, but rather to declare and enforce it uniformly throughout the United States and the several states, and especially in the case of the negro.

Counsel for plaintiff, in reply to the fact that his client was born at a post under the flag of the Hudson Bay Company, a quasi public and political British corporation, endeavored by citations from the state papers to establish the fact that in 1817, the British government only held Fort George (Astoria) as a captured place, and that about that time it was delivered up to the United States. Astoria was in fact delivered to the United States in pursuance of article one of the treaty of Ghent (8 Stat. 218), for the restoration of places captured during the war of 1812, on October 6, 1818. 113 Cong. Globe, p. 218. But the fact so far as this action is concerned is not material. It is not claimed that Fort George was held by the British government at the time of plaintiff's birth therein, as a captured port or otherwise, but that it was occupied by a British corporation—British subjects—in pursuance of the treaty of joint occupation. It appears from the special verdict that the Northwest Company obtained possession of the place in 1813; and that thereafter the same was in the exclusive occupation and control of said company until its union with Hudson Bay Company in 1821, who thereafter occupied it exclusively, until 1846.

But I do not rest the conclusion—that the plaintiff was born in the allegiance of the king of Great Britain and not in that of the United States—on the mere fact that the plaintiff was born at a post of the Hudson Bay Company, rather than at any other point or place in the territory included in the treaty of joint occupation. It is admitted that the plaintiff's father was a British subject by birth, and while he lived in the territory—at least between 1818 and 1846—he was in the allegiance of the king of Great Britain, and his children wherever born therein, were born in the same allegiance and are British subjects.

It was also urged by counsel for plaintiff, that both Alexander and Thomas McKay—the plaintiff's grandfather and father—came to Oregon before the treaty of 1818, and therefore were not settlers under it. The fact is admitted, but I think the conclusion both illogical and irrelevant. The treaty operated upon those who were in the territory when it went into effect, to the same extent that it did upon those who came afterward. It placed them equally under the allegiance of their respective sovereigns, and limited them to the same use and occupation of the territory. It is immaterial whether plaintiff's ancestors came to the country or occupied it under the treaty or not. They were British subjects in any view of the matter,

and if, when the plaintiff was born, the territory by reason of treaty was British soil as to British subjects, without doubt he was born one. Again, it being admitted by the special verdict that Alexander McKay joined the expedition of Astor as a partner in the so-called American Fur Company, and sailed from the American port of New York, in the Tonquin, for the territory of Oregon, it is claimed that these facts show that the plaintiff's ancestors did not come to the country or occupy it under the treaty of joint occupation, and therefore the plaintiff was not born in the allegiance of the king of Great Britain.

In the settlement of Oregon, Alexander McKay is a historical character. He was a British subject and a member of the Northwest Fur Company. The new company which he formed in conjunction with Astor, and of which he was the principal partner, was substantially a company of Canadians and British subjects. All the partners, except Astor, and three fourths of the clerks and employés, were British subjects. McKay went from Montreal to New York en route to the mouth of the Columbia in a birch bark canoe, transporting it on a wagon across the portages between the St. Lawrence and the Hudson. While at New York, there being then apprehensions of a war between the United States and Great Britain, McKay had an interview with the British minister for the purpose of getting his advice how to act in case of a rupture between the two nations, in which he represented that himself and associates were British subjects going to the Columbia to trade under the American flag. Northwest Coast of America, c. 1. Gabriel Franchere. I see nothing in these facts to cast doubt upon the conclusion that the plaintiff was born of a British subject, in the allegiance of the British crown. Alexander and Thomas McKay came to the country British subjects, and the mere fact that they embarked at an American port, and that the former was a partner in a fur company, that called itself American for the convenience of trade or the exigencies of war, in no way affected their political status or that of the plaintiff's.

It is also insisted that the plaintiff is a citizen of the United States, and a voter under the operation of articles 14 and 15 of the constitution, on the ground that they apply to and include Indians—at least half-breeds—born within the limits of the United States. Article 15 secures the right of suffrage, irrespective of race, color or condition of servitude, to citizens of the United States, as defined by article 14. It follows that an Indian, whether of the whole or half blood who is a citizen of the United States, is entitled to vote, or rather he cannot be excluded from this privilege on the ground of being an Indian, as that would be to exclude him on account of race. But the Indian tribes within the limits of the United States have always been held to be distinct and independent political communities, retaining the right of self-government, though subject to the protecting power of the United States. Worcester v. Georgia, 6 Pet. [31 U. S.] 575. They have the right of use in the soil which can only be divested by the United States, with their consent by purchase or without it, by war. Godfrey v. Beardsley [Case No. 5,497].

The special verdict states that the plaintiff was born of a Chinook woman, but does not state who the Chinook Indians were, or where they lived. I suppose the court has judicial knowledge of a fact so well-known in the history of Oregon, as that the Chinook Indians at the period of the plaintiff's birth, were a well-known tribe living at or near the mouth of the Columbia river. Its language was the basis and principal element of the "jargon" which, during the first half of this century, was the general medium of communication between the white and the Indian tribes from the Umpqua river on the south, to the straits of Fuca on the north, while their one-eyed chief, "Old King Comcomly," has been immortalized in the classic pages of Irving's Astoria. As the northwestern boundary was finally acknowledged or established, this tribe was within the limits of the United States. The plaintiff is nine sixteenths Indian, eight of which he gets from his Chinook mother, and the other one from his Canadian father. As a matter of fact, the Indian blood predominating, he is not a half-breed, as claimed on the argument by his counsel. But I cannot perceive that it is material to consider whether he is a half-breed or not. In legal contemplation he is an American Indian, by virtue of his mother being a member of the Chinook tribe, or a British subject, without reference to his race, by virtue of being the son of Thomas McKay, and his birth in the allegiance of the British crown.

According to the case of U. S. v. Sanders [Case No. 16,220], the plaintiff follows the condition of his mother, and is an alien. It was held in that case that the issue of an Indian woman and a white man is an Indian, and vice versa; that the rule of the civil law—partus sequitur ventrem—prevailed. But the contrary is the rule of the common law in the analogous case of the issue of a marriage between a freeman and a neif. 2 Bl. Comm. 94. In such case, by that rule, the child follows the condition of the father. My impression is that the plaintiff ought to be deemed to follow the condition of his father. Congress seems to have taken this view of the matter in the passage of the act of September 27, 1850, granting land to settlers in Oregon, commonly called the "Donation Act." 9 Stat. 496. Section 4 of this act grants land to each white settler on the public lands, who is a citizen of the United States, or who has or will declare his intention to become such, "American half-breed

Indians included;" thereby excluding half-breeds, the children of alien fathers, as not Americans, but aliens. But it is not necessary to absolutely determine this question.

Suppose that the plaintiff should be held to follow the condition of his mother, and is therefore a Chinook Indian; is he then a citizen of the United States under article 14 of the constitution? According to the doctrine that has been uniformly held in regard to the status of the Indian tribes in the United States he is not. Being born a member of "an independent political community"—the Chinook—he was not born subject to the jurisdiction of the United States—not born in its allegiance. On the other hand, if the plaintiff is held to follow the condition of his father he is a Canadian of mixed blood, born in the allegiance of the British crown, and therefore a British subject. In neither case was he born a citizen of the United States, and can only become one by complying with the laws for the naturalization of aliens. True, as the law now stands, the plaintiff cannot be admitted to citizenship, because he is neither a "white alien" nor a person of "African nativity or descent." But that is a matter within the exclusive cognizance of congress.

By the constitution of Oregon (article 2, § 2) no person is entitled to vote at any election therein, unless, among other things, he is a citizen of the United States, or has declared his intention to become such, "conformably to the laws of the United States upon the subject of naturalization." This description of persons is broader than that contained in article 15 of the constitution of the United States, which does not include persons who have merely declared their intentions to become citizens. The act of congress under which this action is brought is enacted in pursuance of article 15, and only applies to citizens of the United States. 16 Stat. 140. On June 6, 1870, the plaintiff was not a citizen of the United States. This being so, he is not within the purview of the act and cannot maintain this action. If the defendant's refusal to permit the plaintiff to take the preliminary oath as to his qualifications, so as to give him a prima facie right to vote, was wrongful, as I think it was under the state law, the case is not within the act of congress. That only gives a remedy for such refusal in case of citizens of the United States.

A word in conclusion: I am aware that the ruling in this case, would exclude from the privilege of voting quite a number of persons of mixed blood—persons whose fathers were British subjects, and mothers, Indian women—who have heretofore often, if not uniformly been allowed to vote in this state. They have done so by common consent, and under the authority of a vague public opinion that these persons by remaining south of the forty-ninth parallel after the treaty of 1846, could, and thereby did, elect to become American citizens. But "public opinion is not any authority on a point of law;" and it appears in this instance as in others, "that common consent is sometimes a common error." The remedy, if any is deemed necessary, is with the leigslature, and not the courts.

There must be judgment for the defendant in bar of the action, and for his costs and disbursements.

Case No. 8,841.

McKAY v. CARRINGTON.

[1 McLean, 50.] [1]

Circuit Court, D. Ohio. Dec. Term, 1829.

REAL PROPERTY—CONTRACT TO CONVEY—INSTALMENTS—FAILURE—DECREE FOR SALE—TITLE TRUSTEE FOR PURCHASER—ADMINISTRATOR.

1. Martin purchased a tract of land in Ohio, of Carrington, of Virginia, to be paid for by instalments. On the failure of any of the payments, Carrington, by giving notice and paying into the Bank of Virginia, his heirs, executors or administrators, had a right to annul the contract.

2. This contract, except by consent, can be annulled in no other manner than the one pointed out.

3. During his life C. treated the contract as binding, and his administratrix after his decease, obtained a decree for the money, and sold the land, and became the purchaser at the marshal's sale. She could only purchase Martin's equity.

4. Where a contract for the sale of land is void, or cannot be enforced by reason of laches on the part of the vendee, on the death of the vendor the land descends to his heirs.

5. Where an estate is contracted to be sold, equity considers it as converted into personalty. In such case the vendor is a trustee for the purchaser.

[Cited in Smith v. Babcock, Case No. 13,009.]

6. The complainant purchased the land, and paid a part of the purchase money; failed to get possession, which was held by purchasers under Martin. Decree pro confesso by the administratrix against the heirs of her dec'd husband, one being a minor, for the title. No proof that all the heirs were included. A delay of seven years and more before the tenants of Martin were ejected, and the title under the decree was tendered. The property decreased nearly fifty per cent. in value, and on these grounds a rescission of the contract was decreed, and the repayment of the money with interest. The circumstances of this case are materially different from a common bill for the rescission of the contract and damages.

[Cited in Cooper v. Brown, Case No. 3,191; Warner v. Daniels, Id. 17,181; Davis v. Read, 37 Fed. 424.]

[Cited in Merchants' Bank v. Thomson, 55 N. Y. 15; Hoyt v. Tuxbury, 70 Ill. 339. Cited in brief, Mastin v. Grimes, 88 Mo. 479.]

7. To obtain a rescission, it is not necessary to pay the whole of the purchase money.

8. That the notes given are negotiable and outstanding, is a reason why chancery will interpose its powers.

[Cited in Pierpont v. Fowle, Case No. 11,152.]

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

[This was a bill in equity by Jesse McKay against Elizabeth J. Carrington.]

Creighton & Bond, for complainant.
Mr. Scott, for respondent.

OPINION OF THE COURT. This controversy arises on a contract dated the 13th December, 1817, by which the defendant, a resident of Virginia, sold to the complainant 2367 acres of land in two tracts, in Ohio, which the defendant had purchased under a decree of this court against Samuel G. Martin. Martin had purchased the land of Edward Carrington, deceased, in his life time, the husband of the defendant; but had paid only a small part of the consideration money. To compel the payment of the balance a suit in chancery was brought by the defendant, as administratrix of her husband's estate, and the land was ordered to be sold. The complainant was to pay for the land ten thousand dollars; the first payment of three thousand dollars to be made immediately; the second, of three thousand one hundred and fifty dollars and fifty cents the 1st January, 1819, and the balance the 1st January, 1820. And if the complainant failed to make payment, the defendant had the right to sell the land under a decree of court for the balance of the purchase money, the surplus, if any, to be paid to the complainant. There being no provision in the contract that the complainant might enter into the possession of the land, he alleges that he obtained a writing from the defendant authorizing him to take possession; but that he was unable to do so, as possession was held by various persons under Martin. This operated, it is alleged, greatly to the injury of the complainant, and he had no means of maintaining an action at law for the recovery of the possession. The bill further states, Edward Carrington left several heirs, some of whom are yet not of age. That the complainant at the instance of the defendant, or with her approbation, advanced three hundred and twenty-four dollars to pay expenses incurred by her in prosecuting suits in the circuit court to perfect her title to the land. It appears from the proof, that the land has greatly deteriorated in value, and on that ground connected with the lapse of time and the inability of the defendant, even on the filing of the bill, to make a clear title, he prays the contract may be rescinded, and the money paid, with the sum paid for costs, may be decreed to him, with interest; and that the land may be ordered to be sold for the payment thereof. The defendant in her answer states, that the purchase was made by the complainant, with a full knowledge of the state of the title. That she made no representations to mislead him, and that all the facts relating to the land and the title were as well known to the complainant as to herself. That she has not attempted to coerce the payment of the money, but has brought an ejectment and recovered judgment against the persons in possession under Martin, and had them turned out of possession. And that so soon as she could ascertain the residence of all the heirs of her deceased husband, she caused a bill to be filed against them in the county where the land lies, and obtained a decree of the court of common pleas for a title; and that she is now ready and willing to make a deed for the land, on the payment of the balance of the purchase money. It appears that a part of the land was taken possession of by the complainant, and that, for some time he received the rents and profits thereof; and then declined receiving them, as he did the entire possession of the land after the recovery of it under the suit in ejectment.

The first question which may be considered as arising out of the foregoing facts is, whether a court of chancery, under all the circumstances of the case, would, at the instance of the vendor, decree a specific execution of this contract. It is contended that Martin having failed to comply with his contract, for the purchase of the land; the estate both equitable and legal, on the decease of Carrington, descended to his heirs; and consequently the administratrix, who represents the personalty only, had no control over the contract. This contract was entered into the 11th October, 1805. The purchase money amounted to three thousand five hundred and fifty dollars and fifty cents, to be paid by Martin as follows: fifty dollars in hand, one thousand dollars the first of May ensuing, and the balance on or before the first May, 1807; the said Carrington, his heirs, &c. to retain the title in the land until the payment of the purchase money, and then he was to convey the land in fee simple by special warranty. Should Martin fail in making any one of the payments, Carrington, his heirs, executors or administrators, had the option, at any time thereafter, to annul the bargain by giving notice thereof and paying into the Bank of Virginia, on account of said Martin, his heirs, &c., any sum or sums of money without interest, which had been paid on the purchase. There is a receipt on the agreement for the payment of fifty dollars, and one for five hundred dollars, dated 30th March, 1807. Thirty dollars, it seems, were sometime afterwards loaned by the vendor to Martin, which was endorsed on the contract. Carrington died, on or about the 29th October, 1810.

The principle laid down by the counsel for the complainant is correct, that where a contract for the sale of land is void, or cannot be enforced, on account of laches in the vendee, on the death of the vendor the land descends to his heirs, and the contract is not considered as forming a part of the personal estate which goes to the executor or administrator. By the contract under consideration, Carrington, in his lifetime, had the power expressly to annul it; as there was a failure to make the payment, it seems he did

not think proper to exercise the power, but nearly two years after the second payment became due, he received from Martin five hundred dollars in part of it. This is conclusive that on the 30th March, 1807, the contract was considered by Carrington as of binding force; and until the day of his decease he failed to put an end to it in the mode provided. His administratrix had the same power as the deceased in his life time to annul the contract, by giving notice and repaying the moneys received. This she did not do, but on the contrary treated the contract as if it were in full force; and called upon a court of equity to decree a specific execution of it. When an estate is contracted to be sold, equity considers it as converted into personalty. And this is the case, although the election to purchase rests merely with the purchaser. 7 Ves. 436. Equity considers things agreed to be done as performed. The vendor is viewed as a trustee for the purchaser of the estate sold, and the purchaser as a trustee of the purchase money for the vendor; consequently the purchase money goes to the executor or administrator of the vendor, and the interest of the vendee descends to his heirs. As Carrington in his life time had given no indication of an intention to annul the contract, and as he had the power to do so, in a mode expressly provided; and as he received a part of the purchase money, after he had a right to put an end to the contract, no doubt can exist that he considered it in full force. If in the contract a particular mode is provided, by which a party may rescind it, as in the present case, by giving notice and repaying the money received, it can only be done in the mode provided. The repayment of the money by express agreement, is a condition precedent to the rescission of the contract, and must be so considered in equity as well as at law. This step not being taken, may be considered as indicating a determination to enforce the contract, and an acquiescence in the delay of payment. The equity of Martin, therefore, was not extinguished at or before the decease of Carrington. This being the case, there can be no doubt that the purchase money went to the administratrix, and formed a part of the assets in her hands. This view is greatly strengthened from the fact, that the heirs took no step to annul the contract; nor the administratrix, either of whom might have done so; but on the contrary, called the aid of a court of chancery to enforce it.

By the 3rd section of the act of this state, "for the execution of real contracts" it is provided, "that any person who has made a contract for the sale of land, and dies before the completion of it, leaving heirs under the age of twenty-one years, his executors or administrators being desirous of completing such contract, for and on behalf of such minor children and heirs, may apply to the court of common pleas who have power to authorize a conveyance, where the consideration money has been paid or secured to be paid, to be made in pursuance of the contract." This statute would seem to give the representatives of the personal estate a control over contracts for the sale of real property, which authorizes them to enforce such contracts, in all cases, where they may be considered for the advantage of the heirs. No application was made under this statute, by the defendant, it is presumed; because Martin had not paid, and was believed to be unable to pay the consideration money. A final decree was entered against him for the balance of the purchase money and interest, and on his failing to pay it, within a given time, the land was ordered to be sold. A contract thus sanctioned by a court of chancery, by the administratrix of Carrington, and by Carrington in his life time, cannot be considered or treated as a nullity. Chancery has enforced it, and given the heirs the full benefit of its provisions. Under the sale directed by the decree against Martin, the defendant became the purchaser of the land, for the sum of five thousand four hundred and forty dollars and twenty-five cents, as appears from the marshal's deed. What right did the defendant acquire by this purchase? The equitable interest of Martin was all that could be sold, or that the defendant under the sale could purchase. The marshal's deed, therefore, could only invest her with this equity.

The defendant prosecuted the suit against Martin as the administratrix of her husband's estate, but the purchase at the sale seems to have been made on her own account. Being the trustee of her husband's estate, I should entertain doubts whether chancery ought to aid a purchase made under such circumstances. There is no intimation, however, of any unfairness, and the high character of the party forbids any presumption that she did not intend to act in good faith.

It appears that in November, 1823, the defendant filed a bill in the court of common pleas for Clinton county, setting forth the contract with Martin, the proceedings under it, the sale of the land by the marshal, and her purchase of it. She also stated that the purchase money had been paid to the heirs and she prayed that a decree investing her with a title might be made. As the defendants were non-residents, and one of them a minor, notice was given as the statute requires. A decree pro confesso was obtained at a subsequent term.

It is a principle well settled in chancery, that where a person purchases a title, known to be defective by him, at the time, he shall not afterwards object to it, on account of such defect. Where a purchaser under a decree objected to a specific execution of the contract, because a part of the defendants being minors, might open the decree after they became of age, and perhaps set it aside,

it was ruled not to be a valid objection, as the purchaser was bound to know the circumstances under which the decree was rendered. And it is contended that the complainant purchased with a full knowledge of the defendant's title, and that he cannot therefore avail himself of the objections urged against it. He must be presumed to have been acquainted, at least to some extent, with the nature of the title which the defendant acquired by the purchase under the decree against Martin, as in the contract there is an express reference to it. But it would be, perhaps, in the absence of proof, carrying the presumption too far to say, that he was bound to know the full legal import of that title. As a high price was to be paid for the land, it is not to be presumed that the complainant considered himself as purchasing a mere equity. Nor does such a construction seem to have been given to the contract by the defendant. The agent of the defendant who made a verbal arrangement with the complainant respecting the land, states that he did not consider the defendant as having the legal title, though it does not appear that his impressions were communicated to the complainant. From the sum advanced by the complainant to defray expenses of suits, prosecuted by the defendant to perfect the title, it appears that when the defects in the title were known to him, he took no step to disaffirm the contract, but aided the defendant in her efforts to remove the objections to it. It has been decided where a defect in a title becomes known to a vendee during a treaty for the purchase, although he was ignorant of it before, yet, if afterwards he continues the treaty, he shall not, on account of such defect, disaffirm the contract and recover his deposit. The same principle would have a strong application to the complainant if, after he was fully apprised of the objections to the title, he exercised acts of ownership over the land by the receipt of rents, and advanced money to defendant to assist her in procuring a good title. These facts would evince a determination, it would seem, to waive any advantage which a defect in the title might give him, and to abide by the contract. They were certainly calculated to make this impression on the vendor. By the contract there was no time fixed when the conveyance should be executed. The defendant agreed to "sell and convey" the land to complainant, and he agreed to make certain payments. Under this contract the defendant is not bound to make the conveyance until the purchase money be paid.

On the 1st January, 1819, the second instalment of three thousand five hundred and fifty dollars and fifty cents was due, and on the first of the succeeding January, the balance became payable. Neither of these payments has been made.

Although there is a great want of certainty as to time, in the facts proved, yet from their connection it is to be inferred, that no step was taken by complainant evincive of a disposition to rescind the contract, on account of the defects in the title, until a considerable time after the last instalment of the purchase money became due. At what time he abandoned the possession of a part of the land, which he admitted to one of the witnesses he had enjoyed, does not appear. He refused the possession when it was tendered to him, after the suits in ejectment had been decided. From the nature of the contract and the circumstances connected with it, it does not appear, if the vendor now claimed a specific performance of it, that the delay in making the conveyance could be urged as an objection by the complainant. He has neglected to fix the time himself, by paying the purchase money, or offering to pay it. Until this was done the vendor was not bound to convey. But the complainant has not only failed to make payment, but he has done several affirmative acts, which showed an acquiescence in the course taken by the vendor to clear the title.

But there are still two objections to be considered against the right of the vendor, to a specific execution of the contract. First, the great change in the value of the land. Second, the defect which remains in the title. Although modern decisions in England seem to consider a performance as to time, with more strictness than former decisions, still it is admitted that time is of far less importance than a change in the circumstances of the parties, or in the value of the property embraced by the contract. Where the property has not materially changed in value, and the circumstances of the parties in relation to it remain substantially as they were when the contract was made or was to have been performed, time is seldom considered material. But when a specific execution of the contract will give the purchaser the property, greatly deteriorated from the value it bore when he should have received it, it would be unjust to compel him to receive it. Chancery will never interpose its powers under such circumstances, to carry the contract into effect.

But it may be said that in the case under consideration, no time being fixed for the conveyance, the complainant should have fixed the time by the payment or tender of the purchase money, and not having done either, he ought not to be permitted to take advantage of his own negligence. That by failing to place himself in an attitude to demand a title from the vendor, he has acquiesced in the delay and justly incurred the risk of the rise or fall of the land. There is undoubtedly great force in this suggestion, and it is difficult to obviate the objection it presents. McKay, it is alleged, made this purchase for purposes of speculation; at least that he bought under the hope of selling without much delay, at a profit. The purchase and

sale of lands, it is known were made extensively some years ago, by many persons in this state and elsewhere. And I do not know any objection to this business, which does not equally apply to the buying and selling of any other description of property. Land is a fair object of traffic, as well as personal property.

Chancery will not aid what may be called a speculating contract, but a fair purchase of land with a view of again disposing of it, at an advance, does not come within the objection. The object with which any description of property is purchased being lawful, may be considered by a court of chancery. The purchase of a reversionary interest, it has been decided, makes time a material part of the contract. So where an estate is sold to pay off an incumbrance bearing a higher rate of interest than the vendor is entitled to receive. And it may well be said that time is of the essence of the contract, where the vendor has purchased to sell. But to this consideration is opposed the fact that McKay has not entitled himself to the conveyance. It may, however, be fairly presumed, that the embarrassments of the title, and his failure to obtain possession of the land for a number of years essentially injured his interests by preventing a sale of it. Though he had but the equitable title, still if that title had been accompanied by possession, it is probable he might have sold the land, if not at an advance, at least so as to indemnify himself. But the purchasers under Martin retained the possession some seven or eight years after the purchase of McKay, and until they were removed by legal process. Before this was accomplished, and a full possession of the land tendered, it had become less valuable by nearly fifty per cent. than it was when the purchase was made. Although it may be said, therefore, that the vendor was not bound to make the conveyance until the purchase money was paid; yet from the manifest object of McKay in purchasing, the full possession of the land was essential to his interests. This he failed to obtain and the consequences have been extremely injurious to him. This fact, taken in connection with the defect in the title under the decree in Clinton county, is sufficient to refuse a specific performance in behalf of the vendor. There is one infant defendant against whom the decree was entered, who may open it up, and perhaps, as it regards his interests, reverse it when he shall become of age. This, it has often been ruled, constitutes a fatal objection to a title, in a court of chancery, except by purchasers under the decree. But, if a court of chancery would not, under the circumstances of this case, at the instance of the vendor, decree a specific performance of the contract, still it does not necessarily follow that on the application of the vendee the contract will be cancelled. The cases are numerous where both parties having been grossly negligent in the performance of the contract, have been refused the aid of a court of chancery and left to their legal remedies.

The remaining questions for consideration are, whether under the facts of the case the complainant is entitled to the interposition of a court of chancery, and if so, what relief can be given him. It is a rule in chancery that he who claims its interposition, must not only show himself entitled to it by the fairness of the contract, but also, by having done on his part what in equity he was bound to do. In this case it is contended—that the relief sought is at law and not in chancery; and that if chancery take jurisdiction, the relief to the extent prayed for cannot be given. Where the vendor of land has no title, or a defective title, and there are outstanding notes or bonds given for the purchase money, which may be assigned, chancery will take jurisdiction of the case and order the notes or bonds to be delivered up and cancelled. In such a case the remedy at law is inadequate, because the vendor may delay the commencement of an action for the purchase money at his pleasure, and if the obligations were assigned without notice, they being negotiable, a failure of consideration could not be set up against the assignee. No reference to authority need be made to sustain this position. It involves the exercise of a power which exclusively belongs to a court of chancery, and which has been exercised on numerous occasions.

But the question arises, whether the powers of a court of equity can be extended, beyond that of rescinding the contract. The damages to which the vendor, by his failure, has subjected himself, it is insisted must be ascertained in a court of law. In the case of Denton v. Stewart [1 Cox, Ch. 258]; 1 Fonbl. Eq. 44, note 2, Lord Kenyon, master of the rolls, sitting for the chancellor, directed the master to enquire what damages the plaintiff had sustained by the defendant's not performing his agreement, of which a specific performance was prayed by the bill, but which could not be decreed; the defendant having by sale of the estate put it out of his power to perform his agreement with the plaintiff. On the authority of this decision was the case of Greenaway v. Adams decided, in 12 Ves. 395. In that case the master of the rolls observes: "The party injured by the non-performance of a contract has the choice to revert either to a court of law for damages, or to a court of equity for a specific performance. If the court does not think fit to decree a specific performance, or finds that the contract cannot be specifically performed, either way he should have thought there was equally an end of its jurisdiction; for in the one case the court does not see reason to exercise the jurisdiction; in the other the court finds no cause for the exercise of it. However, the case of Denton v. Stewart is a decision in point against that proposition." In the case of Gwillim v. Stone, 14 Ves. 128, which was a bill to have a contract delivered

up, on the ground of the defective title of the defendant, and for compensation for the injury to the plaintiff by the failure of the contract, the decree was made for delivering up the contract without prejudice to an action, instead of an enquiry before the master. In this case the master of the rolls observes, that in the case of Denton v. Stewart, and Greenaway v. Adams, above cited, the object of the bill was a specific performance; and in the latter he had some doubt upon the principle. This bill, he stated, is of a different nature, asserting from the first that the defendant cannot make a good title. It is more proper for an action. The equitable relief is obtained by a decree for the delivering up the instrument. The bill in the case of Todd v. Gee, 17 Ves. 275, prayed for the specific performance of an agreement for the sale of an estate to the plaintiff by the defendant; or if the defendant cannot perform it, that the plaintiff may receive satisfaction for the damages and injury sustained by the non-performance. And the lord chancellor observes in the case, "that he should be inclined to support the whole course of previous authority against Denton v. Stewart, not being aware that the court would give relief in the shape of damages, which is very different from giving compensation out of the purchase money. That court, he states, except under very particular circumstances, as these may be, upon a bill for the specific performance of a contract to direct an issue or a reference to the master to ascertain the damages. That is purely at law. It has no resemblance to compensation." Upon an adjournment of this case, the lord chancellor again observes, "that his opinion on the three cases cited (Denton v. Stewart, Greenaway v. Adams, and Gwillim v. Stone) was confirmed by reflection; that, excepting any special cases, it is not the course of proceeding in equity, to file a bill for a specific performance of an agreement, praying in the alternative, if it cannot be performed, an issue or an enquiry before the master with a view to damages. The plaintiff must take that remedy, if he choose it, at law generally, though not universally. In Denton v. Stewart, the defendant had it in his power to perform the agreement, and put it out of his power pending the suit. The case, if it is not to be supported on that distinction, is not according to the principles of the court."

From these authorities, it appears that the decision in the case of Denton v. Stewart has been overruled, or at least has been considered as turning on the peculiar circumstances of the case. The circumstance of the vendor having conveyed the title during the pendency of the suit, seems to be considered as the principal ground on which damages were decreed. The decision in that case cannot derive much support from the case of Greenaway v. Adams, for the master of the rolls seems to have yielded to the authority of the former case contrary to his own convictions, without adverting to the circumstances of the case, as stated afterwards in the case of Todd v. Gee. The objection to a decree for damages seems to be considered from the above authorities as stronger where a rescission of the contract is asked, than where a specific execution of it is prayed and damages in the event of the vendor not being able to make a good title. But in either case, by the authorities cited, except under peculiar circumstances, damages will not be decreed. In a bill for a specific performance, if the vendor be not able to make a conveyance for the entire estate sold, the purchaser may insist for the specific thing, so far as the right of the vendor extends, and compensation out of the purchase money for any embarrassment of the title or deficiency in the number of acres sold. If in such a case, however, the whole of the purchase money has been paid, it is difficult to distinguish it in principle from a case where the rescission of the contract is prayed. In the one case one half of the land is deficient, and a decree is entered for the one half, and the return of the purchase money paid with interest for the other half. In the other case the vendor having no title to the land, the whole of the purchase money paid is decreed with interest. If in the one case it may be said that chancery acquires jurisdiction by decreeing a specific execution of the contract in part, and consequently may put an end to the matter in controversy by doing full justice between the parties; may it not be said in the other, that jurisdiction is equally acquired by the court where there are outstanding negotiable notes or bonds given for the purchase money, which if assigned may be enforced against the vendee, and which should therefore be delivered up and cancelled.

In the case of Law v. Pratt, 9 Cranch [13 U. S.] 469, the court observe that "to obtain a specific performance is no object of Law's bill, it is incumbent on the opposite party therefore, to show some ground of right to force such a decree upon him. But considering as we do that Law is not in default, there can be no reason to decree a specific performance, when every thing shows that it would be productive of nothing but loss. Besides, a specific performance, such as would answer the ends of justice between these parties, has now become impossible. An issue quantum damnificatus it is certainly competent for this court to order in this case, but it is not consistent with the equity practice to order it in any case, in which the court can lay hold of a simple equitable and precise rule to ascertain the amount which it ought to decree." The court in that case decreed that the defendant should refund, for the deficient lots at the rate of the purchase. In a subsequent case between Dunlap v. Hepburn, 1 Wheat. [14 U. S.] 197, the court say: "There are many cases in which a court of equity, although it would not decree a specific performance, will yet refuse to order a contract to be cancelled. The inability of the vendor to

make a good title at the time the decree is to be pronounced, furnishes a very good reason for excluding him from relief in a court of equity; and yet it does not follow that the court will for this reason merely, set aside the contract. Generally speaking a court of law is competent to afford an adequate remedy to either party, for a breach of the contract by the other, from whatever cause it may have proceeded; and whenever this is the case a resort to a court of equity is improper. But if the contract ought not in conscience to bind one of the parties, as if he had acted under a mistake, or was imposed upon by the other party, or the like, a court of equity will interpose and afford a relief which a court of law cannot, by setting aside the contract; and having thus obtained jurisdiction of the principal question, that court will proceed to make such other decree as the justice and equity of the case may require."

In the case under consideration, the second instalment became due the 1st January, 1819, and the third the 1st January, 1820. Neither of these instalments were paid by the complainant, but he filed his bill the 13th April, 1821, for a rescission of the contract. Has he by a failure to pay these instalments been guilty of such negligence as to prevent the interposition of a court of chancery in his behalf. Did equity require that he should part with his money before he obtained possession of the land agreeably to contract, when it was apparent the vendor could not make him a title. The first default seems to have been with the vendor, in not putting the complainant into possession of the land. Had the complainant called upon the vendor for a specific execution of the contract, it would have been essential for him to have paid, or offered to pay the whole of the purchase money; but as he goes for a rescission of the contract, on account of a defect of title in the vendor, connected with other circumstances, a payment of the purchase money was unnecessary. To have paid the balance of the purchase money could not have strengthened the equity of the complainant. Chancery requires no act to be done in vain: it therefore could not require the payment of the purchase money in this case, after the defects in the title had become fully known to the complainant. More than two years were suffered to elapse from the time the second instalment became due to the filing of this bill. Was it incumbent on the complainant to give notice to the vendor, of his determination to rescind the contract so soon as he discovered the defect in the title. In ordinary cases this might be necessary, but in this case the possession in part of the land was given to the complainant and he, no doubt, entertained the hope that the entire possession would soon be relinquished to him. And under this expectation he seems to have given time to the vendor to clear the title. This bill was filed in April, 1821, and it was not until November that the vendor took the first step to perfect her title by filing a bill against the heirs of her deceased husband. In August, 1824, a decree was obtained in her behalf. Whether this bill embraced the whole of the heirs or not is left to conjecture; the only evidence of the fact seems to be that they were called the heirs of Edward Carrington, deceased, in the bill. A decree pro confesso was entered against them, one of them being a minor, for whom a guardian ad litem was appointed.

As before remarked, the court do not consider the vendor in an attitude to demand a specific performance of the agreement. The delay, the failure to give possession, the change in the value of the property, and the intrinsic defect in the title, are insuperable objections to such a demand. And these considerations, together with the fact that the notes for the balance of the consideration, are outstanding, and being negotiable may be assigned, constitute a ground, as we think, for the equitable interposition of this court. And taking jurisdiction of the case on these grounds, the court will not stop short of settling the matter in controversy. They will decree a rescission of the contract, that the outstanding notes be delivered up and cancelled, and that the money paid on the purchase be repaid with interest. This appears to be within the spirit of the decisions cited from Cranch and Wheaton, and it cannot be considered in opposition to the English adjudications referred to, unless it be supposed that there are no particular circumstances to vary this case from that of Todd v. Gee, in 17 Ves. 275. The outstanding negotiable notes, and the great change in the value of the land, are believed to bring this case within the English decisions. To rescind the contract and send the complainant to a court of law to recover back the money paid, would seem to be unnecessary, as the rule of damages, the money paid with interest, is the same at law as in equity. There is here then a certain and unvarying rule for the ascertainment of damages, and they can as well be ascertained by the court as by a jury. But the court will go no further in this case. They will not decree a payment of the money alleged by the complainant to have been expended by him, at the instance of the vendor, in the prosecution of certain suits to perfect the title. There is no evidence of the amount of money thus expended, and if there were, the complainant could resort to his legal remedy. This money is not alleged to have been advanced as a part of the purchase money. It may have been advanced under an agreement which is only properly examinable at law. At all events there are no special circumstances made known which connect this expenditure with the original contract, so as to bring it within the jurisdiction of the court. Nor will the court order the land to be sold to satisfy the amount decreed to be repaid. There is no allegation that the vendor is in doubtful circumstances,

or that the decree will not be complied with, or may not be satisfied in the ordinary mode. The costs of the suit to be paid by the defendant.

Case No. 8,842.

MACKAY v. CENTRAL R. R. OF NEW JERSEY.

[See 4 Fed. 617.]

Case No. 8,843.

MACKAY v. EASTON.

[2 Dill. 41; [1] 16 Int. Rev. Rec. 173.]

Circuit Court, E. D. Missouri. Sept. Term, 1872.[2]

LAND GRANTS — MISSOURI — NEW MADRID LOCATIONS—EJECTMENT — VALIDITY OF PATENT.

1. A patent issued in 1827, pursuant to a New Madrid certificate or warrant, under which both parties claimed title, and pursuant to the requirements of acts of congress is valid, and possession by the defendant under the patent for ten years was *held* to entitle him to a verdict in an ejectment against him.[2]

2. The case distinguished from Easton v. Salesbury, 23 Mo. 100, same case in error, 23 How. [64 U. S.] 426, where the patent of 1827 was decided to be void.[2]

3. Acts of congress pertaining to the New Madrid locations referred to by Treat, J.

This was an action of ejectment to recover possession of certain land situated in the city of St. Louis, forming part of a tract which was located under New Madrid certificate No. 159, dated November 16, 1816, in favor of James Smith, upon which a patent was issued May 28, 1827, to said Smith or his legal representatives. Smith, on July 9, 1811, had had confirmed to him by the commissioners for the adjustment of titles to land in the territory of Missouri, certain lots of land in New Madrid county, which lots were afterwards, and while still owned by him, materially injured by earthquakes; whereupon, by virtue of the act of congress approved February 17, 1815 [3 Stat. 211], making provisions for the relief of sufferers by the New Madrid earthquakes, the certificate aforesaid was issued in the name of James Smith, and upon this certificate the patent above mentioned was issued to Smith or his legal representatives. Both parties in this action claimed under the James Smith in whose name the certificate of location was issued. Plaintiff [George R. Mackay] claiming under a title bond by Smith to Andrew P. Gillespie, dated April 14, 1816, and under a deed by Smith to Gillespie, executed of date March 5, 1819, pursuant to the covenant to convey contained in such bond. Gillespie, in 1846, conveyed to William W. Gitt, who conveyed to plaintiff. Defendant [Alton R. Easton] claimed under a deed dated October 22, 1816, by James Smith to Rufus Easton, who, on June 28, 1826, conveyed to William Russell, from whom the title passed through various intermediate holders to defendant. The case was tried before a jury.

D. T. Jewett and John F. Darby, for plaintiff.

Charles Gibson, E. Casselbury, and William B. Thompson, for defendant.

Before MILLER, Circuit Justice, and TREAT, District Judge.

THE COURT, through TREAT, District Judge, instructed the jury that the patent of 1827, above referred to, was valid, and that the only point for their determination was whether the defendant had been in possession, under the patent, for ten years prior to the bringing of the suit, and that if they were satisfied that possession for that period had been proved, they would find for the defendant. The jury accordingly returned a verdict for defendant. [In view of former decisions, the most striking feature of the case was the ruling of the court that the patent of 1827 was valid, that being the point upon which the case eventually turned.] [3] It may be observed that the same patent has been decided to be void in the case of Easton v. Salesbury, tried in the St. Louis court of common pleas, in 1855, before his honor, Judge Treat (one of the judges who sat on the trial of the present case), a decision which was first affirmed by the supreme court of Missouri (23 Mo. 100), and afterwards, on writ of error, by the supreme court of the United States. 21 How. [62 U. S.] 426. Conflicting as the decision in Easton v. Salesbury, and that in the present case may appear, such conflict arises, not from a different interpretation of the law, but from the fact that in the former case there was wanting a link which in the present case has been supplied. In order rightly to understand the precise nature of this link, and the ruling of the court, an acquaintance with the acts of congress pertaining to the New Madrid locations is necessary. This was stated by Treat, J., as follows: "By the act of congress above referred to, approved February 17, 1815, any persons owning lands in New Madrid county, and whose lands had been materially injured by earthquakes, were authorized, subject to the limitations and restrictions therein mentioned, to 'locate the like quantity of land on any of the public lands in the territory of Missouri, the sale of which was then authorized by law.' This act made it the duty of the recorder of land titles for that territory, upon proof of the title of any such person to the benefits of the act, to issue a certificate that such person was so entitled. Upon such certificate being issued, location was to be made, on claimant's application, by the deputy surveyor of the territory, who was required to survey the same and return a plat of such

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

[2] [Affirmed in 19 Wall. (86 U. S.) 619.]

[3] [From 16 Int. Rev. Rec. 173.]

location to the recorder, with a notice designating tract located, etc., which notice and plat were to be recorded in said recorder's office, whose duty it then was to transmit to the commissioner of the general land office a report of the claims allowed and the locations made, delivering to the party a certificate of the circumstances and of his being entitled to a patent. This certificate was required to be filed with the recorder within twelve months from its date, and thereupon the recorder was to issue another certificate, which, being transmitted to said commissioner, entitled the party to a patent. Following this act and curative thereof in respect to the mode of survey, was another act, approved April 26, 1822 [3 Stat. 668], which, inter alia, provided that all warrants issued under the act of 1815, should be located within one year after the passage of the amendatory act. that is, within one year after April 26, 1822, otherwise they should be null and void. Now, in the case of Easton v. Salesbury, where the controversy was between the title under the same New Madrid certificate No. 159, and a Spanish concession, but in which the validity of the patent to James Smith of May 28, 1827, above mentioned, was involved, that patent was successively adjudged by the three courts through which the case passed to be not only voidable, but absolutely void, ab initio, the warrant, according to the proofs in that case, not having been located within one year from April 26, 1822, as required by the act of that date. But in the present case the proofs showed that the warrant was located on February 26, 1823, thus establishing the fact of the location within the year limited by the statute of 1822, and thereby supplying the link that was missing in Easton v. Salesbury. This patent having been thus issued pursuant to the certificate or warrant under which both parties claimed title, and pursuant to the terms and limitations of the acts of congress, was therefore valid, and possession by the defendant, under the patent, for ten years before the suit was brought, having been proved, it only remained for the jury to find for the defendant."

Judgment accordingly.

[A writ of error was sued out from the supreme court, where the judgment of this court was affirmed. 19 Wall. (86 U. S.) 619.]

Case No. 8,844.

McKAY v. GARCIA.

[6 Ben. 556.] [1]

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

SUIT AGAINST FOREIGN CONSUL — PRACTICE—ARREST—APPLICABILITY OF THE NEW YORK CODE —PENDENCY OF ANOTHER SUIT FOR THE SAME CAUSE OF ACTION.

1. An action of debt was brought against a foreign consul, for money received in a fiduciary capacity. The defendant, being arrested, moved on affidavits to vacate the arrest: *Held*, that, under the act of February 28, 1839 (5 Stat. 321), in connection with the act of January 14, 1841 (Id. 410), and the 179th section of the New York Code of Procedure, the defendant was liable to arrest in the action.

2. Under the 5th section of the act of June 1, 1872 (17 Stat. 197), the plaintiff had the right, under the 205th section of that Code, to oppose the defendant's affidavits by affidavits in addition to those on which the arrest was granted.

3. The pendency of another action in a state court against the defendant for the same cause of action was of no importance, as the state court had no jurisdiction of an action against a consul, and would be no defence if the defendant were not such.

4. The motion to discharge the defendant must be denied.

[This was an action at law by Nathaniel McKay against Edwin C. B. Garcia.]

William Tracy, for the motion.

William Blaikie and Merritt E. Sawyer, opposed.

BLATCHFORD, District Judge. This is an action for a debt. By the act of February 28, 1839 (5 Stat. 321), in connection with the act of January 14, 1841 (Id. 410), imprisonment for debt is allowed, on process issuing out of a court of the United States, where, by the laws of the state, imprisonment for debt shall be allowed, the conditions and restrictions prescribed by the state being applicable to the process issuing out of the court of the United States. The act of 1839 provides that "the same proceedings shall be had" in the court of the United States "as are adopted in the courts of such state."

The 179th section of the Code of Procedure of New York provides for the arrest and imprisonment of a defendant in an action for money received in a fiduciary capacity. This is such an action.

This being an action at law, the practice in it must, under the 5th section of the act of June 1, 1872 (17 Stat. 197), conform, as near as may be, to the practice now existing in a like cause in the courts of record of the state of New York.

The defendant having moved, on affidavits on his part, to substantially vacate the order to hold to bail, the plaintiff has a right, under the provisions of section 205 of the Code of Procedure of New York, to oppose such motion on new and further affidavits and proofs, in addition to those on which the order to hold to bail was made.

The pendency of a former suit against the defendant in a state court for the same cause of action, is of no importance, for such state court was and is without jurisdiction of the suit, as the defendant was and is a foreign consul. But if he were not, the weight of authority is that the fact of the pendency of such suit in the state court would be of no effect on this suit. Loring v. Marsh [Case No. 8,514].

The cause of action here is one which was

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

assignable. On all the affidavits and papers on both sides, I am of opinion that the order to hold to bail would have been properly grantable in the first instance. If so, it must be upheld. The motion to vacate the order to hold to bail and to discharge the defendant from bail to the marshal on his filing common bail, is denied.

Case No. 8,845.

McKAY et al. v. HILL.

[1 Hask. 276.] [1]

Circuit Court, D. Maine. Sept., 1870.

CORPORATIONS — STOCKHOLDERS — CAPITAL WITHDRAWN — LIABILITY — LIMITATION — DIVIDENDS NOT EARNED — NOTES GIVEN THEREFOR — STATUTE.

1. The withdrawal of any portion of the capital by a stockholder in a corporation, renders him liable under Rev. St. Me. 1857, c. 46, § 24, for the corporate debts contracted since June 1, 1857, to the amount of capital so withdrawn.

2. To construe a statute, effect should be given to each part of the enactment if possible, that the whole statute may have meaning.

3. The limitation of a year, in the above statute, does not apply to an action for a corporate debt, contracted after June 1, 1857, against a stockholder for having withdrawn capital from the corporation.

4. The surrender by a stockholder of his shares in a corporation and his receiving in exchange therefor the stock of another corporation, that he originally paid for his shares, operates as a withdrawal of capital.

5. So does the receipt of dividends not earned.

6. So does the surrender of shares in exchange for corporate notes that are subsequently paid.

7. Notes of a corporation, given in payment of dividends declared but not earned, are void in the hands of the stockholder receiving them.

Case, by [Nathaniel McKay and others] creditors of an insurance company, against a stockholder [William Hill], charged with having withdrawn the capital of the corporation, and thereby under Rev. St. Me. 1857, c. 46, § 24, become liable for corporate debts. The case was tried upon the general issue before the court without a jury, the parties having given the usual stipulation.

William L. Putnam, for plaintiffs.

Josiah H. Drummond, for defendant.

Before SHEPLEY, Circuit Judge, and FOX, District Judge.

FOX, District Judge. On the 14th day of March, 1866, the plaintiffs procured from the Piscataqua Fire and Marine Insurance Company, a corporation under the laws of this state, having its place of business in the county of York, a policy of insurance for the sum of $2,500, upon the steamer Gen. Hooker for one year, against the usual marine risks. Within the year the steamer was lost, and at the September term, 1867, of this court, the plaintiffs recovered against that company upon its policy a judgment for $2,703.33 debt and $45.33 costs of suit. Upon this judgment, execution issued October 31st, 1867. December 4th, 1867, the marshal of the district made return thereon, that he had made diligent search for property of the defendants with which to satisfy the execution in whole or in part and was unable to find any, and so for want thereof he returned the execution wholly unsatisfied. On the 2d of January, 1868, he made a further return, that on the 6th of December he had exhibited the execution to William Hill, one of the stockholders of said Piscataqua Fire and Marine Insurance Company, and requested him to show attachable property of the corporation to satisfy the execution, to which Hill replied, he had not any property of said corporation in his hands. On the 6th of December the marshal also served on the defendant a written notice from the plaintiffs, requesting him to show to the officer holding such execution attachable property of the company to satisfy the same, to which defendant replied as before. Thereupon the plaintiffs, on the 31st day of January, 1868, commenced the present suit against Hill, claiming to recover of him as a stockholder in the insurance company by reason of his withdrawal of a portion of the capital stock of the corporation. The case is submitted to the court under the provisions of the act of congress by written stipulation of the parties, without the intervention of a jury.

The first question which is presented for decision is, whether a stockholder in an insurance company, who withdraws a portion of the capital of the company, is thereby made liable to a law suit in behalf of the creditor of the company, for debts contracted after June 1st, 1857, the defendant contending that such liability no longer exists under any of the provisions of the laws of Maine. The 24th section of chapter 46 of the Revised Statutes of Maine declares that, "the stockholders of all corporations created by the legislature after February 16th, 1836, excepting banking corporations, unless it is otherwise specified in their charter, or by any general law of the state, shall be liable for the debts of the corporation contracted during their ownership of such stock, prior to the first day of June, 1857, in case of deficiency of attachable corporate property, to the amount of their stock and no more; and such liability shall continue, notwithstanding any subsequent transfer of such stock, one year after such transfer is recorded on the corporation books; but no stockholder whose stock has been fully paid in, and no part of the principal has been withdrawn, shall be so liable on debts contracted after said first day of June; but in the latter case, when an officer certifies on an execution against a corporation, that he cannot find corporate property to satisfy it, each stockholder's stock and in-

[1] [Reported by Thomas Hawes Haskell, Esq., and here reprinted by permission.]

terest in stock may be seized and sold thereon as on execution against him; and he may recover of the corporation the value of the stock or interest so taken, &c."

Section 25 of the same chapter as amended, authorizes a plaintiff, at any time within six months after the return of an execution against a corporation recovered on a debt for which any stockholder is liable under the preceding section, unsatisfied in whole or in part for want of attachable property of the corporation, to demand of any stockholder of such corporation to disclose and show attachable property of the corporation, sufficient to satisfy the execution; and by section 26 such creditor, after demand, may have an action of the case against such stockholder to recover of him individually the amount of his execution and costs, or the deficiency thereof, not exceeding the amount for which such stockholder is liable by section 24; such action to be commenced within six months after judgment recovered against the corporation.

The rights of these parties therefore depend on the true construction of section 24 of chapter 46 of the Revised Statutes. This section in the first place declares that "stockholders of all corporations created, &c., shall be liable for debts of the corporation, contracted during their ownership of such stock prior to the first day of June, 1857, in case of deficiency of attachable corporate property to the amount of their stock and no more; * * * but no stockholder, whose stock has been fully paid in and no part of the principal has been withdrawn, shall be so liable for debts contracted after said first day of June." Upon this language, the argument of the learned counsel of the defendant is, that but one class of liabilities is affirmatively and positively declared, viz: for debts contracted prior to June 1st, 1857; that the subsequent provision as found in this section is not of a positive, certain and obligatory character, declaring or establishing a liability, but is the rather of a negative order in its terms, viz: that for debts of the corporation contracted after the first of June, a stockholder, whose stock has been fully paid in and no part thereof withdrawn, shall not be personally liable for such debts. It is conceded that this company was incorporated after Feb. 16th, 1836, that the demand of the plaintiffs was contracted by the company after the first day of June, 1857, and that by the repealing act of 1857 the prior acts creating a liability against stockholders for corporate debts were repealed, leaving their rights and liabilities dependent on the enactments of the Revised Statues. The language of the 24th section of chapter 46; is certainly peculiar and somewhat doubtful and ambiguous, and we concur with the defendant's counsel, that it does not in clear, direct, absolute and positive words declare an obligation and liability against a stockholder, who has not fully paid in his stock, or who has withdrawn a portion of the capital. To express such a liability, language much more apt and positive might have been employed by the legislature; and yet, we entertain no doubt that it was the intention and design of the legislature that such conduct on the part of a stockholder, as would reduce or destroy the security which corporate creditors might otherwise have availed themselves of, should subject the stockholder to a personal liability for the debts of the corporation to the extent at least of his stock.

In the construction of statutes, several acts in pari materia and relating to the same subject, are to be taken together and compared, because they are considered as having one object in view, and as acting on one system, and the rule applies, though some of the statutes may have expired or are not referred to in the other acts. 1 Kent. Comm. 463.

By an act of the legislature of Maine, approved Feb. 24, 1821, c. 139, § 2, it was enacted that "in case of any loss or losses whereby the capital stock of insurance companies shall be lessened before all the installments are paid in, each proprietor or stockholder's estate shall be held accountable for the installments that may remain unpaid on his share or shares, at the time of such loss or losses taking place."

The 7th section of the act declares, that "whenever it shall so happen that by losses on policies or otherwise, their corporate property shall be insufficient to pay all their debts, the individual stockholders shall be liable in their private capacity, in case the whole amount of the capital stock is not paid in, to any creditor of said company, to the amount that may be due from said stockholders on their shares."

By chapter 200, Act 1836, this liability was broadly extended, and thereby stockholders in all corporations created after Feb. 16, 1836, excepting banking corporations, unless otherwise specified in their charter, in case of deficiency of attachable corporate property, were rendered liable to have their estate taken on execution against the corporation to the amount of their stock, or to an action on the case, in behalf of the creditor to recover of said stockholder the amount of the execution or the balance due thereon, not exceeding the amount of his stock.

The laws were revised in 1840, and by chapter 76, § 18, this provision of the act of 1836, was re-enacted. In 1855 by chapter 169, the remedy of scire facias was substituted for an action on the case. In 1856, by chapter 271, the 18th section of chapter 76 of Revised Statutes was repealed, but the liability of the stockholders for corporate debts, to the amount of their stock, was re-enacted, and an action of the case restored, and the liability to have their property taken on execution against the corporation was extinguished by a repeal of sections 18, 19, and 20, of chapter 76 of the Revised Statutes.

By a resolve of the legislature of 1856, c.

341, the revision of the laws, which had been made under a resolve of a prior legislature, was committed to Hon. Ether Shepley, "whose duty it shall be to compare the revision made under such resolves, with the existing laws, and make such further revision and new arrangement thereof, including the public laws passed at the present session, as may be necessary to present the same in the most complete form for the consideration of the legislature. Ch. J. Shepley made his report to the legislature of 1857, and in his revision incorporated the provisions of chapter 271 of Laws of 1856, continuing the general liability of the stockholder to the amount of his stock, for all debts contracted by the corporation during his ownership of the stock. Whilst the report of Ch. J. Shepley was pending before the legislature of 1857, and before it had been entirely adopted, that legislature by an act approved April 15, 1867, c. 58, entitled "An act to exempt stockholders in corporations from personal liability," enacted "that the stockholders of all corporations, * * * when the stock of the stockholders claiming this exemption shall have been paid in to the full amount thereof, and no part of the principal shall have been withdrawn, shall not be personally liable for the debts the corporation contracted after June 1, 1857; but when the officer having an execution against the corporation certifies thereon that he cannot find corporate property or estate wherewith to satisfy it, the stock and interest of each stockholder in the stock of the corporation shall be liable to seizure and sale on the execution in the same manner as on execution against him."

This act contains no repealing clause of any former provisions of the statutes. The Revised Statutes of 1857 were passed on the 16th day of April, 1857, approved the 17th, only two days after the approval of chapter 58 above recited. The 24th section of chapter 46 of the Revised Statutes clearly manifests a design to incorporate into the Revised Statutes the provisions of chapter 58, which had received the sanction and authority of the legislature only two days before, and to substitute the provisions of this chapter in place of those found in the revision of Ch. J. Shepley, which were simply a condensation of the act of 1856, c. 271.

From the examination of the prior statutes, it is manifest, that from the organization of this state, it has been its policy to require the capital stock of insurance companies to be fully paid in, and if the same was not done, any delinquent stockholder was subject to the suit of a creditor of the company for the amount unpaid; that in 1856 a much more stringent liability was established by which stockholders were, without any such faults on their part, either of neglecting to pay in full their subscription to the capital stock, or not allowing it to remain as a part of the capital, rendered generally liable to the amount of their stock for debts of the corporation contracted during their ownership.

This liability, onerous and severe as it manifestly was, continued until the session of the legislature of 1857, when chapter 58, Acts 1857, was enacted. But it was not entirely and absolutely extinguished by that act, although the title of the act is "An act to exempt stockholders in corporations from personal liability." The language of the act is perfectly clear and precise, and its import and effect does not admit of any question. Previous to its passage, stockholders were thus liable. The act of 1857 does not in terms repeal any of the prior acts by which such liability was created, but it declares that stockholders, whose stock has been fully paid in and no part of the principal shall have been withdrawn, shall not be personally liable. The liability certainly remained upon the stockholder, whose stock had not been fully paid in, or when a portion of the capital had been by him withdrawn, and it is quite apparent from the language employed, that on the 15th of April, the legislature did not contemplate an entire release of the stockholders from liability, but the rather did intend that if the capital was in any way deficient through the agency of the stockholder, he should continue responsible for the debts of the corporation.

In this state of the law, can we presume that two days afterwards, by the passage of the Revised Statutes, it was the intention and purpose of the legislature to abolish all liability of stockholders, a liability founded in justice and reason, and which had been so carefully guarded and protected by its enactments but a day or two previously? Could it have been the intention and design to have allowed such fraudulent dishonest proceedings on the part of the stockholders to become thus beneficial to the guilty party, and so unjust and detrimental to the innocent creditors of the company? It became necessary to incorporate into the Revised Statutes the provisions of the various acts passed at that session of the legislature, and in accomplishing this purpose, the legislature adopted the language now found in chapter 46, § 24, and at the same time it repeals chapter 58, and all other provisions of previous laws touching the liability of such stockholders.

The Revised Statutes were intended as a revision of former laws, and it has been expressly decided by the supreme court of Maine, Hughes v. Farrar, 45 Me. 72, that in the revision of the statutes of 1857, the principal design was to revise, collate and arrange the public laws, and in revising, to condense as far as practicable; that a mere change of phraseology should not be deemed a change of the laws unless there was evident intention in the legislature to make such change. The same principle as to the construction of statutes which are intended as a revision of former laws is found recognized in Gaffney v. Colvill, 6 Hill, 567; Cros-

well v. Crane, 7 Barb. 191; Taylor v. Delancy, 2 Caines, Cas. 143; Conger v. Barker, 11 Ohio St. 15.

It being certain that the general liability of stockholders existed from 1836 to 1857, and that it was not entirely abolished by the legislature of 1857, by act of April 15th, c. 58, but was thereby only modified and allowed to remain and exist in full force against this particular class of delinquent stockholders, guided by these decisions and rules of law, we cannot conclude that there was intended by the same legislature to be an entire extinction of such liability from the language it has seen fit to adopt in its revision as contained in the 46th chapter.

We do not find there any language sufficient to satisfy our minds that the legislature intended to make any change. On the contrary, it is manifest that they understood such liability existed, and they intended it should remain unabridged. After declaring expressly the liability of stockholders for corporate debts contracted prior to June 1, 1857, the act further declares "that no stockholder whose stock has fully been paid in, and no part of the principal has been withdrawn, shall be so liable for debts contracted after said first day of June." This language was designed to have some meaning, to convey some idea, to have force and effect as declaratory of the legislative will, and unless it is to be construed as recognizing a liability on the part of stockholders, thus refusing to make good their proportion of the capital stock, or who shall have diminished it after it has been paid in, the language is senseless and of none effect.

It should be remembered that all prior acts, relating to liability of stockholders in these corporations for the corporate debts, were repealed. No liability for these debts existed at common law, and the first clause of the 24th section, c. 46, was restricted to a liability for debts contracted prior to June 1, 1857. What force, propriety or object was there then in formally enacting that stockholders who had not withdrawn any portion of their capital should not be liable for debts contracted after June 1st? There was no such liability. Strike from this section this clause, leave it with only the prior clause, declaring stockholders liable for debts contracted prior to June 1st, without any other enactments on the subject, and it would make no difference whether the capital had or had not been fully paid in, or any portion thereof subsequently withdrawn, because no provision of law existed creating any liability for any debts contracted after June 1st; this provision is to be construed as exonerating such delinquent stockholders from liability for debts of the corporation contracted after June 1st.

When stockholders were already exonerated therefrom, and their liability by the previous clause expressly restricted to the debts contracted prior to June 1st, it is apparently the merest absurdity to declare a class as exempt, when by the most comprehensive language in the same section, the liability of the whole body of stockholders was limited to debts previously contracted, and by no existing provision of law were they subject to liability for debts subsequently contracted.

A statute is not to be thus construed; on the contrary, force and effect should be given to every clause, sentence and word contained in it if possible, so as to carry into effect the design and intention of the legislature. No clause or sentence should be deemed void, superfluous or unimportant; and if from the whole statute the intent is different from a literal import of some of its terms, the intent must prevail. It is our duty therefore to hold, that by this second clause the legislature intended some operative, effectual provision, other than that which preceded it, and not that it was mere surplusage, an ambiguous repetition in part of what it had expressed in the clearest language a few lines previously. In U. S. v. Freeman, 3 How. [44 U. S.] 565, Wayne, J., says, "Whenever any words of a statute are doubtful or obscure, the intention of the legislature is to be resorted to in order to find the meaning of the words. A thing which is within the intention of the maker of the statute, is as much within the statute as if it were within the letter. 'Every part of the act is to be taken into view for the purpose of discovering the mind of the legislature.'" In U. S. v. Babbitt, 1 Black [66 U. S.] 61, Swayne, J., says, "What is implied in a statute is as much a part of it as what is expressed;" and this principle was re-affirmed in Gelpcke v. Dubuque, 1 Wall. [68 U. S.] 221.

In Ryegate v. Wardsboro, 30 Vt. 749, the court says: "The question arises, are we at liberty when the words of the statute are plain and unambiguous, but are directly repugnant to the whole spirit and intent of all our legislation on the same subject, and in the same act, and seem to involve an absurdity, to disregard the letter of the law and attach to it that meaning which the legislature really intended? It is urged that when the language of a statute is plain, clear and intelligible, it is itself the best, and should be the only expositor of the meaning of the legislature. Theoretically, this argument would seem to furnish a safe rule of interpretation. Practically it is not always safe or sensible. A rigid adherence to it woud not unfrequently involve us in contradictions, absurdities and palpable violations of the real intention of the legislature. * * The letter of the law is found by experience not to be in all cases a correct guide to the true sense of the lawgiver." The 14th section of the bankrupt act in terms dissolves only those attachments made within four months from the commencement of proceedings in bankruptcy, and yet it was decided in Leighton v. Kelsey, 57 Me. 85, that this provision is equivalent to an express provi-

sion for the preservation of an attachment made more than four months before proceedings in bankruptcy, and that thereby such attachments are saved and remain valid.

If the legislature of 1857 were inquired of as to its intention and purpose in case of a delinquent stockholder who had withdrawn his capital, would it not reply that only two days prior to our enacting the Revised Statutes, we by a legislative act, chapter 58, declared our intentions in language beyond question, and we did not intend any change by the words we have employed in the revision. Our meaning was to hold him responsible for such conduct to the creditors of the company, and although, in revising the law, we may not have used the clearest language to convey the idea, we have in fact declared that if the stockholder pays in his stock and permits it to remain unimpaired to satisfy corporate debts, he shall by so doing be exonerated from liability for such debts, and by thus exonerating him in such case, have we not only impliedly, but most manifestly indicated that we intended he should be accountable, if he should so conduct as to diminish the fund which creditors should always be at liberty to resort to wholly unimpaired.

That such was the design of the legislature, we gather from the further provision of the same section, by which the security provided for a creditor for debts of the corporation, contracted after June 1st, is that the stock of the individual stockholder in the corporation may be seized and sold on the execution. What possible profit or advantage would such a remedy prove to a creditor, if each stockholder could with entire impunity withdraw from the corporation the capital he had paid in? If a corporation on the verge of insolvency could with safety to its stockholders divide among them its capital, leaving nothing but the shares of a mere nominal value, such a course would in all cases be resorted to, and thereby the remedy of the creditor would be rendered of no avail whatever. The 33d section of chapter 46 declares that "corporations, &c., * * * are not allowed to divide any of their corporate property so as to reduce their stock below its par value, until all debts are paid, and then for the purpose of closing its concerns; and in case of such unlawful division, a judgment creditor may file a bill in equity against such stockholder, and the court may decree that any such property may be paid to such creditor in satisfaction of his judgment."

This remedy we hold to be cumulative, additional to that of an action of the case given the 26th section, and not in substitution thereof; that the liability of a stockholder for such a diminution of the corporate funds is clearly and distinctly recognized by this section from the same chapter of the Revised Statutes, and which was a mere revision and condensation of chapter 54, Act 1848. The rule of the federal courts is to adopt the construction of a state statute given to it by the supreme court of the state, and it would have afforded us great satisfaction if we could have found that the question here presented had been decided by the supreme court of Maine. Not being advised of such a decision, we have been compelled to form our own conclusions as to the construction of this statute, unaided by the investigations of the courts of the state, and we are of opinion that a stockholder of a corporation, who has withdrawn a portion of the capital, is by so doing, by force of chapter 46 of the Revised Statutes rendered liable to a suit of the creditor of the corporation on a debt contracted since June 1, 1857. Has the defendant violated the provisions of the statute by an illegal withdrawal of any portion of the capital stock of the company?

The Piscataqua Mutual Fire & Marine Insurance Company was incorporated by the legislature of Maine, as a mutual office by chapter 535, approved March 17, 1855. By section 12, a guarantee capital was authorized not exceeding $100,000, and the directors were empowered "to allow therefor a sum not exceeding six per cent. per annum, and may use, negotiate or assess the same, only for the purpose of paying the just debts of the company." By chapter 426, Laws 1860, authority was given to increase the guarantee capital of the company to $500,000, and by section 2 "the holders of the guarantee capital shall receive such share of the net profits of the company as may be provided by the charter and by-laws of said company, and declared by vote of the directors." By an amendment of the charter, chapter 168, Acts 1862, the company was made a stock company and by the first section of that chapter it was provided "that the guarantee capital shall not be less than $100,000, divided into shares of $100 each," and that the capital "shall be vested in the name of said company, and be held for the payment of all losses and liabilities incurred by said company during the continuance of its charter, or while any liabilities remain outstanding against it."

The 17th section of chapter 49 of the Revised Statutes provides, "that no dividend shall be made by any insurance company after any diminution of the capital stock by losses, depreciation or otherwise, until such diminution is supplied by actual funds, or the value restored;" and we do not find, in any of the provisions of the charter of the Piscataqua Fire and Marine Insurance Co. or of its amendments, any authority to contravene this general law, and distribute as dividends a portion of the capital.

The first section of chapter 168, Act 1862, would the rather require that the whole guarantee capital should be held for the payment of losses, &c., so long as any liabilities were outstanding against the company. By chapter 384, Laws 1867, the surrender of the charter of this company was accepted;

but it was expressly enacted that any special remedies against its officers or stockholders shall not be affected thereby; nor shall this act relieve them, or any of them, from any personal liabilities under any of the statutes of this state."

It is shown that June 1, 1863, the defendant became the owner and received a certificate of eighty-two shares of the stock of this company, paying the company therefor by a transfer to it of eighty-two shares of the Dover and Winnepisseogee Railroad Company stock. He continued to stand upon the books of this company as the owner of these eighty-two shares until May, 1866, when he surrendered to the company the certificate of this stock and received back the eighty-two shares of railroad stock. The defendant received his dividends from the insurance company on the eighty-two shares of its stock standing in his name for the years 1864 and 1865. The directors, by a vote of May 5, 1866, voted, "that the president and secretary be directed to carry into effect the contract with Wm. Hill, according to the obligation of said company under date of June 1, 1863, and that they be authorized and directed to transfer to Wm. Hill eighty-two shares of the Dover & Win. R. R. Co."

The contract referred to by this vote is not produced, and there is nothing found on the record of the directors, excepting the above vote, relating to such a contract, or in any manner referring to or sanctioning the same, which, it is stated, was an agreement by the insurance company to return to Hill, on demand, the railroad stock received by the company from him in exchange for a like amount of its own stock. It is manifest that in May, 1866, when Hill received from this company the reconveyance of the eighty-two shares of railroad stock, the insurance company was deeply insolvent; and we are well satisfied that the defendant was aware of the condition of the company, as he had for for a long time been one of its directors and treasurer.

Their policy of insurance having been procured from the company, by the plaintiffs, prior to these transactions between the defendant and the insurance company, the right of the plaintiffs to resort to the capital of the company, for payment of their demand against the company, as it existed at the date of their contract cannot be impaired by these proceedings. It was a part of the contract that the capital should be applied to the liquidation of the debts of the corporation, and no part of it could be thus withdrawn, so as to impair the rights and securities of the plaintiffs. Such were the general provisions of law on this subject, and such also were the provisions of the charter of this company as amended in 1862, c. 168.

At the date of the plaintiff's policy, the defendant, by the records of the company, was the absolute unqualified owner of eighty-two shares of its stock, and the eighty-two shares of the railroad stock appeared on its books as a portion of the capital of said insurance company. There was nothing whatever, so far as is made to appear, to indicate any other rights or interests than those of full, complete, actual ownership by the several parties of the stocks in the several corporations according to the terms of their certificates. The records of the directors of the insurance company do not contain any note or indication that the defendant had a right to surrender his stock in the insurance company, and on demand to withdraw from its capital the eighty-two shares of railroad stock. From these circumstances, taken in connection with the acts of ownership of the parties over the several stocks, the insurance company receiving the dividends on the railroad stock and paying to the defendant dividends on the stock thus held by him in the insurance company, and the defendant receiving them until the company had become deeply insolvent and its stock of no value, we are of opinion he should not have withdrawn the eighty-two shares of railroad stock and cancelled his certificate of a like number of shares in the insurance company, although the company might perhaps have been bound to carry out this arrangement if the rights of other parties were not affected thereby. As against the plaintiffs, at the time creditors of said company, we hold the transaction as entirely unauthorized, and in its legal operation and effect a prohibited withdrawal of the value of $8,200, of the capital stock of said Piscataqua Fire and Marine Ins. Co.

On the first of August, 1862, the defendant subscribed and paid for 225 shares of the stock of this company for which he received certificate No. 222.

Upon this stock he was paid dividends at the rate of eight per cent. per annum to Nov., 1865. Dec. 24, 1862, it appears from the directors' records it was voted "that the treasurer, Wm. Hill, be and he is thereby authorized to purchase the following certificates of stock, viz: No. 222 for 225 shares, No. * * * amounting in all to 434 shares of the value of $43,400, and the said Hill is authorized to issue company notes for the same, payable on demand and bearing semi-annual interest."

This vote remained dormant, no action of any kind was taken under it for years, so far as it appears, but on the contrary, it was disregarded by all parties, and Hill drew his dividends on this stock at the rate of eight per cent. until Nov., 1865. Thirteen of the shares were disposed of by Hill in 1865, and the certificate for the balance was cancelled in 1866, and Hill received therefor a note of the insurance company for $21,200, being the par value of said shares. This note bears date Feb. 1, 1866, but from all the evidence we find that the project was not carried into effect till sometime afterward, and the note then dated back to Feb. 1st, in order to con-

ceal and cover up the transaction if possible. This note for $21,200, is numbered 156 and dated Feb. 1st. Note No. 155 was dated Feb. 8th. That numbered 157 was dated April 5th. The defendant admits, "that from an examination of the cancellation of the stock certificate it looks as if it was written April 27, 1866, and then Feb. 1, 1866 was written over it."

This operation appears on the company's journal, the entry immediately preceding it bearing date April 25th, and the next subsequent April 26th. We are satisfied that this scheme was not completed until April 26th. The company note was then executed, the parties, the better to conceal their fraudulent designs, dating it Feb. 1st. Hill has since received from the property of the corporation the full amount of this note with interest. This manoeuvre finds no support in the vote of Dec. 26, 1862. All parties were satisfied that they were engaged in an illegal enterprise as is manifest from the false dates inserted by them in the instruments. When it was attempted, the company was insolvent, and it was simply a plan to allow the defendant to cancel his certificate of 212 shares of the worthless stock of this corporation and receive therefor the note of the company for their par value. On the same day a very large amount of notes and other property of the corporation was assigned to this defendant, a portion of which was applied by him to the payment of this note. This whole proceeding was a gross fraud, and as against the plaintiffs, the defendant cannot be permitted to reap any profit therefrom, but must be considered as having thereby withdrawn from the capital of this insolvent company the further sum of $21,200. The company being greatly embarrassed, on April 27th, and May 4, 1866, assigned to the defendant notes and other property of the company to the amount of about $160,000, he being also a bona fide creditor of the company for a very large sum. He collected from the property thus assigned to him $68,502.87, leaving uncollected a large amount. He states that after crediting to the company the sums thus collected, there remained due to him in January, 1869, about $20,000; but to produce this result, he charges the company with the note of $21,200, and interest, and also a note of $3,269, and interest, received by him for dividends which were made in contravention of the general provisions of the statutes, and which were not authorized by the charter of the company nor its amendments, if thereby the capital stock was diminished, which is beyond question; the books of the company also show, that he received for dividends about $4,000 more, he being the owner in all of 500 shares in the stock of said company. The defendant was summoned as trustee of the insurance company on the 8th of June, 1866, on a suit in favor of Albert Bowker, in which suit the defendant was defaulted as trustee, and a judgment was rendered April 8, 1868, against the corporation for $5,016.44 damages and $82.77 costs. An action of sci. fa. is now pending against Hill as trustee in said cause before the law court for York county, and it is claimed by his counsel that he should not be held accountable in this present suit on account of this trustee process, which was instituted long before the present plaintiffs commenced their action against the company. By the 27th section of chapter 46, the stockholder is permitted to "prove in reduction of his liability the amount of corporation debts which he has previously paid, and which have not been repaid to him by the corporation; also, any debt due him from the corporation for which, he at the time might maintain an action at law against it; and may show any other legal cause why judgment should not be rendered against him."

From the exhibit made by the defendant, we do not find he has paid any debts of the corporation which have not been repaid to him, or that he has any other claim on the company; and the pendency of the action of sci. fa. against him does not establish a legal cause why judgment should not be rendered in the present suit. We entertain great doubt as to his liability to be charged as trustee in said cause, and we certainly can perceive no pretence to hold him chargeable on account of the eighty-two shares of railroad stock, which he withdrew from the company in May, 1866. We are also well satisfied, that if he should be held chargeable as trustee, and compelled to pay the full amount of Bowker's judgment against the corporation, that he held in his hands and possession the property and estate of the corporation more than sufficient for his indemnity, after deducting from his claims against the corporation the demands which are manifestly illegal, and for which the corporation was not legally accountable to him. It is claimed that this withdrawal of the eighty-two shares of the railroad stock and of the $21,200, in payment for the 212 shares of the company's stock, if illegal, was a mere nullity and void, and that the case must stand therefore, as if the attempt was unsuccessful and without effect: that the defendant, in law, still continues the owner of these shares in the capital stock of the insurance company. If this is the legal result, then no stockholder could be held accountable for a withdrawal of a portion of the capital stock of the corporation; as in all such cases, the withdrawal of the capital is prohibited, and is in express violation of law, when thereby the capital is reduced below its par value. This defendant, having in our judgment violated the law, such violation, by the force of the statute renders him amenable to the plaintiffs' suit, and when the plaintiffs resort to the remedy provided for them in the act, it is not for the defendant to reply, true, my conduct was in violation of the law, but being so, it was without effect. The law having forbidden my doing as I did, I have not accomplished my purpose.

So far as these creditors are concerned he has accomplished it. The capital of the company is de facto reduced just the amount he has withdrawn, and he must abide the consequences. It is also suggested, that the trustees under the act for closing the affairs of this company have commenced a process in equity against this defendant to recover back from him the property of the corporation thus illegally obtained by him, and that this bill is now pending before the supreme judicial court of York county. It is a sufficient answer to this suggestion that the bill in equity was not filed until Dec., 1868, and the plaintiffs' rights as creditors of the corporation had become vested long previously, and were expressly saved to them by the act accepting the surrender of the charter and authorizing the appointment of trustees to close its concerns.

The defendant being held accountable for debts of the corporation contracted after June, 1857, by reason of his withdrawal of a portion of the capital stock of the company, the limitation of liability for one year does not apply to the present suit. The case shows that the present action was seasonably commenced, and that all the requirements of the statutes as to demand, notice, &c., were complied with. The plaintiffs therefore are entitled to recover from the defendant the amount of their execution against the Piscataqua Fire and Marine Insurance Co., with interests and costs. Defendant defaulted.

Case No. 8,846.

McKAY v. MORRILL.

[Nowhere reported; opinion not now accessible.]

Case No. 8,847.

McKAY v. WOOSTER et al.

[2 Sawy. 373; 6 Fish. Pat. Cas. 375; 6 Am. Law T. Rep. 169; 3 O. G. 441; 5 Pac. Law Rep. 105.] [1]

Circuit Court, D. California. April 7, 1873.

PATENTS—ASSIGNMENT OF TERRITORY—RIGHT TO VEND THEREIN—LAWFUL SALE—EMANCIPATION.

1. When a patented article has been lawfully made and sold without restriction or condition, it is no longer within the monopoly, and the purchaser may use it without restriction as to time or place.

[Cited in Holiday v. Mattheson, 24 Fed. 186; Hobbie v. Jennison, 40 Fed. 891; Rice v. Boss, 46 Fed. 197; California Electrical Works v. Finck, 47 Fed. 586.]

2. The assignee of all the right, title and interest of the patentee in his invention and patent, in a specified territory, without any restriction upon his right to vend in said territory, may, with respect to the rights of a subsequent assignee for other territory, lawfully sell the patented article within his own territory, without restriction or condition.

[Cited in Hatch v. Adams, 22 Fed. 438; Hobbie v. Smith, 27 Fed. 662; Graff v. Boesch, 33 Fed. 279; Rice v. Boss, 46 Fed. 197.]

3. B. is assignee, without restriction or condition, of all the rights of the patentees for the territory east of the Rocky Mountains, in a patent for an improved case for transporting eggs. M. is a subsequent assignee for all the territory west of the Rocky Mountains. E. purchased of B. at Chicago, a number of his patent cases, filled them with eggs in Iowa, and transported the eggs in said cases to San Francisco: *Held*, that such use of the cases west of the Rocky Mountains is not an infringement of the rights of M., under his assignment for the territory west of the Rocky Mountains.

Bill in equity [by David McKay against John B. Wooster and others,] to restrain the infringement of a patent right, by use and sale of a patented case for the transportation of eggs. The following facts appear from the stipulation of the parties filed in the case: On February 26, 1867, a patent was duly issued to J. L. and G. W. Stevens, of San Francisco, for an "improvement in cases for transporting eggs." In August, 1872, said patentees, by deed, granted and assigned to H. F. Billings, of Chicago, in the state of Illinois, "for, to and in all the states and territories of the United States, east of the Rocky Mountains, all the right, title and interest which they, the said John L. and George W. Stevens had in and to the said letters patent, and the invention as secured to them by said letters patent, and all their rights, liberties, privileges and franchises which they had or might acquire by or under the said letters patent," which said deed was duly recorded. Since said assignment, said Billings has erected a manufactory for said patent cases for the transportation of eggs, at Chicago, in the state of Illinois, and has manufactured, in accordance with the specifications of said patent, and he still continues to manufacture said cases; and he has sold and he continues to sell the same "to the public, or to whomsoever desires or desired to purchase them, without any restriction or reservation whatsoever." On the seventeenth of October, 1872, said J. L. and George W. Stevens made a similar transfer of all their right, title and interest in said patent and invention, in and to all the states and territories lying west of the Rocky Mountains, to the complainant, David McKay, who thereupon entered upon the manufacture of said patent cases at San Francisco; and he has ever since continued to manufacture and sell the same for use in that portion of the United States lying west of the Rocky Mountains.

The defendants are commission merchants, doing business at San Francisco, receiving goods consigned by merchants east of the Rocky Mountains, and selling the same on commission. M. Evans & Co., are merchants, doing business at Ames, in the state of Iowa, and a part of their business is dealing in eggs. Said Evans & Co., between the

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

seventeenth of October, 1872, and the filing of the bill in this case, purchased in the usual course of business at Chicago, of said Billings, "without any restrictions or reservation" on his part, a number of said patent cases manufactured by him as aforesaid, filled them with eggs in the state of Iowa, for the purpose of transportation, and shipped them so filled with eggs to defendants at San Francisco, who received them and sold the eggs on commission in the regular course of their business as commission merchants. The use of the aforesaid cases in the transportation of eggs from the Rocky Mountains to San Francisco, is the infringement complained of; and the threatened continuance of the practice, and further use and sale of the cases so received, the injuries sought to be restrained. Numerous other parties are engaged in similar transactions.

Holland & Spencer, for complainants.

H. H. Haight and Clark Churchill, for defendants.

SAWYER, Circuit Judge (after stating the facts). Under the view I take, the only question necessary to determine, seems to be precisely the same decided by Shepley, Circuit Judge, in Adams v. Burke [Case No. 50], viz: "Does the purchase of a patented article, lawfully manufactured, and sold without restriction or condition, within his territory by the territorial assignee of a patent right, convey to the purchaser the right to use or sell the article in another territory, for which another person has taken an assignment of the same patent?"

The learned judge answers the question in the affirmative. This is the only case I have found in which the precise question has ever been considered. One would suppose that a question of so much importance, and so likely to arise, would long since have been presented to the supreme court, and authoritatively determined, but it does not appear to have been done. It is insisted that the case cited is not correctly decided, and argued with a great deal of force, that since Lockhart and Seeley in that case, and Billings in this, only purchased the right of the patentees in a limited territory, they did not themselves have the right to supply, either directly or indirectly, other territory than that purchased; that their right only extended to making, using and vending to be used in the specific territory purchased; that, as they had themselves no right to use in other territory, their vendees could acquire no greater right than they themselves owned; that their purchase of the right to a specific territory necessarily limited their power to sell the machine to be used in that territory alone; that this limitation and restriction is necessarily implied in the sale, even without any express stipulation to that effect; that the patent under the fifth section of the act of congress of 1836 [5 Stat. 117], in terms, gives the patentee "the full, exclusive right and liberty of making, using and vending to others to be used," the said invention throughout the jurisdiction of the United States; that the eleventh section authorizes him to assign the whole or part of his interest for "any specific part or portion of the United States;" that when he assigns his entire interest for a specified part, he assigns the right acquired under the fifth section of "making, using, and vending to others to be used," in that specific part, and "to be used, as well as to make and use in that part alone;" and, therefore, when an assignee of a specific territory sells a machine in that territory, the machine so sold is taken out of the monopoly as to that territory only, there being no power in the vendor to withdraw it from the monopoly, as to other territory in which he has no monopoly or control, and that he can only dispose of his own share of the monopoly, or liberate therefrom to the extent of his own interest therein. This it is argued, is the reasonable construction of the law, and the contract of assignment of the right of the patentee to a specific part of the territory authorized by the act. The consequences of a different view are also urged in support of the position taken, some of which, it is said, find a striking illustration in this case. Thus, it is argued, that labor and materials being cheaper, and the other facilities for cheap manufacture being greater at Chicago than at San Francisco, the patent cases for transporting eggs can be made at a cost so much lower at Chicago than at San Francisco, that the purchaser of the Chicago manufacture could undersell the complainant in his own territory. Eggs, also, being so much cheaper east than west of the Rocky Mountains, large quantities are there purchased, and sent to these Western markets. The transportation of the patent cases costs nothing, because it is necessary in shipping to use boxes or cases of some kind, and these require no more room than others.

The freight is paid on the eggs as merchandise, and the greater security against breakage, and the improved condition of the eggs brought in these cases, more than compensate for their cost at Chicago. Those dealing in eggs, therefore, can purchase these patent cases at Chicago, ship them with eggs from any part of the United States east to parts westward of the Rocky Mountains, and after disposing of their contents, sell them at half cost, or even give them away, and still make a remunerative profit on their transaction. There is no use for the cases for return freight. Thus the entire market west of the Rocky Mountains, including nearly one third of the territory of the United States, can be wholly supplied, indirectly, through middlemen, at prices less than it is possible to make the article for here, by parties who have only purchased the territory east, to the utter loss or ruin of those who have pur-

chased and paid for the territory west of the Rocky Mountains. So, again, it is said, it may well be in the case of many inventions, that some particular locality affords such facilities for cheap manufacture that the whole United States may be supplied from that point at prices that would defy competition in any other locality, so that it would only be necessary to purchase the right for the territory on which the factory is located, in order, through middlemen, to practically enjoy a monopoly of the whole country.

It is easy to see that the result of supplying the whole country, indirectly through the merchant, who is usually the seller to the consumer, is precisely the same as though the maker himself directly sells to the consumer. It must be confessed that these arguments are entitled to grave consideration. Enough has been said in this, and in the case cited, to render it manifest that great practical inconvenience may result from either view.

In the absence of an authoritative adjudication, I should hesitate long before venturing to dissent from a well considered decision of so learned, experienced and eminent a jurist as Judge Shepley. But in this instance, I can perceive no good ground for doubting the soundness of the proposition laid down in the guarded form in which it is stated in the case cited.

An important question not discussed by the learned judge, may, however, arise, as to when, or under what state of facts, a patented machine may be regarded as "lawfully * * * sold without restriction or condition, within his territory, by the territorial assignee of a patent right."

In the case now under consideration, it will be seen by reference to the stipulated facts, that the assignment to Billings was made in August, 1872, while that to complainant was not made till October following. If there is any conflict, therefore, in the rights claimed by the parties, the complainant's assignment, so far as the conflict is concerned, being subsequent in time, was taken in subordination to the prior grant to Billings—that is to say, he could only take by his assignment what was left after Billings' interest had been carved out. At the date of the assignment to Billings, the patentees were still the holders of the entire interest under the patent. Had they, at that time, at Chicago, sold one of the patented articles in question, without restriction or condition, that, undoubtedly, would have been a lawful sale without restriction or condition, and the article so sold would have been taken out of the monopoly, and the purchaser, or any one deriving title through him, would have been entitled to use it till worn out in any part of the United States. The patentee himself could not, by a subsequent assignment of his patent, have limited the right of the purchaser already vested. The vendor, being at that time entitled to the whole monopoly for the entire jurisdiction of the United States, it was competent for him to wholly emancipate the article sold by taking the entire royalty for the use in any part of the territory. And a sale, without restriction or limitation, would work such emancipation. In such case any party subsequently purchasing the right to any specific portion of territory, would take that right subject to the use of the machine so sold, at any point within the territory purchased. What the patentees could do with respect to one machine, they could do as to any number of machines in existence, or to be brought into existence. What they could do themselves, they could by contract authorize, or convey the right to any other party to do. As the patentees themselves could lawfully sell these patented articles at Chicago without restriction or condition, so as to authorize the purchasers, or those claiming under them, to use the machine anywhere in the United States, they could convey the right to Billings to lawfully do the same. This authority to emancipate from the monopoly by an unrestricted sale was a part of their "right, title and interest in the invention secured by the patent," that could be exercised and enjoyed at Chicago, or other place east of the Rocky Mountains, as well as elsewhere. The assignment to Billings is in the broadest terms. It is of "all the right, title and interest which the said John L. and George W. Stevens had in and to the said letters patent, and the invention as secured to them by said letters patent, and all their rights, liberties, privileges and franchises, which they had, or might acquire by or under said letters patent," "for, to and in all the states and territories of the United States east of the Rocky Mountains." There is no limitation of the power to vend within the territory. The patentees could lawfully make without restriction or condition, could use without restriction or condition, or could vend without restriction or condition anywhere within the specified territory, and all their rights they conveyed to Billings without restriction or condition, who, thereupon, stepped into the shoes of the patentees, as to the territory sold. Had they intended to limit the right of vending, "to vending to be used" by the purchasers within the territory sold only, they should, at least have so specified the intention, and by some apt words restricted the right of use in the deed of assignment. This unrestricted assignment of the right to vend, put it in the power of Billings to lawfully vend the patented article within his territory without restriction or condition, and, thereby, wholly emancipate from the monopoly the articles so sold. The complainant subsequently purchased his territory, and, whatever the terms of his grant, he could, of course, only obtain what was left of the franchise, or monopoly. As the patentees, after their sale to Billings, could not object to sales by him without re-

strictions or conditions, their subsequent assignee cannot object. The latter's right is subject to the right of Billings, and those who have lawfully purchased without restriction or condition from him. This is as far as it is necessary to go in this case. It is unnecessary, now, to consider the effect of an express limitation in the deed of assignment of the right to vend for the purpose of use only within the purchased territory; or how far the complainant, being a subsequent purchaser of territory, can lawfully vend without restriction or condition, so as to wholly emancipate the article sold from the monopoly, and enable the purchasers of the patented article of his manufacture to use it in the territory of Billings.

If there is any practical hardship in the construction adopted of the law and contract under it, and it should turn out to be the correct construction, then the patentee, when he desires to assign, must consider whether he can afford to do so without restriction, and the subsequent purchaser, when he wishes to buy, must determine whether he can afford to do so with the burden entailed upon his territory by a prior grant unlimited in the particulars indicated. There must be a decree for defendants. Let the bill be dismissed with costs.

[NOTE. This case was affirmed by the supreme court at the October term, 1873. The case was taken to the supreme court on appeal, where the decree of the court below was affirmed, with costs, December 15, 1873. There was no opinion, and the case is not reported.

[For other cases involving this patent, see note to Coburn v. Schroeder, 8 Fed. 519.]

Case No. 8,848.

Ex parte McKEAN.

[3 Hughes, 23.] [1]

District Court, E. D. Virginia. April 19, 1878.

HABEAS CORPUS — FUGITIVE FROM JUSTICE — MITTIMUS — WHAT NECESSARY THEREIN.

Where a citizen charged with an offence committed in another state has been committed for trial by the committing magistrate of a state, it is competent for a court of the United States on a writ of habeas corpus to inquire into the validity of the mittimus, and to discharge the prisoner unless, 1. There is a charge of crime against the prisoner in the state from which he is alleged to be fugitive; 2. There be a demand by the governor of that state for his arrest and detention; 3. There be an indictment found in the state from which the prisoner has fled, or an affidavit made and certified by the governor of that state; and 4. The prisoner should have been in the state where the crime was committed, and have fled from it.

[Cited in Ex parte Brown, 28 Fed. 654.]

The petition is in these words: "Your petitioner, A. W. McKean, would respectfully represent to the court that he is a resident of the state of New York; that he is a commercial traveller representing the house of Kelly & Co., in the town of Rochester; that a few days ago he came to the city of Richmond in the interests of his house; that on the 17th day of April, 1878, he was arrested by the police of the city upon suspicion of being a fugitive from justice in that he has been guilty of forgery in the state of Kansas; that this arrest was made upon the bare description of the forger in a detective newspaper; that on the 18th of the month he was carried before the Hon. J. J. White, police justice of said city, and was by him committed to jail to await the action of the hustings court. The petitioner would state that he is wholly innocent of any such crime, that he is illegally held in custody, without just or sufficient cause. In consideration whereof your petitioner prays that your honor will issue a writ of habeas corpus directed," etc. The writ was issued, and on the hearing the following was the decision of the court:

HUGHES, District Judge. The constitution of the United States, article 4, section 2, authorizes the executive of any state from which a person accused of crime has fled to demand of the executive of the state into which he has fled, that he be delivered up and removed to the state having jurisdiction of the crime; and congress has provided (section 5278, Rev. St.) that the arrest for that purpose be when there is produced a copy of an indictment found, or an affidavit made before a magistrate certified to be authentic by the executive of the state where the crime is charged to have been committed. The state of Virginia has adopted provisions similar to if not identical with those of the constitution and laws of the United States on this subject, and whether she had done so expressly or not, these latter provisions are a part of her law and are obligatory upon her officers and courts. It has been held that the power of congress to legislate on this subject of the delivery of fugitives from one state into another is exclusive, and that its law is the paramount law of the subject. Prigg v. Pennsylvania, 16 Pet. [41 U. S.] 539; Martin's Case [Case No. 9,154]; Jones v. Vanzandt [Id. 7,502]; Smith's Case [Id. 12,968] It was competent for this court to issue the writ in this case, because congress has given jurisdiction to the courts and judges of the United States to issue the writ of habeas corpus in cases of prisoners who are in jail, or in custody in violation of the constitution or any law of the United States. So that the only question before me is whether this prisoner is illegally confined, that is to say, whether he is confined upon a charge and upon proofs illegal or insufficient in contemplation of the law under which he has been apprehended and held.

It would seem plain from the language of the laws of congress and of Virginia that, in order to justify an arrest and detention in a case like the present one, there must

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

first be a charge of crime against the prisoner in the state where the crime is alleged to have been committed; that there must secondly be a demand by the governor of that state upon this for the arrest and detention; thirdly, that the evidence on which the arrest is based must be an indictment found in the state from which the prisoner has fled, or an affidavit made and certified by the governor of that state; and it would seem obvious, fourthly, that the prisoner should have been in the state where the crime was committed, and had fled from it. The law of Virginia does not strictly conform in language or substance to the law of congress describing the evidence on which the arrest and detention shall be made. The law of congress requires that they shall be made on production of the copy of an indictment found, or on production of an affidavit made before a competent magistrate, "certified as authentic by the executive of the state from whence the prisoner so charged has fled;" while the law of Virginia provides that the arrest may be made "upon complaint on oath or other satisfactory evidence that such person committed the offence." I think the intention of the legislature of Virginia was to make some such proof as that contemplated by the act of congress, requisite to the arrest of a person charged with crime in another state, but it does not in terms require that the affidavit or indictment should come certified by the executive of the state where the crime was committed. It seems to me that the law of the state ought to be construed in connection with the law of congress of which it is a part; and that on habeas corpus, it is competent for me to look into the proceedings which took place before the committing magistrate, for the purpose of determining whether the requirements of the law of congress in respect to the arrest and detention of fugitives from justice from other states have been observed. If the committing magistrate were merely holding this prisoner from day to day, awaiting such testimony as the law requires, I should remand the prisoner to him and await his final action; because it is customary as an act of comity between states that, in such cases, a reasonable time shall be allowed for sending on the requisite proofs of the crime and of the charges from the state where the crime was committed. But it seems that the magistrate has taken final action in the matter and exhausted the powers intrusted to him by the state law, so that the prisoner is before me on the validity of the mittimus, which is made part of the return of the jailer of Richmond to the writ of habeas corpus. The committing order of the magistrate does not set out in terms such facts as are required by law to give him authority to arrest and detain this prisoner. There is no demand from another state. There is no evidence that a crime has been committed. Nor is there evidence that this prisoner committed such a crime as the magistrate knew of only by hearsay. The prisoner must be discharged.

McKEAN (ALLEN v.). See Case No. 229.

McKEAN RAILROAD & NAVIGATION CO. (WINANS v.). See Case No. 17,862.

McKECHNIE (UNITED STATES v.). See Case No. 15,682.

McKEE (BRADLEY v.). See Case No. 1,784.

Case No. 8,849.

McKEE v. The PEARL.

[Newb. 129.] [1]

District Court, D. Michigan. 1857.[2]

COLLISION—SCHOONER AND STEAMER — HEAVE IN STAYS.

1. A vessel when beating down the river, need not "heave in stays" in meeting a steamboat, but must keep her course.

2. It is the duty of the steamboat to avoid the vessel.

[Libel in rem by Frederick McKee, owner of the Pilot, against the Pearl.]

The schooner Pilot was beating down Detroit river in broad daylight, when near the head of Bois Blanc island, and close hauled on the starboard track, she was struck on her starboard side by the steamboat Pearl ascending the river, both vessels being near the buoy on the Canada shore.

John S. Newberry, for libelant.

Lothrop & Duffield, for respondent.

WILKINS, District Judge. The steamboat was ascending and the schooner Pilot was beating down the river. The important fact is admitted by the answer, which, according to the principles settled in [St. John v. Paine] 10 How. [51 U. S.] 580, fixes the fault on the steamboat. The answer alleges "that the schooner did not go about or heave in stays, but kept on her course." Being propelled by sails, this was her duty and no fault; and as settled by this court in The Whip and Michigan [Case No. 17,511], the steamboat should have avoided her. The collision occurred in broad daylight, and could have been, and should have been, avoided by the steamboat.

By the proofs submitted, the schooner sustained considerable damage by detention, repairs and injury to cargo, amounting in all, by the estimate furnished, to $265.81. Decree for that amount.

[This cause was taken by appeal to the circuit court, where the decree of this court was reversed. The Pilot, Case No. 11,168.]

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

[2] [Reversed in Case No. 11,168.]

Case No. 8,850.

McKEE v. UNITED STATES.

[Hoff. Land Cas. 173.] [1]

District Court, N. D. California. Dec. Term, 1856.

MEXICAN LAND GRANT — SUBSEQUENT PERFORMANCE OF CONDITIONS—OCCUPATION AND INHABITATION.

The objection by the board met by further testimony taken in this court.

Claim for eight leagues of land in Colusi county, rejected by the board, and appealed by claimant [William H. McKee].

E. W. F. Sloan, for appellant.

William Blanding, U. S. Atty., for the United States.

HOFFMAN, District Judge. The claim in this case was rejected by the board, not however because any doubt was entertained as to the genuineness of the grant, but because no sufficient performance of the conditions was shown. The subsequent decision of the supreme court in the Case of Fremont has established a different rule for our guidance, and the testimony taken in this court on appeal is abundantly sufficient to remove the only objection urged by the board to a confirmation of the claim. Abner Bryan swears that the rancho [Jacinto] claimed by the appellant was known as Dr. McKee's rancho; that in 1846 and 1847 he was employed by McKee to take charge of and cultivate it; that he built a house upon and planted it with corn, wheat and potatoes; that he had upon it about one hundred head of cattle, and from twenty-five to thirty horses and some hogs. The witness remained on the land until the end of 1847, when he left it, and Capt. G. Swift took charge of the stock. José Castro testifies that Rodrigues, the original grantee, was a civil and military officer of the Mexican government; that on receiving his grant he was not required to occupy the land, as his services were needed in the army. He was subsequently transferred from the military to the civil service, but was required to hold himself in readiness for service in the army. He continued to be employed until July, 1846, in the custom house at Monterey, except at intervals when he was called into military service. The witness further states that at the time of obtaining his grant in 1844, the government owed him about half of what he had earned as an officer of the army, but it was without funds to pay him, and the witness states his belief that the debt has never been paid. The grant in this case does not contain the usual condition of occupation and inhabitation, and the above testimony satisfactorily explains the reasons of the omission.

We think that there is no evidence in the case to authorize the presumption that the claim was abandoned by the grantee, or that he is now attempting to resume it owing to the enhanced value of the land. On the contrary, the reasons of his delay are fully explained, and were such as were not only received by the former government, but were immediately owing to their own express commands. We think, therefore, that a decree of confirmation should be entered.

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

McKEE (UNITED STATES v.). See Cases Nos. 15,683–15,689.

Case No. 8,851.

McKEE v. VERNON COUNTY.

[3 Dill. 210.] [1]

Circuit Court, W. D. Missouri. 1874.

MUNICIPAL BONDS—SUBSTITUTION OF NEW BONDS FOR OLD—ESTOPPEL.

The agent of the county and the presiding justice of the county court substituted engraved bonds, the signatures on the coupons of which were lithographed, for private bonds, the new bonds being of the same date and amount as the old, and the old being at the same time destroyed; there was no order of the county court for the substitution, but the county afterwards paid interest for two years, retained the certificate of stock, which was the consideration of the bonds, and entered of record other reasons than the substitution, for ceasing to pay interest on the new bonds: *Held* that the plea of non est factum was not sustainable as a defense to an action to recover coupons on the new bonds.

This suit [by Logan McKee] was for collection of interest coupons from bonds proved to have been executed by the presiding justice and clerk of the county court, and substituted, with the knowledge of the county agent, for other bonds regularly issued about seven months previously, which were surrendered and destroyed at the time of the substitution. Plea, non est factum. Reply (1) in denial; (2) estoppel. It appeared in proof that the county held $300,000 of railroad stock, and the railroad was built through the county. The defendant claimed that the surrender and destruction of the old bonds by their holders released the county, and the issue and delivery of new bonds without any order of the county court were without authority and that the bonds were therefore void. A jury was waived and the case tried to the court.

Mr. Stephenson, Mr. Shippen, and Ewing & Smith, for plaintiff.

Mr. Stone, Mr. Burton, Mr. Jackson, and W. P. Johnson, for the county.

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

DILLON, Circuit Judge (orally). This is an action brought against Vernon county on coupons attached to bonds issued under authority contained in the charter of the Tebo and Neosho Railroad Company, approved in

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

January, 1860, which conferred on the county court power to take stock in such company and issue bonds in payment therefor. The county court made a subscription to the capital stock and issued bonds to the amount of three hundred thousand dollars. This action is on the coupons for interest upon some of these bonds. The defendant pleads non est factum, to which plaintiff replies by denial, and by setting up that the county is estopped, 1st, by its having levied taxes and paid coupons up to 1872, making two or three payments; and 2d, by having received a certificate of its stock from the railroad company, and still holding it; whereby the plaintiff claims the case is brought within the decision in 13 Wall. Pendleton Co. v. Amy, 13 Wall. [80 U. S.] 297.

Upon the trial it appeared as follows: The county court made an order of subscription for the railroad stock, and appointed Mr. Birdseye, as the agent of the county, directing him to prepare the bonds, which were accordingly prepared and were issued under the order. The original bonds were printed and were signed by the presiding justice, and sealed with the seal of the county. The clerk was Hall, who had a deputy, Weyand. Hall being a dissipated man, Weyand attended to his duties and signed Hall's name with the knowledge of the presiding justice and of the county agent. These bonds did not receive favor because not printed in good style, and the county agent proposed to the presiding justice to substitute engraved bonds for the printed ones, and to this the presiding justice acceded. The old bonds were surrendered and destroyed by the presiding justice, as he testifies, and in January, 1871, new bonds were issued corresponding in terms and form with the old ones. Members of the county court had gone out of office and new members had come in, and Hall, the former clerk, had gone out of office and Weyand had become clerk.

The substituted bonds bore the same date with the former ones, and were signed by the same presiding justice and the same clerk, and this was at the instance and in the presence of the county agent to whom the matter had been especially intrusted by the county court. As the new bonds were made to bear the old date, Weyand still signed the name of Hall, his predecessor in office, for whom he had been deputy, and the signatures on the coupons were lithographed. These bonds were delivered by the presiding justice to the county agent, who proceeded to carry out his instructions.

The county paid interest on these new bonds in 1871 and 1872, and there was evidence that the county received a certificate of stock in the railroad company, not produced at the trial, but remaining in the possession of the county. The county court ordered the subscription to be made, and the bonds to be executed by the presiding justice, and attested by the clerk and the seal of the county. The statutes of Missouri make no provisions as to the mode in which these securities shall be executed.

The only irregularities presented in this case are, 1st, the substitution of new for old bonds; and 2d, the signing by Weyand of Hall's name as clerk. The question is then, whether the plea of non est factum is supported by proof of these irregularities.

If the statute provided expressly the mode in which these securities must be issued, the question, in case of non-conformity with its requirements, would be more difficult. The bonds were ordered to be attested by the clerk, but what was done afterwards in levying taxes and payment of interest makes a waiver of that part of the order, and the county is now estopped in relation thereto.

These irregularities are not so great as in the Winnebago Case in Iowa, decided by the United States supreme court. 16 Wall. [83 U. S.] 6. The county judge there issued bonds which were objected to in New York, and he, as county judge and agent in New York, more than 1,000 miles from his official residence, had a new county seal made, cancelled the old bonds and issued new bonds in substitution. The power of a county judge in Iowa is no greater than of the county court in Missouri. Here there are no checks on the judges, and no fraud is alleged, and the county suffered no wrong. The feature of the substitution is much worse in the Winnebago County Case.

In reaching these conclusions our views are strengthened by the order made of record by the Vernon county court, declaring its reasons for not paying its interest. They were not the substitution of bonds, or the informality of execution, but solely on a ground not here taken in defense, namely, that the railroad company did not complete its main line according to contract. Again, we deem the acts and participation of the county agent of importance, and the county is to be held to know what he and the presiding justice knew. The failure to give notice of the special term of the county court is of no importance whatever.

The bonds recite their issue under the Tebo and Neosho Railroad charter, and if as we hold in this case they are the bonds of the county, no failure in the performance of duty on the part of the officers can affect the rights of bona fide holders.

We find for the plaintiff for the amount of his coupons, with interest from maturity. Judgment accordingly.

In Pennington v. Baehr [48 Cal. 565], July term, 1874, the supreme court of California decided that coupons may be signed by a printed fac simile of maker's autograph, although not expressly authorized by statute.

McKEE v. VERNON COUNTY. See Case No. 14,877.

McKEEN (DELANCEY v.). See Cases Nos. 3,749 and 3,750.

McKEEN (DENNISTON v.). See Case No. 3,803.

McKENNA (BERNARD v.). See Case No. 1,348.

Case No. 8,852.

McKENNA v. FISK.

[1 Hayw. & H. 179.] [1]

Circuit Court, District of Columbia. April 23, 1844.

TRESPASS VI ET ARMIS — EVIDENCE THEREUNDER —QUARE CLAUSUM FREGIT.

1. In a suit to recover for injury done to personal property the plaintiff must show what property was injured, and that the defendant participated in said injury, either in person or by his advice and counsel.

2. In an action of trespass vi et armis the plaintiff cannot recover for any damages done to real property.

At law.

Brent & Brent, for plaintiff.

Jos. H. Bradley, for defendant.

BY THE COURT (charging jury). In the original case the declaration contained three counts. The first and third were, that the defendant, with force and arms, seized, &c., the goods and chattels of the plaintiff. In the second he is charged with having, with force and arms, broke and entered a certain shanty, &c., of the plaintiff situate in the county of Washington. The defendant pleaded not guilty, and issue was joined on that plea. On the trial the court refused to permit the plaintiff to give in evidence, that the defendant came to the shanty of the plaintiff, in Alleghany county, Maryland, with a large force of armed men, and also to show the value of the goods. Exceptions were taken to the above ruling, and the case went to the supreme court through a writ of error. The supreme court sustained the exceptions taken by the plaintiff, and remanded the cause for further proceedings. [1 How. (42 U. S.) 241.]

On the mandate of the supreme court being received, the declaration was amended as follows: "And therefore the said Bernard McKenna, by Brent & Brent, his attorneys, complains for that heretofore, to wit, on the first day of September, A. D. 1839, at Washington county, in the District of Columbia, the said Charles B. Fisk, with force and arms, seized, took and carried away, certain goods, chattels, bonds, promissory notes, accounts, evidences of debt and choses in action, to wit: one thousand gallons of spirituous liquors of different kinds, two thousand pounds of coffee, and one thousand pounds of tea, four hundred suits of clothing ready-made for sale, two hundred bushels of Indian corn, all the promissory notes and accounts of sundry persons due to said Bernard to the amount of at least four hundred dollars, a large quantity of household furniture, beds and bedding, and kitchen utensils, all of which said goods, chattels, bonds, promissory notes, accounts, evidences of debt and choses in action, then and there belonging to said plaintiff, the property of said plaintiff, of great value, to wit, of the value of two thousand dollars, current money of the United States, the said defendant then and there converted and disposed of to his own use, and other wrongs to the said plaintiff then and there did, against the peace, government and dignity of the United States. (2) And also, for that, heretofore, to wit, on the first day of September, A. D. 1841, at the county of Washington, in the District of Columbia, the said defendant, with force and arms broke to pieces, spoiled, damaged and destroyed certain other goods, chattels, bonds, promissory notes, accounts, evidences of debt and choses in action, to wit, bottles, decanters, barrels, casks, hogsheads, jugs and demijohns containing one thousand gallons of spirituous liquors of different kinds, and also destroyed one thousand pounds coffee, two hundred pounds of tea, one hundred suits of ready-made clothing, two hundred bushels of Indian corn, sundry promissory notes, bonds, bills and accounts due to the plaintiff, from sundry persons, to the amount of five hundred dollars and a large quantity of planks, timber, shingles and lumber of the said plaintiff of great value, to wit, of the value of two thousand dollars, current money of the United States, then and there being, and other wrongs to the said plaintiff then and there did against the peace, government and dignity of the United States. Whereby the goods, chattels, bonds, promissory notes, evidences of debt, accounts, choses in action, and effects particularly described in the first and second counts hereof, of the value above mentioned, were wholly lost to said plaintiff, wherefore, the said plaintiff saith he is the worse, and hath sustained damage to the value of four thousand dollars, and therefore he brings suit."

The defendant pleaded "not guilty"; on which plea issue was joined.

The plaintiff to sustain the issue on his side joined, produced a certain James McGratt, a competent witness, who being duly sworn, said, that he was not present when the alleged trespass was committed, but arrived on the ground some time after; that on his reaching the premises of plaintiff he found his house in the possession of the militia; that the house, or shanty, was then unroofed, the casks which held liquor out on the ground, the liquor running from the heads, which had been apparently bored through; the papers and ready-made clothing scattered about in the house; that there were many citizens there; that the defendant was there, and witness saw him passing through the military and talking with them, as if giving orders, but could not hear what he said; that he was on the premises the preceding

[1] [Reported by John A. Hayward, Esq., and Geo. C. Hazleton, Esq.]

day, when the militia were also there, but witness did not see defendant there; that plaintiff was taken and carried away, and about a week after witness saw him in jail at Cumberland, ironed, and afterward saw him at large about five weeks after. To all which testimony relating to the acts of the preceding day, and the imprisonment of plaintiff, defendant objected; but the court overruled the objection, and suffered the evidence to go to the jury; to which defendant, by his counsel, objected. The plaintiff having given said evidence, the defendant then proved, on cross-examination of said witness, that the plaintiff had admitted the recovery and sale himself of a barrel of whiskey spoken of by said witness in his examination-in-chief as having been injured or destroyed by defendant, which had been taken, with the other articles mentioned in the declaration, by the defendant. Whereupon, the plaintiff asked the witness to state all that the plaintiff said at the same time in regard to the injuries complained of in the declaration; but the court refused to allow such question to be put, or the same to be answered; and the plaintiff excepted to such refusal.

After reciting certain evidence, the following prayers were, by the counsel for the plaintiff, asked to be given as instructions to the jury: "That the act of Maryland, named in the evidence and the proceedings offered in evidence by the defendant, do not justify the trespasses committed on plaintiff's personal property, if the jury shall find from the evidence that said trespasses were committed by the defendant and those with whom he acted, provided they further find that at the time of said alleged trespasses the plaintiff was absent in the custody of the civil authorities, and that there was no person in his shanty at the time of entering the same, as described in the evidence, and committing said alleged trespass. That the plaintiff is entitled to recover for any trespasses mentioned in the declaration and proved, if the jury shall believe from the evidence that the defendant was present ordering and abetting said trespasses, unless the jury should be of opinion that the said trespasses were all of them absolutely necessary to suppress the disturbances on the line of said canal. That if the jury find from the evidence that defendant is guilty of the trespasses as alleged in the declaration, then the plaintiff is entitled to recover damages for the injury done to the personal property of the plaintiff by such trespasses, notwithstanding the jury may find that plaintiff afterwards recovered the whole of the personal property so trespassed upon. Should the jury be of the opinion from the evidence that the plaintiff was keeping a store on the line of the canal, as stated in the evidence, in a public manner, for the sale of liquors, groceries, dry goods and other articles, the presumption of the law is, that he had license for so doing, as the law directs, to sell said liquors, groceries, &c., and that it is not incumbent upon said plaintiff to produce said license, unless the contrary be proved, because the question arises incidentally in the cause, and no notice appears to have been given to the plaintiff to produce the license. Should the jury be satisfied from the evidence that the plaintiff sustained any damage, be it ever so small, by the conduct of the defendant, as stated in the declaration, or of those with whom he acted in the absence of proof of special damage, the law presumes a nominal damage to the plaintiff, and entitles him to a verdict in his favor. That in such case, the plaintiff is entitled to recover, as damages, whatever the jury shall find from the evidence to have been the value to the plaintiff of the powder and liquors totally destroyed, at the time and place of its destruction, and also whatever they shall find to have been the damage done to the other goods and property of the plaintiff, which were not actually destroyed, as stated in the evidence, valuing the goods and property also at the time and place, when and where they were so damaged. In ascertaining the actual loss of the plaintiff by the destruction of the liquors mentioned in the testimony, the jury are not to consider the profits he might possibly, or would probably, have made by the sale of the said liquors, by small quantities, from time to time, but the damages are to be measured by the amount which the liquors were worth, by the barrel or cask, at the time and place of its destruction, and upon the same principle the jury are to ascertain the value of the powder or other property actually destroyed. That the plaintiff is also, in addition, entitled to recover such damages as the jury may be of opinion from the evidence is a fair compensation to him for the disorder and interruption of his business, occasioned by the destruction of his property. That in addition to the damages referred to in the preceding instructions, the jury may give such other and further damages for the plaintiff as under all the circumstances appearing in evidence they may be of opinion is right and proper, provided they think any damage, in addition to the actual damage, right and proper upon the whole evidence; which the court gave as prayed. And the defendant, by his counsel, objected to the granting of the said instructions, each and every of them.

"If the jury believe from the evidence that the defendant, acting in concert with a body of armed men, came to the house of the plaintiff, in his absence, while he was in custody, and without his consent and against his will, obtained entrance thereto by threatening to break down the door; that the party with whom the defendant was acting, in his presence and with his consent, threatened to burn the house in a short time, in consequence of which entry and threat the goods of the plaintiff were removed with the con-

sent of the defendant and his confederates, by certain persons having no authority from plaintiff to remove his goods from his said house, then the plaintiff is entitled to recover any damages stated in the declaration which he may have sustained by reason of such removal, notwithstanding the acts of the legislature of Maryland, read in evidence, and the military orders and proceedings given in evidence. And notwithstanding there may have been rioting and disturbances at plaintiff's said house previous to said alleged trespasses."

This was given with the following qualification: "Unless the jury should find from the evidence that there was insurrection and disturbances as stated by the justices; that the plaintiff participated in the said insurrection and disturbances, or that the said rioting and disturbances at his house were by his permission, and that the injury done to said property was necessary for the purpose of effecting the suppression of said insurrection."

After offering certain evidence, the defendant, by his counsel, prayed the court to instruct the jury that if the jury shall find from the said evidence that an insurrection actually existed on the line of the canal in Alleghany county, at the time of the alleged trespasses; that said insurrection was attended with such violence as to endanger the lives and property of the peaceable inhabitants of the vicinity; and if they shall believe that the military authorities were called out and acted in the manner exhibited in said evidence; and if the jury shall further believe that the militia so called out and so acting did nothing more, and inflicted no other or further injury to property than such as they then reasonably thought was necessary to quell said insurrection, then the jury may find for the defendant.

If from the evidence the jury shall find that the property stated in the declaration was destroyed by being removed from the shanty of the plaintiff by the friends of the said plaintiff, in order to preserve it from injury, and the apprehension that the said shanty was about to be immediately destroyed by a detachment of military, and the said shanty was not in fact destroyed; that the said military had been called out in the manner stated in the evidence, and were under the command of said Barnes, also mentioned in said evidence, then the said plaintiff is not entitled to recover in this action, although the jury shall further find that said defendant, being present with said military detachment, advised and counselled the destruction of the said shanty; which instruction the court (Judge THRUSTON, absent), refused to give. And the defendant, by his counsel, excepted to the said refusals of the court severally.

The following instructions asked for on the part of the defendant were given by the court: That in this action the plaintiff cannot recover for any damages done to real property, and consequently cannot recover for any injury done to the shanty. That before he can recover for any injury done to personal property he must show by evidence what property was in fact injured; and that defendant, either in person or by his counsel and advice, participated in such trespasses.

The jury brought in a verdict for the defendant.

Case No. 8,853.

McKENNEY et al. v. BAKER.

[2 Hask. 130.] [1]

District Court, D. Maine. Jan., 1877.

BANKRUPTCY — RENEWED COMMERCIAL PAPER — RETIRED TRADER—ACCOMMODATION PAPER.

1. Renewed commercial paper subjects a trader to the same legal consequences under the bankrupt act [of 1867 (14 Stat. 517)] that the original promise did.

2. A retired trader, who gives his negotiable promissory note for a trade debt, does not commit an act of bankruptcy by suspending payment of the same, for it is not his commercial paper, made and passed in trade.

3. Accommodation paper, signed by a trader, is not his commercial paper under the amendment of 1874 [18 Stat. 178].

In bankruptcy. Petition by the creditors of Jacob C. Baker, charging him with an act of bankruptcy in the non payment of his negotiable promissory note for the period of forty days after it fell due, the same having been made and passed by him in the business of a trader. Baker answered,, denying that he was a trader when he gave the note, or that the same was his own commercial paper, or that he made and passed the same in the business of a trader. The cause was heard upon petition, answer and proof.

William L. Putnam, for petitioners.

Hanno W. Gage and Sewall C. Strout, for respondent.

FOX, District Judge. This is a proceeding by the creditors of Mr. Baker to have him adjudged a bankrupt, "for that being a merchant and trader, he has suspended and not resumed payment of his commercial paper for more than forty days." The commercial paper thus overdue is set forth in the petition as three notes of Baker, amounting in the aggregate to $2,000, all bearing date of November 16, 1875, payable by Baker to Chas. W. McKenney or order in three months, and given for lumber sold by McKenney to Baker.

In his answer, Mr. Baker denies that he was a merchant or trader at the giving of said notes, and says that the same were not his commercial paper, within the meaning of the bankrupt law, but were made by him for the accommodation of A. L. Hobson and

[1] [Reported by Thomas Hawes Haskell, Esq., and here reprinted by permission.]

for his benefit, and were to be paid by Hobson at their maturity.

It appears in evidence that for some years prior to May, 1875, Mr. Baker had been a trader in Portland, dealing in pressed hay, straw, flour, short lumber and potatoes, shipping to Southern ports these various articles as the markets might justify; that on one or two occasions only, and many years since, had he shipped lumber of any kind to the West Indies.

It did not appear that he had ever traded in heading in any way until the transaction with McKenney in May, 1875. It was not questioned that on the afternoon of May 3, 1875, Baker sold out his entire stock in trade to O'Brien, and gave up to him his counting room and place of business, continuing to occupy desk room there for a short time to close up his accounts, but not being engaged in trade. On the third day of May, 1875, A. L. Hobson, who was the brother-in-law of Baker and then engaged in the West India trade, was desirous of obtaining from C. W. McKenney, a manufacturer of lumber, 25,000 pair of heading. McKenney, not being satisfied with Hobson's credit, was unwilling to sell the heading to Hobson, but would sell to Baker; during the forenoon of that day, May 3d, it was agreed between these parties that Baker should purchase the heading of McKenney, and that he should receive for it the notes of Baker from time to time as the heads were delivered, to be brought in on the cars from Buxton at McKenney's charge, but in the name and to the address of Baker. Hobson agreed with Baker to pay his notes given to McKenney as they should fall due. The heads were all delivered as agreed, and with the assent of Baker, were received by Hobson and by him disposed of. On the thirteenth of May there was $2,000 due to McKenney for heading delivered under this contract, and on that day he called on Baker for his note for that sum, which he received and caused to be discounted. When it fell due, it was renewed by Baker, and the renewal note not being paid, the three notes of Baker described in this petition, amounting to $2,000, were received therefor by McKenney and have never been paid.

The notes of Baker now held by McKenney, being renewals of one received for the note of $2,000 given by Baker to McKenney May 13, 1875, it is claimed by the petitioners that under the bankrupt act the court must look to the date of the original note; that the rights and liabilities of the parties are to be determined as of that date; that the renewals are not to be considered as payments of the primary note, but as mere extensions from time to time of the original liability; and that the question here to be decided depends upon whether the note given by Baker on the thirteenth of May is to be deemed his commercial paper made or passed by him in the course of his business as a trader.

In the opinion of the court, the new security must be regarded as a substitute for the original note. This, in reality, has never been paid, but the time of its payment has been extended, and the party has not, by such an extension, been discharged from any liability under the bankrupt act, to which he was subjected by the original promise; but he remains charged with all the legal consequences which the note of May 13th imposed upon him. Such was the opinion of the lord justices in Ex parte Griffiths [3 De Gex, M. & G. 175] hereinafter referred to, a case in this respect parallel with the present.

Was this note of May 13th Baker's commercial paper made and passed by him as a trader? It is not claimed that at that date he was then in fact a trader, engaged in trade as before, or carrying on business excepting in completing the purchase of the heading; but it is urged that on May 3d, in the forenoon, he was in trade as he had been for years, and as a trader, then contracted to purchase of McKenney the heading; that from time to time McKenney under and by virtue of and in performance of this contract sent forward to Baker's address the heading; and that in this behalf Baker's dealings as a trader were not completed and determined until all the heading was delivered and paid for; and that in all that he did under this contract in receiving the heads by his agent, Hobson, and in giving the note of August 13th, he was acting as a trader; that although he might have previously withdrawn from his other business, until payment was actually received for the heading, he could not by thus retiring from trade exonerate himself from the consequences growing out of this transaction.

Taking this transaction singly and alone, I am of opinion under the peculiar circumstances attending it, that it would hardly have constituted Baker a trader within the law. While the title to the heads did numerically vest in Baker, and he agreed to become accountable to McKenney for the payment of the agreed price, yet it was part of the arrangement that this was all for the benefit and use of Hobson, who was to take care of the notes of Baker as they matured, and on this account was to receive the headings as they were delivered.

Baker was not to sell the heading to Hobson in the ordinary usual course of trade; but the actual trading was between McKenney and Hobson with a right to demand of Baker his negotiable paper for the property. In this way he became, in one view, the purchaser of the heading, but not for his own benefit; and it is beyond question that if this transaction was the only evidence to constitute Baker a trader, it would not be within the act. By his former dealings, and not by this, was he a trader on May 3d, and when he entirely withdrew from the business he had before carried on, his carrying out the contract with McKenney, so far as he was required by its terms, did not con-

tinue him in trade as a trader within the purpose of the bankrupt law.

It is said that having been a trader May 3d, he could not, by abandoning trade, devest himself of the consequences resulting from such occupation, and that he remained a trader until the debts he owed when a trader were all discharged. Great reliance is placed upon the case of Ex parte Griffiths, 3 De Gex, M. & G. 175, before the lord justices. In that case a trader contracted a bond debt in 1839. He continued a trader until 1848. Judgment was recovered on the bond in 1850. Lord Justice Knight Bruce, in his opinion, says: "I apprehend that by the spirit and intent of the bankrupt law, according to principle equally and authority, these two rules are clearly established: First, that a trader, who, after becoming indebted, leaves off trading, is not to be heard to say to his creditors that the trading has been left off, if a question arises whether the debtor can or cannot be as a trader made bankrupt; secondly, that a bond, in the case of a simple contract, or a judgment in the case of a specialty, which for many purposes extinguishes (though not satisfying) the original debt, does not do so as against the creditor for the purpose of disabling him from making his debtor a bankrupt on the original debt, remaining in every sense, or in every other sense, unsatisfied."

Lord Justice Turner (page 178) says: "Then it is said that the respondent is not a trader under the 72d section of the bankrupt law consolidation act, because he ceased to trade in 1848; but as he had been a trader, and the debt existed during the trading, he must be considered as a trader still, so long as the debt is not paid."

The same principles are recognized in Stronge v. Hawkes, 3 De Gex & J. 70. In Bailie v. Grant, 9 Bing. 122, Chief Justice Tyndal, says: "The debt contracted before trade, but remaining unpaid at and after the time the debtor enters into trade, appears to us to be a subsisting debt for every purpose and subject to any consequences which belong to a debt originally contracted during trade."

The English bankrupt law then in force required as a foundation for proceedings against a trader for a commission in bankruptcy, that he should be indebted on a demand which was outstanding against him while he was, in fact, a trader; and under such circumstances, he was liable to be adjudged bankrupt, although he had left off trading. This liability, by reason of such indebtment as a trader having once attached, continued so long as the debt remained unsatisfied.

English decisions of a later date may perhaps create a doubt whether the same consequences would result under the bankrupt act, as in Ex parte Bailey, L. R. 13 Eq. 321. Bacon, C. J., says: "Then as to the point of the debt or some part of it having been contracted while the debtor was a trader, I am of opinion that the existing statute has, in this respect, no retrospective operation, and that it speaks of and refers only to such persons as, at the time of its commencement, were, or should afterwards become traders."

In Wms. Bankr. Prac. 24, in commenting on this language, the learned authors say: "It would seem clear that if the existence of debts contracted whilst in trade is in itself sufficient to constitute a man a trader, no question as to whether the act was retrospective would have arisen in this case, because trade debts were still existing at the time of the petition, which was in 1871, and therefore, this case would seem to be an authority that under the present act actual present trading was necessary."

In Re Schomberg, 10 Ch. App. 174, each of the lord justices declares that the language of the act, "the debtor being a trader has for the space of seven days &c.," must mean a trader at the time the summons was served; but as I read the case, the learned justices found that the debtor in that case was not a trader at the contracting of the debt or subsequently, so that the question as to the effect of the existence of a debt whilst a trader did not arise.

In my opinion however, it is not essential for the purposes of the present case to determine whether or not under the present bankrupt law of England the rule is different from that established by the decisions under former acts. Conceding that a commission in bankruptcy could in the English tribunals now be sustained by an act of bankruptcy, committed by a trader after retiring from trade, the debt having been contracted by him in the course of his trading, I am of opinion that under the provisions of the bankrupt law as amended by congress, the party is not subject to be decreed a bankrupt for non payment of his negotiable paper, given by him after retiring from trade in settlement of a trade debt.

In England it may be necessary that there should be a debt outstanding, contracted or owing by him whilst in trade to subject the debtor to bankruptcy. This debt still continues after the party retires from trading. It remains a subsisting debt just as before, burdened with all the consequences which originally belonged to it while the party was in business. Thereafterwards no new consequences arise from its remaining unpaid, or attach to it afterwards; but it simply exists and continues, without change or modification, affecting the debtor as it did originally, but not increasing or diminishing his liability. As a trader he owed this debt. In that state it afforded a basis for bankruptcy proceedings, and by his ceasing to be longer a trader, the party ought not to be thereby relieved from any consequences to which he was then subjected on account of it.

Under our bankrupt act, so long as a party refrains from issuing his commercial paper

as a trader, however much he may be indebted in other ways, he is not liable to any of the provisions of the bankrupt law, and on account of such other indebtment could never be adjudicated a bankrupt. Such liabilities do not afford any foundation for proceedings in bankruptcy against a trader; and while they are subsisting debts for every purpose, and subject to every consequence which belongs to a debt originally contracted during trade, they do not entail any other consequences than those which exist while the party remains a trader.

If a trader under our law is liable to be subjected to bankruptcy on account of his general indebtedness, and should withdraw from trade, he would still remain liable to be put into bankruptcy so long as such debts are unsatisfied; but as by our law a trader is not liable to be thrown into bankruptcy on account of such debts, but only when the same are merged in commercial paper does the liability of bankruptcy follow, after it has been made and passed by a trader, and he has allowed it to remain overdue and unpaid the forty days made requisite by the act. If such paper is not put in circulation by a trader during the time he is actually in trade, it would be a strained and forced construction of our statute to hold that if made and passed months or years after withdrawal from trade, in discharge of a trade debt, it thereby becomes within the act commercial paper, then made and passed by a trader in the business of trade, when for years he had not bought or sold, in the way of trade, a dollar's worth of property.

A debt originally contracted by a trader may well be said to be a trade debt, due from a trader even when he has long been withdrawn from trade, and he continues liable to all the consequences, which attached to the debt in its then condition, but to none others; by giving his negotiable paper in settlement of the debt after he has retired from business, the relations of the parties ought not to be changed; each should stand as far forth as practicable in the positions they were previous to the making of the note, and thereby neither should acquire or lose any rights. Such is in fact the substance and effect of the English authorities, relied on by the petitioners. No one of them asserts that any new rights attach subsequently to the old debt; but they remain exactly as before, the debtor's ceasing to be a trader having no effect whatever; and in my view, such is the true construction of this provision of our law.

In the case of Re Jack [Case No. 7,119], before Woods, J., in the circuit court in Georgia, the head note is, "that a person, who gives a note when he has ceased to be a trader, does not commit an act of bankruptcy by suspending payment thereof, although the note is given for a debt contracted while he was a trader; for the law requires that he should be a trader at the time of making of the note." The opinion of the learned judge on this point is brief, and does not refer to any authorities, and the case was decided upon section 39 of the bankrupt act. It is similar to the present, and, being the judgment of the circuit judge, is of great weight, although not conclusive in another circuit.

The opinion of Hoffman, J., in Re Stevens [Case No. 13,393], it is claimed would lead to a different result. In that case, a firm were manufacturers; one member died; Stevens, the survivor, in settling the affairs of the firm and closing up its business, gave a draft in payment of a debt of the firm, contracted in the course of its business, which draft, having been protested, was the basis of the petition as an act of bankruptcy, and the petition was sustained. The report of the case is not very satisfactory. It does not appear but that Stevens still continued in business as a manufacturer after the death of his copartner; nor is it stated what was the nature of the debt for which the draft was given, whether it was or not commercial paper. The proceedings were prior to the amendatory act of 1874, by which, as I hold, the law in this respect was much limited and restricted, and the case of Re Stevens [supra] is therefore of but little assistance in the determination of the questions now before the court.

If this view of the law is erroneous, there still remains another ground upon which, as I think, this petition can not be sustained. I hold, that under the circumstances of the present case, this note of the respondent's of May 13th, can not, within the act, be considered "the commercial paper of Baker, made or passed in the course of his business as a trader."

The trade with McKenney for the heading was for Hobson's benefit solely; and he was to receive and dispose of it as he saw fit. McKenney was to have Baker's notes for the heading, but Hobson was to pay these notes as they matured, and they with their renewals are all entered among his "bills payable," and I am satisfied McKenney was cognizant of the agreement. All that he asked for was a direct and absolute claim upon Baker for the payments, and having obtained that, he was content, although he well understood that Hobson had agreed with Baker to protect him from these notes, and that Baker was not to be primarily liable, but that throughout the transaction, he was acting, not in his own behalf as the purchaser of the property, but simply for the advantage and accommodation of Hobson and as a guarantee of the payment by Hobson to McKenney.

Prior to the amendment of the bankrupt act in 1874, there existed a serious conflict in the decisions of the various tribunals upon the question whether one was liable to be adjudged a bankrupt by reason of non payment of negotiable paper to which he was a party for the accommodation of a third party. Since the passage of that amendment, I think the courts must decide that such paper is not

brought within the act, and is not to be deemed the commercial paper of a trader made or passed by him in the course of his business as a trader. The object of this amendment was to restrict this liability within a much narrower range, and to confine it to a trader's own business paper by him negotiated in the course of, and directly connected with such business, and for his own purposes and benefit, and which he was bound to meet promptly at its maturity, and not to include what is known as accommodation paper which the party never expects to pay, and therefore does not ordinarily provide for as it falls due. Such paper would, of course, be provable against the estate if the debtor became bankrupt; but I can not think its non payment for forty days is now to be deemed an act of bankruptcy, as it is not his own business paper and does not arise or grow out of his business as a trader, but is wholly extraneous. Petition denied.

McKENNEY (FOXALL v.). See Case No. 5,016.

McKENNY (BANK OF COLUMBIA v.). See Case No. 874.

McKENNY (BANK OF THE UNITED STATES v.). See Case No. 926.

McKENSIE (BANK OF THE UNITED STATES v.). See Case No. 927.

Case No. 8,854.

McKENTY v. UNIVERSAL LIFE INS. CO.

[3 Dill. 448; 3 Ins. Law J. 385; 6 Chi. Leg. News, 199; 4 Bigelow, Ins. Cas. 153.] [1]

Circuit Court, D. Minnesota. Jan. 7, 1874.

LIFE INSURANCE POLICY—INSURABLE INTEREST OF CREDITOR—SURRENDER—ACTION FOR BALANCE BY ADMINISTRATOR.

A policy of insurance was issued for $3,000 upon the life of a debtor, payable upon his death to his creditor: on the death of the assured, the creditor holding the policy received from the insurer $2,050.57, "in full of all claims under the policy," and surrendered it; afterwards the creditor assigned "all his right, title, and interest in the policy" to the administratrix of the assured, subject to the amount he had received from the company in payment of his debt. *Held*, that an action by the administratrix, under such assignment, against the insurer for the balance of the $3,000 could not be maintained.

The plaintiff [Johannah McKenty], administratrix of the estate of Henry McKenty, deceased, brought suit upon a policy issued on the latter's life by the defendant.

The following is a copy of the policy: "Universal Life Insurance Company, of New York. This policy of insurance witnesseth, that the Universal Life Insurance Company, in consideration of the representations made to them in the application therefor, and of the sum of $36.10, lawful money of the United States, first in hand paid by Henry McKenty, and of the quarter-annual payment of a like amount on or before the 14th days of October, January, April, and July, in every year during the continuance of this policy, at the office of said company in the city of New York, or to their agents, as hereinafter provided, do hereby promise and agree to pay to Charles H. Parker, the assured under this policy, his heirs, executors, or assigns, at their office aforesaid, the sum of three thousand dollars, lawful money of the United States (the balance of the current year's premium, if any, being first deducted therefrom), in thirty days after due notice and proof of the death of Henry McKenty, of San Francisco, in the county of San Francisco, and state of California, whereupon this policy shall cease and determine. * * * In witness whereof the said Universal Life Insurance Company have, by their president and secretary, signed and delivered this contract this fourteenth day of October, A. D. 1868. Wm. Walker, President. Jno. H. Bewley, Secretary."

Parker, the assured, was a creditor of McKenty, and after his death, on payment of his debt, executed the following receipt: "New York, February 26, 1870. Received from the Universal Life Insurance Company two thousand and fifty-six and 57/100 dollars, in full for all claims under the within policy, terminated by the death of Henry McKenty. C. H. Parker."

On receiving this amount, Parker surrendered the policy to the company. Afterwards, and on the 12th day of April, 1871, Parker executed the following assignment to the plaintiff, administratrix of the estate of her husband: "San Francisco, April 12, A. D. 1871. For value received I hereby assign to Mrs. Johannah D. McKenty, as administratrix of the estate of Henry McKenty, late of St. Paul, Ramsey county, Minnesota, deceased, all my right, title and interest in, to and by virtue of a certain policy of insurance number 5,736, dated October 14, 1868, made and issued by the 'Universal Life Insurance Company' of New York, to said Henry McKenty, then of San Francisco, California, for $3,000, payable to myself (Chas. H. Parker). This assignment being made to said Mrs. McKenty, as aforesaid, subject to the payment of the sum of about sixteen hundred dollars heretofore paid to me thereon by said company and receipted for by me. This assignment is made without recourse to me in any event or under any circumstances. Charles H. Parker."

On the trial the court ruled as shown in the opinion below given.

Gilfillan & Williams, for plaintiff.
Lorenzo Allis, for defendant.

NELSON, District Judge. This contract of insurance was effected by Parker, although the first premium appears to have been paid by McKenty. Parker was a creditor of Mc-

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission. 3 Ins. Law J. 385, contains only a partial report.]

Kenty, and had such an insurable interest as would entitle him to recover in a suit against the company, had it refused payment to him.

The better opinion at this time is that policies of life insurance are not like fire and marine insurance, contracts of indemnity. The agreement is that in consideration of a certain annual, semi-annual or quarter-annual payment of money to the company, it will, on the death of the party whose life is insured, pay to the person named in the policy a certain amount therein specified.

It is unnecessary in this case to decide whether upon this policy the assured named therein could recover any more than his debt due at the time of the death of his debtor. This action is not brought by him as the beneficiary named in the policy, but by the administratrix of the estate of the deceased whose life was insured, and she seeks to recover the surplus over and above the amount paid to Parker by the company. It is undisputed that Parker was paid, on the death of McKenty, all that he claimed, and he has given a receipt in full of all demands against it, and surrendered the policy.

To sustain the demand made by the administratrix, it is urged that "Parker was a trustee for the estate of McKenty on his death for the amount of the policy, over and above his interest in it (which is said to be the amount of his debt), and that the receipt given by him in full of all demands, and the surrender of the policy can not affect the estate." I do not think the policy upon its face, or the testimony, shows that any one but Parker had an interest in it.

It was possible to effect an insurance so that a portion of the loss would go to the decedent's estate, and to have made the assured named in the policy a trustee to receive it; but there is nothing in the case to indicate that any such purpose was intended.

The plaintiff can not recover, under the assignment from Parker to her, after the latter had been paid by the company the full amount he claimed. At the death of McKenty, the right of action upon the policy belonged to Parker alone. He made his claim, and offered proofs to maintain it, was paid the amount and gave a receipt in full for all demands. That put an end to all his interest in the policy, and it is not possible for the plaintiff, who claims under an assignment made after this receipt was given, to recover anything more from the company. See Bliss, Ins. § 554; Rawls v. American Mut. Life Ins. Co., 27 N. Y. 282; [Insurance Co. v. Robertshaw, 26 Pa. St. 189.] [2]

Judgment for defendant.

On a motion for a new trial the court gave the following opinion:

NELSON, District Judge. This case is not to be governed by the common law rule defining what constitutes a good accord and satisfaction. Parker, the creditor and assured, did not urge a claim for or demand the full amount named in the policy, but agreed, on a sufficient consideration paid him, to exonerate the company from all further liability; received it, and gave his receipt in full, and surrendered the policy. This, in my opinion, had the effect of an absolute release, as much so as it would have been if a formal instrument had been drawn up and signed and sealed.

The old common law rule of accord and satisfaction was always considered technical, and unsupported by reason. Dewey, J. in Brooks v. White, 2 Metc. (Mass.) 283, says: "The foundation of the rule seems to be, that, in the case of an acceptance of a less sum of money in discharge of a debt, inasmuch as there is no consideration, no benefit accruing to the creditor, and no damage to the debtor, the creditor may violate with legal impunity his promise to his debtor, however freely and understandingly made." This is a rule founded on very poor morals to say the least, and it has been doubted whether it would apply to anything but a bond.

In Co. Litt. 212b, it is said, that "where the condition is for payment of twenty pounds, the obligor can not * * * pay a lesser sum in satisfaction of the whole, because it is apparent that a lesser sum can not be a satisfaction of a greater. But if the obligee do * * * receive part, and therefore make an acquittance, under seal, in full satisfaction of the whole, it is sufficient, by reason the deed amounteth to an acquittance of the whole." Thus we see that the common law rule was intended to secure only a settled and deliberate agreement to discharge the debt. When this appeared and was established, the acquittance of the whole is admitted.

A formal instrument under seal is not the only evidence in my opinion to establish a release. The surrender of the policy in this case by Parker, was, to say the least, prima facie evidence of an intention to release all claims under it, and when this fact is conceded, and a receipt in full of all demands is written upon the face of it, and signed by him, I think in law the company is absolutely discharged.

The other point presented, to-wit, that the construction of the contract, so far as the intention of the parties thereto, should have been left to the jury, is not tenable. The policy was the only evidence in the case to indicate what was the intention of the parties. There is no evidence outside to show that the assured was a trustee, and that when his debt was paid he must account for the balance of the amount specified in the policy. The question presented was, "what is the legal construction of the contract?" This the court decided and so charged the jury. Upon the conceded facts in the case, in the view taken by the court, there was no issue of fact for the jury to decide which would authorize

[2] [From 6 Chi. Leg. News, 199.]

a verdict for the plaintiff. See 2 Hare & Wallace's Notes to Smith's Leading Cases, p. 439. Motion denied.

As to nature of life policies and conflicting decisions as to the continuance of the creditor's interest down to the death, and the extent of recovery, see May, Ins. §§ 7, 8, 110, 118. Phoenix Ins. Co. v. Bailey, 13 Wall. [80 U. S.] 616. Bliss, Ins. §§ 24, 30, 31; Swick v. Home Ins. Co. [Case No. 13,692].

Case No. 8,855.

McKENZIE et al. v. ANDERSON.

[2 Woods, 357.] [1]

Circuit Court, S. D. Georgia. April Term, 1873.

EXECUTOR—BORROWING FROM ESTATE — INTEREST CHARGEABLE—MALADMINISTRATION—LOSS FROM VIS MAJOR—CONFEDERATE MONEY.

1. Where a trustee and executor, in entire disregard of the directions of the will, takes funds of the estate and treats himself as the borrower, he must be charged with the highest amount of interest allowed by the law. He is personally and absolutely responsible for the fund.

2. Mode of adjustment of accounts of executor and trustee, in case of maladministration.

3. For such public and national calamities as war, foreign or civil, and the vicissitudes of fortune which attend them, no individual, who does not incite them, is responsible.

4. An executor is not responsible for the loss of the funds received by him for dividends in Confederate money or notes, which, at the time, he was obliged to accept.

This was a bill filed by the legatees of William J. Scott, residing in Great Britain, against [G. W.] Anderson, the executor, for an account, and for a change of trustee. William J. Scott, a resident of Savannah, Georgia, was possessed of a considerable real and personal estate in said city, and made his will, dated October 6, 1823, and a codicil thereto, dated June 4, 1829, by which, after constituting the defendant and others as executors and trustees, he devised and bequeathed to them all his estate in trust: First, to convert the same into money unless invested in good mortgages or government funds, and with the proceeds to pay his debts and funeral expenses; secondly, to invest the residue in the public stock or funds of Great Britain, the United States, or any individual states, or any municipal corporation, or in the capital stock or shares of any chartered bank, or upon real estate, as they might in their discretion think proper; thirdly, fourthly, etc., to pay one-half the income and profits of said estate to his daughter Elizabeth (one of the complainants, wife of William McKenzie), during her life; and after her death, the said half of his estate to such child or children of either of his daughters, or their issue, as his daughter Elizabeth should by will appoint; and to pay the other half of said income and profits to his daughter Kezia now deceased, the mother of the other complainants, for her life; and after her decease, to pay the said half of his estate to such child or children of either of his daughters as his daughter Kezia should by will appoint; and if either daughter should die intestate, then to pay and divide her moiety to and among her children and their issue, if any, share and share alike. The testator further empowered his executors to call in any debts or securities which to them might appear unsafe or insecurely invested, and to invest the same or the proceeds thereof according to the directions before given. The testator died in 1830, and the defendant proved the will on the 3d day of November in that year, and took possession of the estate, amounting, as stated by the bill, in real estate, to the value of $24,000, and in personal estate to $48,323.20. The bill further stated the marriage of the daughters, Elizabeth, to William McKenzie, and Kezia, to Richard R. Manson; and the death of Kezia intestate, leaving her surviving the complainants, Richard R. Manson and Elizabeth R. Gordon, there being then no other children of either of said daughters of the testator, nor any children's children. The bill charges that large sums of money came into the executor's hands, which he failed to invest as directed by the will, but applied the same to his own use; that he has failed to pay over the interest as directed; that he invested large sums in Confederate States bonds, which he had no right to do; that he continued to keep a large amount invested in the stock of a banking corporation, to wit: the Planters' Bank, of Georgia, of which he was president, the assets of which were used for the benefit of the Confederate States government, whilst it was his duty to have changed said investment; and the failure to do so resulted in a great loss to the estate; that he kept large balances in his hands which he might have invested, and so lost the interest thereof, and then invested the same in Confederate bonds, which became worthless. Other delinquencies are charged which it is not necessary to specify.

The answer stated that the real estate sold for only $21,000, and that the personal estate was appraised at $45,895, a copy of the inventory being annexed to the answer. The answer further stated that of this amount, the sum of $3,497.96 was decreed to be the property of the two children and was paid over to them, and that certain other items did not produce the amount of the appraisement. The defendant appended to his answer a copy of his whole account from 1830, down to the time of filing the bill, and this account furnished the materials from which, with the aid of some further extraneous evidence, a satisfactory disposition of this case could be made. He admitted, and his accounts and testimony showed, that he received large amounts of money belonging to the corpus of the estate, arising from the sale

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

of lands and other sources, which he loaned out on personal security, without investing the same as directed by the will. But he contended that he paid over the interest thereof, and that they were loaned out at greater profit in that way, than they could have been in any other manner. He admitted that on the 9th day of June, 1863, he invested the sum of $23,000 in Confederate States bonds, and on the 15th of January, 1864, the further sum of $1,010 in like securities; that this was money received by him in Confederate treasury notes for loans then due, part of the corpus of the estate, which he was authorized to receive in this form by a statute of Georgia; and that the purchase of the bonds was sanctioned by an order of the superior court of Chatham county, Georgia, made in May term, 1863; and that he still held the said bonds. He further stated that from and after the year 1861, all the rents, issues and income of the estate were received in Confederate treasury notes—a part of which were in his hands. He further stated that from 1864 to 1866 there was no income which came to his hands, and only a few hundred dollars thereafter, of which he gave a detailed statement. He admitted that he invested largely, to the extent of 244 shares, in the Planters' Bank of Georgia, of which he was president, and could not, in his judgment, have made a better investment. He admitted that said bank made large loans to the Confederate States of America, of which he gave a list; but said that it was forced to do so by law and public opinion. He denied that the failure of the bank was due to these loans; but insisted that it was caused by the statute of Georgia which compelled the bank to receive the treasury notes of Georgia and the Confederate States in payment of all dues to the bank. By an amended answer he said that the Confederate bonds purchased by him were not purchased from the government, but from private individuals in the market.

Upon this bill and answer the matter was referred to a master, who made a long report to which both parties excepted; and it was upon these exceptions that the case was heard.

H. R. Jackson, for complainants.

T. E. Lloyd and W. S. Chisholm, for defendants.

BRADLEY, Circuit Justice. It appears from the master's report and from the defendant's accounts and evidence, that the $23,000 invested in Confederate States bonds was a sum of money, part of the corpus of the estate which had accumulated in the defendant's hands many years before, as far back as 1840, and had been accumulating several years before that time, and which he had never invested in accordance with the directions of the will; but which, he alleges, he loaned out from time to time to individuals on their personal security, and which was all paid in Confederate treasury notes in 1863. It further appears that the balance of the estate had been invested by the defendant in bank stock of the Savannah Bank, including a few shares of railroad stock; that these investments commenced soon after the commencement of the trust, and were continued from time to time as funds came into his hands from the sale of lands and other sources. In 1840, these investments stood as follows:. bank stocks and railroad stocks whose par value was $47,400, and which had cost the trust fund the sum of $44,958. These investments remained unchanged down to the time of filing the bill in this case. In 1848, on occasion of receiving an extra dividend of $1,600 from the Marine Bank, the amount was invested in thirty-two additional shares in said bank. One complaint made by the complainants is, that these investments should have been changed when the Civil War rendered them precarious. With the exception of the railroad stock, they are now a total wreck and loss. The $23,000 was an additional amount which the executor retained in his hands, and which he alleges that he loaned out on personal security as before mentioned. His accounts contain annual credits of interest for moneys loaned, which he says were the moneys in question. These credits are always in a single sum, and from the year 1848 down to the period of the war, they were invariably the sum of $1,489.25. From 1842 to 1847 inclusive, they were $1,540. Prior to 1842, they were for less sums according to the amount which the defendant contends was thus lent out on personal security. These several sums prior to 1848 were just the amount of 7 per cent. on certain round sums of principal.

Now with regard to this account, the complainants contend: 1. That the defendant never gave credit for interest on the full amount remaining in his hands. 2. That, instead of simple interest, he ought to be charged with compound interest on the amounts actually remaining, or that ought to be, in his hands, because, as they contend, he used this money himself, and is guilty of gross misconduct and breach of trust in not investing it pursuant to the directions of the will. 3. That he ought to be charged with eight per cent. instead of seven per cent. up to 1846. But the accounts further show that in addition to the standing sum of $23,000, for which the executor allowed annual interest, an additional amount gradually accumulated in his hands over and above his remittances to the legatees.

These accumulations increased from $22.52, in 1843, to $21,278.21 in 1864. There was a sudden increase of this balance in 1851, from $2,794.78 to $6,454.11, and it rose in 1855 to as high as $20,000, but was reduced back in 1859 to $3,000. The cause of this is explained to be, that in 1850 Mrs. Manson, one of testator's daughters, died; and the executor says that no one appeared with proper au-

thority to receive her portion of the income, and, therefore, he was obliged to keep it in his hands, ready at any moment to be paid over; and that when Mrs. Manson's children came of age he paid over to them the income belonging to them, which they received at his hands. He insists that they are now precluded from making any objections to the course pursued by him. The complainants insist that he ought to account for the interest on these balances. After 1861, it will be observed that the balance grew rapidly, till in 1864, it reached the amount of $21,278.21. The defendant says that the existence of the war and the blockade prevented him from making any remittances; and that he was obliged to receive the income during this period in Confederate state moneys and securities, in which he now has the said final balance on hand. As before stated, the complainants insist that the bank stock ought to have been disposed of and changed into some safe investment; and that the $23,000 ought not to have been invested in Confederate securities; but that the defendant is responsible for it on several grounds.

These are the principal facts and points in the case. The conclusions to which the master came, and which appear in his report, were: 1. That the defendant was not bound to change the investments of bank stock. 2. That he is responsible for the sum of $23,075, to be charged against him in 1863, in gold, with simple interest, and that he cannot claim credit for the investment of that sum in Confederate securities. 3. That he is chargeable with simple interest on the amounts of income of the moiety of the estate belonging to Mrs. Manson's children, whilst they remained in his hands. 4. That the dividends from stocks received by him in Confederate money should be "scaled down" according to Barber's Table, and that the balance of the account, when so amended, should be charged against the defendant.

By a supplementary report, the master states that on reflection he concludes that the defendant should not be charged at all with the dividends which the banks had paid him in Confederate money, because it was not his fault that such currency was paid to him; and that the evidence shows him to be still in possession of such notes so paid him.

Without going largely into the reasons which have influenced my judgment in this matter, I will proceed to state the conclusions to which I have come. I think the defendant is chargeable with the balances of principal money in his hands, from 1832 down to 1861, as for money used by him for his own purposes. The amount of interest annually credited by him was always invariably seven per cent. on a certain amount for the entire year. For several years, it was on $10,000, $12,000, $16,000, $18,000, and $20,000; for many years in succession, it was on precisely $22,000; and for more than twenty years, in succession it was seven per cent. on $23,000, less seven and one-half per cent. commissions. Now is it credible that these precise amounts were kept out on loan at precisely seven per cent. for precisely the entire year? It is impossible to think so. The defendant evidently charged himself with seven per cent. on the amount which he chose to regard as the proper amount to be out on interest. This was nothing else than borrowing the money himself. He treated himself as the borrower. What he did with the money does not appear, except from his general allegation that he lent it out. He cannot, when under oath, remember a single person to whom he lent it. It is manifest that he took it for his own use, on his own responsibility, and at his own risk. And he certainly did so in entire disregard of the directions of the will. He may not have meant wrong personally. He may have allowed to the legatees all the interest that he realized himself; nay, he may have allowed them more than he realized. He clearly did not account to them for what he did realize. It is impossible that his loanings and turnings of the money could have exactly produced just that uniform sum every year. His own accounts prove most conclusively that he used the money himself. He may have loaned it out to others; but where is the account of those transactions? They were never rendered. They were never kept. Under such circumstances the presumption must be taken most strongly against him. He must be charged with the highest amount of interest allowed by the law; and the secret deduction of seven and one-half per cent. for commissions must be disallowed. The rate of interest to be charged, therefore, will be, according to the decisions of the courts of this state, eight per cent. down to January 1, 1846, and seven per cent. from that date to 1863. The law, it is true, says six per cent. compound interest after January 1, 1854; but the executor concedes that he made seven per cent. with the money, and he must be charged at that rate. It follows as a necessary corollary to this view of the case that the executor is personally and absolutely responsible for this fund. It is a debt due from him to the trust fund. No inquiry need be made as to the regularity of the investment of the $23,000 in 1863. That investment cannot avail the executor in the least. By his own breach of trust, the money, if belonging to the estate at all, was lying around on personal security in temporary loans. But it did not belong to the estate; it belonged to him. He had made himself the borrower of it; and, under those circumstances, he cannot discharge himself by procuring such securities as Confederate bonds, in a time of civil war, the fate of which was to decide whether they were worth any thing or not.

In reforming the account upon the principles which I have stated, I do not deem it necessary to assume different balances of principal on which to calculate interest from

those on which the executor allowed it prior to 1840. It will only be necessary to charge him with the additional one per cent. on the sums which he admits were at interest. He was entitled to some little margin on his balances, to allow him time to make investments. And, upon a careful examination of the account, I do not find that the actual balances prior to 1840 much exceeded the amounts on which he allowed interest in the account. From 1840 to 1847, inclusive, he ought to be charged with interest on $23,000 instead of $22,000; for that amount was in his hands during that period. After 1847, he should be charged with the full seven per cent. on $23,000, without deducting the seven and one-half per cent. commissions, and no commissions are to be allowed on the excess of interest to be accounted for. The excess of interest to be thus charged in reforming the account should be compounded, with annual rests, at the rate of seven per cent. per annum, down to January 1, 1854, and at the rate of six per cent. per annum after that time; and the accounting is to be brought down to the present time; for the executor still owes this money. I do not deem it necessary to state the account on a specie basis, as distinguished from legal currency. Compound interest must be allowed on the recognized principles applicable to such cases as the present. The language of the supreme court of this state in Fall v. Simmons, 6 Ga. 272, aptly expresses the general law on this subject: "Liability to pay simple interest is the rule, compounding is the exception. If the trustee applies the fund to his own benefit in trade, or sells trust stocks and applies the proceeds to his own use, or refuses to follow the directions of the deed creating the trust, as to investments, or conducts himself fraudulently in the management of the funds, and in all other instances depending upon like principles, chancery will direct the compounding of the interest." See, also, Williams, Ex'rs (Ed. 1859) p. 1676, and note. I do not think that the act of 1847 (Cobb, New Dig. 336) is intended to control the operation of equity in such cases. It is the object of that statute to lay down the rule that shall govern the question of interest in ordinary cases. The court is asked to disallow the ordinary commissions of two and one-half per cent. charged by the executor in his accounts. This I do not think we are called upon to do. The general management of the estate by the executor, independent of the $23,000, has been successful and productive of a generous income. Whilst the court has the power to disallow this item in cases of misconduct, the circumstances of the case do not, in my judgment, call for it.

When the account has been thus reformed, it will appear that the balances of interest accumulated in the executor's hands from 1843 to the breaking out of the Civil War were larger than is shown by the accounts. These balances at one time, after the death of Mrs. Manson, grew to be very large, and the complainants ask that the executor may be charged with interest upon them. He, on the contrary, insists that he had to keep the money ready to be paid over at any time when a person should come forward with the proper authority to demand it. The executor knew precisely what the difficulty was, and that no person could be qualified to receive the money until the children came of age, without getting letters of guardianship in this state, of the application for which he, as the agent of the parties, would receive timely information. To pretend that he would have subjected himself to any peril in putting the money out at interest seems absurd. If he had opportunities, as he says he had, for lending out $23,000 of the corpus of the fund, without hazard that he was not willing to assume, he surely could have loaned out the $15,000 to $20,000 of accumulated interest. But he need not have loaned it out on mere personal security; he could have loaned it out on call, or on call with reasonable notice, upon securities abundantly safe, and was under no necessity of, and had no sufficient excuse for keeping such a large amount of money, belonging to minors, entirely idle and unproductive. I think he must be charged with simple interest, at six per cent., on the balances of interest due to the Manson family, year by year, up to 1858, inclusive, when he paid over the bulk of the accumulation to the children of Mrs. Manson. That amount was due to them, and should have been paid them. Simple interest at six per cent. per annum should be charged upon the aggregate amount from January 1, 1859, to the present time. That amount, at least, could have been realized on temporary loans. It is a debt due from the executor to the Manson children, and has never been discharged. I do not deem it necessary to charge him with compound interest on this item, because the children themselves have neglected to claim it. But I cannot regard their laches in not claiming it, or their acquiescence in the receipt of what the executor saw fit to pay them, as estopping them from claiming it now, either on the ground of the statute of limitations or any other ground. The very meagre accounts which the executor was in the habit of rendering to the legatees, consisting of mere aggregate sums of receipts and expenditures for the year, conveyed them no information which ought to stop their mouths with regard to the accuracy of the accounts, or to charge them with sleeping over their rights.

I would only observe in addition, that the amount of income in the executor's hands, due and payable before the commencement of the war, became a personal debt, and he is responsible therefor. Whatever the balance may have been at the close of the year 1860, less the two sums of $1,496.34 and $2,809.77, remitted in January and May, 1861, will be charged to the executor.

The only remaining question relates to the alleged neglect of the executor to change the investments of bank stock on the breaking out of the war. I do not think that he is chargeable with negligence on this score. The investment was authorized by the will. Indeed, some of the stock now held belonged to the testator himself at the time of his death. For such public and national calamities as war, foreign or civil, and the vicissitudes of fortune which attend them, no individual, who does not incite them, is responsible. And in the midst of the public alarm and disorder consequent thereon, no man, however prudent, can be expected to forecast what is best or most expedient to be done with property or investments, his own or those which he holds in trust. All property, all human interests, nay, life itself, is bound up in the national destinies which decide the fate or control the prosperity of the country in which it is situated or enjoyed. Whatever is at stake therein must abide by this law. No human foresight or sagacity can provide against the vicissitudes to which the human race itself is subject. Where was the man in 1861 to tell the executor what he should do, or what was most wise to be done? Was it his duty to emigrate from the country, or to send the property in his charge out of it? No one will contend for such an absurd proposition. For, to what country should he go, which might not be subject to the same convulsions? Considerations of like character exonerate him from responsibility for the dividends received on the stock. What he received, he must account for—nothing else. It is contended that he ought to have converted the Confederate funds received by him for dividends into gold or exchange, and to have transmitted them to the legatees. I do not think he was bound to attempt this. The perils were too great. He would have been chargeable with negligence had a loss occurred thereby. If anything could have been done by him more prudent than he did do, it might, perhaps, have been, to purchase gold and keep it on hand, or to invest in stocks or property. But where was the security of his keeping possession of gold? And in what securities or property could he have invested which were not exposed to loss or destruction?

Without attempting, therefore, to decide the delicate questions arising on the laws passed in 1861 and 1863, authorizing executors and trustees to invest in Confederate securities and to receive Confederate funds, which I think are to be regarded as valid and binding where they do not conflict with the savings and reservations of the constitution of 1868, I do not hold the executor responsible for the loss of the funds received by him for dividends in Confederate money or notes, which he was obliged to accept at the time. A decree will be made in conformity with this opinion, and a new trustee appointed.

Case No. 8,856.

McKENZIE et al. v. COWING.

[4 Cranch, C. C. 479.] [1]

Circuit Court, District of Columbia. Nov. Term, 1834.

NE EXEAT—EMBEZZLEMENT — DEPOSIT IN BANK—INJUNCTION TO RESTRAIN PAYMENT.

If a clerk embezzle the goods of his employer, and convert the same into money, and deposit it in a bank to his own credit, injunction will not lie to restrain him from disposing of it, although he has no other property, and is about to quit the district; no debt being positively averred so as to justify a ne exeat.

The bill in this case was filed in Alexandria, and an injunction was granted by one of the judges, to restrain the bank of Potomac and the bank of the United States at Washington from paying to the defendant [William Cowing], and to restrain the defendant from receiving or transferring the money deposited therein by the defendant to his credit.

Mr. Semmes and Mr. Jones, for defendant, moved the court to dissolve the injunction for want of equity in the bill.

By consent, the motion was heard at Washington, and was fully argued by Mr. Semmes, Mr. Bradley, and Mr. Jones, for defendant, and by Mr. Coxe, for plaintiffs [McKenzie & Co.].

Mr. Semmes, for the defendant, cited 1 Bl. Comm. 152; Bradby, 147, 213; Vernon v. Vawdry, 2 Atk. 119; Cox v. Bateman, 2 Ves. Sr. 19; Bartlett v. Hodgson, 1 Term R. 42; 3 Ridg. App. 1; Moses v. McFerlan, 2 Burrows, 1008; Rhodes v. Cousins, 6 Rand. [Va.] 188; Wiggins v. Armstrong, 2 Johns. Ch. 144, 145; Id. 283; Chamberlayne v. Temple, 2 Rand. [Va.] 384; Millar v. Taylor, 4 Burrows, 2400; Oxford v. Richardson, 6 Ves. 695, 707; Anon., 1 Vern. 120; Id. 127, 276; Lord Chedworth v. Edwards, 8 Ves. 46; Hart v. Ten Eyck, 2 Johns. Ch. 108; Clifford v. Brooke, 13 Ves. 131; Webster v. Couch, 6 Rand. [Va.] 519; 1 Co. Litt. (Thomas' Ed.) 527.

Mr. Jones, on the same side, cited 1 Madd. Ch. Prac. 154; Eden, 211; Dick, 149; Deg v. Deg, 2 P. Wms. 414; Sowden v. Sowden, 1 Brown, Ch. 582, 1 Coxe, Ch. 165; Lechmere v. Earl of Carlisle, 3 P. Wms. 211; Perry v. Phelips, 4 Ves. 108, 17 Ves. 174; Pitt v. Jackson, 2 Brown, Ch. 51; Jaques' Case, 1 Johns. Ch. 65; Wallace v. Duffield, 2 Serg. & R. 521; Pollard v. Patterson, 3 Hen. & M. 67; Schmidt v. Dietricht, 1 Edw. Ch. 119; Rogers v. Vossburgh, 4 Johns. Ch. 84; Livingston v. Kane, 3 Johns. Ch. 224; Chichester v. Vass, 1 Munf. 98.

Mr. Bradley, same side, cited 1 Leach, 251, 699, 870; 2 Russ. 197, 201, 202; 2 Starkie, 833; Cox v. Paxton, 17 Ves. 330; Eden, 27; Coop. 276; Phillips v. Crammond [Case No. 11,092]; Murray v. Lylburn, 2 Johns. Ch. 441.

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

Mr. Coxe, contra, cited Lutterell v. Reynell, 1 Mod. 283.

CRANCH, Chief Judge (nem. con.). The facts stated in the bill, and which upon the motion to dissolve the injunction for want of equity, are to be taken as true, are, that from 1828 to 1834, the plaintiffs employed the defendant as their clerk, book-keeper, and salesman in the retail dry-goods business at a salary of about $350 a year, and that, during that time, he clandestinely and fraudulently, and in violation of the trust reposed in him, abstracted and appropriated to his own use, money and effects of the plaintiffs to an amount exceeding $9,000. That he has a large amount of money deposited to his credit with the Bank of the United States at Washington, which, to that extent, if so much he has, is the money of the plaintiffs; or has arisen from their property and money so abstracted by the defendant. That the plaintiffs have brought suit at law against him to recover the money and effects so clandestinely taken and appropriated to his own use. That the defendant is about to remove from the District of Columbia, and that he has no property except the money in bank and two boxes at William Gregory's, the contents of which are unknown. That the defendant will remove and secrete the money before the determination of the suit at law against him, unless restrained by the court, &c.; and that the plaintiffs want his answer and discovery in some material points necessary to the prosecution of the suit at law. This is not stated to be such an equitable debt, nor averred in so positive a manner, as to justify the court in granting a writ of ne exeat if it had been asked for; and it was not asked for, probably, because the counsel of the plaintiffs correctly supposed that if it could be considered as a simple debt, it was recoverable at law, and would be a case for legal bail. If it is not a case for a ne exeat, to detain the person of the defendant, upon which alone a court of equity can act, there seems to be as much reason for not detaining the property of the defendant upon which a court of equity cannot act, unless by means of an execution specifically authorized by statute.

The only question remaining is, whether this money is, according to the statement of facts in the bill, to be considered as the money of the plaintiffs. The bill avers that it is the money of the plaintiffs; or has arisen from their property or money so abstracted, &c. If the averment had been positive and absolute that it is the plaintiffs' money, there could be no doubt that it might be retained by injunction. The doubt arises from the alternative averment that it has arisen from the plaintiffs' property and money so clandestinely, fraudulently, and in violation of his trust, abstracted and appropriated to his own use. If the fact be, as suggested by this averment, that this money is the proceeds of the plaintiffs' money abstracted by the defendant and appropriated to his own use, can the court consider it as specifically the money of the plaintiffs? The plaintiffs themselves did not so consider it or they would not have made the alternative averment; for if, in either case, it be the plaintiffs' money, it was sufficient to have so averred it to be. The question then occurs, can this court follow and specifically detain the money that has arisen from the abstracted money of the plaintiffs?

The strongest case which has been cited in favor of the plaintiffs, is that of Lord Chedworth, in 8 Ves. 46. In that case, however, the injunction was only to prevent a transfer of stock which had been purchased directly with the plaintiff's money by his agent, who had placed it in his own name instead of that of the plaintiff; and the injunction was only granted until the defendant should, by his answer, distinguish the property of his master which he had mingled with his own; and the lord chancellor says: "The case, though new, stands upon a principle that will maintain it only till he informs me what part of this property is not his master's." It is true that the injunction was at first extended to the money at the banker's as well as to the stock; but, a few days afterward the lord chancellor varied the order by confining the injunction to the stock. And in the case of Cox v. Paxton, subsequently reported in 17 Ves. 329, "Lord Eldon said he had consulted with Lord Ellenborough, and thought he had gone too far." This is stated in 1 Madd. Ch. Prac. 155, and in Eden, Inj. 211, although it does not appear in the case of Cox v. Paxton, as reported in 17 Ves. That case, however, does, in principle, overrule that of Lord Chedworth in 8 Ves. In the case of Cox v. Paxton, the plaintiff's clerk had embezzled his money by false entries in his accounts of receipts and payments, and laid it out in the purchase of policies of life insurance, which he had delivered to the defendants on account of a debt due by him to them, with notice that they were the produce of the plaintiff's property. This embezzlement was a felony within the 39 Geo. III. c. 85; but independently of that objection, the Lord Chancellor Eldon said: "You cannot denominate him" (the clerk) "a trustee, in any way; there was no trust to lay out this money upon policies of insurance, nor any obligation except to account. His application of the money in this way could never, even without this act of parliament, have given the plaintiffs a title to these policies of insurance. How, then, are they to be considered the plaintiff's property in the hands of the defendants?" "If this case is to be taken according to the representation of the bill, (as it must be upon this demurrer, but only for the purpose of the argument,) that the defendants, knowing that the plaintiff's

money was laid out in these policies, insist upon holding them, the morality of it is obvious; but that cannot be the foundation of a rule in equity." The demurrer was allowed. The case of Rhodes v. Cousins, cited by the defendant's counsel, from 6 Rand. [Va.] 188, states the doctrine very strongly, that a court of equity cannot control a debtor as to the disposition of his property, until final judgment or decree.

If, therefore, the money in the bank is not the specific money of the plaintiffs, and if the defendant cannot, according to the judgment of Lord Eldon, be denominated a trustee in any way, we do not see that we have any authority to deprive the defendant of the control of it. If the transaction amounts to a felony, there is no civil remedy. If it be not a felony, it can only be a tort, or a contract, express or implied. If a tort, the remedy is in damages; if it be a contract, the remedy is in debt, or assumpsit; if it be a debt, it is as much a debt at law as in equity; and the plaintiffs may have bail at law, if they can make out a proper case.

We think the injunction cannot be supported upon the face of the bill, and that it must, therefore, be dissolved. Injunction dissolved.

[See Case No. 14,880.]

MACKENZIE (MANDEVILLE v.). See Case No. 9,014.

Case No. 8,857.

McKENZIE et al. v. The OGLETHORPE.

[2 Betts, D. C. MS. 35.]

District Court. S. D. New York. Sept. 21, 1841.

SEAMEN'S WAGES—MASTER'S CONTRACT—ILLEGAL VOYAGE—NAVIGATION ACT—DAMAGES FOR NONPERFORMANCE.

[1. A ship is bound by her master's contract with seamen for any voyage for which he has authority to engage her.]

[2. Foreign seamen, unwittingly shipping for a voyage wherein the navigation acts forbid their employment, may recover in rem damages resulting from nonperformance.]

[This was a libel for seamen's wages by McKenzie and others against the ship Oglethorpe, Knox, claimant.]

PER CURIAM. The defence made by the answer and supported by the testimony of the master, presents an eminently hard case on the part of the owner, if the demand of the libellants is to prevail. The ship took out a crew from this port on a circuitous voyage to Glasgow where the men deserted and the libellants with others were shipped in their place. This employment, the defence asserts, was specifically limited to bringing the ship to her home port, and it meets the objection that foreign seamen could not be expected to hire on such terms, by allegations that the rate of wages here were higher than in Scotland, that there was a great excess of seamen above the demand for them at Glasgow, and that they were anxious for opportunities to get to this country. This representation is corroborated by many intrinsic facts and presumptions. The vessel was bound to her home port and the common understanding would obviously be, that her voyage would then terminate and she would be at the absolute disposal of her owners. It was moreover notorious that the crew required was to supply the places of deserters, and this would indicate very clearly, that the new crew were only to fill out and complete the service begun by the former one, and would not be sought for to enter on any new prolonged adventure. Another consideration which, it must be presumed, would influence the master, was, that he could not but be apprized that by the laws of this country he would not be allowed to take a crew of foreigners in his ship out of the United States, and that accordingly any contract of his to that end, would be arrested here and he be prevented fulfilling it. Supposing, then, that the master acted with common fairness and had no more than the humblest understanding of his duties, the presumptions would be strong and persuasive that he contracted with the libellants only as he asserts to serve from Glasgow to New York.

The libellants however support their demand by a mass of proof too direct and of too great weight, to be displaced by mere presumptions and inferences or to be counteracted by the single testimony of the master. Three witnesses not interested in this controversy called by the libellants and one called by the claimant, all unite in swearing that the contract with the libellants was for a voyage to New York thence to other ports in the United States or South America and back to a British port. Two of the libellants examined as witnesses for each other, testify to the same facts. There is some variation in the meaning of the witnesses, as to the intermediate points of the voyage, but all agree in this, that the ship was to go to New York from Glasgow, and to return to a British port as her final terminus. The court would be compelled to yield to this weight of proof of the contract, if only influenced by the mere balance of evidence but there is connected with it an additional particular, adding to its force as against the claimant. The libellants all signed articles in Glasgow, and these witnesses assert those articles specified the terms of the agreement. The master admits the existence of articles, but says he refused to receive them or allow them to come on board his ship because they were British articles and that accordingly the broker, who shipped the men, in his presence separated the signatures of the crew from the heading or contracting part

of the agreement and told the master he might annex that part to his American articles. He accordingly connected it by wafers to the bottom of his ship's articles.

Whatever the inducement or excuse might be to this procedure it is palpable that the statements of the witnesses as to the general contents of the agreement must on this hearing be conclusive against the claimant. He yet holds the written contract, which he could produce in court, or he might have examined the brokers abroad, if he does not assent to the version given by the libellants. The court must then proceed upon the fact that a written contract of the purport alleged by the libellants was made with the crew, by the ship's broker, and that it was placed in the hands of the master before the crew entered on board and that they have never assented to the destruction or alteration of that contract. Did the brokers abroad exceed their authority, or if they acted under the instructions of the master, could he charge the ship and owners upon the agreement so entered into with the libellants?

There being no other evidence of the understanding upon which the brokers were to obtain a crew, than the testimony of the master, it must in this case be regarded as proved that they were employed specifically to ship men for the remainder of the voyage and accordingly had no authority to make stipulations, binding the vessel to them for any services after her arrival at New York. The captain swears positively to this point and there is no evidence produced by the libellants which can countervail the proof. He goes farther and asserts that he never mentioned the ports named in the contract and that he could not have suggested expectations of going such a voyage, because he had never been at Charleston or Savannah and had no knowledge whatever of the intention of the owner to employ the ship on that route. There are many circumstances conducing to the persuasion that this statement is not entirely ingenuous. Why would the ship brokers at Glasgow engage men on such a voyage unless they gathered from the captain the idea that the ship was expected to perform it? And when the articles were offered him no exception was taken to the terms of the contract but his natural pride fired up at the indignity of placing on board an American vessel, shipping articles bearing the insignia and stamp of royalty. It is moreover to be remembered that the last voyage was from New Orleans to Glasgow, and that the ship was ordinarily engaged as a carrying vessel from New York to Southern ports and then to Great Britain. Besides, it is in evidence that the master offered the libellants to continue them on board if they would sign American articles and obtain their certificates of citizenship or protection and one of the crew testifies that he is yet retained on board to perform the voyage for which he shipped with the libellants and the owner, when he first heard of the difficulty with the crew, immediately ordered them to go on board and complete their voyage with the ship without objection to the contract claimed by them.

Upon these circumstances it is incredible that the contract framed, was a mere invention of the ship brokers and that there was no design or expectation when the crew were shipped that the vessel would after her arrival at New York be despatched on the voyage indicated in the articles. This evidence would certainly go far to uphold the contract as authorized by the captain if it stood alone opposed to his oath; but the libellants are entitled to the benefit of the ratification of the entire contract implied in law, from his accepting the articles and the service of the crew under their engagement. I feel, therefore, no difficulty in holding that the libellants have sufficiently established the validity of the contract of the brokers with them, so far as it respects the authorization of the master.

The remaining consideration is whether the master had power to bind the ship by the agreement so made by him. In discussing this proposition of law, every reasonable intendment is to be made in support of the act of the master and it must accordingly be assumed that he was controlled by no special instructions (none being shown) and that he might exercise to the fullest degree the powers incident to his office and situation. He was the commander of a trading vessel, on a circuitous voyage. He was then performing one from New York to a Southern port in the United States thence to Glasgow and back to New York, and the fair bearing of the proofs is, that she had been employed in similar voyages antecedently and that she was to continue in a like business. In shipping a crew then, is the authority of the master limited to the voyage already fixed upon or in progress or may he engage with them prospectively and contract for a voyage not yet declared or adopted by the owner? Each branch of this inquiry suggests a topic important to ship owners and mariners, but neither need be decided to its fullest extent, in order to dispose of the issue between these parties. The master might undertake to engage the ship to a crew, for periods so indefinite and remote, as to afford palpable proof of fraud upon the owners and if not to impute a participation in it to the seamen, at least, to amount to a plain caution or notice to them that the contract was beyond the authority of the master. As general agent of the owner, the master is clearly empowered to contract in correspondence with the apparent service of the ship (Abb. Shipp. pt. 2; The Tribune [Case No. 14,171]), nor do I feel disposed to throw a question upon his authority to engage men beyond the period that may be necessary or even proper in respect to the employment in which she is engaged.

The limits of a general agency of this character must from the nature of the case be indefinite and fluctuating and the law will accordingly impose the chief hazard of it on the party instituting it and protect the one honestly confiding in it. The master, wanting seamen, incontrovertibly has the power to hire them for a fixed period of time, a month, six months, a year. The possession of a vessel requiring to be navigated is a letter of authority to the master to contract for her employment (Abb. Shipp. pt. 2, c. 2) and this would seem to be without regard to the time necessary to fulfill the service (Abb. Shipp. p. 92, note 1; Id. p. 99; Holt, Shipp. p. 3, c. 1, § 1). And as the master has power to engage his vessel to a series of voyages (or for an indefinite period) he must necessarily have a like authority to provide seamen for such voyages. Take the instance of this ship, seeking freight in Glasgow. By the well-established principles of the maritime law the master might have chartered her or engaged on a stipulated freight, to run the very voyage for which he hired the libellants. Id. pt. 2, c. 2; Id. pt. 3, c. 1; Abb. Shipp. pt. 2, c. 2; 3 Kent, Comm. 161. And as it is the usual duty of the master to hire mariners for his vessel, his authority to make contracts of the most favorable character in this behalf will be presumed (Story, Ag. 119), where there is no express restriction upon it proved and where it is exercised out of a home port. At least his authority in this particular will not be regarded as narrower than that for the letting or employment of his ship. I perceive therefore in this case clear proof that the master contracted with the men for a voyage beyond the mere return of the vessel to her home port, and to be continued at least until the restoration of the seamen to the country of their residence, and I should be very unwilling to declare such a contract void or inoperative. It may happen that the only condition upon which American vessels, in their necessity, can obtain foreign seamen abroad, is to engage the return of the ship to the place they are taken from; and it seems to me that in all cases it would be no more than a reasonable stipulation and one therefore which ought to bind the ship.

It is contended that our laws prohibit taking out of the United States ports a crew of foreigners, and that a contract to that effect would accordingly be abrogated by the statute. It is true that at least two-thirds of the crew must be American citizens, but it was no part of the contract with the libellants that they should be qualified to serve in conformity to the requirements of our laws. It belonged to the master or owners to see that the contract could be fulfilled on their part and I apprehend a party would never be permitted to set up for his protection and in avoidance of his contract with a foreigner, that the execution of it would involve the violation of his own municipal laws. The English courts enforce contracts entered into with intent by both parties to violate the revenue laws of a country. (6 C. Rob. Adm. 348; 1 Doug. 252; 1 Cowp. 343), and navigation laws probably would claim no higher sanction than kindred acts in relation to imports. Here there is no pretence that the libellants contracted with any intent to violate the law of this country or with any knowledge of its provisions. Their contract may be bona fide and meritorious, and if the master led them into an engagement which he would not be allowed to fulfill in his own country, their claim to remuneration instead of being barred by such occurrence would rather appeal with a more urgent equity for that cause to the protection of the proper tribunals. This is so even when the vessel is condemned and their lien is lost, because she was engaged in an illegal voyage. [The St. Jago de Cuba] 9 Wheat. [22 U. S.] 409; [Sheppard v. Taylor] 5 Pet. [30 U. S.] 675; Edw. Adm. 35; 6 C. Rob. Adm. 207, 350. The law implies in protection of seamen, the engagement of the master and owners, that the stipulated voyage is legal in regard to foreign governments and their own, and awards them damages, when it is proved that they have been drawn into a contract that is illegal. 3 Kent, Comm. 188. The voyage must be considered as broken up in this port, either because the master was not suffered by our law to carry it into execution at his own election or that of the owner. There being no default of the seamen, and the ship remaining as she was at the time of the contract, they are entitled to compensation in damages against the vessel. Abb. Shipp. 450, note 2; 2 Hagg. Adm. 158; Emerson v. Howland [Case No. 4,441]. I am rather inclined to regard this in the nature of a voyage broken up, in respect to the libellants, to the same degree that it would be, had the laws of the United States interdicted the voyage which the master contracted for. It would then be clear of the character of a wilful and wrongful act. In such cases, seamen are not held entitled to recover wages for the entire voyage agreed upon, but an allowance by way of wages, that shall compensate them for the loss sustained. This is plainly the spirit of the adjudications upon this subject. Woolf v. The Oder [Id. 18,027]; Hindman v. Shaw [Id. 6,514]. Broader damages are given when the case is marked by acts of fraud on the part of the owner or master. 3 Johns. 510.

I think there is no ground in this case to impute fraud or circumvention to the master. Independent of his testimony upon this head, it appears from the evidence of one of these foreign seamen, that he understood the contract to allow them to leave the ship in New York if they chose to do so. He plainly regarded the prolonged voyage named in the articles as a privilege which the crew could enjoy if they preferred continuing with the vessel to leaving her here. So, also, the suggestion to the libellants that they should be

provided with passport protections, and the offer of the owner to continue them on board, all indicate that there was no purpose to enveigle the men to this country and then abandon them without furnishing them employment. But if the construction urged by the libellants' counsel is adopted and it be held that the master contracted with these men fraudulently and has wilfully violated the contract, that in order to give damages according to the measure proposed, there should be clear and consistent proof of the voyage agreed for. Except in the two particulars of running to New York and the termination of the voyage in Great Britain it would be impossible upon the evidence produced for the court to decree what were the termini or what the probable duration of the voyages stipulated for, after leaving New York. The court could not accordingly avail itself of that branch of the contract as a measure of damages in any respect. If the intermediate port was Charleston, the voyage might be protracted a fortnight—if South America, for a series of months. Taking then the agreement so far as the concurring weight of evidence defines it, I shall hold that the libellants are entitled to wages at the rate contracted for, to this port; for one-half a month here as a reasonable period after they knew the voyage was abandoned to enable them to obtain an opportunity to return and also for such time as will ordinarily be occupied in a voyage from New York to Liverpool or Glasgow. This time will be ascertained by the clerk.

A decree will be entered in conformity to these principles.

McKENZIE v. The RICHMOND. See Cases Nos. 11,796 and 11,797.

MACKENZIE (UNITED STATES v.). See Cases Nos. 15,690 and 15,691.

McKENZIE (WILLIS v.). See Case No. 17,771.

Case No. 8,858.

In re McKEON.

[7 Ben. 513; 11 N. B. R. 182; 3 Am. Law Rec. 611; 11 Alb. Law J. 7.] [1]

District Court, S. D. New York. Dec., 1874.

BANKRUPTCY — DISCONTINUANCE AFTER COMPOSITION—VOLUNTARY AND INVOLUNTARY—WHAT ASSENT IS NECESSARY.

1. On November 11th, 1874, McK. filed a voluntary petition in bankruptcy, and was adjudged a bankrupt, and surrendered his property to the register. He then proposed to his creditors, under the provisions of section 17 of the bankruptcy amendment act of June 22d, 1874 [18 Stat. 182], a composition of his debts, on the payment of thirty cents on the dollar, to be paid in cash. No time of payment was specified. The composition was accepted by the creditors and confirmed by the court on December 15th, 1874. The bankrupt then presented to the court a petition, praying that the bankruptcy proceedings might be discontinued and his property restored to him, to enable him to carry out the terms of the composition, and a majority in number and amount of his creditors joined in the prayer: *Held*, that, even if the fourteenth section of the bankruptcy amendment act of June 22d, 1874, should be held to relate to voluntary as well as involuntary proceedings, still it would be necessary that there should be notice to all the creditors, and a hearing of them, and an approval by the court of the propriety of the discontinuance prayed for.

2. The court could not approve of this discontinuance until the terms of the composition had been carried out.

3. The creditors who accepted the composition must be deemed to have acted in reference to the case in its then existing status, and if the court were now to surrender the property which was then in its possession, that would be an alteration of the composition, which could only be altered by a resolution passed in the same way as the original composition.

4. In involuntary cases, where there has been no adjudication, there may be a discontinuance without the assent of any creditor except those bringing the petition, and without notice to other creditors.

In bankruptcy.

Ulman, Remington & Porter, for bankrupt.

BLATCHFORD, District Judge. On the 11th day of November, 1874, Thomas McKeon filed, in this court, a voluntary petition in bankruptcy, and was, on the same day, adjudged a bankrupt by the register to whom the case was referred, and surrendered all his property to the register. He then instituted proceedings for a composition with his creditors, under section 17 of the bankruptcy amendment act of June 22d, 1874. The composition proposed was the payment of thirty cents on the dollar, to be paid in cash, in full discharge and satisfaction of all his debts. No time for making the payment was specified. The proposed composition was accepted by a resolution which was duly passed and confirmed by the creditors, and other due proceedings were had, the result of which was that the court accepted and confirmed the composition by causing such resolution to be recorded and the other necessary papers to be filed. This was done on the 15th of December. The bankrupt now presents to the court a petition, setting forth that he is desirous of complying with the terms of the composition; that, to enable him to do so, it is necessary he should resume his business, and regain his credit and standing in the business community; and that it is impossible for him to do so until the proceedings in bankruptcy are discontinued, and his property and books are released from the custody of the register and restored to his possession. He, therefore, asks that this be done. With this petition, he presents to the court a paper signed by a majority in number and amount of all his creditors, in which they set forth that they are satisfied he is

[1] [Reported by Robert D. Benedict, Esq., and B. Lincoln Benedict, Esq., and here reprinted by permission. 11 Alb. Law J. 7, contains only a partial report.]

complying, and intends to comply, with the provisions of the composition so accepted, and that it is for the best interest of all concerned that the prayer of the petition should be granted, and that they join in such prayer and request that it may be granted. Upon these papers, this court is asked to now make an order that the proceedings in bankruptcy be discontinued, and that the register, on payment of all fees and expenses, restore to the bankrupt all his property.

Section 14 of the bankruptcy amendment act of June 22d, 1874, provides, that "all proceedings in bankruptcy may be discontinued on reasonable notice and hearing, with the approval of the court, and upon the assent in writing of such debtor and not less than one-half of his creditors in number and amount, or, in case all the creditors and such debtor assent thereto, such discontinuance shall be ordered and entered; and all parties shall be remitted, in either case, to the same rights and duties existing at the date of the filing of the petition for bankruptcy, except so far as such estate shall have been already administered and disposed of." Although this provision is enacted as an amendment to a section of the bankruptcy statute which applies solely to proceedings in involuntary cases, and although the expression "such debtor," occurring twice in it, has relation properly only to "the debtor" just before spoken of, namely, the debtor against whom a petition is filed by creditors, yet, if it were to be held that the provision applied also to voluntary cases, it would still be necessary, by its express terms, that, before a discontinuance could be ordered under it, there should be reasonable notice to all the creditors, and a hearing of them, and an approval by the court of the propriety of such discontinuance.

In the present case, there has been an adjudication of bankruptcy. The property of the bankrupt has passed into the custody of the court, not provisionally merely, but in such wise that all the creditors have, by virtue of the adjudication, a right to require, that, unless they all assent to a different course, the proceedings in bankruptcy shall not be discontinued until the property of the bankrupt is substantially applied towards the satisfaction of their debts. In cases where there has been an adjudication, whether voluntary or involuntary, the practice has always been observed not to allow the proceedings to be discontinued, without the affirmative assent of all the creditors, unless provision was made to pay in full the debts of all. The new provision of section 14 of the act of 1874 was designed, where applicable, to apply to cases where there had been an adjudication, and not to cases where there had been no adjudication. No legislation was needed for cases of the latter description, for, where there had been no adjudication, the courts allowed a discontinuance. Moreover, the reference, in section 14, to the estate as having been "already administered and disposed of," implies an adjudication.

Now, assuming that section 14 applies to the present case, although it is a voluntary one, and that, although there has been an adjudication in it, there can be a discontinuance under the conditions provided in that section, yet it is impossible to see how the court ought to approve of the discontinuance until the terms of the composition have been carried into effect. The thirty per cent. was to be paid, and in cash. It is shown not to have been paid. By section 17 of the same act, the court may enforce, in a summary manner, the provisions of a composition. The creditors, in the present case, who have not signed the assent to a discontinuance, are supposed to know that there has been an adjudication in this case, and to rely upon the fact that the court will not, in such a case, so part with its control over the case, as to deprive itself of the power of considering the proceedings as pending, so as to be able to enforce the compromise, if necessary. Moreover, the creditors who passed the resolution of compromise, and the creditors who confirmed it, as well as those who did not, necessarily knew that an adjudication had taken place, and such of them as have not assented to a discontinuance must be considered as regarding the adjudication, and the control established thereby, as a security for the carrying out of the composition. No other security was exacted by the terms of the composition.

So, also, in reference to surrendering up possession of the property to the bankrupt, the creditors who passed the resolution of compromise, and those who confirmed it, must be regarded as having acted in reference to the case in its then existing status (as was said in Re Reiman [Case No. 11,673]), on the view that the court was to continue in possession of the property of the bankrupt, as a consequence of the adjudication, and was not to surrender it until the thirty per cent. in cash should be paid, nor sooner to vacate the adjudication. The property being in the possession of the court, under the adjudication, the creditors, besides making no provision for security that the thirty per cent. should be paid, other than the security arising from such possession, made no provision, in the resolution for composition, as they might have done, that the property should be surrendered to the bankrupt. The resolution for composition must be read as if it contained a provision that the property should not be surrendered to the bankrupt until the thirty per cent. should be paid. To permit it now to be surrendered is to add to or vary the provisions of the composition, which, under section 17, cannot be done otherwise than by a resolution passed in the manner and under the circumstances provided for passing the original resolution, and presented to the

court in the same manner and proceeded with in the same way.

The foregoing observations have no reference to a case where there has been no adjudication. In the Case of Poznanski, recently, there had been an involuntary petition and a provisional warrant. Thereafter, and before adjudication, proceedings for composition were carried through. The terms of the composition were forty-two and one-half per cent., payable in instalments, to be evidenced by promissory notes payable in four, eight and twelve months from November 1st, 1874, and to be endorsed by persons named in the resolution for composition, the composition to be void in case of any default in payment. On the 4th of December, 1874, the debtors presented to the court the written consent of the attorney for the petitioning creditors, that the bankruptcy proceedings be discontinued, there having been no adjudication. It was also accompanied by the consent of a majority in number and amount of the creditors. The property of the debtors was in the custody of the marshal under the provisional warrant. Thereupon an order was made, that the proceedings in bankruptcy should be discontinued, and that the marshal should restore to the debtors the property which he held under the provisional warrant. This discontinuance was allowed without notice to other creditors, because there had been no adjudication, and because the attorney for the petitioning creditors consented to it, and because there was not, in the resolution for composition, any restriction against a restoration of the property to the debtors. The view was, that, although, when the resolution for composition was acted on, the marshal was in possession of the property, yet it was only under a provisional warrant; that the creditors who passed the resolution must be regarded as having acted in reference to the case under its then existing status, on the view that, as there had been no adjudication, the petitioning creditors could discontinue the proceedings by merely consenting thereto, and without notice to other creditors; and that, by exacting personal security, in the shape of endorsements of the compromise notes, and imposing no other restrictions, they could not be regarded as having created any restriction on the discontinuance of the proceedings, which discontinuance would necessarily result in the surrender to the debtors of the property. It was further considered by the court, that the provisions of section 14 of the act of 1874 do not apply to cases of discontinuance where there has been no adjudication, and do not confer the power of discontinuance in such cases, and do not restrict or take away the power of discontinuance which existed, and exists, in such cases, independently of such section, but that such provisions apply solely to cases where there has been an adjudication, and confer the power of discontinuance in such cases, it not having existed independently of such section. In this view, in an involuntary case, where there has been no adjudication, the assent in writing of one-half of the creditors in number and amount is not necessary to a discontinuance.

I do not intend to say that, where there has been a composition in an involuntary case before adjudication, there must necessarily be a discontinuance, if the petitioning creditors ask it, after a composition has been confirmed by the court. Far from it. In every case, the matter must be regarded with reference to the status of the case and property when the resolution for composition was passed, and with reference to the terms of the resolution. But, although compositions may be proposed and accepted as well in cases where there has been no adjudication as in cases where there has been one, yet debtors and creditors must be held to know that the relation of the court to the property, and to the creditors, and to the proceedings, is very different where there has been an adjudication from what it is where there has been no adjudication. This is known when the resolution for composition is acted upon, and its terms can be arranged accordingly in view of the then actual situation of the property and the proceedings. If, in an involuntary case where there has been no adjudication, but there has been a compromise proposed and accepted, the terms of which have not yet been complied with, the effect of a discontinuance before such compliance may be to deprive the court of the power of summarily enforcing the composition, and also of the power of resuming the bankruptcy proceedings, it is very easy for the creditors to provide, in the resolution for composition, that there shall be no discontinuance, or no surrender of property to the debtor, until the terms of the composition have been complied with. In an involuntary case where there has been no adjudication, the general rule is, that there may be a discontinuance without the assent of any creditor except those bringing the petition, and without notice to other creditors. This should be borne in mind, when a resolution for a composition in such a case is being considered.

If it be suggested that these views of the statute may have the effect to embarrass both debtors and creditors in proceedings for composition in voluntary cases, as compared with like proceedings in involuntary cases, it will be found that the statute has other provisions which seem to discriminate, without apparent cause, between voluntary and involuntary proceedings, to the prejudice of the former. It is sufficient to refer to section 9 of the act of 1874, which imposes on voluntary bankrupts, as a condition of their discharge, that they shall pay a certain proportion of their debts, or obtain the assent of a certain portion of their creditors, while it imposes no such condition on in-

voluntary bankrupts; and to section 10 of the same act, which, in involuntary cases, makes void fraudulent conveyances made to creditors within two months, and to other persons within three months, before the filin of the petition in bankruptcy, while, in voluntary cases, those periods are left to be respectively four months and six months.

It results from these views, that the prayer of the petition must be denied.

McKEWAN (UNITED STATES v.). See Case No. 15,692.

MACKEY (BULLINGER v.). See Cases Nos. 2,126 and 2,127.

Case No. 8,859.

In re McKIBBEN.

[12 N. B. R. (1875) 97.] [1]

District Court, E. D. Michigan.

BANKRUPTCY—DEFECTIVE PETITION—AMENDMENT—AFFIDAVITS BEFORE NOTARIES — FRAUDULENT MORTGAGE—APPLICATION FOR ARREST—COMMISSIONER'S SIGNATURE — DEPOSITION NUNC PRO TUNC.

1. A petition was filed against M. by seven of his creditors. On the hearing of the order to show cause, it appeared that two of the creditors' claims were for amounts less than two hundred and fifty dollars each, but that the five remaining did in fact constitute the requisite number in value and amount. *Held*, that the petition was defective in its allegations, and did not make out a case for an adjudication, but that it might be amended so as to conform to the facts.

[Cited in Re Hadley, Case No. 5,894. Distinguished in Re Hall, Id. 5,923. Cited in Roche v. Fox, Id. 11,974; Re Blair, Id. 1,481; Re Donnelly, 5 Fed. 787; Woolridge v. McKenna, 8 Fed. 679.]

2. Affidavits taken before notaries public cannot be read in matters pending before this court.

3. A fraudulent chattel mortgage on the bankrupt's stock of goods, to secure an alleged debt of several thousand dollars, made with intent to hinder, delay, and defraud creditors, is a sufficient act of bankruptcy to warrant an adjudication.

4. In an application for a provisional warrant and order of arrest of the debtor, under section 40 of the bankrupt act of 1867 [14 Stat. 536], the better practice is to file a separate petition, supported by affidavits of persons having knowledge of the facts, when the same are not stated in the petition of the petitioner's own knowledge.

[Cited in Re Hadley, Case No. 5,894.]

5. In the present case, as the main facts are upon information and belief, a provisional warrant and order of arrest will not be granted; but, as sufficient cause does in fact exist for the issuing of a provisional warrant, leave will be given to make another application.

[Cited in Re Hadley, Case No. 5,894.]

6. Where the commissioner who took the deposition in proof of debts failed to sign the jurat to the deposition, the omission may be supplied if the commissioner distinctly recollects the fact of the creditor signing and verifying it in his presence, and, if not, the party may be sworn and the deposition filed nunc pro tunc.

These were motions (1) to vacate the order to show cause why [James A.] McKibben should not be adjudicated a bankrupt, for the reason that, at the time of granting the order, sufficient grounds did not exist, and no proper and lawful showing was made therefor. (2) vacate the provisional warrant of arrest, on the ground that it did not appear that there was probable cause for believing that McKibben was about to leave the district, or to remove or conceal his property, or to make any fraudulent disposition thereof.

Don. M. Dickinson, for the motion.

H. E. Burtand and D. C. Holbrook, for petitioning creditors.

BROWN, District Judge. The motion to vacate the order to show cause is a very general one, and does not distinctly apprise the petitioning creditors what defects in the proceedings are relied upon; but, as no objection was taken to it upon this ground, I shall proceed to dispose of the case as made upon the argument.

First. Principal objection to the petition is that it does not appear upon its face that the requisite number of creditors have joined in it. The 39th section of the bankrupt act, as amended January 22, 1874 [18 Stat. 178], provides that any person who has committed an act of bankruptcy, as defined by that section, "shall be adjudged a bankrupt on the petition of one or more of his creditors, who shall constitute one-fourth thereof at least in number, and the aggregate of whose debts, provable under this act, amounts to at least one-third of the debts so provable." "And in computing the number of creditors aforesaid who shall join in such petition, creditors whose respective debts do not exceed two hundred and fifty dollars shall not be reckoned."

The petition in this case alleges that the petitioners "are informed, and believe, that your petitioners constitute one-fourth at least in number, upon the basis of two hundred and fifty dollars and upwards, of the creditors of the said James McKibben, and that the aggregate of their debts, provable under the said acts, amounts to at least one-third of the debts so provable." There are seven petitioners. In the statement of their respective demands, contained in the body of the petition, it appears that the claim of A. C. McGraw & Co., one of the petitioners, amounts to only one hundred and sixty-five dollars; and that of W. D. Robinson & Burtenshaw amounts to but one hundred and three dollars.

The question is then distinctly presented whether the requirement that one-third in amount and one-fourth in number of creditors, having claims of two hundred and fifty dollars and over, should unite in the petition,

[1] [Reprinted by permission.]

is met by the allegation of seven petitioners that they constitute the required number, when in fact two of them hold claims of less than two hundred and fifty dollars each.

The legal effect of this allegation is: 1. That the seven petitioners constitute one-quarter in number of all creditors whose debts exceed two hundred and fifty dollars. 2. That the aggregate of their debts amounts to one-third of the aggregate of all claims provable against his estate. Two of these petitioners, however, hold claims of less than two hundred dollars. They are not, then, "of" the creditors whose debts exceed two hundred and fifty dollars. And the allegation is, therefore, pro tanto, untrue.

Second. But it is claimed that the names and debts of these two may be stricken out as surplusage; that the court is at liberty to look at the affidavits in proof of the act of bankruptcy, accompanying the petition (to which a schedule of creditors is annexed), and the petitions be allowed to stand as those of the five remaining creditors, it appearing by this schedule that these five petitioners do, in fact, constitute the requisite proportion of creditors authorized to institute proceedings. In the first place, however, I think the petition itself ought to make a complete case for adjudication, and that defective allegations cannot be supplied except by amendments made in the usual manner. If a single material allegation may be thus supplied, I see no reason why all may not, and the entire case thus made by a series of affidavits. The forms prescribed by the supreme court contemplate affidavits in proof of the claim of the petitioning creditors, and of the act of bankruptcy; but I do not understand they can be used to establish a case not made by petition. In Re Keeler [Case No. 7,638], it was held that the absence of the allegation as to the number and amount of the creditors in the petition could not be supplied by the admission of the debtor that the requisite number had joined. See, also, In re Scull [Id. 12,568]. In Re California Pac. R. Co. [Id. 2,315], it was held that the court might look at the facts set forth in the petition for an injunction to show that the case made by the petition for adjudication was untrue. But I know of no case where affidavits were admitted to make a new and different case.

Again, I do not see how, by any legal fiction, this petition of seven petitioners can be allowed to stand as that of the five whose debts exceed two hundred and fifty dollars. The allegation that "your petitioners constitute one-fourth at least in number, upon the basis of two hundred and fifty dollars and upwards, of the creditors of said McKibben, and that the aggregate of their debts provable under the said acts amounts to at least one-third of the debts so provable," would have to be interpreted as though it read, "That such of your petitioners as hold claims to the amount of two hundred and fifty dollars constitute one-fourth at least in number, etc.,"—an allegation to which it is safe to say none of the seven petitioners supposed he was making oath. It was originally filed as the petition of seven, and can no more be treated as the petition of five than of one. If it were true that the five petitioners did not constitute the requisite proportion of creditors, could a prosecution for perjury be sustained against them? An unnecessary allegation may sometimes be treated or stricken out as surplusage, but I have never known of parties to a suit being ejected in this summary manner. Perhaps, if the allegation with regard to the number of creditors were denied by a debtor, and, upon a reference to ascertain whether the requisite proportion had joined, it should appear that a part of the claims were less than two hundred and fifty dollars, yet, if the remainder constituted the requisite proportion, the petition might still be sustained and allowed to stand, as that of the remaining creditors; but I think the petition, as originally filed, should make a prima facie case. I must hold, therefore, that the petition is defective, and makes no case for an adjudication.

Third. Can this defect be remedied by amendment? In the only case I have been able to find, where the power to amend the allegation with regard to the number of creditors was denied (In re Rosenfield [Id. 12,061]), decided by my learned predecessor, the refusal was put upon the ground that the allegation was jurisdictional, and therefore could not be amended. In Re Cornwall [Id. 3,250], the allegation with regard to the claim of the petitioning creditors was treated by Judge Woodruff as jurisdictional, though the power to amend was not discussed. It was also held to be jurisdictional in Re Burch [Id. 2,138], and in Re Skelly [Id. 12,921]. On the other hand, it was expressly held by the district court of Massachusetts in Ex parte Jewett [Id. 7,303], that the allegation in question was not jurisdictional, and the opinion of this court in the Rosenfield Case was criticised at some length.

Jurisdictional allegations are of two classes:

1. Those strictly jurisdictional, and relating to the subject-matter or the parties. The judgment of a court having no jurisdiction of the subject-matter or parties is null and void, and may be impeached in collateral proceedings, and the record of the court showing such jurisdiction may be contradicted by parol evidence. Galpin v. Page, 18 Wall. [85 U. S.] 350; Starbuck v. Murray, 5 Wend. 148; Williamson v. Berry, 8 How. [49 U. S.] 495; Thompson v. Whitman, 18 Wall. [85 U. S.] 457.

2. Allegations of quasi-jurisdictional facts, which must be made and proved, but, when so proved, are res adjudicata, and binding in collateral proceedings; such, for example, as that, in applications for letters of administration, the decedent left no will; in proceedings in rem, under the revenue laws, that the property has been seized by the collector;

and in proceedings to sell real estate for the payment of debts, that the deceased left no sufficient personalty. Examples of these allegations, and of the conclusive character of the judgment rendered under them, are found in the following cases: Hudson v. Guestier, 6 Cranch [10 U. S.] 281; Thompson v. Tolmie, 2 Pet. [27 U. S.] 157; Ex parte Watkins, 3 Pet. [28 U. S.] 193; Grignon's Lessees v. Astor, 2 How. [43 U. S.] 319; U. S. v. Arredondo, 6 Pet. [31 U. S.] 691; Rhode Island v. Massachusetts, 12 Pet. [37 U. S.] 657; Griffith v. Bogert, 18 How. [59 U. S.] 158; Florentine v. Barton, 2 Wall. [69 U. S.] 210; Comstock v. Crawford, 3 Wall. [70 U. S.] 396; Dyckman v. Mayor, 5 N. Y. 434; Jackson v. Crawfords, 12 Wend. 533; Wright v. Douglass, 10 Barb. 97; Fisher v. Bassett, 9 Leigh, 119.

In the recent unreported case of Michaels v. Post [21 Wall. (88 U. S.) 398], in the supreme court of the United States, the allegation with regard to the debt of the petitioning creditor is treated as jurisdictional, and the judgment of the district court as binding in an action by the assignee. In Betts v. Bagley, 12 Pick. 572, a similar allegation under the insolvent law of New York was treated as jurisdictional. The court remarks "that the magistrate before whom insolvent proceedings are instituted has jurisdiction of the person, where it is shown that the party petitioning as an insolvent is an inhabitant of the county, and of the subject-matter, where the proceedings are brought before him by a petition purporting to be a petition by the insolvent, in conjunction with persons holding two-thirds of all the debts due from the insolvent to persons residing within the United States." I think, therefore, that the allegation in question is a quasi-jurisdictional one, and falls within the second category above mentioned. Does it therefore follow that it is not amendable? It was so held, or rather assumed, by my learned predecessor in Re Rosenfield, above cited; but I think the weight of authority is decidedly the other way. It was held amendable in Ex parte Jewett [supra], and in Re California Pac. R. Co. [Case No. 2,315]. In Re Burch, already cited, the learned judge of the Western district also treated it as amendable. I find no such general doctrine as assumed in the Rosenfield Case, that a jurisdictional allegation, even in special proceedings, cannot be amended. In Conelly v. Taylor, 2 Pet. [27 U. S.] 556, and in Jackson v. Ashton, 10 Pet. [35 U. S.] 480, the allegation of citizenship necessary to be made to give jurisdiction to the federal court was held to be amendable. See, also, Greeley v. Smith [Case No. 5,747]. In attachment proceedings the rule is different in different states. Under the statutes of Alabama and Georgia they are held not amendable (see Hall v. Brazleton, 40 Ala. 406; Cohen v. Manco, 28 Ga. 27), while in Iowa, Mississippi, and New York they are treated as amendable (Bunn v. Pritchard, 6 Iowa, 56; Langworthy v. Waters, 11 Iowa, 432; Johnson v. Tuggle, 27 Miss. 836; Lawton v. Keil, 61 Barb. 558).

The section of the act in question provides that "if the allegation as to the number or amount of petitioning creditors be denied, and it shall appear that the requisite number have not petitioned, the court may extend the time within which the other creditors may join in the petition." Under this provision, amendments of the petition have been permitted in a large number of cases.

Petitions filed between December 1, 1873, and June 22, 1874, are also permitted to be amended by this provision. As congress has expressly allowed amendments of all petitions filed between these dates, and of all those where the allegation in question is untrue in fact, I think that courts ought to be equally liberal in allowing them where the allegation is defective in law. While upon ordinary questions, as they arise, I propose to follow the prior decisions of this court without comment, the practice of altogether disallowing amendments in cases of this character would frequently be so disastrous to creditors, and work such obvious injustice, that I feel constrained to take the responsibility of changing it, and of permitting amendments where the facts of the case would seem to justify it. It appears from one of the affidavits in support of the petition (and I think the court may look at the affidavits for this purpose, although not for the purpose of establishing a case not made by the petition) that the five creditors whose claims exceed two hundred and fifty dollars each do constitute the requisite number and amount, and I shall therefore permit the petition to be amended in this regard.

Fourth. Further objection is made that the acts of bankruptcy charged in the petition are not supported by the depositions. Twelve affidavits are filed in support of the petition, and of the application for a provisional warrant. One of those is sworn to before a circuit court commissioner, and is conceded to be inadmissible. Nine are verified before notaries public, and, I think, are also inadmissible. By the act of July 29, 1854 [10 Stat. 315], notaries public were authorized to "take depositions, and do such other acts in relation to evidence to be used in the courts of the United States, in the same manner and with the same effect as commissioners to take acknowledgments of bail and affidavits might lawfully take or do." In the case of Blake Crusher Co. v. Ward [Case No. 1,505], decided before the publication of the Revised Statutes, Judge Longyear held that the taking of verifications to bills and answers, and of affidavits in support of motions and injunctions, were "acts in relation to evidence" within the meaning of the above provision, and properly done before notaries. The object of this act, however, was, primarily, to amend the 30th section of the judiciary act of 1789 [1 Stat. 88], in relation to dep-

ositions de bene esse, and to extend the power of taking such depositions to notaries as well as to judges, clerks, and commissioners. The revisors of the statutes so treat it, and in section 863 they simply inserted the words "notary public" as one of the officers before whom depositions may be taken, and, apparently gave them no power to do "such other acts in relation to evidence" as was held, in the case above cited, to authorize them to take affidavits. Section 1778 provides that in all cases in which oaths or acknowledgments may be taken before any justice of the peace, they may also be taken before a notary public; but I find no provision by which oaths in general may be taken before justices. They are given power to take complaints for warrants of arrest, and also in certain cases under the merchants' seaman's act, and perhaps in some other minor matters; but I know of no act giving them a general power to take affidavits. I think, therefore, that the nine affidavits in question cannot be read.

The acts of bankruptcy set forth in the petition are: (1) A fraudulent chattel mortgage on McKibben's stock of goods, to secure an alleged debt of three thousand dollars. made with intent to hinder, delay and defraud creditors. (2) That McKibben, being insolvent, assigned, transferred, and disposed of his goods and other property, with intent to hinder, delay, and defraud his creditors, and to defeat and delay the operation of the act. (3) A fraudulent stoppage of payment of commercial paper.

As there is no evidence in the depositions to sustain the last two counts, the only question is whether sufficient appears to show that McKibben made the mortgage specified in the first count with intent to defraud his creditors. The intent need only exist in the mind of McKibben (In re Drummond [Case No. 4,093]), and is determined by looking at what he has said and done, and the effect thereof (Ecfort v. Greeley [Id. 4,260]). The mortgage was made to Hiram Harrington, September 29, 1874, and purported to cover his entire stock of goods as well as the safe contained in his store, and to secure the payment of three thousand dollars, on or before January 29, 1875, with interest at ten per cent. It was filed in the township clerk's office, October 3. The facts set forth in the depositions are substantially as follows: that McKibben had been engaged in business about two years, during the first year as a partner of Harrington, and after that alone, and as successor of the firm of Harrington & McKibben. That on September 25, 1874, four days before the execution of the mortgage, one Rathbun visited St. Louis, where McKibben did business, and took from him an order for dry goods to the amount of two thousand four hundred dollars. Before sending the order to his principals, and on September 29, the day the mortgage was executed, he took from McKibben the following statement of his property: Three lots and houses in St. Louis, four thousand dollars; forty-four lots in wife's name, four thousand five hundred dollars; stock on hand, six thousand dollars; outstanding debts, twelve hundred dollars: total, fifteen thousand seven hundred dollars. Liabilities: Hiram Harrington's mortgage on three lots and houses, two thousand four hundred dollars; mortgage on forty-four lots, one thousand dollars; unsecured claims, two thousand three hundred dollars: total, five thousand seven hundred dollars. Relying upon the truth of this statement, Rathbun forwarded the order for the bill of goods, and also introduced McKibben to several other business houses in Detroit, of whom and of other Eastern creditors before his failure he purchased goods to the amount of about seven thousand five hundred dollars. That on the 18th of February, 1875, learning that McKibben had failed, Rathbun again went to St. Louis, saw McKibben, who admitted giving the chattel mortgage to Harrington, when his attention was called to the apparent loss or deficiency, it having been ascertained by an inventory made upon the foreclosure of the chattel mortgage, that the stock was valued at about two thousand nine hundred dollars. McKibben claimed that the value placed on his stock in September must have been too high, and when reminded that if his stock then and now was about the same, he had nevertheless purchased two thousand five hundred dollars worth more of goods than he had paid of debts, and, asked to account for those two thousand five hundred dollars worth of goods, said that he was unable to do so. Admitted sending off goods to the amount of five or six hundred dollars to other and distant places, but claimed they were old, shop-worn, and unsalable; that he had nothing with which to pay his debts; that when asked how much he valued his lots at, replied, about two thousand six hundred dollars, and that his wife's forty-four lots were worth about two thousand five hundred dollars. To Rathbun's counsel, who accompanied him to St. Louis, McKibben stated that he could not tell how much he owed Harrington, and had no means of knowing without consulting him; that he had paid some of his notes to Harrington, and given others before and after the date of said chattel mortgage. That McKibben refused to show him his books of account; that on asking him who his attorney was, he referred him to one Wright; that he refused to go in with him to see his attorney; that Wright also purported to act as the attorney of Harrington, and that both McKibben and Wright refused to meet together with Rathbun's counsel and discuss the matter at all.

There are many other facts set forth in these affidavits with regard to the removal of valuable goods to a large amount, but as they are sworn to only upon information and belief, it is at least doubtful whether they can be considered upon this motion; sufficient, however, appears to make out a prima facie

case of conveyance with intent to defraud creditors, and to justify an order to show cause.

First. The mortgage covered all the stock of the debtor.

Second. If there was any consideration at all for it other than that already secured by the real estate mortgage, it seems to have been for a precedent debt of two thousand dollars, contracted about a year before, when McKibben bought out the interest of Harrington in the establishment. Harrington up to that time had rested content with personal security.

Three. It was made when McKibben was heavily indebted.

Fourth. On the day it was made, McKibben made a statement of his liabilities, in which the only claim of Harrington was the mortgage of two thousand four hundred dollars, secured on his real estate, no mention was made of the debt secured by this mortgage, if any such existed, nor was anything said about a mortgage being given; he stated the value of his real estate at four thousand dollars, when it was worth, as he afterwards admitted, but two thousand six hundred dollars. The value of his wife's property, stated upon that day at four thousand five hundred dollars, he afterwards admitted was worth but two thousand five hundred dollars.

Fifth. Notwithstanding that, between the giving of the chattel mortgage and his failure, he had purchased goods to the amount of two thousand five hundred dollars more than the amount of debts he had paid, the stock inventoried under the chattel mortgage but two thousand nine hundred dollars, when he had stated it in September at six thousand dollars.

Sixth. He refused to show his books of account, was evidently ignorant of the amount he owed Harrington, declined any explanations, and even refused to confer with his creditors in presence of his counsel. I think these facts are sufficient to justify the issuing of an order to show cause. Is there sufficient to justify a provisional warrant for the debtor's arrest and the seizure of his property? The 40th section of the bankrupt law authorizes a provisional warrant, if it shall appear that there is probable cause for believing the debtor is about to leave the district, or to remove or conceal his goods and chattels or his evidence of property, or make any fraudulent conveyance or disposition thereof. No separate petition for a provisional warrant is presented, but the prayer of the petition for the order to show cause, also asks the issuing of a provisional warrant. It was granted upon the prayer of this petition and upon the affidavits already referred to. Where the facts set forth in the affidavits justify the issuing of a provisional warrant, I should be unwilling to vacate it, simply upon the ground that the affidavits were not in the form of a petition, especially where a warrant was prayed in the original petition. See Morgan v. Quackenbush, 22 Barb. 73. Better practice, however, is to file a separate petition, supported by affidavits of persons having knowledge of the facts where the same are not stated in the petition of the petitioner's own knowledge. I think the provisional warrant should not issue except where all material facts are stated upon personal knowledge. In this case, nothing appears tending to show a removal or concealment of property, or fraudulent disposition thereof, except his admission that he had sent off to other places, not to exceed five or six hundred dollars worth of goods, and that they were old, shop-worn, and unsalable. It is true that deponents swear that they are informed that valuable goods to a much larger amount were sent away and disposed of at various places, but this fact is not established by the personal knowledge of any one, and I think sufficient did not appear to justify the issuing of a provisional warrant, the only object of which is to obtain immediate possession of the goods and person of the debtor, pending the appointment of the assignee. As it seems highly probable, however, from the statements of counsel, as to the contents of the inadmissible affidavits, that sufficient cause does, in fact, exist, for the issuing of a provisional warrant, leave will be given to make another application.

Seventh. The only remaining objection to the proceedings is, that the commissioner who took the depositions in proof of debts, failed to sign the jurat to the deposition of J. H. Bratshaw. It seems that all parties appeared before Mr. Graves, United States commissioner, on the 25th day of February, and made oath to the petition and to the depositions in proof of their respective claims, but that he accidentally omitted to sign the jurat to Mr. Bratshaw's deposition. As the omission is purely a clerical one, I think it may be supplied. If the commissioner distinctly recollects the fact of Mr. Bratshaw signing and verifying the deposition in his presence, he may sign his name to it as it stands, otherwise the party may be re-sworn, and the deposition filed nunc pro tunc.

It is therefore ordered that the petition be dismissed unless the same be amended within ten days; that the respondent be discharged from arrest, and the property seized by the marshal under the provisional warrant be delivered up, but without prejudice to a new application.

McKIBBIN (MITCHELL v.). See Case No. 9,666.

Case No. 8,860.

McKIBBIN v. The C. VANDERBILT.

[2 Int. Rev. Rec. 62.]

Circuit Court, S. D. New York. Aug., 1865.[1]

COLLISION—HUDSON RIVER—NAVIGATION IN CHANNEL—FOG.

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

[This was a libel by Robert H. McKibbin against the steamer C. Vanderbilt, to recover damages resulting from a collision. The district court rendered a decree for libelant (case not reported) in the sum of $7,020.53, from which claimant appeals.]

Mr. Morris, for libelant.

Mr. Jones, for claimant and appellant.

NELSON, Circuit Justice. The collision in this case occurred between the canal boat Canisteo, one of the tows in charge of the tug O. C. Hibbard, and the steamer C. Vanderbilt, on the morning of the 16th May, 1863, on the west shore of the Hudson river, about opposite the arsenal at Troy. The tug had left with her tow that morning, starting from the upper side-cut at Troy, on the west side of the river, descending along the same, one hundred and fifty or two hundred feet from the shore. The Vanderbilt was coming up the river on one of her usual trips, and making for the dock on the east side of the river. There had been a considerable freshet in the river, so that the water was some six or eight feet higher than its usual rate. There was no difficulty, therefore, as to sea room for the steamers to pass to the right and east of the descending tow. Indeed, upon the proofs, even in an ordinary stage of water, the Vanderbilt could easily have passed to the right in going to her dock. Both vessels, however, were in a dense fog at and before they discovered each other, and, as it respects the navigation of each, under the circumstances in which they found themselves, very little, if any, objection can be taken. The point pressing upon the steamer is, that she was too far to the east of the channel of the river, and, therefore, out of her proper course. This view was taken by the court below, and upon it a decree was rendered for the canal-boat. We are inclined to concur in this result. The west side is the natural and ordinary track for descending vessels; and the Vanderbilt, we think, was bound to take notice of this fact, and to have kept nearer to the middle of the river. She had no right to act upon the idea that the descending boat would take that course, and expect her to pass to the left or starboard, between her and the left shore. What makes the case more marked in this respect, is the fact that the steamer's dock was on the east shore, some miles above the collision.

Decree affirmed.

[The case was taken on appeal to the supreme court, where the decree of the circuit court was affirmed, with costs. 6 Wall (73 U. S.) 225.]

[1] [Affirmed in 6 Wall. (73 U. S.) 225.]

McKIM (ASHTON v.). See Case No. 584.

Case No. 8,861.

McKIM et al. v. KELSEY et al.

[Taney, 502.] [1]

Circuit Court, D. Maryland. April Term, 1851.

MARITIME LIENS—REPAIRS—NOTE GIVEN THEREFOR—SURRENDER—JURISDICTION—CONSENT.

1. A promissory note given for articles furnished towards the repair of a vessel, will not bar a suit in admiralty, on the original cause of action, where the libellant produces the note in court, and surrenders it.

2. If the district court has not jurisdiction independently of the consent of the parties, that consent could not confer it.

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

[This was a libel in personam by William McKim and Haslett McKim against Henry Kelsey and Andrew Gray. The district court rendered a decree dismissing the libel, without costs. Libellants appeal.]

J. Mason Campbell, for libellants.

Wm. R. Preston, for respondents.

TANEY, Circuit Justice. The libel filed in this case by the appellants, only states that, at the request of the appellees, who were agents and part owners of the schooner Greek, they found and provided a quantity of copper for the said vessel, which was useful and necessary to her safety and navigation on the high seas; that the appellees gave their promissory note for the amount ($616.16), payable on the 23d of August 1848; and that the note had not been paid; and they pray process in personam against the appellees, and a decree for the payment of the money.

The appellees accordingly appeared and answered, admitting the facts stated in the libel, and consenting that a decree should be passed as prayed; and the libellants produced the note mentioned in the libel, and filed it in court and surrendered it. There was no testimony taken in the case; and at the hearing in the district court, upon these pleadings and proceedings, the learned judge dismissed the libel without costs.

It is evident, that this decree was founded upon the opinion that the district court had not jurisdiction; and certainly, if it had not jurisdiction, independently of the consent of the parties, that consent could not confer it. But the circuit court is of opinion that the

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

district court had jurisdiction of the case, as presented in the libel, and admitted in the answer. The reasoning and authorities upon which this opinion rests, have been already stated in the case of Reppert v. Robinson [Case No. 11,703], in which the same questions arose; and it is unnecessary to repeat them here; but upon the grounds there stated, this court is of opinion that the decree of the district court in this case is erroneous, and must be reversed. Decree reversed with costs.

Case No. 8,862.

McKIM v. PHOENIX INS. CO.

[2 Wash. C. C. 89.] [1]

Circuit Court, D. Pennsylvania. April Term, 1807.

MARINE INSURANCE — OPEN POLICY — SECOND INSURANCE—LIABILITY—WAIVER OF ABANDONMENT.

1. A policy was underwritten by the Philadelphia Insurance Company, on goods on board the Ann, at and from Baltimore to Jeremie, and at and from thence to Baltimore, 12,000 dollars, valued. After the arrival of the Ann in the West Indies, the owner was informed, by a letter from the captain, that the return cargo would be 112,000 pounds of coffee; and insurance was made by the defendants, stating the cargo at 125,000 pounds of coffee, valued at twenty-two cents per pound, from which was to be deducted 12,000 dollars, insured in the Philadelphia Insurance Company. A total loss took place, and the Philadelphia Insurance Company paid the loss, by compromise, waiving an abandonment. The policy underwritten by the Philadelphia Insurance Company, must be considered as open on the homeward cargo.

2. The policy underwritten by the defendants, does not bind them to cover the whole cargo, valued at twenty-two cents per pound, deducting the sum previously insured.

[Cited in Murray v. Insurance Co. of Pennsylvania, Case No. 9,961.]

3. The defendants were not bound to resort to the insurance office in which the first policy was made, to ascertain the precise nature of the same.

4. By the policy made with the Philadelphia Insurance Company, the underwriters had, in case of loss, a right to as much of the cargo as would, at prime cost, amount to 12,000 dollars; and the second policy, in respect thereto, was void.

[Cited in Murray v. Insurance Co. of Pennsylvania, Case No. 9,961.]

[Cited in Deming v. Merchants' Cotton Press, etc., Co., 90 Tenn. 306, 17 S. W. 97.]

5. The waiver of an abandonment by the Philadelphia Insurance Company, did not affect the relations between the plaintiff and the defendants.

[Cited in Murray v. Insurance Co. of Pennsylvania, Case No. 9,961.]

[Cited in Ryder v. Phoenix Ins. Co., 98 Mass. 192.]

The case states, that on the 27th of November, 1803, the plaintiff effected insurance in the Philadelphia insurance office, on goods on board the Ann, at and from Baltimore to Jeremie, with liberty to touch at one other port at the West Indies, and at and from thence back to Baltimore; 12,000 dollars insured. A written memorandum was subscribed at the bottom, by which it was declared that the insurance was on flour, dry goods, wine, and provisions, &c. &c., valued at 12,000 dollars, clear of premium. The invoice contained the above articles, and some others of no great value, such as candles, tobacco, &c. The plaintiff, after the arrival of the vessel at her port in the West Indies, received a letter from his captain, informing him of the sale of the outward cargo; that he had then on board about 60,000 pounds of coffee, and expected to take in about 112,000 pounds, probably more. Upon receiving the letter, the plaintiff, in December, 1803, directed his agent to insure the return cargo, estimating it at 125,000 pounds of coffee, valued, as concerns this risk, at twenty-two cents per pound: from which was to be deducted 12,000 dollars, insured in the Philadelphia insurance office, which would leave 15,500 dollars to be covered. The agent made out his order on this letter of instructions, and carried it to the office of the defendants, where the risk was underwritten upon the terms mentioned; at and from Jeremie to Baltimore, being on coffee shipped, to be valued at twenty-two cents per pound. A total loss having taken place on the homeward voyage, the plaintiff gave notice to the Philadelphia and Phoenix offices, and offered to abandon, and to make such cessions as might be proper. The Philadelphia office insisted upon a cession of the whole cargo, which was refused by the plaintiff; the defendants, understanding the nature of the first policy, or from some other cause, refused the abandonment. After this suit was brought, the plaintiff compromised with the Philadelphia insurance office, and gave up his claim of interest, they consenting to pay the principal, and not to require any cession. Instead of 125,000 pounds of coffee, the vessel took in only about 113,000 pounds.

Tilghman and Lewis, for plaintiff, contended that the policy on the return voyage was open, and that the defendant being informed of the prior insurance, which it was his duty to examine, and agreeing to value the whole cargo shipped, at twenty-two cents per pound, did, in effect, agree to pay what might remain of the value of the whole cargo at that price; after deducting the 12,000 dollars, previously insured.

For the defendant, it was insisted, by Rawle and Ingersoll, that the voyage insured in the Philadelphia office, was out and home; and if the outward voyage was valued, which must be admitted, so too must have been the homeward voyage. If so, the whole being valued at 12,000 dollars, the plaintiff had no interest left to insure with the defendant; and of course the second policy, by the express terms of it, was void.

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

That the valuing the property at risk, is merely to save the trouble of proving it; and that the case must be considered precisely as if the cargo was really worth only 12,000 dollars; of course, there was nothing left to insure by the second policy. The plaintiff, in case of loss, must have abandoned all to the Philadelphia office, and had nothing left to abandon to the defendants; that the defendants were not obliged to examine the first policy, because it was referred to; particularly as the order was calculated to induce in them a belief, that in the first policy, the whole cargo was valued at twenty-two cents per pound. Strictly, then, the plaintiff can recover for no part of the cargo; but, at any rate, he can recover no more than the premium estimated in coffee, at prime cost, and then turned into coffee again, at twenty-two cents per pound. The question submitted is, on which principle is the loss to be settled?

WASHINGTON, Circuit Justice. The first thing to be clearly and distinctly understood, is the nature and extent of the contract between these parties. The defendants have underwritten 15,500 dollars on the cargo of this vessel, at and from Jeremie to Baltimore, valuing every American pound weight of coffee, shipped on board, at twenty-two cents; but it was also agreed, that if the plaintiff should have made a prior insurance upon the cargo so shipped, these defendants should be answerable only for so much as the amount of such prior insurance might be deficient towards fully covering the premises, such amount being understood to be the whole sum so underwritten; and that the policy, so far as property had been previously insured, should be considered as null and void; and the premium to be returned on so much of the sum so insured, as the defendants were exonerated from by such prior insurance. The defendants then insured only the property which was uncovered by any prior insurances. This leads to the inquiry, what part of the cargo from Jeremie to Baltimore, had been previously insured; and how much, if any, remained to be covered by this policy? Twelve thousand dollars, clear of premium, had been underwritten in the Philadelphia insurance office, on the cargo of this vessel, at and from Baltimore to Jeremie, and back again; and the important question is, whether this latter policy covered the whole, or what part of the return cargo? The plaintiff contends, in the first place, that the first policy covers 12,000 dollars out of 24,847 dollars and 46 cents, the value of the whole cargo of coffee, at twenty-two cents per pound; and, on the other hand, it is insisted, by the defendant, that, in strictness, the whole cargo is covered by the first policy.

The arguments on which the plaintiff founds his first claim, are, that the policy, though a valued one on the outward voyage, is open as to the return cargo; and that the defendants having been apprized of the first insurance, which covered as much coffee only as the 12,000 dollars would purchase at twenty-two cents per pound, they consented to cover the balance of the plaintiff's interest in the whole cargo; which, valuing the coffee at twenty-two cents per pound, the price it would in the plaintiff's estimation be worth here, would have amounted to 15,500 dollars, the sum insured, if 125,000 pounds had in fact been shipped. To prove that the defendants knew and had it in their power to examine particularly the terms of the prior policy, and that they were content to make this special contract, reference was made to the order for insurance, which desires insurance to be made "on the homeward cargo, consisting of coffee, valuing the same at twenty-two cents per pound, as interest may appear on board, say 125,000 pounds, American weight, valued, as far as respects this risk, at twenty-two cents, is 27,500 dollars, out of which deduct the sum already insured in the Philadelphia insurance office, on the homeward cargo, 12,000 dollars;" which leaves 15,500 dollars yet to be insured, at and from Jeremie to Baltimore. Each and every pound of coffee which may be shipped on board, shall be valued at twenty-two cents per pound.

The plaintiff's counsel are, in the opinion of the court, perfectly correct in contending that the policy effected in the Philadelphia insurance office, is open on the homeward cargo. If the written memorandum had not been added, it cannot be denied but that the policy on the outward and homeward voyage would have been open; and it is not less undeniable, that the written clause which fixes the value, is confined to the enumerated articles, and any others which could properly be included in the et caetera. The enumerated articles are such as must have been understood to constitute the outward cargo, and by the invoice we find, that in fact they did constitute that cargo. If there were no other articles on board to satisfy the et caetera, we should, nevertheless, require strong authorities to convince us, that an entire cargo, constituting the whole property which might be brought back, was intended to be covered under an et caetera; when, in the same clause, so particular an enumeration had been made of the articles which constituted the bulk of the cargo. But there is no room for giving such a construction to the et caetera in this case, as we find in the invoice of the outward cargo, a variety of articles not enumerated, of no great value, and such as are worthy of being covered by an et caetera. This construction is greatly strengthened by considering how unlikely and how unusual it is, to value a cargo, the amount and value of which is at the time totally unknown to the insured. This point being established, what follows? The plaintiff's counsel say that the defendants have specially agreed to cover the whole cargo, valued at twenty-two cents per pound, deducting therefrom only the 12,000 dollars insured by the first policy. To this

conclusion the court cannot assent. If the written clause were so express and plain, as to leave no doubt that such was the intention of the parties; and if it appeared that the defendants were fully informed as to the nature of the first insurance, this clause would control the printed clause, important as it is considered by all the insurance offices in this city. Every presumption is against such an intention, and the evidence to prove it ought to be extremely clear and strong. The words, "every pound of coffee shipped, or to be shipped," taken in reference to the words in the order, "valued, as far as respects this risk, at twenty-two cents per pound," and so stating the amount from which the 12,000 dollars was to be deducted, amounted to so plain a declaration that the cargo had been previously valued at twenty-two cents per pound, as to leave no doubt concerning the intention of the defendants, at least, if not that of the plaintiff. But it is said that the defendants, having been apprized of the first insurance, were bound to examine it, or to take the consequences of their negligence in not doing so. But we answer, that if, in any case, the underwriters are, upon such information, bound to run from office to office to examine papers thus referred to, they were not bound to do so in this case; when the plaintiff spoke a language respecting the nature of the first policy, if not too plain to be misconstrued, yet such at least as was sufficient to mislead. The order of insurance plainly intimates that only 12,000 dollars were to be deducted from the whole amount of the cargo, whereas it is admitted that in case of loss, the first underwriter would, upon abandonment, have been entitled to so much of the cargo as 12,000 dollars would have absorbed, at prime cost and charges; and the plaintiff would have been entitled to claim the value of the same proportion of the cargo. The defendants, therefore, were clearly misled by the manner in which the first insurance was represented to them. If these were the rights of the parties under the first policy, it follows, that so much of the cargo was covered thereby, as 12,000 dollars would purchase at prime cost and charges; and consequently the second policy, in respect thereto, was, by the terms of it, void. The defendants, then, are answerable only for so much of the coffee as remains after this deduction is made, at the price of twenty-two cents per pound. Upon the happening of the loss, the plaintiff could certainly have abandoned no more to the defendants, which proves that no more was insured. It is unnecessary to decide, whether an underwriter may, by an express agreement made at the time the contract of insurance is concluded, bind himself to run the risk of a technical total loss, and yet relinquishing all his right to the thing insured, should any thing be saved; because, in this case, there is nothing which, in any respect, amounts to such an agreement.

This argument on the part of the defendants, cannot be got rid of by the agreement of the Philadelphia Insurance Company, after the loss, to waive all their right to the property which might be saved; because, at the time this policy was signed, it was, by the terms of it, void, except as to the property uncovered by the first; and no future circumstance could give it life, as to the other property, without the consent of the other party to the contract.

McKIM (SWATARA R. CO. v.). See Case No. 13,681.

McKIM (UNITED STATES v.). See Case No. 15,693.

Case No. 8,863.

McKINDER et al. v. DUNLAP.

[1 Cranch, C. C. 584.] [1]

Circuit Court, District of Columbia. Nov. Term, 1809.

CHECK—DEMAND OF PAYEE—INSOLVENCY OF DRAWER—PRESUMPTION.

If the drawer and payee of a check upon a bank reside in the town where the bank is, and the drawer be insolvent; the jury cannot, in law, infer from those facts, that the plaintiffs had used due diligence in demanding payment, and giving notice to the defendant.

The plaintiffs [McKinder & Guilliat] offered in evidence a check drawn by the defendant [Samuel Dunlap] upon the bank at Norfolk.

Mr. Jones, for defendant, contended that in order to charge the defendant, the plaintiffs must prove that they demanded payment from the bank; and gave notice to the defendant in reasonable time.

Mr. Taylor, for plaintiffs, offered to prove that the plaintiffs and defendant lived in Norfolk; that the bank was in Norfolk and solvent; and that the defendant was insolvent; and contended that the jury might infer from these facts that the plaintiffs had used due diligence in demanding payment from the bank and giving notice to the defendant.

But THE COURT was of opinion and so instructed the jury that they could not, in law, make that inference.

Case No. 8,864.

In re McKINLEY.

[7 Ben. 562.] [2]

District Court, S. D. New York. Jan., 1875.

BANKRUPTCY—ADJUDICATION—SETTING ASIDE—JURISDICTION.

1. A petition in bankruptcy against McK., regular on its face, was filed. A proper case was

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

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

presented to the court for service on him by publication. Such service was made, and, on the return day, proof of due service being presented, and the debtor not appearing, an adjudication of bankruptcy was made. A petition was afterwards presented to the court by R., representing that he was a creditor of McK., and had not been named as such in the petition in bankruptcy, and that the debts of McK. were much greater than was alleged in that petition, and that the requisite number and amount of creditors had not joined in the petition. On this petition R. prayed that the adjudication of bankruptcy and all the subsequent proceedings might be set aside and vacated. McK. also at the same time applied, on affidavits, for an order that the proceedings be vacated, or that he be allowed to file an answer. His affidavit set up that he had no knowledge of the filing of the petition, and that the petition was not signed by the requisite number and amount of creditors, and that the petitioning creditors knew it: *Held*, that the court having been satisfied on the evidence before it on the return day, that the requirements of the statute as to number and amount of petitioning creditors had been complied with, so adjudged, which judgment is by the statute declared to be final.

2. Such judgment is certainly final in the absence of fraud or collusion.

3. The allegation that the petitioning creditors knew that the proper number of creditors had not joined in it, was not sustained, and both motions must be denied.

In this case, after an adjudication of bankruptcy had been made, a petition was presented to the court by one Andrew Rhende, which set forth that the petition in the case was filed by creditors whose claims amounted to $8,790; that the petitioner was a creditor of [John H.] McKinley for over $10,000; that other parties, stated in the petition, were creditors to the amount of over $20,000, and none of them had joined in the petition, although all the debts were provable in bankruptcy; that McKinley was indebted in at least $40,000 of provable debts; and that the claims of the petitioning creditors were, therefore, much less than was required by the statute. On this petition Rhende applied to have the adjudication of bankruptcy vacated and the petition and all proceedings under it dismissed. At the same time an application was presented on behalf of McKinley to have the proceedings annulled, or that he might have leave to file an answer denying that the creditors who had joined in the petition constituted the requisite number and amount under the statute, and denying that McKinley had been during six months preceding the filing of the petition a resident of the Southern district of New York. This application was founded on an affidavit of McKinley, setting forth a list of his creditors, showing debts amounting to over $60,000; and setting forth also that he had had no personal knowledge of the proceedings, that the petition and order to show cause were only served on him by publication, and that he believed that the fact that one-third in amount of his creditors had not signed the petition was well known to the petitioning creditors at the time of filing the petition. In opposition to the motion, an affidavit was presented on the part of the petitioning creditors denying any such knowledge, showing the facts which justified the service by publication under the statute, and denying the truth of the allegation as to the amount of McKinley's debts.

S. B. Higenbotam and E. McKinley, for the motions.

M. Diefendorf, opposed.

BLATCHFORD, District Judge. The petition in bankruptcy was regular on its face. On the papers before the court the order for substituted service by publication was properly made. Service was so made. On the return day the debtor did not deny the allegation as to the number or amount of petitioning creditors by a statement in writing to that effect. Proof of service by publication being made, and the court being satisfied on the evidence then before it that the requirement of the statute as to the number and amount of petitioning creditors had been complied with, the court so adjudged, and that judgment is contained in the order of adjudication, which finds that the facts set forth in the petition are true, one of which facts is the allegation as to the number and amount of petitioning creditors. The statute declares that such judgment shall be final. Certainly it is final in the absence of fraud or collusion. No fraud or collusion is shown in this case. It is not denied that the bankrupt had carried on business within this district for the period requisite to give this court jurisdiction of the case. Jurisdiction by such carrying on of business is alleged in the petition. The allegation that the petitioning creditors knew, when the petition was filed, that the proper number and amount of creditors had not joined in it is not sustained.

The motions to vacate the adjudication are denied, and the motion of the bankrupt for leave to interpose an answer is denied.

McKINLEY (UNITED STATES v.). See Case No. 15,694.

McKINNEY (DART v.). See Case No. 3,583.

McKINNEY (FARMERS' LOAN & TRUST CO. v.). See Case No. 4,667.

McKINNEY (HOW v.). See Case No. 6,749.

Case No. 8,865.

McKINNEY v. NEIL.

[1 McLean, 540.] [1]

Circuit Court, D. Ohio. July Term, 1840.

CARRIERS—STAGE COACH—UPSETTING—INJURY TO PASSENGER — PRESUMPTION — WANT OF SKILL — NEGLIGENCE — DAMAGES — IMPEACHING WITNESS.

1. A stage proprietor is bound to furnish good coaches, gentle and well broke horses, good har-

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

ness, and a prudent and skilful driver; and should a passenger receive an injury from any defect in this preparation, the proprietor is liable.

[Cited in Frink v. Coe, 4 G. Greene, 557.]

2. The upsetting of a stage is prima facie evidence of negligence; and a passenger who has been injured need show nothing more to sustain his action.

[Cited in Frink v. Coe, 4 G. Greene, 558, 560; Sherlock v. Alling, 44 Ind. 204; Lemon v. Chanslor, 68 Mo. 356; Ryan v. Gilmer, 2 Mont. 517. Cited in note to Memphis & O. R. P. Co. v. McCool, 83 Ind. 398.]

3. It will then be incumbent on the defendant to show, by way of reducing the damages, or in bar of the action, the circumstances of the case.

[Cited in Frink v. Coe, 4 G. Greene, 560.]

4. The defendant is not responsible for casualties which could not be foreseen nor guarded against. But he is liable for the smallest degree of negligence or want of care in the driver, or for his want of skill.

[Cited in Lusby v. Atchison, T. & S. F. Ry. Co., 41 Fed. 185.]

[Cited in Frink v. Coe, 4 G. Greene, 557; Galena & C. U. R. Co. v. Yarwood, 15 Ill. 471; Galena & C. U. R. Co. v. Fay, 16 Ill. 567. Cited in brief in Huelsenkamp v. Citizens' Ry. Co., 37 Mo. 544. Cited in New Orleans, I. & G. N. R. Co. v. Allbritton, 38 Miss. 242; Taylor v. Grand Trunk Ry. Co., 48 N. H. 316. Cited in note to Twomley v. Central Park, etc., R. Co., 69 N. Y. 159. Cited in Treadwell v. Whittier, 80 Cal. 589, 22 Pac. 271; Memphis & O. R. P. Co. v. McCool, 83 Ind. 398. Cited in brief in Le Barron v. East Boston Ferry Co., 93 Mass. (11 Allen) 314.]

5. If the driver leave the common track and take one not used, which increases the risk, it is evidence of negligence.

6. Want of skill in the driver, being a material fact in the cause, may be proved as any other fact. In this respect the driver stands in a different relation from a witness, whose general character only can be impeached.

7. A witness cannot be impeached by proving that at other times he made contradictory statements, unless he shall be interrogated as to such statements.

[Cited in U. S. v. Dickinson, Case No. 14,958; Conrad v. Griffey, 16 How. (57 U. S.) 47.]

[Cited in Sutton v. Reagan, 5 Blackf. (Ind.) 220. Cited in brief in Jarboe v. Keoler, 8 Ind. 315.]

8. But where an ex parte deposition of a witness was read, of the taking of which no notice was given, under the act of congress, and under the peculiar circumstances of the case, the court permitted contradictory statements to be proved.

[Cited in Howland v. Conway, Case No. 6,793.]

[This was an action by Adam McKinney against William Neil to recover damages for personal injuries sustained in an accident alleged to have been caused by the negligence of the defendant.]

Messrs. Ewing and Stansbury, for plaintiff.

Messrs. Wright and Wilcox, for defendant.

OPINION OF THE COURT. The defendant, in connection with others, is an extensive stage proprietor, and runs the lines of stages from Columbus to Zanesville, in this state. The plaintiff being a passenger in one of these lines, through the negligence and want of skill of the driver, as he alleges, the stage was upset, and he was severely injured. For this injury, the loss of time and expense, this action was brought. It was proved that the plaintiff being in Columbus on the evening of the 18th December, 1838, took a seat for the next morning's stage to Zanesville, at the stage office, and paid the usual fare of four dollars and fifty cents. At the time this was done the agent or clerk, in the office, informed him that he would have to occupy an outside seat. The stage left Columbus for Zanesville the next morning at ten o'clock, and proceeded on the national road about thirty-five miles, to near Linnville, where, at the foot of a hill the stage upset and the injury complained of was done. When the stage left Columbus there were nine passengers inside, and two, the plaintiff being one of them, on the outside with the driver. At Reynoldsburgh, the first place of change, one of the inside passengers left the stage. And at Jack-town, there being another passenger, it was suggested to the plaintiff that, being the sixth person entered, he had a right to take his seat inside of the coach, which he declined doing. The route of the driver complained of commenced at Etna, and it was observed by several of the passengers, that he drove very fast. After a short delay at Jack-town, the driver continued on his route at the same rapid rate. Near the summit of the hill at the foot of which the misfortune occurred, the driver passed on the right-hand side of a two horse wagon of Mr. Hampden, a witness, who was driving the same direction as the stage. Hearing the approach of the stage, Mr. Hampden turned his horses to the left, which gave to the stage more than half the road. It passed without coming in contact with the wagon, and the witness observed that all the horses except one, which was a very fast trotter, were in full gallop. The stage had a patent lock or rubber, but the driver, instead of using the lock to retard the progress of the stage, in descending the hill, applied the whip twice within the observation of the witness. The hill was between a quarter and a half mile long. After passing Mr. Hampden's wagon, the horses ran to the verge of the right hand side of the road; they then inclined to the left. The plaintiff and his fellow passenger on the outside, Thompson, remonstrated with the driver more than once; and requested him to use the lock; but he refused to do so, telling them there was no danger. The horses continued their direction to the left, until the near wheels of the stage ran off the paved road a foot or two, and continued so to run some two or three rods, when the horses turned to the right, and the stage upset with great violence. The ground where this occurred was nearly level. The off-wheels ran on the paved road, but the descent was small from the paved to the unpaved part of the

road, and with ordinarily good driving, the coach could have been in no danger of upsetting where it did upset. A moment before the stage turned over, one of the inside passengers observed they were going over. At this time the speed of the horses was about as great as it had been. When the stage turned over it became uncoupled, and the horses ran off with the fore-wheels. The plaintiff was picked up about a rod behind the stage body, shockingly mangled. His head was cut in several places, but the principal wound was in his left limb. The back part of his thigh was much lacerated, and from the knee down there was a severe contusion. From the manner of the injury, it it probable that he attempted to jump from the stage, the top of which must have fallen on his limb, as the left leg of his pantaloons was much torn. An attempt was made to remove him to Linnville, a short distance, but he could not bear the motion; and he was taken into a house at hand, where he remained under the care of a physician and nurses for three months, before he was able to be removed to his brother's, in Delaware. Forty-eight hours transpired before the physician could produce a reaction of the system, during which time his extremities were cold, and a sense of shivering pervaded his system. He also suffered under a delirium the greater part of the time. The flesh on his leg mortified and fell off, so as to expose the muscles, which were also much injured. The plaintiff being present, his leg was examined by physicians, in the presence of the jury. It has yet acquired but little strength, and is much smaller than the other; and it is the opinion of the physician that it will never become sound and strong. The plaintiff offered to prove a want of skill in the driver, by showing that at one time his lines were not properly fastened on his horses, and at another time he handled them unskilfully, and was near upsetting the stage.

To this evidence the defendant's counsel objected, on the ground that the plaintiff may prove the general character of the driver, but cannot show his incompetency or want of skill by proving particular facts. If in this respect the driver stands in the same relation as a witness, it is very clear that the inquiry must be limited to general character, and cannot go as to particular facts. This rule is founded in justice. A witness is brought before the court and is required to testify. And if his testimony shall be impeached, it would be most unjust to discredit him by the proof of particular facts, of which he has had no notice, and against which he cannot be expected to be prepared to defend himself. But as every man is presumed to be ready at all times to defend his general character, on this ground he may be impeached. A driver, as such, may have a general character. But the driver in question was a stranger, had been on the route only three or four days, and had established no general character. This, it is admitted, in the case of a witness, could have no influence on the general rule. But may not a distinction be drawn, in this respect, between the character of a driver and that of a witness? A driver is a voluntary agent, and professes to have skill in driving; and he is employed in a business, which, for the safety of passengers, requires firmness and a high degree of skill. He is charged with a want of experience and skill, and how are these to be proved? May they not be proved by persons skilled in driving, and who have observed him drive? If, for instance, he is so ignorant of the duties he assumes to perform, as not to know how to harness the horses, or to handle the lines, may the fact not be shown? In what way could his incompetency be more satisfactorily established? His skill as a driver is often the gist of the action; and it is involved in the present case. In this view, he does not stand in the relation of a witness whose credibility is attempted to be impeached; but he stands in the place of the defendant, who is answerable for his want of skill and negligence.

The question of skill is the point in issue, and is not collateral. May it not then be shown by proof of the fact, the same as any other material fact in the case? It is admitted that proof of negligence at any other time would not be proper, as it would not conduce to establish negligence at the time of the injury. But this is not the case as it regards a want of skill. Proof of this a few days or hours before the stage was upset, may have some important bearing, in the opinion of the jury, on the conduct of the driver at the time of the injury. If a few days before the occurrence, the driver showed himself to be ignorant of the common duties of a driver, it is not at all probable, that in so short a time he could have acquired the necessary skill and experience; and if for the want of these the stage was upset, the defendant is liable. This though offered as evidence in chief, is in the nature of rebutting testimony. For it will be incumbent on the defendant to show, that the driver was experienced and skilful. In an action against the owners, for negligently managing a ship, so that she was wrecked and the plaintiff lost his passage, another act of negligence not bearing on the wreck, and which could not possibly cause it, was held irrelevant. 1 Car. & P. 70. And where the defendant was indicted for keeping a disorderly house, the court confined the evidence to general reputation and excluded particular facts. 1 Serg. & R. 342, 343. But where an individual is indicted for passing counterfeit bills or notes, proof that similar notes or bills were found in his possession is admissible. And so on an indictment for passing counterfeit coin. If instruments for coining be found in possession of the defendant, the fact may be proved. Proof that he has at other times passed counterfeit notes or coin, is also prop-

er. This is admitted to show the knowledge of the defendant, that the notes or coins which he is charged to have passed, were counterfeit. 1 Phil. Ev. 179; 6 Barn. & C. 145; 1 Camp. 324; Bayley, Bills, 447. To show fraud in selling an inferior kind of goods for blue guineas, a witness was allowed to prove a sale to himself of a parcel of blue guineas by the defendants, before the sale to the plaintiffs; and the declaration and conduct of the defendants towards him on the subject of the distinct parcel. 1 Johns. 90, 99, 100.

In the case of Stokes v. Salstonsall, 13 Pet. [38 U. S.] 181, the declarations of the driver after the upset of the stage, that he had upset fifty stages, &c. was admitted by the circuit court as evidence, and the judgment of that court was generally affirmed by the supreme court. Had these declarations been considered as having been made by a witness merely, they would, clearly, have been inadmissible. But coming as they did from the agent of the defendant, and for whose conduct he was answerable, they conduced to prove a want of skill in the driver, and were, therefore, received as evidence. In our limited research we have been unable to find a case in point, but we are inclined to think, that as want of skill is a fact material in the present case "it may be proved as any other fact in the case;" and that in this respect the driver stands in a relation different from a witness whose character is impeached. Under this decision the plaintiff proved that on one occasion the driver had his lines fastened wrong, the check rein of one or both the lines being buckled on the outside; and that on another he handled the lines so unskilfully, as to nearly upset the stage in passing the waggon of one of the witnesses. The defendant proved that the driver had been employed by an agent, some few days before the upset, on his enquiring for stock, and saying that he had driven stage two years and six months for Calder, in Pennsylvania, on the northern route from Harrisburg to Philadelphia. The driver had been in Columbus a short time, and had professed to be an apothecary and a blacksmith. The defendant also proved, that his stage lines were generally managed as well and indeed better than any other lines in the western country. That drivers had uniformly been dismissed for intoxication and for any misconduct, on the complaint of travellers. That an experienced person was employed at Columbus, whose duty it was to inspect the stage coaches, harness, &c., and to see that no coach was taken out of the yard which was not in good order, and also the harness. He also proved that a day or two before the accident an agent passed on the line, and found the horses of the driver and also the harness in a good state; and his habits were proved to be good for the time he had been on the road. It was also proved the day after the injury, the plaintiff on being interrogated by a witness whether the driver was drunk, replied, that he did not know, but rather thought not. And the defendant called a witness to discredit Samuel Thompson whose deposition was read by the plaintiff, by showing that to different individuals the witness made statements different from those in his deposition. To the introduction of this evidence the plaintiff objected, on the ground that the witness had not been interrogated as to these statements, and that until this was done they could not be proved. This question it is admitted, after a full discussion has been decided, by the supreme court of this state, in favor of admitting the evidence. But it is insisted that this decision is in violation of the general rule on the subject. In the construction of the statutes of the state, and in matters of practice, so far as they have been adopted by the law of congress, this court follow the same rule of decision as the supreme court of the state. But in all other questions the court will look to the decisions of the state, as the decisions of other courts, and not as establishing the law.

This rule is well settled in England, that the contradictory statements of a witness cannot be proved, unless the witness shall be examined as to such statements. 1 Phil. Ev. 293; 2 Brod. & B. 286, 315; 2 Peake, 232. But if the statements are irrelevant to the issue, they cannot be contradicted. 4 Leigh, 405, 406; 5 Wend. 301, 302–305; 3 Car. & P. 75. And we think this is the correct rule. It is reasonable and just. Until a witness shall have had an opportunity to explain prior and contradictory statements, by having his attention called to them, they should not be the subject matter of proof. But in the present case, the deposition was taken ex parte, under the act of congress, and the taking of it was not known to the defendant until it was opened, at the present term. The plaintiff could not know of this attempt to discredit the witness, until the evidence now offered. It was in the power of the defendant, on reading the deposition, to move for a continuance, on the ground that he wished to take the deposition of the witness in regard to the statements, with the view of afterwards contradicting him. This, perhaps, might be done, as the deposition of Thompson, thus taken, would be substantially a cross examination. But as the rule of evidence on this point had been differently settled by the supreme court from the view here given, we will, under the circumstances, admit the evidence. It is to be understood, however, that we adhere to the English rule on the subject. In the case of Daggett v. Tallman, 8 Conn. 169, 177, 178, the court say, in general, wherever a fact would be relevant as affecting the credit of a witness, and might be inquired of upon cross examination, the same fact may be shown to impeach his credit, where he is absent, having made a deposition. This rule, however, must be subject

to many exceptions. Several witnesses being sworn, stated that Thompson, who was the outside passenger with McKinney on the stage, and who was also considerably injured, on the same evening that the stage was upset and the next day, said he did not think that the driver was much, if any, to blame; and that he hoped the company would not discharge him. That he stated, as they were going at a rapid rate down the hill, he and also McKinney requested the driver to check the horses, and that the driver, bracing his feet against the foot-board, pulled the lines with all his force, when something gave way, and the stage immediately upset. A statement of the facts which the defendant expected to prove by the driver McKee, having failed to take his deposition, was read as evidence, without objection. This witness stated, that near the summit of the hill he came in contact with a waggon, which frightened his horses, so that they became unmanageable, and that at the foot of the hill, in attempting to avoid a pile of stones, the lines broke and the stage upset. It was proved by other witnesses that some four or five hundred yards from where the stage was left, two pieces of the lines were picked up, one piece about four feet long, the other about one foot; and the witness stated that on those pieces being sewed on the lines they were complete. Another witness stated that he picked up a part of one of the lines, about four feet in length, in the road about a rod or two in advance of the stage. Whether this was the piece picked up by the other witness and brought near to the stage was not explained.

The cause was zealously and ably argued on both sides; and THE COURT charged the jury substantially as follows:

The injury received by the plaintiff, and for which this action was brought, is proved by Dr. Morris, the attending physician, and several other witnesses. There is no contrariety in the evidence as to the extent or permanency of the injury. The suffering of the plaintiff cannot well be estimated. It was as great as human nature could bear. For forty-eight hours the scales of life and death hung in suspense. The coldness which precedes dissolution pervaded his system. His pulse was at times not perceptible, and he labored under delirium. At length the system re-acted, and the symptoms became more favorable. But the progress of recovery was slow and painful; and it would seem, there is little ground of hope that he will ever recover from his present state of decrepitude. His leg may probably acquire more strength, but all the physicians agree that, in all probability, it will never become sound. In this form of action, the plaintiff seeks compensation from the defendant, for the sufferings he has undergone, the time he has lost, the money he has expended, the injury to his business, and the loss, in a considerable degree, of his limb. Should the plaintiff be entitled to your verdict, you will be as capable as the court, and indeed more so, of estimating the amount of damages he should recover. The upsetting of the stage is prima facie evidence of negligence, and to sustain his action it was only necessary for the plaintiff to show he was a passenger, having paid his fare, and that he was injured by the upsetting of the stage. The defendant, with his partners, is engaged in an enterprise intimately connected with the public accommodation. Having incurred a large expenditure in establishing his lines of stages, he holds inducements to the public to travel in his lines. He is bound to provide good coaches and harness, gentle and well broke horses, and a skilful and careful driver. These are obligations which the law imposes on every stage proprietor; and if any injury is received by a passenger, from any defect in this preparation, the proprietor is responsible.

There are certain risks which are incurred by every stage passenger, and for which the proprietor is not responsible. These are those casualties which human sagacity cannot foresee, and against which the utmost prudence cannot guard. If, for instance, a gun should be fired so near the stage as to frighten the horses, and they, becoming unmanageable, upset the stage and injure a passenger, he is without remedy as against the driver or his employers, as no fault can be attributed to them. We are surrounded with dangers at home and abroad; and they are greater when we travel than while we remain stationary. In some modes of travelling these dangers are greater than in others. They may be greater on water than on land; on a fast line of stages than on a slow one. And every passenger must make up his mind to meet the risks incident to the mode of travel he adopts; which cannot be avoided by the utmost degree of care and skill in the preparation and management of the means of conveyance. This is the only guaranty given by the proprietor of the line. You will understand the application of the evidence better, gentlemen, if I consider it, in strictness, as it might have been introduced. The plaintiff then has sustained his right of action by showing the injury he received from the upset of the stage, he being a passenger. And it is then incumbent on the defendant to prove facts and circumstances which go to reduce the damages, or to excuse him from all liability. The defendant has shown by several witnesses a promptness and vigilance, by the company, in the general management of their lines very creditable to them. They have evinced a commendable solicitude for the accommodation and safety of passengers. And it would seem that no lines in the Western country, by the preparation of coaches, horses, drivers and a vigilant superintendency, are better entitled to public confidence than the one

now in question. But in this case it appears the driver employed had no other recommendation of his experience and skill, than that which was afforded by his own statements.

The main ground of the defence is, that blame does not attach to the driver. And this, it is insisted, is shown by the statement of facts which the driver would swear to, admitted as evidence; the remark of the plaintiff that he did not think the driver was intoxicated, and the repeated remarks of Thompson, that he did not think the driver was to blame and hoped he would not be discharged by the company. And it is contended that the fact of the lines being broken, strongly corroborates the statements of McKee, the driver, that the lines broke, which was the proximate cause of the upset of the stage. The declaration charges the injury to the want of skill and care of the driver, and not to any deficiency in the coach, harness, or horses. And the court recognize the principle urged, that the plaintiff can recover only on the grounds stated in his declaration. So that if the lines were broken by reason of any defect in them, that can give no right of recovery to the plaintiff. It must be observed that the statements made by Thompson, as proved by the defendant, are not evidence in chief, but can only be considered as lessening the weight or destroying the effect, of the facts stated in his deposition. On the part of the plaintiff, it is insisted, that the other evidence goes to disprove the statement of the driver, and that independently of the deposition of Thompson, which they do not admit to be discredited, they have shown recklessness and want of skill in the driver. That the speed with which he drove down the hill, using his whip and not using the lock, showed him to be reckless and was the cause of the disaster. The driver must not only be skilful, but he is bound to exercise the utmost degree of care. And if you shall think, from the evidence, that in commencing the descent of the hill and driving down it, in the manner proved, he acted imprudently or rashly, the defendant is liable, although you should find that the immediate cause of the upset was, the breaking of the lines. The least degree of imprudence or want of care in the driver fixes the liability of his employers. And if in this case in descending the hill, such an impetus was given to the stage as to render it difficult and hazardous for the driver to check and control his team, the defendant is liable. It is evidence of want of care in the driver, if he leave the common track and take one not used, which increases the risk. Something has been said as to the exposure of the plaintiff by keeping an outside seat, when he might have taken a seat inside of the coach. This circumstance can have no influence in the case. The defendant was as much bound to convey the plaintiff safely on the outside as the inside of the coach. It is not pretended that the upset of the stage was, in any degree, attributable to the position or the act of the plaintiff.

Upon the whole, gentlemen, having heard, with a most patient and careful attention, the evidence and arguments of counsel, it remains for you to make up your verdict in this important case. A case interesting to the parties and to the public. If you shall find from the evidence, that the upset of the stage was caused by one of those accidents which a skilful driver, using the utmost care could not avoid, you will find for the defendant; but on the contrary, if you shall believe that the injury received by the plaintiff was, in any degree, attributable to a want of skill or care in the driver, you will find for the plaintiff, and assess for him such damages, as under all the circumstances, you shall think him entitled to receive, and the defendant is bound to pay.

The jury returned a verdict of $5,325.00 in damages, for which a judgment was entered.

NOTE. As the statement of the driver, in this case, was read in evidence, without objection; and as the driver implicated was examined as a witness, without objection, in the case of Maury v. Talmadge [Case No. 9,315], tried at the same term, it may not be improper to say something as to the competency of this evidence. An interest in the question does not go to the competency of a witness. But if the verdict can be used in evidence against the witness, should the party who called him, fail, the witness is incompetent on the ground of interest. In Phil. Ev. (Ed. 1839) 56, 130, it is said that in an action against a master for the negligence of his servant, the servant is not a competent witness to disprove his own negligence; for the verdict may be given in evidence in a subsequent action by the master against the servant, as to the quantum of the damages, though not as to the fact of the injury. And to this effect are the following cases: Green v. New River Co., 4 Term R. 589; Martin v. Henrickson, 2 Ld. Raym. 1007; Miller v. Falconer, 1 Camp. 251; 15 East, 474; 3 Camp. 416; Rotheroe v. Elton, Peake, 84; 2 Moore, 508; 8 Taunt. 454. But though agents and brokers are competent to prove a sale or contract, they are not competent to prove the contract properly executed, in an action against the principal for their misconduct or negligence. 1 Holt, N. P. 139; Bird v. Thompson, 1 Esp. 339; 6 Esp. 73. The coachman in an action against another for an injury done by a cart to the coach, while the coachman is driving, is not a competent witness for the plaintiff, the owner of the coach. Kerrison v. Coatsworth, 1 Carr. & P. 645. So a pilot is not a competent witness for the captain of a steam boat, sued for running down a barge, the pilot steering at the time of the accident, though the captain was on board. Hawkins v. Finlayson, 3 Carr. & P. 305. The guard of a coach is not competent for the proprietors, sued for mismanaging it, so that the plaintiff was struck by the luggage. Whitamore v. Waterhouse, 4 Carr. & P. 383. In the case of The Hope [Case No. 6,678], it was held that where a vessel was seized for a violation of the non-importation act of 1st March, 1809, c. 91 [2 Story's Laws, 1114; 2 Stat. 528, c. 24], and there were strong circumstances to induce a presumption that the master was privy to the illegal importation of the goods, which were found concealed on board the vessel, it was ruled that he was not a competent witness for the owners of the vessel, to prove his ignorance of the goods being on board. He had a direct interest to prevent a forfeiture, occasioned by his own illegal conduct; for the decree of condemnation would be good evidence

in a suit brought against him by the owners. From these authorities it would seem, that the driver is not a competent witness in behalf of the proprietor who is prosecuted for an injury received, through the negligence or misconduct of the driver.

McKINSEY (CALLADAY v.). See Case No. 2,318.

Case No. 8,866.

McKINSEY et al. v. HARDING.

[4 N. B. R. 38 (Quarto, 10).] [1]

District Court, D. Virginia. Sept. 24, 1869.

BANKRUPTCY—LIEN CREDITOR—JUDGMENT—GOING BEHIND—INSANITY OF BANKRUPT—CORAM NOBIS—REFUSAL TO BE EXAMINED—PROOFS.

1. Where assignees apply to court for an order to examine a lien creditor who had obtained judgment against Ira Hurt, one of the bankrupts, for four thousand three hundred and sixty-two dollars and fifty-one cents, and against Walter C. Calloway, the other bankrupt, for four thousand two hundred and fifty dollars and fifteen cents, alleging usury on the part of Calloway. In Re Hurt, the lien creditor refused to be examined, through advice of his counsel, and submitted to the court the following questions: Is it competent for the district court to go behind the judgment of the state court, and inquire into the consideration of the debt upon which the judgment is founded? The facts disputed were: Usury in the consideration of the debt—ability and opportunity of the bankrupt to plead to action at law in the state court—his mental condition at the time the process was served, and at the date of the judgment obtained against him. *Held*, the lien creditor should have produced evidence satisfactory to the register, or answered the questions of the assignee in relation to his asserted lien against the estate of the bankrupt.

[Cited in Re Pittock, Case No. 11,189.]

2. In view of the alleged insanity of the bankrupt, a writ, coram nobis, in the court where the judgment was rendered would be the proper mode of redress; the jurisdiction of this court will then attach to the whole subject.

3. In Re Calloway, the lien creditor again refused to be examined—the same questions were certified to the court, and it was admitted that the judgment was rendered upon a plea of usury. *Held*, the creditor was right in refusing to be examined in relation to a question of usury upon the debt for which the judgment was rendered.

4. Where the assignees, by their counsel, moved to strike out proofs filed in each of said cases, and the motion was objected to by attorney for lien creditor, *held* the proofs having been admitted to file, and appear in form, and since they distinctly assert and claim a lien, although against the entire estates of the several bankrupts, the real lien is not thereby vitiated.

5. The informality in the proofs objected to does not avail, for the reason, the witness has sworn positively, of his own knowledge.

[Cited in Re Watrous, Case No. 17,270.]

Hurt & Calloway filed their petition in bankruptcy, in Lynchburg, in 1868, and were duly adjudicated bankrupts. McKinsey & Brown, of Danville, were appointed assignees, and in the course of the proceedings in this case, these assignees applied to the court for an order to have Dr. Harding examined before the register, in Lynchburg, under the following circumstances:

On the 9th November, 1865, Harding obtained a judgment in the circuit court of Roanoke county, against Hurt, upon which he proved a debt against this bankrupt's estate for four thousand three hundred and sixty-two dollars and fifty-one cents, the defendant having waived his plea previously plead that he had well and truly paid the debt. Again, on 3d September, 1866, the said Harding obtained the verdict of a jury in the said circuit court of Roanoke, against Calloway, for the sum of four thousand two hundred and fifty dollars and fifteen cents, which he also proved against said Calloway's estate—in both cases principal, interest, and expense are included.

The object of the assignees' proceeding was to revive a charge which had been got up by Hurt & Calloway in the state court, of usury on the part of Calloway, but as the salient points of the case are fully elucidated in the register's reports and opinions, as also in the pleas of the counsel, we give them entire, this being the first case in which this question (of usury) in connection with state court judgments, has been before the district court in bankruptcy.

In re Ira Hurt, Senr.

At Lynchburg, in said district, on the 15th June, 1869, before me, John F. Cobbs, one of the registers of said court in bankruptcy, upon an order in said matter heretofore made and entered, for the examination of John B. Harding et al.

Present: L. D. Haymond, Esq., attorney for assignees; Andrew Rutherglen, Esq., attorney for J. B. Harding, creditor, etc.

The said John B. Harding personally appeared before me, at the time and place designated in said order, and through advice of his counsel refused to be examined in relation to a judgment obtained by him against the bankrupt, prior to the commencement of the proceedings in bankruptcy: First. Because a question of law and fact has been raised in these proceedings. Second. Because, until the decision of the court has been obtained, it is incompetent to proceed with the evidence sought to be had, and desires these questions to be certified to the court, which are herewith submitted accordingly.

The following are the questions: First. Is it competent for the district court to go behind the judgment of the state court, and inquire into the consideration of the debt upon which the judgment is founded. Second. The questions of facts. Usury in the consideration of the debt—ability and opportunity of the bankrupt to plead to action at law in the state court—his mental condition at the time the process was served, and at the date of the judgment obtained against him?

Upon the foregoing questions, the register is of the following opinion: The lien creditor, John B. Harding, should have produced evidence satisfactory to the register, or answered the questions of the assignees, in re-

[1] [Reprinted by permission.].

lation to his asserted lien against the estate of the bankrupt. The validity of the judgment being put in question, and no certified copy of the proceedings in the state court being exhibited before the register, it is impossible for him to express any definite opinion on the questions presented. But if it should be shown that the proceedings in the state court were in all respects regular and legal, and that the defendant had a day in court and pleaded, and upon the issue joined the judgment was rendered, then the plea of res judicata prevails, and I am of opinion that said judgment, according to the laws in force at the time in Virginia, constituted a lien upon the real estate of the bankrupt; if, however, the record of the proceedings in the state court discloses the fact that the defendant made no appearance, that no matter was pleaded, and no issue joined, in the action upon which the judgment was obtained, it appears to the register that the whole matter should be inquired into, but that the remedy of the assignees properly belongs to another forum. The question of the jurisdiction of the district court to go behind the judgment of the state court, and inquire into the consideration of the debt upon which the judgment is founded, I think has been settled adversely in Re Campbell [Case No. 2,349], and reaffirmed in Re Burns [Id. 2,182]. Vide G. B. C. R., 69, 70. The plea of res judicata is conclusive, except for the fact of the insanity of the bankrupt alleged, or some informality or illegality in the proceeding in the state court. But if insanity, or any matter of fact, be the ground for a review of the judgment, a court of equity is not, but a court of law is, the proper forum for redress, and a writ of error, coram nobis, in the court wherein judgment was rendered, would be the proper mode of redress. The alleged insanity is matter of fact, which, if true, made the judgment erroneous, and which, if known to the court, would have caused it to provide for a proper defense, by guardian ad litem (Gordon v. Frasier, 2 Wash. [Va.] 130; Cole v. Pennell, 2 Rand. [Va.] 174); and when the fact is of the kind which may be made the ground of a writ of error, coram nobis, equity has no jurisdiction (Williamson v. Appleberry, 1 How. [42 U. S.] 206), in which a party was dead when judgment was rendered. The chancellor held it no ground for injunction, but for error, coram nobis. The relief granted in equity by virtue of Code of Virginia (Ed. 1860), 141, applies to cases wherein money has been paid out upon usurious considerations; and is not applicable to judgments upon which no money has been paid out. I am, therefore, of opinion that the district court cannot go behind the judgment; but that the assignees, if they desire to raise the question, must sue out a writ of error, coram nobis, in the court which rendered the judgment, and have it reversed. The suit will then be open, and the jurisdiction of this court will attach to the whole subject as if it were a pending suit when the proceedings commenced in this matter.

John F. Cobbs, Register.

In re Walter C. Calloway.

At Lynchburg, in said district, on the 15th of June, 1869, before me, John F. Cobbs, one of the registers of said court in bankruptcy, upon an order in said matter heretofore made and entered, for an examination of John B. Harding et al.

Present: L. D. Haymond, Esq., attorney for assignees; Andrew Rutherglen, Esq., attorney for John B. Harding, etc.

The said John B. Harding personally appeared before me, at the time and place designated in said order, but refuses, through the advice of his attorney, to be examined in relation to a judgment obtained against the bankrupt prior to the commencement of these proceedings in bankruptcy: First. Because a question of law as well as facts has been raised in these proceedings, and are requested first to be certified to the court for its decision. Second. Because, until the decision of the court has been obtained, it is incompetent to proceed with the evidence sought to be had.

The following are the questions of law and facts arising in said matter, and asked to be certified to the court for its decision, viz.: Is it competent for the district court to go behind the judgment of the state court, and inquire into the consideration of the debt upon which the judgment is founded? It is admitted that a judgment was rendered upon a plea of usury, and the amount and date of said judgment duly rendered after hearing both parties in the state court.

Upon the foregoing questions the register is of the following opinion:

By the petition of the assignees, the only question they ask to be inquired into by the court being that of usury, in the consideration of the debt upon which the judgment is founded, having already been adjudicated in a court of competent jurisdiction, the plea of res judicata in the present matter must prevail.

The register is of the further opinion that the witness and creditor, John B. Harding, is right, and should be sustained by the court, in refusing to be examined in relation to the question of usury upon the debt for which the judgment was rendered; the matter having been fully heard and determined in open court, and that said judgment, by the laws of Virginia in force at the time of its rendition, constituted a lien upon the real estate of the said bankrupts.

John F. Cobbs, Register.

In re Ira Hurt & Walter C. Calloway.

George C. Brown, assignee of Ira Hurt, and the same Geo. C. Brown and John W. McKinsey, assignees of Walter C. Calloway, by their attorney moved to strike out or expunge the proofs filed in each of said cases

by Andrew Rutherglen, attorney for John B. Harding, on June, 1869, on the following grounds, to wit:

First. That the said proofs appear to be intended for cases in which the proceedings are involuntary, whereas both of these cases are voluntary proceedings.

Second. The debts set up and claimed in said proofs were founded on an usurious consideration, and are, therefore, illegal, and these estates cannot be charged with their payment.

Third. The debts are claimed as liens on the entire estate of the bankrupts, whereas, if they are liens at all, they only bind the real estate.

Fourth. For informality in not conforming to the requirements of general clause 103, section 22, of the bankrupt act [of 1867 (14 Stat. 527)]. They do not, nor do either of them show any reason why the creditor himself could not have made the deposition in person. The attorney does not "testify to the best of his knowledge, information, and belief," nor does he set forth his means of knowledge as to said claims.

Fifth. In the matter of Hurt, if the writ of summons of the state court was served on said Hurt at all, it was at a time when he was of unsound mind, and incapable for that reason of giving it any attention; and the supposed judgment was rendered at a special term of Roanoke circuit court, held more than thirty miles from the place of Hurt's residence, when he was still of unsound mind, but also when there was no public means of communication between Roanoke Court House and Hurt's neighborhood, it having been not long after the close of the late war; and hence Hurt, or his agent, or committee (if he had one), had no notice of said special term, and could not for that reason have made any defense in said court. But if the proofs in these cases, or either of them, shall be sustained and admitted, then it is claimed that the creditor has thereby surrendered any and all liens supposed to exist or to have been created by the judgment described and set forth in said proofs.

In re Ira Hurt, Sen., and Walter C. Calloway.

John B. Harding, by his attorney, objects to the proposed proceedings in the cases in bankruptcy of Ira Hurt and Walter C. Calloway, in respect that they are beyond the jurisdiction of the court in bankruptcy.

First. Because the proposed proceedings are instigated by the assignees of these bankrupts in defiance of an established rule in law in bankruptcy, that "the rights of a bankrupt to sue for and recover back money paid by him as usury is not such a right of property as vests in assignees in bankruptcy." Nichols v. Bellows, 22 Vt. 581.

Second. Because the said Harding's proofs of debt, filed with the register in these cases, consists of judgments obtained in a competent court, and are conclusive with respect thereto. Williams v. Armroyd, 7 Cranch [11 U. S.] 423, 603.

Third. Because a judgment or decree of a court of competent jurisdiction is conclusive that where a matter has been once heard and determined in one court, it cannot be raised anew and reheard in another, and hence the plea of res judicata in the present case prevails. Hopkins v. Lee, 6 Wall. [73 U. S.] 109; Bank of U. S. v. Beverly, 1 How. [42 U. S.] 134.

Fourth. Because a judgment of a state court cannot be assailed in the district court, but the assignee and creditors must resort to the state court to test its validity. Ex parte Burns [Case No. 2,182]; Atkinson v. Purdy [Id. 616].

Fifth. Because, had there been grounds for making such an investigation as the one sought, it is out of time, and falls under the rule competent, but admitted, and therefore it has been held that "where the offense for which the penalty is demanded was alleged and proved to have been committed on the 14th day of October, 1807, and the bill was found by the grand jury November, 1808, that whatever interest the complainant might have had was lost at the commencement of the prosecution, more than one year, the time limited, having elapsed." Ang. Lim. p. 96, § 109.

Sixth. Because, in respect that the preceding points have arisen in the proceedings, the said Harding desires the opinion of the district judge thereon, and until such opinion be obtained and duly intimated to all concerned, he denies the competency of the register to proceed further under the order made on the requisition of the assignees.

John B. Harding,

By his counsel, Andrew Rutherglen.

Lynchburg, 15th June, 1869.

In re Ira Hurt, Sen., and Walter C. Calloway.

At Lynchburg, in said district, on the 15th of June, 1869, before me, John F. Cobbs, one of the registers of said court in bankruptcy, the foregoing objections being presented to the claims of John B. Harding, a creditor who has filed his proofs of debt, the same is requested to be certified to the court for its decision thereon, which is herewith done accordingly. And upon the foregoing objections I am of the following opinion:

The proofs have been admitted to file and appear in form, and since they distinctly assert and claim a lien, although against the entire estates of the several bankrupts, the real lien is not thereby vitiated. The informality in the proofs objected to does not avail for the reason the witness has sworn positively of his own knowledge. The remaining objections to said proofs, I think will be found passed upon in the opinion of the register expressed upon the questions certified to the court for its decision in each of the said matters in bankruptcy.

John F. Cobbs, Register.

L. D. Haymond, for assignees.
Andrew Rutherglen, for Dr. Harding.

UNDERWOOD, District Judge. The decisions of the register are approved and affirmed.

McKINSTRY (McCABE v.). See Case No 8,667.

Case No. 8,867.

In re MACKINTIRE.

[6 Int. Rev. Rec. 29.]

District Court, S. D. New York. July 19, 1867.

BANKRUPTCY—REGISTER'S FEES—ORDER FOR EXAMINATION OF A BANKRUPT.

[A register in bankruptcy is not entitled, under rule 30 of the "General Orders in Bankruptcy" or under any provision of the bankrupt law (Act 1867), to any fee, either from the bankrupt or the creditor, for issuing an order upon the application of a creditor for the examination of the bankrupt in behalf of such creditor, but the creditor must pay the register his legal fees for taking the deposition of the bankrupt, both on direct and cross examination.]

[In the matter of James Mackintire, a bankrupt.]

BLATCHFORD, District Judge. In this case the register certifies that the first meeting of creditors was held July 11th, at which notice was given of an application next day for an order to examine the petitioner on behalf of a creditor, and the meeting was duly adjourned to July 12th. On that day, the petitioner attending, a creditor who had filed proof of his claim applied for an order in pursuance of said notice, for the examination of the petitioner on behalf of the creditor, at that time the petitioner not objecting to the time, but insisting that the creditor must pay the register's fees for the order. The creditor refused to pay the fees, insisting that they must be paid out of the deposit of fifty dollars made by the petitioner with the clerk. The register proposed to grant the order on payment by the creditor of one dollar as the proper fee. At the request of the creditor the register has certified the question for the decision of the court.

The register in his certificate refers to that portion of the 4th section of the bankruptcy act [of 1867 (14 Stat. 518)] which provides that the fees of the registers, as established by the act, and by the general rules and orders, required to be framed under it, shall be paid to them by the parties for whom the services may be rendered in the course of proceedings authorized by the act. He also refers to that part of rule 29 of the general orders in bankruptcy which provides that the fees of the register shall be paid or secured in all cases before he shall be compelled to perform the duties required of him by the parties requiring such service. He also states it to be his opinion, that the granting of the order for the examination of the bankrupt having been required by the creditor, and not by the bankrupt, the former and not the latter ought to pay the fees for the order.

On the part of the creditor it is claimed that such fees as are connected with the personal examination of the bankrupt, are governed by the 47th section of the act; that the bankrupt is compelled by that section to deposit fifty dollars for that purpose; that that section contemplates that the services of the register in the examination of the bankrupt are services required by the bankrupt and not by the creditor; that under the 47th section, the register was entitled to charge three dollars for the adjourned meeting of creditors on the 12th of July, such fee to be paid by the bankrupt; that such fee was the only fee the register had a right to charge, there being no provision by which he could exact one dollar from the creditor for entering an order for the examination of the bankrupt; that no such order was required; that there are services of the register specified in the 4th section of the act, which may be required of a creditor, and for which he should pay, but that the act does not contemplate that a creditor shall pay for the register's services in examining the bankrupt for the purpose of seeing whether he has made a proper exhibit of his affairs, when he calls a meeting of his creditors for that purpose; that under the 47th section the bankrupt must pay to the register for that service, the three dollars for the meeting of creditors, and also the fees allowed by law for taking his deposition; that section 26 of the act requires the bankrupt at all times to attend and submit to an examination on oath upon all matters relating to the disposal of his property, &c.; that the fees for such examination are provided for by section 47 of the act; that that section says that such fees shall be paid out of the estate and have priority over all other claims; that the court may, under rule 29 of the general orders in bankruptcy, exercise its discretion as to the payment of the whole or a part of the fees out of the fund in court, but that without such direction from the court the register must look to the funds in court for his fees in such a case as the present.

The views urged for the creditor are thus fully stated, in order that it may be seen that the question has been considered by the court in all its aspects. The fee of one dollar proposed to be charged by the register, in this case for making the order for the examination of the bankrupt, is not provided for by the act, and is not at all provided for, unless it is covered by the following provision of rule 30 of the general orders in bankruptcy, under the head of "Fees to the Register." "For every order made where notice is required to be given, and for certifying copy of the same to the clerk, one dol-

lar." This provision allows a fee of one dollar for making an order, and for certifying a copy of the same to the clerk, in a case where previous notice is required to be given to an adverse party of the application for the making of the order before the order can be made. That this is the meaning of that provision of rule 30 of the general orders, is shown by the language of rule 8 of the general orders. In the present case, no notice was required to be given to any party of the application for the order for the examination of the bankrupt before the order could be made. By the 26th section of the act, it is provided that the court may, at all times, require the bankrupt upon reasonable notice to attend and submit to an examination on oath, upon all matters relating to the disposal or condition of his property, &c. An order requiring the bankrupt so to attend and be examined, and service of such order on him a reasonable length of time previously, are necessary, and the form of such order is prescribed by form No. 45, of the form specified in the schedule annexed to the general orders in bankruptcy. But no previous notice is required to be given to any person of the application to the register by the creditor for the making of the order. It is to be made ex parte on the application of the creditor. It may also, under section 26 of the act, be made by the register ex parte on the application of the assignee, or by the register on his own suggestion without any application. The register was, therefore, not entitled to charge any fee for making the order in this case. There are many specific services which must be rendered by the registers, and for which no specific fee is provided either by the act or the general orders in bankruptcy. Their compensation for such service is covered by the specific fees which are enumerated in the act and the general orders. Thus the register receives two dollars for issuing a warrant, but no specific fee is provided for the adjudication of bankruptcy, form No. 5, which the register must make before he can issue the warrant. He receives compensation for making the adjudication in the fee of two dollars, which he receives for issuing the warrant. That fee of two dollars is a fee for doing everything, (a fee for which is not otherwise specially provided,) which results in the issuing of the warrant, and no specific fee is provided for the service of examining the bankrupt's petition and schedules, when such examination results in the withholding of the adjudication of bankruptcy. So also the fee of three dollars to the register for an order for a dividend, covers all his services not otherwise provided for, which result in the making of the order for the dividend; and the fee of two dollars to the register for every discharge, when there is no opposition, covers all his services not otherwise provided for, which result in the granting of the discharge. The making of the order in this case for the examination of the bankrupt, not having any fee specially attached to it, must be considered as compensated by some one or more of the fees which are enumerated.

The fee of one dollar for the order cannot be considered as authorized by the provision of the 47th section, which gives a fee of one dollar for "every application for any meeting in any matter" under the act. The word "meeting," wherever used in the 47th section and elsewhere in the act, means a meeting of creditors, such as is spoken of in the 12th, 27th, and 28th sections. The application by the creditor for the order for the examination of the bankrupt, cannot be regarded as an application for a meeting of creditors.

As the register was bound to make the order asked for, without requiring the payment by the creditor or any other person of any specific fee for such order, this decision might properly go no further than to dispose of that point. But in view of the positions urged by the counsel for the creditor, it is deemed proper to lay down some propositions which are applicable to this case, and which have been carefully considered: (1) Where a creditor applies under section 26 of the act, for an order for the examination of the bankrupt, the creditor must pay the register the fees allowed by law for taking the deposition of the bankrupt, not only for his direct examination but for his cross examination, if any, and the register is not required to look in the first instance for such fees to the bankrupt, or to the fifty dollars deposited by him or to the bankrupt's estate. (2) Whether such fees shall ultimately be paid out of the estate, will be a question for consideration hereafter.

The clerk will make a certificate of this decision to the register, Edgar Ketchum, Esq.

McKNIGHT (GILLESPIE v.). See Case No. 5,435.

Case No. 8,867a.

McKNIGHT v. McKNIGHT et al.

[2 Hayw. & H. 132.] [1]

Circuit Court, District of California. Oct. 26, 1853.

GUARDIAN AND WARD — PROPERTY OF WARD — SEIZIN — HUSBAND AND WIFE — ACTION BY WIFE — JOINDER OF HUSBAND.

1. The control of a guardian of the real estate of his ward constitutes a sufficient entry to invest the ward with actual seizin; and on the marriage of the ward the authority of the guardian ceases, so far as the right of the ward is concerned.

2. A wife, unless she be entitled to a sole and separate estate, can bring no suit without the

[1] [Reported by John A. Hayward, Esq., and Geo. C. Hazleton, Esq.]

union of her husband in relation to her property or interests, either real or personal, legal or equitable.

In equity. The complainant [Ann E. McKnight] states that she is a daughter and one of the heirs at law of Anthony Preston, deceased, who died intestate, seized of considerable real estate, leaving a widow and five other children besides the complainant. That she married James M. McKnight while under the age of 21 years, and the ward of Jacob Gideon. That upon the treaty of said marriage it was especially agreed and stipulated between her intended husband and her guardian that the estate of the complainant should be settled upon her and her heirs, free from any control of her intended husband, and from all liabilities for his debts. That her husband has not entered in fact upon any portion of said estate, nor received the rents and profits, nor seized in her right of her undivided interest therein; nor hath she made entry therein. That certain creditors of her husband have levied a fieri facias upon a life interest in her estate, who are made defendants in this suit. That without such ante-nuptial agreement the title of her husband as tenant by the courtesy, has not accrued, by reason of there having been no entry by her or him upon any part of the premises, but that the whole of said estate has remained awaiting partition and subject to dower. The prayer of the claimant was, that a decree be passed for the purpose of carrying into effect the ante-nuptial agreement, and that her husband be decreed to have no estate or interest in the premises, and that the creditors be enjoined from further proceedings, &c.

The defendants [James M. McKnight, James M. Small, John F. Dyer, Esau Pickerell, John F. Pickerell, William McVeigh, and James H. McVeigh] answering, admitted the facts as stated in the bill. That the husband of the complainant had issue by her born alive, and was entitled as tenant by the courtesy inchoate (his wife being still alive) to a life interest in one undivided fifth part, subject to the widow's dower in the whole. That if any ante-nuptial contract was made it never was reduced to writing, and is therefore null and void, so far as the defendants are concerned. That in point of law, the possession of the joint coparceners, and the reception of the rents and profits of the guardian, is equivalent to a reception thereof by the infant coparceners, and that the complainant, as one of the coparceners, has had an actual legal seizin of said estate. That the pendency of the partition proceedings cannot affect their right to enforce their judgments.

Sam'l Chitten, for defendants, says the grounds alleged in the bill for equitable interposition on behalf of the complainant are: First, An ante-nuptial agreement in contemplation and consideration of the intended marriage between the complainant and James M. McKnight, made between said James M. McKnight and said Jacob Gideon, the guardian of the complainant, to settle all the property of the complainant to her sole and separate use. Secondly, That the husband, James M. McKnight, has never had seizin of his wife's interest in the legal estate in question. It is conceded that no settlement has ever been made. An agreement to settle is all that is relied upon for the complainant. Whether such agreement, if it ever had existence at all, was in writing or by parol, the allegations of the bill furnish no information; but as no written agreement is produced, and its non-production is wholly unaccounted for, we are warranted in assuming that if any agreement was in point made it was by parol. It is not proved that any agreement at all was written or parol was made. The only evidence touching this question is found in the deposition of Mrs. McKnight, the mother of the husband, and Mrs. Preston, the mother of the complainant. The affidavit of Mr. Gideon to the allegations of the bill is not evidence (certainly not upon a final hearing). The testimony of the two mothers apart from all bias, is altogether too loose and indefinite to establish the fact of the existence of any agreement at all, and if deemed by the court sufficient to establish the existence of an agreement, is yet so loose that it is impossible for the court to give effect to it by decree. But we insist that an ante-nuptial parol marriage agreement, even if a post-nuptial settlement, in pursuance of its terms, and reciting the fact of such agreement, be executed, and that too before the lien of the creditor attaches by judgment or execution, is yet void as to the creditor of the husband, whose debt has existence before the execution of the settlement. See 1 Story, Eq. Jur. 366, 367; and Reade v. Livingston, 3 Johns. Ch. 481, and authorities cited. If we are right in this position, then the bill of the complainant must be dismissed. As a femme covert she can only be entertained when suing separate from her husband, to enforce or protect an existing separate right or interest. As to the objection that the husband has never been seized, the control by the guardian of the estate, and receipt by him in his official character of rents, constituted a sufficient legal entry to invest the wards with actual seizin, if such seizin were necessary to confer upon the husband an interest liable for his debts (which however is denied). And upon the marriage, the authority of Gideon as guardian, so far as the complainant's rights and interests were concerned, ceased. And the same seizin and all were by operation of law transferred to and vested in the husband, and he could by no mere parol agreement, divest himself thereof. It is not very distinctly perceived, however, in what manner the question of the husband's seizin can affect the rights of the creditors, pending the lives of the husband

and wife. If the wife were dead, a question might arise as between the husband and the heirs as to his title as tenant by the courtesy which might possibly be affected by the character or fact of his seizin during the coverture, but whilst the wife is living, unless she be entitled to a sole and separate estate, she can without the union of her husband bring no suit in relation to her property rights or interests, either real or personal, legal or equitable. So that if her claim to a separate estate be without foundation, she cannot be entertained in a court of equity upon either of the grounds alleged in the bill. If she have no right to a separate estate, her husband during the coverture is entitled to all her rights and interests, legal and equitable. If by reason of want of seizin on his part, or for any other reason, his interests in his wife's estate are not legally subject to execution or sale, or if irregularities in the management of the process of execution are likely to effect a sacrifice, if the wife have no sole and separate estate, the husband singly or in conjunction with his wife can alone interpose by suit, either at law or in equity, for redress or protection.

J. M. Carlisle, for complainant.

THE COURT by its decree dismissed the bill with costs, and dissolved the injunction.

Case No. 8,868.

McKNIGHT v. RAMSAY.

[1 Cranch, C. C. 40.] [1]

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

COURTS — JURISDICTIONAL AMOUNT — OFFSET — ARREST OF JUDGMENT.

In an action of debt for an amount large enough to support the jurisdiction of this court, it is no cause for arrest of judgment that the sum due is reduced by offsets to a sum for which the court would not have had original jurisdiction.

[Cited in Hellrigle v. Dulaney, Case No. 6,343.]

Debt. Verdict for the debt in the declaration mentioned to be discharged on payment of £3. 11s.—the plaintiff's demand being reduced to that sum by offsets.

Motion by Mr. Taylor, for defendant, for nonsuit; the sum being less than twenty dollars, and so not within the jurisdiction of this court.

Mr. Swann, for plaintiff, cited Gross v. Fisher, 3 Wils. 49.

Nonsuit refused.

McKNIGHT (SEMMES v.). See Case No. 12,653.

McKNIGHT (SHINN v.). See Case No. 12,789.

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

McKNIGHT (UNITED STATES v.). See Case No. 15,695.

MACKOY (UNITED STATES v.). See Case No. 15,696.

McLAIN (McCULLOCH v.). See Case No. 8,739.

Case No. 8,868a.

McLAIN v. RUTHERFORD.

[Hempst. 47.] [1]

Superior Court, Territory of Arkansas. April, 1827.

NOTES — DAYS OF GRACE — MAKER — PLEADING AT LAW — NOL PROS OF COUNT — ASSESSMENT OF DAMAGES — SUM CERTAIN — JURY.

1. The custom of merchants as to days of grace does not apply as between the maker and payee.

2. A plaintiff may enter a nolle prosequi to any count in his declaration.

3. When the sum is certain, or may be reduced to a certainty by computation, the intervention of a jury to assess damages is unnecessary.

Appeal from Pulaski circuit court.

[This was a suit by John McLain against Samuel M. Rutherford.]

Before JOHNSON, ESKRIDGE, and TRIMBLE, JJ.

OPINION OF THE COURT. Among the numerous points relied upon by the counsel to reverse the judgment of the court below, we deem it necessary only to notice two. First, it is contended that according to the custom of merchants the defendant was entitled to "days of grace," and consequently the action was brought before the instrument, upon which it was founded, became due. We are of opinion that the custom of merchants is not applicable to this case. From an examination of the instrument upon which the action was brought, it will be seen that it is merely a simple duebill, payable to the plaintiff himself, and not to him "or order." It is not negotiable, nor can it be transferred, unless by assignment, under the statute. But, had the note in this case been, from its phraseology, negotiable, even then, unless it had been actually transferred, the custom of merchants allowing days of grace would not apply. The custom of merchants does not apply to the immediate parties to the transaction, or, in other words, to the maker and payee. While a promissory note continues in its original form of a promise from one man to pay another, it bears no similitude to a bill of exchange. The resemblance begins from the first indorsement, and when once indorsed, the law relative to bills of exchange applies.

The second point we have thought worthy of notice is, that "the plaintiff had no right to enter a nolle prosequi on the second count, and take final judgment on the first." We are most clearly of opinion that the plaintiff,

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

in discontinuing the second count, acted in strict conformity with the most approved practice; the plaintiff having the undoubted right to the control of his own case. We are also of opinion that the judgment on the first count was correctly taken, the intervention of a jury being unnecessary. The rule, as established by the supreme court of the United States (Renner v. Marshall, 1 Wheat. [14 U. S.] 215), is this: Whenever an action is brought for a sum certain, or any sum that may be reduced to a certainty by computation, the intervention of a jury may be dispensed with. Judgment affirmed.

Case No. 8,869.

McLANAHAN v. ELLERY.

[3 Mason, 269.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1823.

PARTNERSHIP—DISSOLUTION—DIVISION OF CREDITS—ASSIGNMENT BY PARTNER—RIGHT OF ASSIGNEE AGAINST DEBTOR.

Where a firm put a debt, after the dissolution of the partnership, at the disposal of one partner, and gave information of it to the debtor, such partner has a right to assign it as security for his private debt, and in equity the assignee may maintain a suit for it against the debtor.

Bill in equity. The bill stated, that in the month of September, 1818, the mercantile house of Dorsey & McLanahan of New Orleans, of which house the plaintiff was the surviving partner, sold to one Frederic Montgomery, of Marseilles in France, goods to the value of $15,000. That previous to that sale, the said F. Montgomery had been a partner of the house of Montgomery, Fitch & Company, of said Marseilles, and that whilst so a partner, John S. Ellery, the defendant, became indebted to the said house of Montgomery, Fitch & Co. to the amount of $4097 15. That on the thirty-first of June, 1818, and after said Frederic Montgomery had dissolved his connexion with the said house of Montgomery, Fitch & Co., the said house addressed a letter to said Ellery, which they dated as follows, "We have handed to Mr. F. Montgomery an extract of your account current, being now in liquidation of our concerns while he was a partner. In the event you have not already taken dispositions for remitting us by some of your ships, it will accommodate us very much if you will hold the balance at his disposal;" which letter the defendant received, enclosed in one from said F. Montgomery, and to which last he replied in February, 1818, promising to pay the balance so due from him, in Boston, in the course of the ensuing summer, provided the said balance had not been already remitted to Marseilles or paid by one Samuel B. Edes, whom he had entrusted to pay the same, in the event of his selling a cargo of elephant's oil belonging to the defendant at Gibraltar; which balance the bill stated, was not remitted by said Edes, or ever paid by said Ellery. That said F. Montgomery, on the thirteenth March, 1819, in order to secure to the plaintiff, as surviving partner of the house of Dorsey & McLanahan, the amount so due to that house from said F. Montgomery, for the goods purchased as beforementioned, drew a bill of exchange on said Ellery, payable to the order of the plaintiff, for the sum of $4000, showing to the plaintiff at the time the correspondence between said Montgomery and the defendant, relative to said balance of account; and that said F. Montgomery did also, at the same time, assign over to the plaintiff, in due legal form, the said balance. That the bill of exchange was presented to the defendant, and notice given him of the said assignment, but that he refused to accept the said bill or to pay over the said balance to the plaintiff.

The defendant in his answer admitted the facts as set forth in the bill, and stated that the only reason for refusing to pay the said F. Montgomery in the first instance, and afterwards the complainant, the balance so due from him, was his apprehensions that said Edes might pay it for him in Europe, either by the remittance of money or merchandise, the said Edes being in India, and not in a situation to receive intelligence from him the said Ellery. That some time in the latter part of the summer of 1820, Messrs. Munson & Barnard, of said Boston, as agents of Asa Fitch, Jun., who claimed to be the liquidator of the concerns of Montgomery, Fitch, & Co., called upon the defendant, and handed him a letter written to the defendant by said Fitch, dated March 1, 1820, enclosing a printed circular, bearing date February 28, 1820, giving notice of the dissolution of the firm of Montgomery, Fitch & Co., and that said Fitch was exclusively charged with the liquidation of the concern, and that the said letter stated to the defendant, that he said Fitch had authorized said Munson & Barnard to call on the defendant for the balance of account due Montgomery, Fitch & Co., as stated on the 30th June, 1818, and given them a power of attorney to receive it. That the said letter also enclosed an open letter addressed to the defendant by said F. Montgomery, dated February 18, 1820, in which he said, "Having been requested by Messrs. Montgomery, Fitch & Co. to settle your account with these gentlemen as per their letter to you under date of the 30th June, 1818, I made over and drew on you for the same, order of James J. McLanahan, Esquire, and by my respects of the 13th March, 1819, you were authorized to understand with him on that business. This cession having been made after I learned the unfortunate necessity that my friends were under of suspending their payments on the 4th January, 1819, and not having been debited with same in my account with them, I have no claim to

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

this debt, which can only be disposed of by Messrs. Montgomery, Fitch & Co., and I hereby renounce all pretensions thereto, and annul the cession made to Mr. McLanahan, of which you will please take due note." And that the said Messrs. Munson & Barnard also exhibited to the defendant a paper, purporting to be an agreement made between one Francis Clapier, as attorney of the plaintiff, on the one part, and by Montgomery, Fitch & Co. on the other, being dated the 20th June, 1819, in which the said Clapier, for the said plaintiff, released all his claims upon said Montgomery, Fitch & Co., as acceptors of four bills of exchange, amounting together to the sum of 56,500 francs, and one other for the sum of 32,700 francs, reserving, however, all the plaintiff's rights against the said F. Montgomery. That the said instrument also contained, on the back thereof, a receipt of the said Clapier, in which he acknowledged to have received certain sums of money on account of the said bills, which receipt bore date November 2, 1819; and that the defendant having declined to account with said Munson & Barnard in consequence of his engagements to the plaintiff, the said Munson & Barnard, on the 2d September, 1820, instituted a suit against him in the name of Montgomery, Fitch & Co., to recover said balance, which suit was still pending in the supreme court of Massachusetts. The cause came on for a hearing upon the bill and answer and documents, all the papers being admitted to be duly proved.

Mr. Webster, for plaintiff.
Mr. Hubbard, for defendant.

STORY, Circuit Justice. There is no controversy as to the facts in this case; the principal question is, whether the bill of exchange and assignment to the plaintiff, stated in the bill and answers, were sufficient to pass a title to the property, to the plaintiff. The substance of the case is this; the defendant owed a debt to the firm of Montgomery, Fitch & Co. of Marseilles. On the dissolution of their partnership they apprized the defendant that they had put that debt "at the disposal" of one of the partners, F. Montgomery, and requested him to pay it accordingly. The defendant assented to it, provided the debt was not paid by an agent of his, then expected to go with his ship to Marseilles. The debt was not paid by the agent. In the meantime, F. Montgomery, being indebted to the plaintiff (as surviving partner of a firm at New Orleans,) as security for that debt drew a bill of exchange for the supposed balance in the hands of the defendant, and two days afterwards executed an assignment of the same balance to the plaintiff. The bill was refused acceptance by the defendant, and the assignment was duly notified to him. Upon these transactions, there can be no doubt that in equity the debt passed by the assignment to the plaintiff, unless the partner was incompetent to assign it for his own private debt. Assuming that, as partner, he was so incompetent, yet it is very clear, that the partners, by putting it at his disposal, and requesting the payment to be made to him, gave him an absolute right to receive it, or dispose of it, in any manner he might choose. In short, as to any third person, he became the complete proprietor. If any doubt could remain on this point, it is completely extinguished by the subsequent ratification of the other partners, as to this very assignment, contained in the letter of Fitch addressed to Messrs. William & J. Brown, in June, 1819. The assignment then was originally good and valid, and the defendant has shown nothing to prevent its full operation. The subsequent attempt of F. Montgomery to defeat this assignment, by a revocation, is entirely void. He can no more take away this, than any other security bona fide given to his creditor. The negotiation in Marseilles by Mr. Clapier, as agent of the plaintiff, absolved the firm of Montgomery, Fitch & Co. only, from liability to the plaintiff; but left his rights as a creditor in full force against F. Montgomery. The debt therefore, for which the assignment was given as security, remaining unpaid, the plaintiff is entitled to a decree for the amount of the balance in the hands of the defendant; and I shall accordingly so declare. Decree accordingly.

McLANAHAN (NELLIS v.). See Case No. 10,099.

McLANE (GWATHNEY v.). See Case No. 5,882.

McLANE (MURRAY v.). See Case No. 9,964.

McLAREN (HARRISON v.). See Case No. 6,139.

Case No. 8,870.

McLARNS' CASE.

[Cited in U. S. v. Holly, Case No. 15,381. Nowhere reported; opinion not now accessible.]

McLAUGHLIN (BANK OF THE UNITED STATES v.). See Case No. 928.

Case No. 8,871.

McLAUGHLIN v. JOHNS.

[1 Cranch, C. C. 372.] [1]

Circuit Court, District of Columbia. Dec. Term, 1806.

BAIL—IN CIVIL ACTION—AFFIDAVIT.

Affidavit of administratrix to hold to bail.

[This was a suit by McLaughlin's administratrix against Richard Johns.]

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

Affidavit of administratrix, "that the above account is truly extracted from the books of the deceased, and that she believes the same to be a just and true account, and that since the death of the intestate she has received no part thereof," held sufficient to hold to bail—(nem. con.).

[See Case No. 10,828.]

McLAUGHLIN (PATTERSON v.). See Case No. 10,828.

Case No. 8,872.

McLAUGHLIN v. RIGGS.

[1 Cranch, C. C. 410.] [1]

Circuit Court, District of Columbia. June Term, 1807.

DISTRESS FOR RENT—REPLEVIN—PLEA "NO RENT ARREAR"—AUTHORITY—DEATH OF LESSEE.

1. Upon the issue "no rent arrear," the defendant is not bound to prove that the distress was laid by his order or authority.

2. The landlord may distrain after the death of the lessee.

Replevin. Avowry for rent arrear—plea, no rent arrear and issue.

F. S. Key, for plaintiff, moved the court to instruct the jury that the defendant, to maintain the issue on his part, must prove that the distress was laid by himself or by some person by him duly authorized; and that the defendant had no right to distrain after the death of Charles McLaughlin, the lessee.

But THE COURT (nem. con.) refused.

Case No. 8,873.

McLAUGHLIN v. STELLE.

[1 Cranch, C. C. 483.] [1]

Circuit Court, District of Columbia. June Term, 1808.

COURTS—JURISDICTIONAL AMOUNT—NON PROS.

Assumpsit. Verdict for $11. Non pros.: it being below the jurisdiction of this court.

[Cited in Hellrigle v. Dulaney, Id. 6,343.]

See Currey v. Fletcher [Case No. 3,490], Dec. term, 1802.

Case No. 8,874.

McLAUGHLIN v. STEPHENS.

[2 Cranch, C. C. 148.] [1]

Circuit Court, District of Columbia. April Term, 1818.

MUNICIPAL CORPORATION—ORDINANCE—GAMING—STATE LAW.

The common council of Alexandria, have power to prohibit by their by-laws, the keeping of gaming-tables in the town, under a penalty to be recovered by warrant before the mayor, in the name of the common council, and to be levied upon the goods and chattels of the offender, although he may be also liable to prosecution under the laws of Virginia, adopted by the act of congress of the 27th of February, 1801 [2 Stat. 103].

[Cited in Town of Van Buren v. Wells (Ark.) 14 S. W. 40; State v. Lee, 29 Minn. 453, 13 N. W. 915.]

Trespass against the defendant (who was a constable,) for levying a penalty of $20, under the by-law of the 15th of June, 1816, for keeping a faro-table. By the amended charter of 1804 (section 5) the common council of Alexandria has power to make "all laws which they shall conceive requisite," "for the regulation of the morals and police of the town," and "for the prevention and removal of nuisances," "and to enforce the observance of their said laws by reasonable penalties and forfeitures to be levied upon the goods and chattels of the offender," provided that such laws shall not be inconsistent with the laws and constitution of the United States.

Mr. Mason, for plaintiff, contended that the power to make by-laws, was not intended to give the corporation power to make laws concerning matters which were already regulated by the general law of the land; but only concerning such subjects as affected the morals or police of the town exclusively. That the offence was already provided for and prohibited by the act of assembly of Virginia of the 19th of January, 1798, p. 373. That gaming did not affect the town exclusively. That the plaintiff might be twice punished for the same offence, if he was liable to this penalty.

Mr. Taylor, contra. This by-law applies exclusively to the police of the town. The penalty is for keeping the gaming-table in the town, which is a circumstance of aggravation of the offence, and is necessary to the conviction.

THE COURT (nem. con.) was of opinion, that the corporation had power to pass the by-law, and to enforce it in this manner.

Case No. 8,875.

McLAUGHLIN v. TURNER.

[1 Cranch, C. C. 476.] [1]

Circuit Court, District of Columbia. Dec. Term, 1807.

PLEADING AT LAW—ASSUMPSIT—ACCOUNT COUNT—ACCOUNT FILED—DAY STATED.

1. Upon a count "for sundry matters properly chargeable in account, as by account annexed," it is not necessary that the account should be such as would be evidence per se under Act Md. 1729, c. 20.

2. The day stated in the declaration is not material, so that the articles were delivered and payable before the action brought.

The first count of the declaration stated that the defendant [Samuel Turner] was indebted to the plaintiff [McLaughlin's administrator] "for sundry matters properly chargeable in account, as by an account there-

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

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

unto annexed." The second count was for board and lodging, and other necessaries for twelve months. The plaintiff produced an account for a tavern-bill, and proved that he presented the account to the defendant, who said there were other credits on a former account, and he would produce them, and settle the account.

Caldwell & Morsell, for defendant, contended that the evidence did not support the first count, and that no evidence could be given upon that count, but an account which would in itself have been evidence under the act of 1729 (chapter 20), under which act alone they contended the count was good. The issues were non assumpsit and limitations. There was no demurrer.

But THE COURT (nem. con.) said, if the count is bad, he might have demurred, or might move in arrest of judgment. But if the count is good, there can be no question but that the evidence offered will support it.

Mr. Morsell contended also, that the plaintiff could not give in evidence any charge for articles delivered before the 4th of May, 1805, the day laid in the declaration.

But THE COURT (nem. con.) said the day was immaterial, so that the articles were delivered and payable before the action brought.

McLAUGHLIN (UNITED STATES v.). See Case No. 15,697.

Case No. 8,876.

In re McLAVE.

[8 Blatchf. 67; [1] 3 Alb. Law J. 75.]

Circuit Court, S. D. New York. Nov. 12, 1870.

NAVY — ENLISTMENT — MINORS — CONSENT OF FATHER—HABEAS CORPUS.

1. The statutes in regard to the enlistment of minors in the navy of the United States, reviewed.

2. Under section 1 of the act of March 2, 1837 (5 Stat. 153), it is unlawful to enlist boys for the navy, unless they are boys not under thirteen nor over eighteen years of age, and unless, when they are of that description, they enlist with the consent of their parents or guardians, and unless they enlist to serve until they arrive at the age of twenty-one years.

3. In this case, a person who, when he was eighteen years and five months old, enlisted in the navy for three years, without the consent of his father, who was then living, and took an oath, on enlistment, that he was twenty-two years of age, was discharged from such service, on habeas corpus, on the petition of his father, after one year and seven months of service, he himself declaring, on oath, that he desired to be discharged.

On habeas corpus.

Samuel B. Higenbotam, for petitioner.

Henry E. Davies, Jr., Asst. Dist. Atty., for the United States.

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

BLATCHFORD, District Judge. One John McLave, who was born on the 20th of November, 1850, enlisted, on the 23d of April, 1869, being then eighteen years and five months old, in the naval service of the United States, for the term of three years, without the consent of his father, who was then living. On enlisting, he took an oath, that he was twenty-two years of age. On the 26th of October, 1870, the father presented a petition to this court, praying for the discharge of McLave from service, he being on board the United States vessel of war Guerriere, in the harbor of New York. The grounds urged for the discharge are, that the enlistment was invalid for want of the consent of the father, and that the laws of the United States do not authorize the enlistment of minors into its naval service, except minors above the age of thirteen years and under the age of eighteen years, to serve until they became twenty-one years of age, and for no longer or shorter term.

The first statute of the United States in which any provision appears in reference to the enlistment of boys in the navy, was the act of June 30, 1798 (1 Stat. 575), the 5th section of which provided, that the president might permit a proportion of boys for the vessels of the navy of the United States, according to the exigencies of the public service. The act of April 21, 1806 (2 Stat. 390), provided, in its 3d section, that the public armed vessels of the United States, in actual service, in time of peace, should be officered and manned as the president should direct, provided that the whole number of able seamen, ordinary seamen, and boys, should not exceed nine hundred and twenty-five. The act of March 3, 1807 (2 Stat. 443), authorized the president, in addition to the then existing naval peace establishment, to employ not exceeding five hundred able seamen, ordinary seamen and boys, should the exigency of the public service require the same. The act of January 31, 1809 (2 Stat. 514), in its 2d section, authorized the president, in addition to the number of petty officers, able seamen, ordinary seamen and boys then authorized by law, to cause to be employed three thousand six hundred able seamen, ordinary seamen and boys, who should be engaged to serve for a period not exceeding two years, subject to be discharged sooner, if, in the judgment of the president, their service might be dispensed with. The act of January 2, 1813 (2 Stat. 789), in its 4th section, spoke of boys as part of the crews of naval vessels. By the act of May 15, 1820 (3 Stat. 606), the 2d section of the act of January 31, 1809, was amended, so far as to authorize the enlistment of able seamen, ordinary seamen and boys during the continuance of the service or cruise for which they should be enlisted, not, however, to exceed the period of three years. In no one of these statutes was there any provision requiring the consent of parents or guardians

to the enlistment of boys. These statutes came before the circuit court in Massachusetts, for consideration, in the case of U. S. v. Bainbridge [Case No. 14,497], in 1816. Mr. Justice Story was of opinion that, by them, congress had authorized boys to be engaged in the service of the navy, without requiring the previous consent of their parents to the contract of enlistment, and that such contract, when fairly made with an infant of reasonable discretion, was binding to all intents and purposes. The district judge (Judge Davis) was of opinion that the consent, either expressed or implied, of the parent or guardian, where there was one, was necessary, to authorize the engagement of a minor in the naval service.

We come now to the last statute that has been passed in regard to enlistments in the navy. It is the 1st section of the act of March 2, 1837 (5 Stat. 153). The title of that act is, "An act to provide for the enlistment of boys for the naval service, and to extend the term of the enlistment of seamen." The 1st section of it is as follows: "It shall be lawful to enlist boys for the navy, with the consent of their parents or guardians, not being under thirteen nor over eighteen years of age, to serve until they shall arrive at the age of twenty-one years; and it shall be lawful to enlist other persons for the navy, to serve for a period not exceeding five years, unless sooner discharged by direction of the president of the United States; and so much of an act entitled 'An act to amend the act entitled "An act to amend the act authorizing the employment of an additional naval force,"' approved fifteenth May, one thousand eight hundred and twenty, as is inconsistent with the provisions of this act, shall be, and is hereby, repealed." This statute was considered by Attorney General Stanbery, in an opinion given by him to the secretary of the navy, in Gormley's Case, 12 Op. Atty. Gen. 258. He says: "The act of March 2, 1837, authorizes the enlistment of boys between the ages of thirteen and eighteen, with consent of their parents or guardians, to serve until twenty-one; but it also provides that other persons may be enlisted for a period not exceeding five years, unless sooner discharged. The latter clause of this act would seem to include minors above the age of eighteen, and extends the period for which they and other seamen may be enlisted; while the former clause of the act purports to take away the authority to enlist minors under that age, except with the consent of their parents or guardians. But this restriction in regard to the enlistment of minors under the age of eighteen, requiring the consent of their parents or guardians, necessarily implies that congress intended to dispense with such consent in the enlistment of minors above that age. It follows, therefore, that the enlistment of minors above the age of eighteen, as is the case in the army, seems to be valid without the consent of the parents or guardians." The argument urged against this construction of the act of 1837 is, that the first clause of the 1st section relates to "boys for the navy," and not merely to boys not under thirteen nor over eighteen years of age; that the second clause of that section relates to "other persons for the navy," that is, other persons than boys or male minors, and not other persons than boys or male minors not under thirteen nor over eighteen years of age; that, if the second clause, under the words, "other persons," includes male minors over the age of eighteen years, it must also include male minors under the age of thirteen years; and that such a construction as to minors under the age of thirteen years is against the spirit and intent of the act. This view of the statute necessarily makes unlawful the enlistment of boys over eighteen years of age, even with the consent of their parents or guardians. The other view would authorize the enlistment of boys under the age of thirteen years without the consent of their parents or guardians. But congress, in all the acts, prior to that of 1837, which authorized the employment of boys in the navy, made no restriction as to the age of the boy and required no consent of parent or guardian. The question as to the proper construction of the act of 1837 is a difficult one. But, on the whole, I think it is the better opinion, that it makes unlawful the enlistment of boys for the navy, unless they are boys not under thirteen nor over eighteen years of age, and unless, when they are of that description, they enlist with the consent of their parents or guardians, and unless they enlist to serve until they arrive at the age of twenty-one years. The words, "other persons," in the 1st section of the act, means, adult males. Congress, by the act, would seem to have adopted a new policy in regard to the enlistment of minors for the navy, namely, that of not allowing them to be enlisted of every age under majority, but of permitting them to be enlisted only at such age, above that of thirteen years, as will insure a service by them of at least three years before they shall become adults, and of requiring them to enlist to serve until they shall become adults, and of making the consent of their parents or guardians necessary, in view of the fact that the service is to continue during the entire remainder of their minority. An analogous policy appears in the 3d section of the act of June 12, 1858 (11 Stat. 318), which provides that "it shall be lawful to enlist boys in the United States marine corps, with the consent of their parents or guardians, not being under eleven nor over seventeen years of age, to serve until they shall arrive at the age of twenty-one years." Under that provision it was held, by the court of quarter sessions in Philadelphia, in the case of Com. v. Selfridge [7 Phila. 76, 81], that the enlistment of a minor under seventeen years

of age, in the marine corps of the United States, without the consent of his father, was void.

In the present case, the person enlisted was not enlisted on the idea entertained by the officers enlisting him that he was a minor, but on the understanding that he was an adult. The return to the writ of habeas corpus avers, that McLave was twenty-two years of age when he enlisted. The testimony of his parents shows that he was born on the 20th of November, 1850, and it is proved that he enlisted without the consent of his father. On his examination before the court, he testified that he desired to be discharged from the naval service. His enlistment having been unlawful, it was unlawful not only as against himself but as against the rights of his father, as his natural guardian; and his father, by virtue of such rights, is authorized to prosecute the writ for his discharge. In re Ferrens [Case No. 4,746]. Moreover, although the petition for the writ does not state that McLave desires to be discharged, yet, as he has declared on oath that he does desire to be discharged, he will be regarded, in this case, in view of his unlawful enlistment, as himself applying for his discharge.

I do not intend, by any thing I have said, to assent to the proposition, that congress cannot authorize the enlistment of minors in the service of the United States, without the consent of their parents or guardians.

An order will be entered directing the discharge of McLave.

Case No. 8,877.

In re McLEAN.

[2 Flip. 512;[1] 9 Cent. Law J. 425; 25 Int. Rev. Rec. 384; 8 Reporter, 813.]

Circuit Court, S. D. Ohio. Nov., 1879.

RIGHT TO INSPECT COURT RECORDS—STATUTE—RULE OF COURT.

An unlimited right of a citizen of the United States to inspect and examine all the records and papers belonging to the court does not exist. Such right exists only as allowed by statute or rule of the court.

[Cited in Re Chambers, 44 Fed. 789.]

At law.

Thomas Campbell, for McLean.

Geo. Hoardly and W. M. Bateman, for clerk.

Before BAXTER, Circuit Judge, and SWING, District Judge.

SWING, District Judge. This is a petition filed by Mr. J. R. McLean and the Enquirer Company, in which they set out that heretofore, to-wit, on the 7th day of November, 1879, application was made to Thomas Ambrose, clerk of this court, by J. H. Woodward, an agent of said Enquirer Company, for leave to inspect during office hours books containing the docket and minute entries, judgments, and decrees of the said district court and the United States circuit court, and that the said clerk then and there refused the said J. H. Woodward the privilege to so inspect or examine the books aforesaid. Your applicants would, therefore, respectfully ask the court to order that the judgments and decrees of said court, including the fee books and other books containing the public records and orders of said court, be open to the inspection of the said J. H. Woodward, agent of the said Enquirer Company and of said John R. McLean, under such regulations as to the court may seem proper. With this application there is filed the affidavit of one James H. Woodward, in which he says that he is employed by the Cincinnati Enquirer Company, a corporation doing business under the laws of the state of Ohio, and that acting under the orders of John R. McLean, the manager of said corporation, he made personal application to Thomas Ambrose, clerk of the United States circuit and district courts, for permission to examine the public record, fee books and decrees of said court, and permission was refused him by the said Thomas Ambrose, clerk as aforesaid; and said application was renewed on this day and date by him, as a citizen having the right to inspect said books, decrees and minutes, and was again refused.

To this application there is filed by the clerk a demurrer on the ground, that the petition does not contain facts sufficient to entitle the applicants to the order they pray for.

This proceeding, in one sense at least, is adversary in its character, and yet it is based upon the alleged refusal by an officer of this court of permission to exercise an alleged right of the petitioner. The right which they allege was refused was that of having one J. H. Woodward to inspect, during office hours, books containing the docket and minute entries, judgments and decrees of the district court and the United States circuit court. This right is based solely upon the ground that John R. McLean is a citizen of the United States and that the Enquirer Company is located in the United States. It is not claimed for either that they have any interest in the docket or minute entries, judgments and decrees recorded in said books. If the prayer of the petitioners prayed simply for the right which they claimed an officer of this court had deprived them of, there would be no difficulty in determining the case. But such is not the fact. They pray for an order that the judgments and decrees of said court, including the fee books and other books containing the public records and orders of said courts, be open for the inspection of one J. H. Woodward. It will be seen at a glance that their prayer is greatly beyond what they allege they were not permitted to examine. That was the books containing the docket or minute entries of the judgments

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

and decrees, but this is not only that the judgments and decrees may be examined, but that all other books containing the public records and orders of the court shall be opened to their inspection. So much for the allegations of the petition itself.

But let us see how the allegation of the right, which they allege they were deprived of, is supported by the affidavit which has been filed. The petition says that the application was for leave to inspect the books containing the docket and minute entries, judgments and decrees. The affidavit of the man Woodward is that he applied for permission to examine the public records, fee books, and decrees, showing clearly and conclusively that the petition is not supported by the affidavit. Such is this application, as shown from the papers filed. But it is claimed that notwithstanding the variance between the allegations of the petition and the prayer, and the variance between the proof and allegations, petitioners are entitled in law to the order prayed for; that they are so entitled by the statutes of the United States, or if not by them, they are by the common law entitled to it; that all the books and papers of a court of record are subject to the examination and inspection of any citizen, whether he have any personal interest in them or not; that it is his high and indefeasible right, at any time he pleases during office hours, to make such inspection. If this is true, it is very clear that the petitioners are entitled to the order prayed for. The doctrine is a new and strange one, and certainly finds no support in any adjudication which I have been able to find, and I am very certain none can be produced sustaining any such proposition. But the very formation, purposes and duties of a court forbid such an idea. The court is composed of judge, ministerial and executive officers, together with the attorneys that are members of it. To this body so organized are committed for determination the highest interests of the citizen in his property, his reputation and his person. And a careful record of every step which may be taken in relation to either must be carefully made; every paper connected with any proceeding affecting any one in either of these must be carefully filed and preserved. The title to the entire property of the whole country passes through the courts of this country almost in every half century. They are the repositories of the rights of persons and of property, and in many cases the only evidence of either, and the law imposes upon the court the duty of their secure and careful protection and preservation; a protection and preservation which would be greatly jeopardied if every citizen of the United States at his pleasure and will should be permitted to examine and inspect them in his own way. Not only is such an idea in opposition to the formation, purposes and duties of the court, but it is clearly in opposition to the views of the highest judicial and legislative branches of this government. At a very early day, the supreme court of the United States adopted a rule, known as the fourth rule, which provides that "all motions, rules, orders, and other proceedings made and directed at chambers, or on rule days at the clerk's office, whether special or of course, shall be entered by the clerk in an order book, to be kept at the clerk's office, on the day when they are made and directed, which book shall be open at all office hours to the free inspection of the parties in any suit of equity and their solicitors." If the supreme court believed that all the books and records belonging to the court were open to the inspection of every citizen of the United States, why did they enact such a rule? Or why did they limit the right of inspection to parties and their solicitors? This rule itself is the most convincing proof that no such right, as claimed by the petitioners, was supposed by the judges of the supreme court to have existed.

But it is claimed by the learned counsel for the petitioners that there is a difference between suits in equity and at law; that there could hardly be a case in equity in which the government could have any interest. It is not perceived by the court upon what reason there can exist any difference in the care and custody of the records and papers in equity causes and actions at law, but learned counsel are mistaken in regard to the interest of the government in equity causes. The records of this court show numerous causes in equity in which the government of the United States is plaintiff. But it is said, if that is so, that the citizen is a party in interest, and would have a right to look into the records. In some general political sense it may be true that the citizen is a party in interest in every suit prosecuted in the name of the United States; but in a legal sense he is not such a party in interest as is contemplated by this rule.

That congress entertained the same view is abundantly shown by its acts. In 1848 [9 Stat. 292], it enacted a law providing that "all books in the office of the clerks of the circuit and district courts containing the docket or minute of the judgments or decrees thereof, shall during office hours be open to the inspection of any person desiring to examine the same without any fees or charge therefor." If congress believed the right already existed, why did they think it necessary to create such right by special legislation? Or if they believed it ought to exist, why did they limit the right to particular books, such only as contained the docket or minutes of the judgments or decrees? And again, by the act of February, 1875 [18 Stat. 333], congress provided: "That the accounts and vouchers of clerks, marshals, and district attorneys shall be made in duplicate to be marked 'original' and 'duplicate,' and it shall be the duty of the clerk to forward the original accounts and vouchers of the officers above specified, when approved, to the proper

accounting officers of the treasury, and to retain in his office the duplicate which shall be open for public inspection at all times." If the public had the right already to inspect such papers, why did congress deem it necessary to create such a right by the passage of this act?

It is, therefore, very clear to my mind that the unlimited right of a citizen of the United States to inspect and examine all the records and papers belonging to the court does not exist. The right to examine certain records and papers does exist. It exists as to the books containing the docket or minute entries of the judgments and decrees of the court, and these the petitioners allege that they have been refused by an officer of this court. The prayer of the petition is not in accordance with this averment, and the affidavit is different from both. This petition, however, must be governed by the rules of pleading in other cases, so far as the demurrer is concerned. If the party is entitled to any part of the relief he prays for a general demurrer must be overlooked.

This application for the interference of the court is based upon the allegation that the petitioners have been deprived of a right given them by the law by an officer of the court. This is denied on behalf of the officer by two members of the bar, who are officers also of this court, and who appear in this proceeding on behalf of the clerk. This is a charge which the court is interested in having examined, and the truth or falsity thereof established. The demurrer will therefore be overruled, but no order will be made until a further hearing of the matter is had before the court, when we shall finally determine whether the petitioners are entitled to the order as prayed for.

The judges afterwards granted ex gratia what they ruled the petitioner was not entitled to, as a matter of law.

Case No. 8,878.

In re McLEAN.

[2 N. B. R. 567 (Quarto, 173).] [1]

District Court, North Carolina.[2] 1869.

BANKRUPTCY — AMENDMENT BY IMPLICATION—EXEMPTION.

The approval by congress of the new constitution of North Carolina, does not operate as an amendment of the bankrupt law with respect to the additional exemptions therein provided for. A bankrupt is not entitled to an exemption of one thousand dollars in real estate, and five hundred dollars in personal property, under the new constitution.

Question certified by Wm. A. Guthrie, register. Is the bankrupt entitled to an exemption of one thousand dollars in real estate, and five hundred dollars in personal estate, as provided in the constitution of North Carolina, article ten, sections one and two?

[1] [Reprinted by permission.]

[2] [District not given.]

Brief of J. W. Hinsdale, attorney for assignee: First. Section 14, bankrupt act of 1867 [14 Stat. 522], provides that "such other property as now is, or hereafter shall be exempted from attachment, seizure, or levy on execution by the laws of the United States, and such other property as is exempted from the levy and sale by the laws of the state in which the bankrupt has a domicile, at the time of commencement of the proceedings in bankruptcy, to an amount not exceeding that allowed by such state exemption laws in force in the year 1864, shall be excepted from the operation of the provisions of that section." The present constitution of North Carolina, under which the bankrupt claims an exemption, was not in force in the year 1864.

Second. But it is urged by the bankrupt that this constitution, having been approved by congress, has thereby become a law of the United States, and must be administered as such by the bankruptcy court, with regard to its homestead exemptions. It is insisted, however, by the assignee, that this constitution was not enacted by congress. It does not appear in the official copy of the laws of congress. (See acts and resolutions of the United States passed at the second session of the fortieth congress.) The approval by congress was restricted to the question "whether it is republican in form." Article 4, section 4 of the constitution of the United States, provides that "the United States shall guarantee to every state in this Union a republican form of government." Without yielding the point that congress had no right to interfere with the previous constitution of this state, which was republican in form, it is maintained that the only question upon which congress is competent to pass is, as to the form of a proposed constitution, whether it be republican or not. It is the province of the judiciary to decide all the other questions regarding it. This view of the case is supported by the language used in the preamble of the act of congress entitled "An act to admit the states of North Carolina, &c., to representation in congress," to wit: "Whereas, the people of North Carolina, South Carolina, &c., have, in pursuance of the provisions of an act entitled 'An act for the more efficient government of the rebel states,' passed March 2d, 1867 [15 Stat. 2], and the acts supplementary thereto, framed constitutions of state government which are republican." See act of congress passed June 25, 1868 [Id. 73].

Third. But granting that the congress of the United States intended to approve and ratify the constitution of North Carolina in the fullest extent, such approval and ratification do not render valid a law, which violates the constitution of the United States. Congress itself cannot enact such a law. The exemption laws in question are unconstitutional, as having the effect to prevent the collection of debts. (See fifth amend-

ment to the constitution of the United States, identical with section 12 of the bill of rights of the state of North Carolina, which was construed by the supreme court of North Carolina in Barnes v. Barnes, 8 Jones [N. C.] 372; Hoke v. Henderson, 4 Dev. 12. "A creditor has a vested right in his debt. It is a part of his estate or property in the broad sense in which the word is used in the section above cited.") Manifestly the exemption from execution of all a debtor's property, is an indirect but thoroughly effectual mode of depriving his creditors of his debt, and it is admitted on all hands, that the fifteen hundred dollar valuation will embrace the whole estate of ninety-nine debtors out of every hundred in North Carolina. A state constitution derives none of its binding force from any action congress may take upon it, but from the people of the state from whom it emanates.

Fourth. The provisions of our constitution in question under a retrospective construction, are in violation of that provision of the constitution of the United States which prohibits the states from passing laws impairing the obligation of contracts, and are therefore void. Sturges v. Crowninshield, 4 Wheat. [17 U. S.] 206; Green v. Biddle, 8 Wheat. [21 U. S.] 1; Mason v. Haile, 12 Wheat. [25 U. S.] 370; Bronson v. Kinzie, 1 How. [42 U. S.] 311; McCracken v. Hayward, 2 How. [43 U. S.] 608. While it is admitted that the states have power in a certain degree over the remedy on a contract, they may not abuse that power in reference to any remedy, so far as to destroy the beneficial effects of the contract. Exemption laws which protect a reasonable amount of property from seizure may not be unconstitutional. Morse v. Goold, 1 Kern. [11 N. Y.] 281. But when they are framed to shield all of the property of nearly all of the citizens of a state, they invade the paramount law of the land, and are absolutely void. In the case of Jacobs v. Smallwood [63 N. C. 112], declaring stay laws unconstitutional, Mr. Justice Reade uses the following language: "The obligation of a contract is the duty of its performance—a full and complete compliance with its terms. Any statute which relieves a party from this duty or enables him to evade it, is void. If a stay law which postpones the enforcement of a contract but for a time, impairs its obligation, how much more so does one, which in ninety-nine cases out of a hundred, has the effect to discharge the debtor altogether. Can there be a more certain and ready way to enable a party to evade the obligation of a contract, than to exempt from execution all his property; such a law may allow a man to be 'comfortable,' but surely holds out no inducement to him to be honest."

BROOKS, District Judge. The counsel for the bankrupt contends in effect, that the acceptance by the congress of the United States of the constitution of North Carolina, was in effect an amendment by congress of the bankrupt act of March 2d, 1867; and that the amendment thereby made had the effect to extend or alter the provisions, contained in the fourteenth section of the bankruptcy act, so as to embrace such a homestead, and such provision of personal property as is provided for in said constitution, in addition to the five hundred dollars in value, allowed to be exempted by said section. I am well satisfied that no amendment of the bankrupt law was contemplated by congress, in the act of acceptance referred to, and I am as well satisfied that that act had not the effect contended for. I have decided this question in the case of Thomas C. Dodson, certified from the fifth district, in which I filed an opinion which was published in October, 1868. I see no reason for changing the views expressed in that opinion. It is not necessary that I should determine the question presented by the counsel for the assignee, in regard to the retrospective character of the homestead provision in the North Carolina constitution, as I think it quite clear that the bankrupt is not entitled in any view of the case to the homestead or the personal property claimed by him.

Case No. 8,879.

In re McLEAN et al.

[15 N. B. R. (1877) 333.] [1]

District Court, D. Delaware.

BANKRUPTCY—PARTNERSHIP—JOINT ESTATE—INDIVIDUAL ESTATE—CREDITORS—CREDITOR PARTNER.

1. The joint estate of a partnership is first liable for the partnership debts, and the separate estate of the partners for the separate debts of its individual members, and neither class has a right to go on the fund primarily belonging to the other, until the creditors having preference are fully satisfied.

[Cited in Re Lloyd, 22 Fed. 91.]

2. The debt of a firm which has advanced money to an individual member beyond his share of the capital, is a separate debt of the firm as against the partner receiving the same, and the assignee of the firm may prove the debt in bankruptcy.

3. But while such claim may be proven by the assignee of the firm against the separate debtor partner, he cannot be permitted to come upon the separate estate of the debtor copartner for the use of the creditor copartner, until all the joint creditors are fully satisfied.

[Cited in Re Hamilton, 1 Fed. 811.]

4. A bankrupt creditor partner has no such equitable claim to his share in the separate estate of his debtor copartner, as that he can absolutely transmit it to his assignee in trust for himself, until all the firm creditors are paid.

5. His interest is altogether contingent on the sufficiency of the joint funds to pay the joint creditors; until these are fully satisfied there can be no right of enjoyment in the creditor bankrupt partner.

6. A decision which will satisfy all equities, and give consistent efficacy to all parts of the bankrupt act [of 1867 (14 Stat. 517)], is one which

[1] [Reprinted by permission.]

will permit the proof of the claim while it at the same time restrains the assignee from coming on the separate estate of the debtor bankrupt, until all the joint debts of the firm are fully satisfied.

William Canby was the assignee of John McLean & Son, and also of John McLean and John P. McLean, the individual members of that firm. John McLean & Son were bankers in the city of Wilmington, Delaware. Some twenty thousand dollars more than John P. McLean's share in the capital stock amounted to, was, during the course of business of the firm, advanced by John McLean (the father), to the firm for firm uses and purposes. Father and son shared equally in the profits of the concern. The assignee filed a petition to be permitted to take from the separate estate of John P. McLean, funds with which to pay this claim pari passu with the separate creditors of John P. McLean, and to distribute the same for the benefit of the joint creditors. The separate estate of John P. McLean was ample to pay all his separate debts, excluding this one. The joint estate showed no prospect of paying forty per centum of the amount of the joint debts.

BRADFORD, District Judge. On the 12th of June last, a rule to show cause why the prayer of the petitioner, William Canby, assignee in bankruptcy of John McLean and John P. McLean, trading as John McLean & Son, to obtain authority from this court to take from the separate estate of John P. McLean, funds, and apply the same to the payment of joint creditors pari passu with the separate creditors, was granted, and made returnable on the 26th day of the same month. William Bush, administrator of Maria T. Smith's estate, and as such a creditor of John P. McLean individually, opposed the granting of the petition, and was represented by the Hon. S. F. Bayard, as his counsel. The petitioner was represented by George H. Bates and Edward G. Bradford, Jr. The questions involved were argued at great length with much ingenuity and elaboration; and the confidence expressed by the counsel for the petitioner in the equity of the application, and the careful preparation they have given to the case, have induced me to go at greater length into its examination than I otherwise should have done. The direct object and purpose of the petitioner, for which he seeks the sanction of this court, stripped of all unnecessary verbiage, is to take money from a fund which is appropriated by law to the payment of one class of creditors to the exclusion of the other class until the first is fully satisfied, and apply the same pari passu between the separate and firm creditors in such manner that the separate fund is rendered insufficient to pay the separate creditors. Whether this may be done is the precise question to be answered, and all argument having a tendency to show what ought to be the law on this subject, arising out of the supposed equal equity between the separate creditors of the firm and the joint creditors, worked out through the medium of John McLean's equitable claim against his bankrupt partner, must give way to the actual state of the law as now existing on the subject of the distribution of the estate of the bankrupts, under the bankrupt act now in force.

The first question to be considered is, what is the law on this subject to be administered by a court of equity outside of the provisions of the bankrupt law? And the second is, has that law been changed by the bankrupt acts? It is the undoubted law of this country, decided and sanctioned by the supreme court of the United States, that the separate estate of insolvent partners must be first appropriated to the payment of the separate or individual creditors before it can be touched for the payment of the joint or partnership creditors. It is too late to enter on an examination of the reasons of the law and its equity. There was a short period during which joint creditors were permitted under a joint commission to prove against the separate estate, and come on that fund pari passu with the separate creditors. But that law was afterwards changed, and in England the result of the law is at last settled as above stated, with some exceptions not applicable to this case. Justice Story in his treatise on Partnership (section 376), says, "In the first place then, it is a general rule in bankruptcy, that the joint debts are primarily payable out of the joint effects, and are entitled to a preference over the separate debts of the bankrupt; and so, in the converse case, the separate debts are primarily payable out of the separate effects of the bankrupt, and possess a like preference, and the surplus only after satisfying such priorities can be reached by the other class of debts. For this purpose the joint estate and the separate of the bankrupt constitute separate funds to be administered separately by the assignees under the commission, whether it be a separate commission against one partner, or a joint commission against all the partners." Justice Story is not altogether satisfied with the certainty and definiteness of the equity underlying the decisions; but still states this to be the settled law of England, with three exceptions in which joint creditors shall be permitted to come on the separate property:—1. "Where the joint creditor is the petitioner for a separate commission against a bankrupt partner; 2. Where there is no joint estate and no living solvent partner; 3. Where there are no separate debts. In the first case the petitioning creditor may prove his debt, and share pari passu with the separate creditors in the separate estate. In the second case, all the joint creditors enjoy the same privilege; and in the third case, all the joint creditors share pari passu with each other." Mr. Gow, in his work on Partnership (pages

312-334), cited in note 1, Story, Partn. § 377, gives a statement of the decisions in England on this subject and arrives at the same result. Chancellor Kent, in Murray v. Murray, 5 Johns. Ch. 72, reviews all the law on this subject, stating Lord Hardwicke's rulings —Lord Thurlow's subsequent adverse decision by which he permitted the joint creditors to share pari passu with the separate creditors, and Lord Roselyn's restoration of the old rule, not to permit the joint creditors to share in the separate fund until the separate creditors were satisfied (with the exceptions as stated by Story, above quoted). The court of appeals of Maryland in McCulloh v. Dashiell, 1 Har. & G. 96–107, review the law on this subject, and after examining the authorities, say, "but this examination will satisfy us that amidst all the fluctuations of the rule the principles established in the first cases, occurring more than a century since, have been but for a short period materially encroached upon, and that now the leading principles of distribution, with some modifications, are what they were originally established to be;" and further on "we are thus disposed to adopt the ancient rule as more consonant to equity and justice, that the joint creditors can only look to the surplus after the payment of the separate debts; and on the other hand, that the separate creditors can only seek indemnification from the surplus of the joint fund after the satisfaction of the joint creditors." The Massachusetts cases in 9 and 10 Cush. and 10 and 13 Gray, cited by the counsel for the opposing creditor, all recognize this rule to be the established one in England; but ground their decisions on the language of their state insolvent act, which separates the funds and apportions them to different classes of creditors primarily, and then over to the other class after the preferred class has been satisfied. The statute of Massachusetts in this respect is, with the exception of the use of the word "company" for "partnership," identical with the national bankrupt act now in force, and these decisions will be hereafter referred to for another purpose.

This separation of the funds and their appropriation to the two classes of creditors, so that neither class can share in the fund appropriated to the use of the other until the latter has been fully satisfied, is recognized by the supreme court of the United States as the settled law of this country. The exceptions not pertinent to this case which have been above recited as attaching to the English rule are not considered as law in this country. Murril v. Neill, 8 How. [49 U. S.] 421. The case arose on the construction of a deed of trust for the benefit of creditors. The premises conveyed by the deed were the private property of one of the insolvent partners. It was held by the court (Daniels, Justice, delivering the opinion), that the deed on a proper construction passed the property to his separate creditors; but if such was not a proper construction, on the well-settled principles of equity, as established in England and in this country, the separate estate was set apart for the separate creditors, and could not be infringed on by the joint creditors until all the former had been fully satisfied. As the rulings of the supreme court are obligatory on this one, and as the case is precisely in point, I shall extract from it at some length. The court say (page 426): "The rule in equity, governing the administration of insolvent partnerships, is one of familiar acceptation and practice; it is one which will be found to have been in practice in this country from the beginning of our judicial history, and to have been generally, if not universally received. This rule, with one or two eccentric variations in the English practice which may be noted hereafter, is believed to be identical with that prevailing in England, and is this: that partnership creditors shall in the first instance be satisfied from the partnership estate; and separate or private creditors of the individual partners from the separate and private estate of the partners with whom they have made private and individual contracts; and that the private and individual property of the partners shall not be applied in extinguishment of partnership debts, until the separate and individual creditors of the respective partners shall be paid. The reason and foundation for this rule, or its equality and fairness, the court is not called on to justify. Were these less obvious than they are, it were enough to show the early adoption and general prevalence of this rule, to stay the hand of innovation at this day at least under any motive less strong than the most urgent propriety." The court here gives a history of the establishment of the rule as now in force, of interest to the legal reader, but too long for insertion in this opinion, and concludes in these words: "The proper conclusion from these authorities we deem to be this, as is stated by Justice Story in his treatise on Partnership (section 376), where he says: 'It is a general rule,' etc., etc., in the words already above quoted from Story's Law of Partnership."

Chancellor Kent, in the third volume of his Commentaries (page 65), says: "The joint creditors have the primary claim on the joint fund in the distribution of the assets of bankrupt or insolvent partners, and the partnership debts are to be settled before any division of the funds takes place. So far as the partnership property has been acquired by means of partnership debts, these debts have in equity a priority to be discharged; and the separate creditors are only entitled in equity to seek payment from the surplus of the joint fund after satisfaction of the joint debts. The equity of the rule on the other hand equally requires that the joint creditors should only look to the surplus of the partners after payment of the separate debts. It was a principle of the Roman law, and it

has been acknowledged in the equity jurisprudence of Spain, England, and the United States, that partnership debts must be paid out of the partnership estate; and private and separate debts out of the private and separate estate of the individual partner. If the partnership creditors cannot obtain payment out of the partnership estate, they cannot in equity resort to the private and separate estate until private and separate creditors are satisfied; nor have the creditors of the individual partners any claim upon the partnership property, until all the partnership creditors are satisfied. The basis of the general rule is, that the funds are liable on which the credit was given. In contracts with the partnership the credit is supposed to be given to the firm; but those who deal with an individual member rely on his sufficiency."

It is contended, however, by the petitioner, that the firm of "John McLean & Son" was a separate creditor of John P. McLean, one of the bankrupt partners, and that he as the assignee of the bankrupt firm succeeded to all its rights, and thus is entitled, at the suggestion of and for the benefit of the joint creditors, to prove the firm's debt against one of the bankrupt partners. It is argued that this is not the case of joint creditors going upon a separate fund, but that the assignee in this case, succeeding to all the rights of the firm against John P. McLean individually, is entitled in equity, as a separate creditor, to prove its claim against him and come on his separate estate pari passu with his other separate creditors. It is further argued that this is an equitable claim and can be proven in bankruptcy; and that the right is expressly given by the bankrupt act to all separate creditors to prove their separate claims, so that the petitioner would be deprived of a right granted by congress, were the court to refuse to allow the petition.

It is also insisted on, as a reason for allowing the assignee to prove the claim of this firm as a separate equitable claim against John McLean, and to come on his separate property pari passu with his separate creditors, that there would be no liability over from the firm to any of the separate creditors; and that admitting such proof would not present the objection of permitting competing creditors to strive for a fund for which when obtained they might be liable over to other parties. So that the question now arises, is there a separate debt which is provable under the bankrupt act against the separate estate of the said J. P. McLean? Story, in section 391 of his work on Partnership, says, "The like question may arise in the converse case when the joint creditors seek to prove a debt from a single partner to the partnership against the separate estate of that partner; and here also it is now the settled rule that when one partner has become indebted to the firm, or has taken more than his share out of the joint funds, the joint creditors are not to be admitted to prove against the separate estate of that partner until his separate creditors are satisfied, unless it can be shown that in drawing out the money the partner has acted fraudulently with a view to benefit his separate creditors at the expense of his joint creditors." Mr. Gow, in his treatise on Partnership, says on this point: "The law sanctioned by the authorities of Lord Talbot and Lord Hardwicke formerly was, that if the debt raised by the partners arose out of contract, as upon a loan by the partnership to him, the joint creditors might be admitted to prove against the separate estate in competition with the separate creditors. But the opinions entertained by these learned judges have been receded from in more modern times, and the settled doctrine now is that if the claim arise out of contract, the estates are to be administered jointly and separately as they are actually constituted at the time of bankruptcy; the joint creditors not being permitted to recall into the joint fund what one partner has by contract, express or implied subtracted from the joint, and applied in augmentation of his separate estate. This rule was introduced by Lord Thurlow who, having much considered the question, finally determined that the assignees in behalf of the joint could not prove against the separate estate, unless the partner had taken the joint property with a fraudulent intent to augment his separate estate." "The principle established by Lord Thurlow's decision—i. e., Ex parte Assignees of Lodge & Fendal [1 Ves. Jr. 166]—has been acknowledged and followed by Lord Eldon; and it is now an indisputable rule in bankruptcy that when the debt from one partner to the partnership was incurred with the privity of his copartners, proof by the joint against the separate estate will not be admitted." Chapter 5, § 3, pp. 16–18. See, also, the opinion of Lord Eldon in Ex parte Harris, 2 Ves. & B. 212, 213.

It will thus be seen that the law in England is against the petition on this particular point of permitting the joint creditors to prove the creditor firm's claim against a bankrupt copartner proven. Lord Eldon in case last cited draws no distinction between the cases where the proving creditor is or is not liable over to the competing creditors. He states that there are other principles on which the rule if founded than the one "that a partner cannot come in competition with separate creditors, nor as to the joint estate with the joint creditors." And while we cannot see that John McLean, or the firm as the trustee of his interests, could be liable over to the separate creditors of John P. McLean in case they could reach his separate property, yet we fail to perceive that this constitutes any reason why the rule of equity which has been laid down so positively and clearly should not be applied, and especially as there are other reasons or principles which justify the rule. For, among others, it would violate the well-known principle that the rights of the

creditors are worked out through the medium of the partners. To permit the joint creditors, or the assignee for their benefit, to prove the separate claim of the firm against J. P. McLean's separate estate, or, which is the same thing in substance, the equitable claim of the creditor bankrupt, against his debtor bankrupt copartner, would assume that John McLean or his assignee (remitted to all his rights and liabilities) had a right to possess himself of and enjoy the proceeds of the equitable claim he had against his debtor copartner, equally with, or pari passu with the separate creditors of John P. McLean; whereas he had no such right, and could transmit none such to his assignee. There was no possibility of his having an enjoyable interest until all the partnership debts were paid. His liability in solido, covering all the property he might derive from any source other than the partnership, prevented this. In this case the records disclose the fact that the firm debts so far overbalance all the assets, joint and several, that there is no human probability of any one standing in John McLean's place ever being equitably entitled to a dollar from the separate estate of J. P. McLean. He only, under the most favorable circumstances, had a contingent equitable claim; but never had and most probably never could have any equitable right to the realization of this debt which he could transmit to his assignee either for his own benefit or that of the joint creditors of the firm. The separate creditors have the separate estates of the debtors and the residuum of the separate debtors' estate in the joint fund after the firm or joint creditors are all paid. The partnership creditors have primarily the joint fund or property of the firm to come upon, and afterwards all the separate estates of the separate partners, after all the separate creditors are fully satisfied. A bankrupt creditor of his bankrupt copartner has the residuum of the estate, separate and joint, belonging to the latter after all the separate creditors of the debtor bankrupt and the joint debts of the firm are fully satisfied. The first two classes of creditors have a present priority of right to come immediately on the funds appropriated for them, viz., the separate and joint estates. But the third class, viz., the bankrupt creditor partners of their bankrupt debtor copartners, have no such right; indeed have no fund whatever to come upon until all the partnership debts are first paid. To hold otherwise would be to ignore the well-settled rule that the rights of the creditors must be worked out through the medium of the partners.

The next question for consideration is: Is this mode of the distribution of the assets of an insolvent partnership, and of insolvent partners, altered by the provisions of the bankrupt law? for if it is, we must be guided implicitly by them, regardless of the settled rule which courts of equity in this country, and lately in England, have adopted. The act of congress having reference to this point is in these words (section 5121, Rev. St.): "The assignee shall be chosen by the creditors of the company. He shall keep separate accounts of the joint stock or property of the copartnership, and of the separate estate of each member thereof; and after deducting, out of the whole amount received by the assignee, the whole of the expenses and disbursements, the net proceeds of the joint stock shall be appropriated to pay the creditors of the copartnership, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors. If there is any balance of the separate estate of any partner after the payment of his separate debts, such balance shall be added to the joint stock for the payment of the joint creditors. And if there is any balance of the joint stock after payment of the joint debts, such balance shall be appropriated to and divided among the separate estates of the several partners according to their respective right and interest therein, and as it would have been if the partnership had been dissolved without any bankruptcy; and the sum so appropriated to the separate estate of each partner shall be applied to the payment of his separate debts." The bankrupt law of 1841 [5 Stat. 440] has precisely this mode of distribution. Judge Nixon, U. S. district judge for the New Jersey district, in Re Melick [Case No. 9,399], has given his view of the meaning of this provision, both in the bankrupt law of 1841 and the present act. He says, "That section" (the 36th) "was first introduced into the bankrupt act of 1841, and in its main features embodied no new law, but was only declaratory of the equitable principles which the courts had adopted in the distribution of the bankrupt's assets. It was, nevertheless, proper and useful in this respect that it put to rest the long-mooted and much-discussed question of the power of the bankrupt court in administering the bankrupt's estate, to make orders for the marshalling of assets and the payment of partnership debts with partnership funds and separate debts with separate funds, without the intervention of proceedings by bill in equity." In Re Lane [Case No. 8,044], Judge Lowell says: "The first question is, whether the joint creditors of the firm can have recourse to the separate estate for money drawn out by him while the firm was solvent with the assent of his co-partners." "The general rule in bankruptcy is, that there can be no proof between the joint and separate estates of partners unless there is a surplus of the joint estate to be divided. This rule was adopted, partly as being on the whole equitable, on the supposition that the joint creditors had given credit to the joint estate, and the separate creditors to the separate estates respectively; and partly, I apprehend, upon the consideration that there is no such thing as a debt between partners or between a partner and his firm in respect to partnership matters, excepting upon a wind-

ing up of all the affairs. And it was found to be very expensive and inconvenient to go into a general accounting in bankruptcy, and it was thought more expedient as well as more just to take the estates as the parties left them." So that in this case the precise point is made and decided that the joint creditors cannot prove the debt of the creditor bankrupt partner as against his debtor bankrupt copartner. He denies that it is a debt of such character as to be provable under the bankrupt act, much less such a one as to let in the joint creditors through an equity in the creditor bankrupt partner against his copartner, upon the separate fund. This same point has been decided under the insolvent law of Massachusetts by the supreme court of that state in 10 Cush. 592. As before observed, that law, as regards the distribution of the insolvent's estate, holds the precise language of our bankrupt act, with the exception of using the word "company" for the word "partnership."

The counsel for the petitioner tried to break the force of this decision by saying that equitable claims could not be proven under the insolvent law of Massachusetts. But the court did not place their decision on any such ground, nor indeed did they allude to such an idea. On pages 597 and 598 they say: "Our statute on this subject must be our guide; and whether in accordance with the views of Lord Hardwicke, in favor of joint creditors being admitted to share in the distribution of the separate estate, or of Lord Thurlow, who held the contrary view, it is equally the law to be administered here." "The statute under which these proceedings in insolvency were instituted, and by virtue of which the assignees hold these assets, has declared that, in cases where proceedings are thus instituted against a copartnership, all the estate of the partnership and all the separate estate of the individual partner shall be passed into the hands of the assignees, that the avails thereof shall be kept distinct, and, 'that the net proceeds of the joint stock shall be appropriated to pay the creditors of the company, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors; and if there shall be any balance of the separate estate of any partner after the payment of his separate debts, such balance shall be added to the joint stock for the payment of joint creditors; and if there shall be any balance of the joint stock, after the payment of the joint debts, such balance shall be divided and appropriated to and among the separate estates of the several partners.'" St. 1838, c. 163, § 21. In this case the court would not permit the claim to be proven as against the separate estate. There was no absolute refusal of the proof of the claim. Now, unless there is something more in our bankrupt act to give these joint creditors a right to go upon the separate estate of the said John P. McLean than has already been noticed, I would consider the above-cited case conclusive.

The counsel for the petitioner, however, claim that they have the right to prove an equitable claim held by the firm against one of the copartners, and if they have a right to prove, then they have a right to prove against the separate estate and come in pari passu with the separate creditors. Judge Lowell has denied the right to prove at all. He says it is not the kind of a debt provable in bankruptcy. But admitting it can be proven, does it follow that it must be paid pari passu out of the separate estate, with all the separate creditors? The supreme court of Massachusetts did not refuse to have the claim proven, but denied the right to let it in on the separate fund until all the separate creditors were paid. In section 14 of the bankrupt act, "all rights in equity" of the bankrupt descend to the assignee. In section 19 it is enacted that "all debts due and payable from the bankrupt, at the time of the adjudication of bankruptcy," may be proved against the estate of the bankrupt. In the 1st section there is this language: "And the jurisdiction hereby conferred shall extend to all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; to the collection of all the assets of the bankrupt; to the ascertainment and liquidation of all the liens and other specific claims thereon; to the adjustment of the various priorities and conflicting interests of all the parties, and to the marshalling and disposition of the different funds and assets so as to secure the rights of all parties, and due disposition of the assets among all the creditors; and to all acts, matters, and things, to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt and the close of the proceedings in bankruptcy." In the 36th section are these words: "And all the creditors of the company and the separate creditors of each partner shall be allowed to prove their separate debts."

These are the chief, if not all the provisions of the act from which is derived the conclusion that the court is bound by its proper construction to allow the claim to be proven, and the assignee to come upon the separate estate for the benefit of the joint creditors. This act and its supplements must be construed, if possible, so that it shall be consistent with itself, and so that all its parts shall cohere and be made efficacious. I am not prepared to go to the length Judge Lowell has gone, in denying the proof of this claim; but I am very clear in forbidding the assignee, after proof is made, to touch the separate estate of John P. McLean until all his separate creditors have been paid. It is admitted that the firm can be the separate creditor of John P. McLean (or more exactly that the firm stands as a trustee of the creditor bankrupt debtor, for the firm can have no

ultimate enjoyment or usufruct, indeed is incapable in its nature of having it, but only stands as a medium for accounting between the partners. Nevertheless as a legal entity it is treated as creditor and debtor to the partners individually). There was then an equitable claim the firm had against John P. McLean for money advanced by John McLean to the firm, over and above the amount he was called on to contribute as his share of the partnership funds. Judge Lowell, in Re Blandin [Case No. 1,527], says: "The 19th section of our statute makes provable all debts and liabilities, in language broad enough certainly to cover such as a trustee owes to his cestui que trust or a partner to his copartner," so that we can hardly suppose he meant later, in Re Lane [Id. 8,044], altogether to deny the right to prove the debt, but rather the right to the assignee to come in on the separate fund for the benefit of the joint creditors. I do not see how, without violating the express language of the 19th section of the bankrupt act, I can refuse to allow the claim to be proven. There are other reasons why the claim should be proven, conspicuous among which are these: 1. It is not beyond the contemplation of law, however improbable, that funds may not come to the hands of the assignee with which he could pay, in part or in whole, John P. McLean's indebtedness to the firm. Suppose after the bankruptcy the real estate or other property of the partnership had so risen in value as to be more than sufficient to pay off all the firm debts. Then the assignee, I apprehend, could let in himself as the assignee of the firm, pari passu with the separate creditors of John P. McLean on his separate estate. So that, to meet all possible contingencies, it is necessary to have the proof made in order that the estate should be properly distributed, for the assignee can pay no debt unless it is first proven. And the case might in contemplation of law arise when he had the funds in his possession, and the knowledge that there was a just and equitable claim by one partner or another, and demand the power to pay it. 2. John P. McLean, if his conduct is not impeached by fraud or other impropriety, which stands in the way of his discharge, is entitled to a certificate of discharge in bankruptcy. If it should be that this debt is not provable, then he is not free from his liability therefor, for it is only from such debts that his certificate discharges him. He should be entitled to discharge from this separate debt as well as from any other separate debt. And as one of the prominent features and intentions of the law is to give complete relief in the absence of fraud, it would fail of its purpose if he was decreed a discharge as respects this debt.

I have no hesitation in allowing the debt to be proven. I am however equally clear that the debt should not be proven against the separate estate, for the following reasons: 1. There is no reason to suppose that congress intended to alter the mode of distribution of the insolvent's estate as recognized by the later cases in England and the United States. On the contrary it is fair to infer that it meant to adopt and enact those decisions as the law of the land. 2. Any other construction would not permit this act as a whole to stand and give effect and operation to all its parts. 3. The act plainly commands that separate funds shall be appropriated to separate classes of creditors, who have a priority therein, which shall not be encroached upon until the preferred creditors are fully satisfied. Now it is asked that the assignee be permitted to take funds prohibited to one class until the other is fully satisfied, and appropriate them pari passu to both classes. The proving of this claim then with this result attached would be a mere device to accomplish a forbidden purpose, and as such should not be permitted. No application of the assignee to prove a partner's debt against his bankrupt copartner can deprive these joint creditors seeking their pro rata divisions of their character as joint creditors. They cannot be remitted to the character of separate creditors by and through the medium of an equity as John McLean, for he had, as before said, no equity to transmit until all the debts of the firm were paid. Such then being their character as joint creditors, there is no mode of escape from the conclusion that they cannot come on the separate estate pari passu with the separate creditors. 4. On this construction all the equities of the creditors are preserved; the joint creditors have their fund to go on, the separate theirs, and the creditor bankrupt of his debtor copartner his, should all the joint debts first be fully satisfied; but until then he cannot possess a quality, character, or merit which will change the character of the joint creditors to that of separate creditors, and enable them to come into the present possession of a fund which, as the record at present discloses, John McLean never could have touched.

Let an order be entered admitting the proof of the claim of the firm of John McLean & Son against John P. McLean, but restraining the assignee from applying any portion of the separate estate of John P. McLean until all his separate creditors are fully satisfied.

[See Case No. 2,378.]

Case No. 8,880.

McLEAN et al. v. BROWN et al.

[4 N. B. R. 585 (Quarto, 188).] [1]

District Court, E. D. Missouri. 1871.

BANKRUPTCY — NONPAYMENT OF COMMERCIAL PAPER—SUSPENSION CONTEMPLATED BY LAW.

The non-payment of a single piece of commercial paper is not an act of bankruptcy in itself.

[1] [Reprinted by permission.]

for the reason that there may be a defense to it; but where such suspension is chronic, or there is an inability to meet and pay checks and notes as they mature, then that is such a suspension as the law contemplates, and even though there may be but a single piece of paper and fourteen days past due, the maker may be adjudged bankrupt.

[Approved in Re Hercules Mut. Life Assur. Soc., Case No. 6,402. Cited in Re Hadley, Id. 5,894.]

This was a petition by creditors to have the defendants [Brown, Weber & Co.] adjudged bankrupts, alleging that they had suspended payment of their commercial paper and had not resumed within fourteen days. Upon this suspension issue was taken. At the trial a check of the defendants given in payment of rent of the store they occupied in their business, and which had remained unpaid for more than fourteen days, was presented in evidence. It was also shown that they had been embarrassed for some time before the filing of the petition; that they drew checks without funds in bank to meet them, drawing checks upon one bank and depositing them in another so as to gain the time of a day in their passage through the clearing-house, and also drawing kiting bills, upon which they raised money. The bankrupts alleged that they had arranged for the delay of the paper overdue, and that they had not suspended payment; and that they were not insolvent and could have paid their debts as they matured, but for the filing of the petition, which had destroyed their credit and prevented them from fulfilling their obligations.

TREAT, District Judge. This case differs in its elements from any that have come before me, but the views expressed in previous opinions still remain unmodified. The suspension referred to in the bankrupt act [of 1867 (14 Stat. 517)] is a general suspension of commercial paper, not the mere non-payment of a single note or bill which the debtor refuses to pay because he denies his liability, or does not pay for the reason that he has, as he supposes, arranged for an extension or delay of payment. The court, upon an application of this kind, will not sit to try the validity of the reasons for the non-payment of the note or bill; it is not a court for the mere collection of debts, and each case must be considered by itself in connection with the circumstances surrounding it. This firm may possibly be solvent and able from its assets to meet all demands if it can get indulgence. It may happen to any man in business to find himself in a condition in which he cannot realize his assets in time to meet his obligations as they mature, and he may need a short indulgence to enable him to collect what is due him; but in this case the difficulty had become chronic, and the firm could not meet their paper in the ordinary course of business, and in that sense they may be considered as being insolvent. It had become a system with them in the course of which checks are drawn and redrawn, post-dated, laid over; notes met by checks without funds, trusting to funds to be received thereafter. This had become a habit. They would draw checks and afterwards order their bankers to pay some and throw out others, and then excuse themselves for the return of those dishonored, or try to make some arrangement with the holders thereof for delay. Although, therefore, but a single check is shown to have laid over unpaid for fourteen days, they may be really considered as having suspended payment generally. The non-payment of one piece of paper is not of itself a suspension, for there may be good reason for it; the party may have had a defense against it, or he may have arranged for delay of payment; but when he fails to pay for want of means, and continues unable to pay, he has suspended within the meaning of the act, and may be adjudged bankrupt. Let the judgment be entered for the creditor.

McLEAN v. CHICAGO, ETC., RY. CO. See Cases Nos. 8,892 and 8,893.

McLEAN (DUBOIS v.). See Case No. 4,107.

Case No. 8,881.

McLEAN v. HAMILTON COUNTY.

[4 Wkly. Law Gaz. 1.]

Circuit Court, S. D. Ohio. June Term, 1859.

PARTIES—COUNTY COMMISSIONERS—RIGHT TO SUE AND BE SUED—DERIVED FROM STATE STATUTE—FEDERAL COURTS—PRACTICE—POWER TO REGULATE—CONSTRUCTION OF STATE LAWS.

1. By the provisions of the act to establish a board of county commissioners, passed March 12, 1853, and the act April 20, 1852, the county commissioners of Hamilton county are authorized not only to make contracts in regard to public buildings and other matters, but to sue and be sued in all matters which involve the exercise of their powers.

2. In both cases the right to sue and the liability to be sued arises from the law of the state; and this, under the 34th section of the act 1789 [1 Stat. 92], constitutes a "rule of decision" for the courts of the United States. The citizenship of the plaintiffs must be shown in states other than Ohio, and this gives jurisdiction.

3. The suit must be brought within the state; but this arises from the local character of the commissioners who are sued, and not from any expressed or inferable intention to prohibit suit being brought in the circuit court of the United States.

4. No state has the power to regulate the practice of the circuit court, yet even this is frequently done by an act of congress, adopting the state practice, or by the rules of the court.

5. A circuit court of the United States, while sitting in a state, "is a court of judicature within it." It administers the laws of the state and is bound by their provisions, the same as the local tribunals.

6. The position is unsustainable, that no suit can be maintained in this court against a legal association of individuals, within a state, who do not possess in every respect the technical qualities of a corporation.

[This was a suit by Washington McLean against the commissioners of Hamilton county, Ohio. Heard on demurrer to the bill.]

Geo. E. Pugh, S. Matthews, and N. C. McLean, for plaintiff.

H. Stanberry, E. A. Ferguson, and T. M. Key, for defendants.

McLEAN, Circuit Justice. It is alleged there is no jurisdiction in this case, as the defendants do not constitute, technically, a corporation. There is, at least, novelty in this position. The constitution provides that the judicial power of the United States shall extend to controversies between citizens of different states, and it is argued that persons, however associated under the authority of law, unless they are legally corporators, can have no standing in the federal courts. Having, in part, the functions of a corporation, so as to enable it to make contracts, to sue, and be sued, yet, if it fail in any part of its ideal creation, it is something less than a corporation, and can not sue or be sued in the courts of the United States. Is this position sustainable? As the right of the plaintiff to sue is unquestionable, he being a citizen of the state of Kentucky, we must look to the laws of Ohio to ascertain the rights and liabilities of the defendants. The seventh section of an act to establish a board of county commissioners passed March 12th, 1853, provides that the board of commissioners in the several counties of this state shall be capable of suing and being sued, pleading and being impleaded, in any court of judicature within this state; and by the act of April 20th, 1852, the board of commissioners of Hamilton and Cuyahoga counties, and their successors in office, were authorized to erect buildings provided for by law, either by contract or otherwise, as they might think the public interest might require; and by the second section of that act, the county commissioners may, at their discretion, require all persons sentenced to hard labor to be employed in the erection of county buildings, within the limits of the proper county.

The provisions of acts above cited, and others of the same class, authorize the county commissioners not only to make contracts in regard to public buildings and other matters, but to sue and be sued in all matters which involve the exercise of their powers. But it is objected that "this board is not a corporation, is not, in law, a person natural or artificial, and, therefore, not in any sense a citizen liable to federal jurisdiction." If the commissioners of a county, by their organization, lose their character of citizens, without acquiring that of corporators, in the opinion of the counsel, they can only be denominated as a quasi corporation. The former decisions of the supreme court, which required all the members of a corporation to be citizens of the state in which the suit was brought, practically withdrew from the federal tribunals almost all the great questions which arose on the construction of corporate powers, and denied, to a large portion of our citizens, all redress in the supreme court. This was seen and felt, at an early period, by the distinguished members of that court. And the reason on which this was done—the citizenship of the stockholders—was not satisfactory to Marshall or his associates; but they hesitated for some years to change the rule of decision. At length the rule was so modified as to make the situs of the corporation the place where jurisdiction should be exercised. This secured the full representation of all the corporate rights of the body, without reference to the citizenship of the particular stockholders. The concentrated interest of the body, existed where the business was done, and the agency which carried it on represented the stockholders, and was responsible for its management. This, in reason and law, was the body corporate which exercised the power, and was answerable to all concerned. The position is unsustainable that no suit can be maintained in this court against a legal association of individuals within a state, who do not possess, in every respect, the technical qualities of a corporation. But this will be hereafter considered. It is assumed that if the board of commissioners were a corporation, it is not amenable to the federal jurisdiction, because it is so constituted that it can only be sued in our domestic tribunals. And this, it is said, was clearly within the power of the state legislature. And it is said that the seventh section above cited, "that the board of commissioners in the several counties of this state shall be capable of sueing and being sued, pleading and being impleaded in any court of judicature, within this state," is "undoubtedly a limit to the right and liability of suit." With great respect it is suggested that the words as to sueing "in any court of judicature within this state" do not import a denial of jurisdiction to the circuit court of the United States. The state of Ohio, like all other states, legislates over its domestic concerns. Its laws have no binding force beyond the limits of the state. They are adapted in the terms used to its local policy and organization. A circuit court of the United States, while sitting in a state, "is a court of judicature within it." It administers the laws of the state, and is bound by their provisions, the same as the local tribunals. The jurisdiction of the circuit court is derived from the constitution and the acts of congress. And although no state has power to regulate the practice of the circuit court, yet even this is frequently done by an act of congress, adopting the state practice or by the rules of the court.

It is admitted that there are many provisions in the acts regulating the powers and duties of the county commissioners which are merely local, and refer to county admin-

istrations. But there are others of a different character, which relate to large contracts for the construction of public buildings and other matters, in which a general interest is felt. And it is the policy of the county to encourage a competition which shall reduce the public expenditure in this respect, to the smallest practical amount. For wise purposes, the powers of the commissioners are ample to enter into contracts of any amount, which shall be necessary to secure the objects expressed. The suit must be brought within the state, but this arises from the local character of the commissioners who are sued, and not from any expressed or inferable intention to prohibit suit being brought in the circuit court of the United States. Had such an intention been expressed by the legislature of the state, it could not have been carried into effect. The act of congress and the constitution secure to citizens of other states and of foreign countries the right to sue in the federal courts; and no power of a state can be so exercised as to defeat this right. If a state could so construct its own tribunals as to deny the right of suit to citizens of other states and foreign countries, it could at pleasure repudiate the federal powers. This has been attempted to be done by more than one state. By the first section of the act (February 27, 1846; Swan, St. p. 706) it is provided: "That any company or association of persons, formed for the purpose of carrying on any trade or business or for the purpose of holding any species of property within the state of Ohio, and not incorporated as such, may sue or be sued, in any of the courts in this state, by such usual or ordinary name as such company, partnership or association may have assumed to itself or be known by; and it shall not be necessary in such cases to set forth in the process and pleadings, or to prove at the trial, the names of the persons composing such company." Can any one doubt that a suit may be maintained against such an association under this law, and can it be supposed that the words, "suit may be brought in any of the courts of this state," are a limitation on the right to sue by any one living out of the state? It is of no importance whether the suit brought be against a corporation, technically so called, or an aggregate body made liable to be sued by a law of the state. The jurisdiction in the federal courts is unquestionable in either case.

The thirty-fourth section of the judiciary act of 1789 declares that "the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." It is admitted that this section has no application to the process of the courts of the United States. Can anything be more explicit than the provision of the above section? It is not a practice act, but a rule of decision; and it applies as well to the association authorized to sue and be sued, by the act of 1846, above cited, as to the act establishing the board of county commissioners, and authorizing them to make contracts and to sue and be sued. In both cases the right to sue and the liability to be sued arises from the law of the state; and this constitutes a rule of decision for the courts of the United States. The citizenship of the plaintiffs must be shown in the states other than Ohio, and this gives jurisdiction. In Massingill v. Downs, 7 How. [48 U. S.] 767, 768, the court, in reference to the above section, say: "No statute is of more frequent application in the federal courts; and it has often been held that the settled construction of a state statute by its supreme court is considered as a part of the statute; and the statute as thus expounded is regarded as a rule of decision in the courts of the United States, where it applies—of this character is a statutory lien." In Wayman v. Southard, 10 Wheat. [23 U. S.] 25, speaking of the thirty-fourth section, Chief Justice Marshall says: "This section has never, so far as I recollected, received a construction in this court; but it has, we believe, been generally considered as furnishing a rule to guide the court in the formation of its judgment, not for carrying that judgment into execution. It is a rule of decision, and the proceedings after judgment are merely ministerial." And in Clark v. Smith, 13 Pet. [38 U. S.] 203, the court says: "The state legislatures certainly have no authority to prescribe the forms and modes of proceeding in the courts of the United States; but, having created a right, and at the same time prescribed the remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of proceeding on the chancery side of the federal courts, no reason exists why it should not be pursued in the same form as in the state courts." The same principle is in Wickliff v. Owings, 17 How. [58 U. S.] 44. Language could not be more explicit than that used in this act to give power to the defendants to make contracts, to sue, and a liability to be sued. This is the law of the state; and under the thirty-fourth section of the act of 1789, "it is a rule of decision for this court," and binding on the parties in this case. The right to sue by the plaintiff having attached to him as a citizen of Kentucky, there is no power in the state to defeat it. It is secured by the act of congress and the constitution. The defendants are citizens of the state, and the capacity to sue and be sued does not divest them of that character.

It is suggested that this is a claim for unliquidated damages, and that no suit can be brought on it until it be presented to the commissioners for allowance, and shall be rejected by them. The answer to this is

that it is a contract which was abandoned by the defendants. There is no pretense that there was a performance on their part, and the plaintiff could only seek by action a reparation in damages. Under the circumstances, therefore, it was not a case for adjustment as contemplated by the act. The case of Lyell v. Lapeer Co. [Case No. 8,618], involved an open account which should have been presented for adjustment. But the contract before us was not an account, but an entire contract, which had been repudiated by the defendants, and on which no account could be made out. Under the circumstances, nothing could have been done by the plaintiff but an offer to compromise, which he was not bound to propose.

Finally, the defendants insist, that the contract sought to be inforced is one which this board had no power to make. This objection follows, in order of time, the one made, that the claim under the law was not presented to the defendants for an allowance. But if it shall appear that the defendants had no power to make the contract declared on, no further answer will be required.

The Contract.

"The undersigned, Washington McLean of the one part, and the commissioners of Hamilton county of the other part, hereby agree: (1) That the said commissioners of Hamilton county shall have permission to enter upon, and take possession of, land belonging to said McLean, lying in the valley of Deer creek, east of the southern end of the south approach of the Dayton Short-Line Railroad, and to quarry out of the same all the limestone therein. (2) In consideration whereof, the said commissioners agree to finish the said quarrying within the space of five years from this date, and at the end of that period, or sooner, if the quarrying shall be sooner done, to surrender possession of the said tract of land to the said McLean; and also agree within the time aforesaid, to grade the said land and level down the same, according to a plat of the said ground made by Gilbert, the surveyor, so that the same when graded, cut down and leveled, shall conform to the levels as indicated on the same plat." Oct. 31, 1853.

It is said that the gist of this suit is to recover damages for the non-performance of work by the defendants on the property of the plaintiffs; that he claims to have made such a contract with the defendants; that thereby the public has become bound to improve his land. And we agree with the defendants' counsel that this proposition, as stated, does not make a very favorable first impression. I have just read the contract. It is concise, and contains few, if any, surplus words. The locality of the stone-quarry is described, and it is agreed between the parties that the commissioners shall have permission to enter upon and take possession of land belonging to the plaintiff, and to quarry out of the same all the limestone therein. In consideration whereof the defendants agree to finish the quarrying in five years, or sooner, if the quarrying be done, and also to grade the land and level down the same according to the plat of Gilbert, the surveyor, so as to conform to the plat. Not knowing the circumstances under which this contract was made, I can see nothing on its face to impeach its fairness. In the first place, it is an entire contract. The property, it appears, belongs to the plaintiff. And the defendants agreed to quarry all the limestone in the land, and to level the ground as required by the plat of Gilbert. No one can fail to see the intent of the parties to this contract. I have rarely seen an agreement more concise, or in which more perspicuous terms were used. The stone was to be removed from the ground, and the land leveled, according to Gilbert's map. This comprises the whole contract. Under the second section of the act of 1852, the commissioners had power to employ convicts in the erection of county buildings, or other public works within the county. This appears to me to be a very proper employment for such persons. And in the first section of the same act the commissioners of Hamilton and Cuyahoga counties, and their successors in office, are empowered, in the erection of public buildings, as heretofore by any law provided for, to proceed with the same, either by contract or otherwise, as in their opinion the public interest may require. Here is a wide discretion allowed to the commissioners in the discharge of their important duties. The court certainly will not presume against an exercise of power by the defendants contrary to their own contract, in the face of the law of 1852, which authorized them to proceed in the erection of public buildings or other works, either "by contract or otherwise." Having under their control convict or other labor, and being in want of stone for the public buildings or other public works, it may be supposed that the commissioners deemed it expedient in the exercise of their discretion to rent a stone-quarry on the terms stated in the contract. The object of the contract was to procure stone, and as a consideration for this the defendants agreed to level the ground. No one can be misled in regard to such a contract, especially when it may be supposed convict labor was employed by the commissioners under the authority of law.

In conclusion I would remark that it never has been decided in the courts of Ohio that a suit may not be sustained against the county commissioners; on the contrary, throughout the reports of the state, there are numerous instances in which suits have been sustained, and in many of them the commissioners have been considered as a corporation. Reynolds v. Commissioners of Stark Co., 5 Ohio, 205–207; Williams v. First Presbyterian Soc., 1 Ohio St. 510; Carey v. Commissioners of Montgomery Co., 19 Ohio, 245.

Harding v. Trustees of New Haven Tp., 3 Ohio, 227, 228, 230, held trustees of township were a corporation. Commissioners of Brown Co. v. Butt, 2 Ohio, 353, 355; Commissioners of Gallia Co. v. Holcomb, 7 Ohio, 232; State v. Piatt, 15 Ohio, 23, 24; County Com'rs of Lucas Co. v. Hunt, 5 Ohio St. 488; Boalt v. Commissioners of Williams, Defiance and Paulding Counties, 18 Ohio, 13; Commissioners of Hamilton Co. v. Mighels, 7 Ohio St. 109; Palmer v. Cuyahoga Co. [Case No. 10,688]; Cook v. Hamilton Co. [Id. 3,157]; Same Case [Id. 3,158]; Lyell v. Lapeer Co. [Id. 8,618].

The incidents of a corporation, Blackstone says, are five: 1. Perpetual succession. 2. To sue and be sued, implead and be impleaded, grant or receive, by its corporate name. 3. To purchase lands and hold them. 4. To have a common seal. 5. To make by-laws. The second and third incidents are consequential to the first,—that of perpetual succession. The board of commissioners have this under the law. The power to have and use a common seal need not be given in express terms. In fact, the incidents of a corporation result, as has been held, for perpetual succession. So that it would seem, if the technical qualities of a corporation be applied to the defendants, the suit against them is maintainable. The demurrer is overruled.

McLEAN (HOFFMAN v.). See Case No. 13,665.

Case No. 8,882.

McLEAN v. IHMSEN.

[The case reported under above title in 1 West. Law J. 189, is the same as Case No. 8,883.]

Case No. 8,883.

McLEAN v. JOHNSON et al.

[3 McLean, 202;[1] 1 West. Law J. 189.]

Circuit Court, D. Ohio. July Term, 1843.

BANKRUPTCY—INSOLVENCY—ASSIGNMENT—FRAUD—WHAT ASSIGNEE TAKES—DISTRIBUTION.

1. An assignment of all the property of a firm, in contemplation of a state of insolvency, is a fraud against the bankrupt act [of 1841 (5 Stat. 440)].

[Cited in Perry v. Langley, Case No. 11,006; Globe Ins. Co. v. Cleveland Ins. Co., Id. 5,486.]

2. Such transfer, within two months preceding the application for relief, is, of itself, strong ground of fraud.

3. If one of a firm apply for and obtain the benefit of the act, the firm being insolvent, the assignee takes all the effects of the firm.

[Cited in Amsinck v. Bean, 22 Wall. (89 U. S.) 402.]

4. Relief having been given to the bankrupt, the property must be brought into the bankrupt court, that distribution be made as the law requires. As at present situated, the bankrupt court has no control over the property.

In bankruptcy.

Mr. McLean, for plaintiff.

Mr. How, for defendants.

OPINION OF THE COURT. This bill is filed by the plaintiff, as assignee of Aldrich, a bankrupt. He filed his petition for the benefit of the bankrupt law, on the 17th of December, 1842; and on the 13th of January ensuing he was declared a bankrupt. The facts agreed were, that the firm, consisting of Otis Aldrich, the above bankrupt, and William L. Aldrich, were insolvent and bankrupt at the time the petition was filed; that they had, on the 8th of December, 1842, assigned all their property, of every kind, to Samuel B. Pierre and William G. Pierre; and that their agents have in their possession a large amount of property which belonged to the late firm, consisting of goods, &c., amounting to about the sum of ten thousand dollars. The assignment was made in trust to sell the property, and distribute the proceeds, pro rata, among the creditors of the firm. Only nine days before the petition was filed, the assignment was executed. This, in itself, was an act of bankruptcy—as it was done in contemplation of a state of insolvency. The second section of the bankrupt act provides, "that all future payments, securities, conveyances, or transfers of property or agreements made or given by any bankrupt in contemplation of bankruptcy," &c.; "and all other payments, securities, conveyances, or transfers of property or agreements made or given by such bankrupt, in contemplation of bankruptcy, to any person or persons whatsoever, not being a bona fide creditor, or purchaser for a valuable consideration without notice, shall be deemed utterly void, and a fraud upon the act; and the assignee may claim the same," &c. The assignees were not creditors, and the fact that the assignment was made within two months preceding the application for relief, is, under the second section, if not in terms, impliedly fraudulent. The fourteenth section of the act provides, that the application for relief by one partner, the firm being insolvent, gives to the assignee the assets of the firm.

On the part of the defendants, it is insisted that, under the assignment, the same disposition of the property will be made, as directed by the bankrupt act; and that, as the assignment is not void, but only voidable, it can only be set aside by the creditors. That the creditors, or a greater part of them, are content with the disposition of the property; and that, as a matter of policy, debtors and creditors should not only be permitted, but encouraged to settle their own affairs. The bankrupt has asked and obtained relief under the law, and he must submit to all the provisions of the act. It is only upon the

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

ground that the assignment shall be declared fraudulent, the property can be placed under the bankrupt court. The assignee appointed by that court, in all his acts, is under the immediate directions of that court, and he has given ample security for the faithful execution of the trust. The assignees may not carry out the trust, and for any failure in this respect, the creditors or the bankrupt would be obliged to ask the aid of a court of chancery. In this view it is important, and, indeed, indispensable that the property should be carried into the bankrupt court, that distribution of it may be made to the creditors of the firm, as the law requires.

If the creditors have consented to the assignment, why have they not executed releases to the firm?

A decree will be entered, declaring the voluntary assignment void, and setting it aside. Where the assets have been changed by the assignees, the present plaintiff may receive the money or other proceeds in lieu thereof.

Case No. 8,884.

McLEAN v. KLEIN.

[3 Dill. 113.] [1]

Circuit Court, E. D. Missouri. 1875.

BANKRUPTCY — LANDLORD'S LIEN — HOW CREATED — VALIDITY AS AGAINST THE ASSIGNEE IN BANKRUPTCY OF LESSEE.

An express provision in a lease by which the lessee gives to the lessor a lien on specified personal property used by the former upon the demised premises, when not in conflict with any statute, is valid against the lessee and his assignee in bankruptcy.

[Cited in Merrill v. Ressler, 37 Minn. 85, 33 N. W. 117.]

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

J. H. McLean is the assignee of the lessor of certain premises demised to the bankrupt. The district court made an order allowing McLean's demand to the extent of $660 as a secured claim against the estate of the bankrupt. From this order [Jacob Klein] the assignee in bankruptcy [of Byron A. Baldwin] appeals, and makes two questions: 1st. That McLean is entitled to no lien whatever, and is to be ranked as an unsecured creditor. 2d. If he is to be treated as a secured creditor, it should have been only to the extent of $500. The material facts are these: The lease to the bankrupt was of a hotel, and reserved rent at the rate of $500 per month, payable monthly, and contained this provision for the security of the lessor: "It is further agreed by the lessee (the bankrupt), that all the furniture, crockery, cutlery, and glass by him owned and used in said hotel shall be subject to the payment of said rent reserved as aforesaid, and all unpaid rent shall be construed to be a mortgage lien on the same after the same becomes due and payable." This lease was recorded long prior to the bankruptcy. The rent was paid to January 14th, 1874; on February 14th, 1874, there was one month's rent due ($500), which has never been paid. On the 28th of that month the lessee filed his petition to be adjudged a bankrupt, and the rent, at the rate agreed upon, between February 14th and February 28th would be $160, making in all $660, the sum allowed by the district court. The furniture, etc., has been sold by order of the court, and yielded more than sufficient to pay the amount of rent due.

Jacob Klein, for assignee in bankruptcy (appellant).

T. W. Stratton, for creditor.

DILLON, Circuit Judge. The clause in the lease by which the lessee, in terms, gave to the lessor a lien upon the furniture, etc., in the hotel to secure the rent reserved, was valid between the parties. Although it was declared that "all unpaid rent shall be construed to be a mortgage lien" upon the furniture, etc., yet, technically, it may be conceded there was no mortgage of the property, because no language is used to convey or transfer the title thereto.

Admitting that the instrument is inoperative as a legal mortgage, still it is effectual to create an equitable mortgage, or at least a lien in the nature of an equitable mortgage, which does not depend for its validity upon a sale or transfer of the title to the property to which it attaches, and which is good in equity as against the lessee or his assignee in bankruptcy. Whether it could be maintained against an attaching creditor, or a purchaser from the lessee without notice, I need not inquire. In essence, a mortgage is but a lien upon the property mortgaged, and it is evident here that the parties agreed that the landlord should have security for his rent upon certain personal property used upon the demised premises, and to carry that intent into effect they stipulated that all such property should be subject to the payment of the rent which should be construed to be a lien thereon. Such a provision is valid, and contravenes no statute of the state to which I have been referred. Indeed, in many of the states there are statutes giving a landlord just such a lien or right as is here provided for by the agreement of the parties.

The right in the landlord was perfect as against the bankrupt, and the assignee in bankruptcy takes subject thereto. Abbott v. Godfroy, Mann. (Mich.) 178; Holmes v. Hall, 8 Mich. 66; Hil. Mortg. c. 22; Langdon v. Buel, 9 Wend. 80; Atwater v. Mower, 10 Vt. 75. The Case of Dyke [Case No. 4,227], cited by the appellant, was probably controlled by the Michigan statute, and it was not intended by the learned judge who decided it to

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

deny the validity of equitable liens on property duly created by the contract of the parties, when such liens are good upon the general principles of the law and do not conflict with any statutory provision. The lien provided for in the case under consideration was broad enough to secure all rent becoming due down to the bankruptcy. Affirmed.

NOTE. By 12 & 13 Vict. c. 106, § 184, the rights inter alia of execution creditors, and of mortgagees, and of persons having a lien upon any part of the property of the bankrupt before the date of the filing of the petition or fiat in bankruptcy, are preserved. The previous statute was 6 Geo. IV. c. 16, § 108. Decisions as to rights of equitable mortgagees: Ex parte Sheppard, 2 Mont., D. & D. 431; Ex parte Anderson, 3 De Gex & S. 600; Ex parte Barnett, 1 De Gex, 194; Id. 531; Ex parte Heathcoate, 2 Mont., D. & D. 711; Id. 587; 3 Mont., D. & D. 129, 458.

Case No. 8,885.

McLEAN v. LAFAYETTE BANK et al.

[3 McLean, 185;[1] 1 West. Law J. 15.]

Circuit Court, D. Ohio. July Term, 1843.

BANKRUPTCY—COURTS—CONCURRENT JURISDICTION—CONVEYANCE IN CONTEMPLATION OF INSOLVENCY—PREFERENCE—ASSIGNEE—JURISDICTION IN BANKRUPTCY.

1. In all cases arising under the bankrupt law, the circuit court has concurrent jurisdiction with the district court.

[Disapproved in Bachman v. Packard, Case No. 709. Cited in Re Sabin, Id. 12,195.]

[See Giveen v. Smith, Case No. 5,467.]

2. A conveyance of property, in contemplation of a state of insolvency, is void under the bankrupt law [of 1841 (14 Stat. 517)].

3. And any mortgage or other lien which is intended to give a preference to one or more creditors over others, is also void.

[Cited in Re Walton, Case No. 17,130; Giveen v. Smith, Id. 5,467. Cited in brief in Norton v. Barker, Id. 10,349.]

4. The circuit court has jurisdiction in all cases where a suit is brought by the assignee of a bankrupt, or against him.

[Cited in McLean v. Lafayette Bank, Case No. 8,887; Giveen v. Smith, Id. 5,467; Foster v. Ames, Id. 4,965; Walker v. Towner, Id. 17,089.]

5. All the property and rights of the bankrupt are vested in the assignee, not only from the decree of bankruptcy, but, by relation, from the time of filing the petition. The assignee also represents the creditors.

[Cited in Beardslee v. Beaupre, 44 Minn. 4, 46 N. W. 137.]

6. The bankrupt power is exclusively vested in the federal government.

7. Congress have not given jurisdiction to the state tribunals to carry into effect the bankrupt law. They have not power to vest such a jurisdiction.

[Cited in Shermann v. Bingham, Case No. 12,762; Goodall v. Tuttle, Id. 5,533.]

[Cited in Brigham v. Claflin, 31 Wis. 609.]

8. Bona fide liens under the state laws are valid under the bankrupt law; and a state court may enforce such liens.

9. But if there be fraud in the creation of such liens, and the creditors, through the assignee of the bankrupt, seek to set the liens aside, the district or circuit court of the United States affords the appropriate jurisdiction.

[Cited in Clarke v. Rist, Case No. 2,861; Smith v. Crawford, Id. 13,030.]

10. A state court, by the enforcement of a lien, cannot draw to its jurisdiction the administration of the bankrupt law.

[Cited in Beall v. Walker, 26 W. Va. 748.]

11. Where this effect will result necessarily from the exercise of jurisdiction, the circuit court may interpose by injunction, and stay proceedings in the state court. At least such interposition is proper until the cause can be heard on its merits.

12. A warrant of attorney to confess a judgment, the defendant being insolvent, executed within sixty days preceding the filing of the petition, by the bankrupts, cannot authorise the entry of a judgment.

13. Such judgment, if valid, would create a lien or security within the bankrupt law; and is void.

14. An execution issued on such judgment, though levied, creates no lien on the property levied on. The judgment being invalid, all the proceedings under it are equally so.

In bankruptcy.

Wright, Coffin & Miner and Brown & McLean, for complainant.

Chase & Ball, W. M. Corry, and Fox & Lincoln, for defendants.

OPINION OF THE COURT. This bill is brought by the assignee of John Mahard, Jr., and William Mahard, who are bankrupts, to stay certain proceedings in the state court against the property of the bankrupts. On their schedule the bankrupts returned a large amount of real estate, and also personal property; but the defendants, who are numerous, set up various liens under mortgages, judgments, and levies by execution; and these liens are brought into the state court, to be there investigated. Large as the real estate of the bankrupts is, the liens, should they be established, will exhaust it, to the exclusion of a large class of creditors who have proved their claims under the bankrupt law. The complainant represents that the above liens were all created and obtained in fraud of the bankrupt law; and he prays that the defendants may be enjoined from further proceeding in the state court; that their liens may be set aside as fraudulent; and that the property of the bankrupts may be brought into the bankrupt court, to be distributed according to law. An injunction was allowed on filing the bill, and a motion is now made in behalf of the Lafayette Bank and the Buckinghams, to dissolve the injunction. Many if not all of the other defendants are desirous of having the matters of controversy brought into this court. The mortgage to the Lafayette Bank by the bankrupts was signed the 7th December, 1841, and ac-

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

knowledged and recorded the 13th January, 1842. At October term, 1842, a decree for a sale of the premises was entered by the superior court. The petition under the bankrupt law was filed by the mortgagors the 27th May, 1842, and a decree of bankruptcy was made the 20th of July ensuing. The assignee of the bankrupts, and others who claimed an interest in the mortgaged premises, were made parties to the bill filed by the Lafayette Bank; but the assignee made no answer, nor in any form submitted to the jurisdiction of the court. On the 7th April, 1842, a warrant of attorney was executed by the bankrupts to William M. Corry, Esq., authorizing him to confess a judgment against them in favor of J. S. and M. Buckingham, for a sum exceeding fourteen thousand dollars. This was done at the urgent request of the Buckinghams, and it is agreed, that, at the time, the Mahards were insolvent. On the 8th April, a judgment was confessed, and on the 21st of the ensuing month, execution having been issued, a levy was made on certain personal property, which was afterwards sold, by consent of parties, under the order of the superior court acting as a court of chancery. The proceeds of the sale were brought into that court to be disposed of as it might direct. And it appears that an injunction, which had been previously granted by the superior court to restrain the Buckinghams from proceeding on their execution, was dissolved. From this decision there was an appeal to the supreme court of the state, which continues the injunction.

On the part of the Lafayette Bank, it is contended that this court has no jurisdiction; that the decree of the superior court for the sale of the mortgaged premises is final and conclusive on all parties; that, jurisdiction having attached to that court by the filing of the bill to foreclose the mortgage, it may examine and determine all questions arising under the bankrupt law; and that, as process was served on the assignee, he was a party to those proceedings. On the other hand, it is contended by the assignee, that the mortgage was executed by the bankrupts in contemplation of bankruptcy, to give a preference to the bank over other creditors, and that the mortgage is void under the bankrupt law. The second section of this law provides, "that all future payments, securities, conveyances, or transfers of property, &c., given by any bankrupt in contemplation of bankruptcy, giving any creditor, &c., any preference in priority over the general creditors of such bankrupt, shall be void. And the assignee shall be entitled to claim, sue for, recover, and receive the same as part of the assets of the bankrupt." In the same section, it is declared, that "all the property and right of property of the bankrupt, by operation of law, is vested in his assignee; and the assignee is vested with all the rights, powers, &c., in and over the property 'which the bankrupt had before or at the time of his bankruptcy, declared as aforesaid.'" In the sixth section, it is provided that, "the jurisdiction of the district court shall extend to all cases and controversies in bankruptcies arising between a creditor and the bankrupt, and between such creditor and the assignee." And, in the eighth section, concurrent jurisdiction is given to the circuit court, with the district court, "of all suits at law and in equity, which may or shall be brought by any assignee of the bankrupt against any person or persons claiming an adverse interest, or by such person against such assignee, touching any property or right of property of the bankrupt, transferable to or vested in such assignee." The jurisdiction vested in this court, under these sections, is ample, and reaches every possible controversy which can arise, in the collection and distribution of the effects of the bankrupt. Of whatsoever nature his rights may be, the assignee may invoke the jurisdiction of this court for relief. But he may do more than this. He is not only vested by the law with all the rights of the bankrupt, but with the rights of creditors also. He may set aside a fraudulent conveyance of the bankrupt, which the bankrupt himself could not do. In this respect the assignee represents the general creditors. And in this aspect he stands in the present case.

It is presumed that no one will doubt the powers of congress to confer this jurisdiction. The power "to pass uniform laws on the subject of bankruptcies throughout the United States," is given in the constitution, and belongs to the same class of powers, "as to regulate commerce, establish a uniform rule of naturalization, coin money, establish post-offices and post roads, and to declare war." These, in my judgment, are all exclusive powers. It is true, the supreme court have held that a state may pass a bankrupt law, to operate upon all contracts subsequently made within the state. But I cannot comprehend the principle on which this decision rests. No state can impair the obligations of a contract. That a release, under a bankrupt law, from a contract, does impair its obligation, no one will deny. How can a state exercise this power by any supposed assent of the parties to the contract. Does such a law become a part of the contract, and is the power, therefore, constitutional? This would be a ready, if not a safe mode, of acquiring power by a state, to do that which the federal constitution inhibits. It has been held that the assent of a state enlarged the federal power, so as to enable it to make a turnpike road or other improvement through the territory of a state, which, without such assent, would be unconstitutional. These positions, it seems to me, are equally erroneous. In neither case can the power be derived from the assent or contract of a state or individuals.

The obligation of a contract is as much impaired by a bankrupt law which operates upon future, as upon past contracts. The power is inhibited. Can a state, by the passage of a law, enlarge its constitutional power? Can it say that no contracts shall be made in future, which may not be impaired, under its bankrupt law? Nothing can be more unconstitutional than the notion, that the power vested in the federal government, which, from its nature, must be exclusive, can be exercised by a state, until the same power is exercised by congress. Such a conception seems to me to border upon the ludicrous. I see a state, like the holder of a floating land warrant, hunting among the federal powers for some vacant spot on which to rest, as a temporary occupant; and which must be abandoned as soon as a notice is served on it to quit. A state acts upon its own inherent sovereignty, and upon no such impracticable notion.

The bankrupt power, from its nature, must be exclusive. It must be uniform. A system of bankruptcy has been adopted, and its details are spread out in this act. And summary and extraordinary powers are given to the courts of the United States, to carry out and give effect to this system. This power cannot be exercised by the state courts. Their powers are derived from different sovereignties, to whom they are amenable. Congress had not the power to impose this jurisdiction on the state courts. They have not attempted to do so. Congress have adopted the state laws that relate to the practice of the courts; but the courts of the United States have decided that they cannot execute the insolvent laws of a state. Their organization does not admit of the exercise of the powers necessary to give relief under these laws. The objection is much stronger against a state court giving relief under the bankrupt act. The power belongs to the federal government exclusively, both as regards the enactment of the law and giving effect to it.

Mortgages and all bona fide liens under the laws of a state, and not in fraud of the bankrupt law, are declared to be valid. And the question is asked, have not the state courts power to enforce these liens? The answer may be in the affirmative, but subject to some restriction. The mortgage under consideration, if the allegations of the bill shall be sustained, may constitute one of the exceptions to the rule. That the mortgagee might have filed his bill to foreclose in the circuit court, seems to be clear. The assignee is a necessary party, and the law gives jurisdiction to this court "in all cases between a creditor and the assignee." But he may not have been compelled to sue in this court. Some doubt, however, may be entertained, whether the assignee, being an officer of the law, and bound to discharge his duties under the special direction of the court, should be subjected to any other jurisdiction. He has an undoubted power to redeem the property by paying off the mortgage, and he is entitled, in behalf of the creditors, to the surplus. If the assignee may be drawn into the state court on one lien, he may be so treated in all cases of liens. The present case affords a fit illustration of the principle. Some twelve or fifteen liens are set up on the property of these bankrupts. The property is large and valuable. And the validity of almost all these liens depends upon the construction of the bankrupt law. The entire property of the bankrupts will be absorbed in this way. Now, if this be a rightful exercise of jurisdiction by a state court, although the bankrupt law be uniform in its provisions, it cannot be so in its effects; a state court may hold the act or a part of the act to be unconstitutional. That a uniform construction shall be given to the act, under such an administration of it, is not to be expected. And if this be a proper exercise of jurisdiction, there can be no revisory power in the courts of the United States. There certainly can be none, unless it shall be under the 25th section of the judiciary act of 1789 [1 Stat. 85], to review a decision of the supreme court of the state. This would be a most dilatory and ineffectual mode of executing the bankrupt act; a mode, certainly never contemplated by congress.

On general principles, a state court has an undoubted right to determine a question arising under a law of the United States. This, however, is subject to the revisory power of the supreme court of the United States, as above stated. But questions which involve the efficacy of the bankrupt law, and are essentially connected with its uniform administration, it would seem cannot be brought under the same rule. No light is shed upon this question by the action of the English courts. They all form a part of the same system, and derive their powers from the same sovereignty. Here the judicial power is exercised under different sovereignties, having appropriate powers to give effect to the laws. Under the bankrupt law of 1800 [2 Stat. 19], I am aware, that this jurisdiction, to some extent, was exercised by the state courts. I have not compared that act with the one under consideration, to see whether its provisions in this respect, were different from the present act.

But the question in the present case, does not depend upon the ordinary exercise of jurisdiction by the state courts, for the enforcement of liens against a bankrupt. The complainant in his bill alleges that all the liens involved in this controversy, were given in fraud of the bankrupt act. Every creditor of the bankrupts is interested in this case. If the supposed liens are void, the property of the bankrupts will be distributed among the creditors generally; but if they are valid, the general creditor can receive nothing. And whether these liens are valid or not,

must depend upon the construction of the bankrupt act. Shall these questions be drawn into the state court, and there decided? From the time of filing the petition, by relation, the property of the bankrupts became vested in the assignee. As before remarked, he not only represents the interests of the bankrupts, but the interests of the creditors also. The interests of those who have special liens can as well be protected in this court, as in the state court. They are protected by the law. Why then should the fact of special liens draw this whole controversy into the state court, and take it from the appropriate jurisdiction; a jurisdiction specially provided and vested with all the necessary powers to make a final decision in the case. This the state court cannot do. Should it undertake to determine the validity of the liens under the bankrupt law, and their priorities, still if there be a surplus, it must be handed over to the assignee to be brought into the bankrupt court, for distribution among the creditors. These creditors, through the assignee, are parties in this court, and by its decree the validity of the liens under the bankrupt act, their priorities, and the distribution of the surplus, can all be finally adjusted.

The bankrupt power overrides the contract and puts an end to it. And had there been no reservation in behalf of bona fide liens, they, with other contracts of the bankrupts, would have been abrogated. Shall this exception in the law, in effect, take, at the pleasure of the mortgage creditor, the administration of the bankrupt law into the courts of the state? This would be a matter of little importance in a case free from all difficulty. But where the foundation of the liens depends upon the continuation of the bankrupt act, it would seem, the jurisdiction under which the law was passed should carry it into effect. And this view acquires force from the fact, that the creditors, who are deeply interested in the case, have invoked the powers of the bankrupt court, by proving their claims. And the assignee, their agent, calls specially on the court to interpose its powers and protect the interests committed to it. Has it power to do so? If it has not, there is a great and radical defect in the system. Over the action of the state court the federal court can exercise no control. A foreclosure may be decreed, and so short a time allowed for the payment of the money, as to be unavailing to the assignee. Or the state court may order the sale of the premises, which, of course, must be under the law of the state which requires improved property to sell for two-thirds of its value. And unless the mortgagee shall purchase the property, it may not sell for many years. A connivance between the bankrupt and the mortgagee may, in this manner, keep from his creditors his whole estate. It may be said that the equity of redemption may be sold, under the order of the bankrupt court. But would that court order the sale of the equity of redemption, unless the parties interested were brought before it, and the extent of the liens were judicially ascertained? The district and circuit courts are vested with full chancery and common law powers, to act in all cases arising under the bankrupt law. They possess, in this respect, all the powers of the English common law and chancery courts, over questions of bankruptcy. And is not this jurisdiction exclusive? I am aware that the argument ab inconvenienti, is not a legitimate ground of jurisdiction. But in a case like the present, can it be disregarded? Our system of sovereignties is extremely complicated. The state and federal powers, like the colors of the rainbow, are found to intermix, and it may be sometimes difficult, if not impracticable, to determine the exact limit of either. And when this is the case, what is there but the argument ab inconvenienti to lead the judicial mind to a just conclusion? This, and this only, under the exercise of an enlightened forbearance, can preserve the harmony and efficiency of our system.

It has been shown that the federal court possesses a perfect jurisdiction over all the interests involved in the present case. That the parties are now before it. That the state court has but, at most, a jurisdiction over a part of the case. That it cannot enter a decree that shall settle the conflicting interests of all concerned. In principle, the case seems not to differ from an application to the federal court to discharge a defendant from imprisonment, under the insolvent laws of a state. Such laws generally provide, that on filing his schedule of property under oath, and giving security, he shall be discharged from imprisonment. But the federal court has uniformly refused such applications, on the ground that it could not carry out and give effect to the insolvent law. The act of bankruptcy brings into the bankrupt court, all the interests of the bankrupt. And it seems to be reasonable that that court should exercise an exclusive jurisdiction over those interests. It is no sufficient reason against this jurisdiction, that other interests arising under liens are involved. Those interests are valid under the bankrupt law, being excepted out of its operation, and will be protected by the bankrupt court. But do not those interests necessarily follow the property into the bankrupt court, where it is drawn by the act of bankruptcy? In overruling the motion to dissolve the injunction, as to the Lafayette Bank, the question of jurisdiction is not finally decided. It may again be discussed and considered on the final hearing. It is enough now to say, that from the allegations of fraud in the bill and other circumstances which have been adverted to, the court will not now dissolve the injunction on the ground that it has no jurisdiction of the case. The answer denies, generally, the allegations of the bill; but so complicated are the numer-

ous interests involved, that the continuance of the injunction until the final hearing, seems to be required. The motion to dissolve the injunction, as regards the interest of the Lafayette Bank, is overruled.

The lien set up by the Buckinghams will be now considered. The warrant to confess the judgment was dated the 7th of April, 1842, and judgment was confessed under it the day following. On the 21st of May, ensuing, the execution was levied. The petition of the bankrupts was filed the 27th of May, and a decree of bankruptcy entered the 20th of July. The proceeding of the Buckinghams is void, it is insisted, under the second section of the bankrupt act, which provides, "that all future payments, securities, conveyances, or transfers of property, or agreements made or given, by any bankrupt, in contemplation of bankruptcy, and for the purpose of giving any creditors, &c., any preference or priority over the general creditors of such bankrupt, shall be void, &c., and the assignee shall be entitled to claim, sue for, recover, and receive the same as part of the assets of the bankruptcy." The warrant of attorney, judgment, and levy of the execution were within two months preceding the filing of the petition; and it is admitted that the Mahards were insolvent at the time the warrant of attorney was given. The only question, then, is, whether this proceeding was void, under the above section.

It is contended that the warrant of attorney is not a security or an agreement within the act. This may be admitted; and, if nothing had been done under the power, the argument would have been unanswerable. But is not the act of the agent, thus constituted, the act of the principals? This will not be denied. The Mahards, then, being insolvent, and within less than sixty days before their petition was filed, by their agent specially constituted for that purpose, confessed a judgment in favor of the Buckinghams for an amount exceeding fourteen thousand dollars. A judgment is a security paramount to all other liens of a subsequent date. If valid, it constitutes a lien within the bankrupt act. But is this a valid judgment? The second section of the act provides, "that all dealings and transactions by and with any bankrupt bona fide made and entered into more than two months before the petition filed against him, or by him, shall not be invalidated or affected by this act." This, by the strongest implication, declares that any transaction of the above nature, "made and entered into" less "than two months before the petition was filed," shall be void.

But strong and unanswerable as this position seems to be, there is another, if possible, still more conclusive. The warrant of attorney was given, and the judgment confessed, in contemplation of bankruptcy; and if so, the judgment is void, under the bankrupt act; not that it is necessary to show the Mahards, at the time the judgment was confessed, had determined to apply for the benefit of the act; but they were in an acknowledged state of bankruptcy; and this, from the circumstances, must have been known to the Buckinghams; and hence their great solicitude to procure the confession of the judgment. It does not follow that all judgments obtained within two months before filing the petition, are void. A suit commenced in the ordinary mode of proceeding, and prosecuted to judgment, the judgment, though entered within the sixty days, may constitute a valid lien. Whether such a judgment, therefore, be void or not, must depend upon the circumstances under which it is obtained. As regards the judgment of the Buckinghams, it seems to come within the law, not only as to time, but as to the circumstances which invalidate the transaction.

But it is contended that the lien now under consideration arises from the levy of the execution upon the personal property of the Mahards, which is not within the law: that such a lien is procured from the operation of law, and not from the act of the party. Of what value is the levy, if the judgment be void under the bankrupt act? If the judgment fall, can the levy stand? The argument, that if the judgment were inoperative as a lien, under the bankrupt law, still it is a judgment on which the execution may issue, and a valid levy be made, is more specious than sound. It may be admitted that the judgment may not be void for all purposes; but if it be void, as confessed, in contravention of the bankrupt act, the same principle must invalidate the proceedings on the execution; for such proceedings are equally in contravention of the policy of the act as the confession of the judgment. Indeed, it is a violation of the very letter of the act, by "procuring an execution to be levied." But the judgment, if void under the act, is void for all purposes. No valid rights can arise under it. It is as inoperative as would have been a mortgage or other security given under the same circumstances.

As before remarked, the overruling of the motion to dissolve the injunction will not preclude the party from taking the same ground on the final hearing. The motion to dissolve the injunction, in regard to the money for which the personal property was sold, claimed by the Buckinghams, is overruled; and the cause is continued.

[NOTE. The case was subsequently heard upon demurrer to an amended bill filed by the complainant. The demurrer was overruled. Case No. 8,886. It was again heard upon motion of complainant to appoint a receiver to take charge of a farm, part of the real estate alleged to have been fraudulently conveyed. The motion was allowed. Id. 8,887. It was then heard upon the question of the validity of the transfers alleged to be fraudulently made by the bankrupts. Some of these were held to be invalid. Id. 8,888. Finally it was heard on exceptions to the master's report, which exceptions were overruled. Id. 8,889.]

Case No. 8,886.

McLEAN v. LAFAYETTE BANK et al.

[3 McLean, 415.] [1]

Circuit Court, D. Ohio. July Term, 1844.

BANKRUPTCY — ASSIGNEE — SUIT AGAINST MORTGAGEES — VALIDITY — PRIORITY — PLEADING IN EQUITY — MULTIFARIOUSNESS—WHAT DEMURRER ADMITS.

1. An assignee in bankruptcy has a right to file his bill in chancery against different mortgagees, to test the validity of their mortgages.

[Cited in Foster v. Ames, Case No. 4,965.]

2. In this proceeding the assignee represents the general creditors of the bankrupts.

3. There is no absolute rule in regard to the multifariousness of a bill. The decisions on this point are unsatisfactory and contradictory. The rule is founded on convenience, and must be applied to the peculiar circumstances of each case.

[Cited in Gamewell Fire-Alarm Tel. Co. v. City of Chillicothe, 7 Fed. 353.]

[Cited in Abbot v. Johnson, 32 N. H. 26; De Wolf v. Sprague Manuf'g Co., 49 Conn. 298.]

[See Giveen v. Smith, Case No. 5,467.]

4. The assignee having a right to discharge incumbrances on the bankrupt's estate, may file his bill against all incumbrancers to ascertain the validity, priority and amount of the incumbrances. Such a proceeding is analogous to the foreclosure of a mortgage.

[Cited in Sutherland v. Lake Superior Ship Canal, Railroad & Iron Co., Case No. 13,643; Jones v. Slauson, 33 Fed. 634.]

5. The demurrer admits all the material allegations of the bill.

[This was a bill by Nathaniel C. McLean, assignee in bankruptcy of John Mahard, Jr., and William Mahard, partners as John Mahard & Co., to set aside certain transfers of stock and mortgage of real estate made by the bankrupts and claimed to be fraudulent as to their creditors. An injunction was granted to stay proceedings in the state court seeking to enforce the alleged fraudulent preferences. The case was formerly heard upon motion to dissolve this injunction. Case No. 8,885. It is now heard upon demurrer to an amended bill.]

Wright & M'Lean appeared for complainant.

Mr. Corry, for defendants.

OPINION OF THE COURT. At the last July term this case was before the court, on a motion to dissolve the injunction which had been granted. On that motion the question of jurisdiction was generally considered and sustained. [Case No. 8,885.] Leave was then given to amend the bill, which amendment has been filed, and two of the defendants, J. S. and M. Buckingham, demur to the amended bill, and assign as cause of demurrer, that it is multifarious, in joining distinct rights; and, also, in the misjoinder of parties defendants. The complainant, as assignee of John and William Mahard, bankrupts, filed his bill in chancery, stating that John Mahard, Jr., one of said bankrupts, being insolvent, and in contemplation of bankruptcy, gave mortgages to the Lafayette Bank of Cincinnati, and other persons, named as defendants, on various tracts of land and town lots, to secure to some of them the payment of large sums of money, and to indemnify others as indorsers for the said Mahards, all of which deeds of mortgage are averred to be in fraud of the bankrupt law. That the partnership assets of the Mahards are small, except the real estate mortgaged as aforesaid, all of which being applied in the payment of debts, will still leave among the creditors of the bankrupts, a large amount unsatisfied. To the Buckinghams, mortgages were given on lots 404 and 460, in the city of Cincinnati, to indemnify and save them harmless on account of their indorsements for the said Mahards. On the same lots, previous mortgages had been executed to Andrew Johnson, to secure him against loss for his indorsements. In addition to these mortgages, a bill of sale was executed to the said Johnson, by the said John Mahard, Jr., for a large amount of personal property, which is also alleged to be void under the bankrupt law [of 1841 (5 Stat. 440)]. The amended bill alleges, that the bankrupts held certain shares of stock in the Lafayette Bank, and in the Franklin Bank, to which the Lafayette Bank and John S. Buckingham, and the trustees of the Franklin Bank, set up some claim. That John Mahard, Jr., sold to Charles B. Dyer, that part of in-lot 404, described in the mortgage to the Franklin Bank, for the sum of ten thousand dollars. That the bank assented to the sale, and having received seven thousand dollars, released its mortgage. And that John Mahard, Jr., received a house and lot in Lewistown, Hamilton county, from Dyer, in discharge of the balance due on the purchase of the above lot. That this arrangement was assented to by the Buckinghams, and was made by the said John Mahard in contemplation of bankruptcy, and in fraud of the bankrupt law. The amended bill further represents, that a mortgage was given by John Mahard, Jr., on certain real property in Covington, in the state of Kentucky, to the Northern Bank of Kentucky, to secure certain payments to said bank due by the Mahards, which mortgage was in fraud of the bankrupt law. It is also alleged that the mortgages executed to the banks, as aforesaid, were intended to secure loans of money, which were made at a greater rate of interest than six per cent. And the bill prays, that the conveyances aforesaid, for the reasons stated, may be set aside, and declared null and void, and the property mortgaged, sold for the general creditors of Mahard, and for such other and further relief, &c.

The above is a general but not a particular statement of the leading facts of the bill. It is sufficient to show the grounds on which the demurrer to the amended bill has been

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

filed. The demurrer admits, of course, that the mortgages set forth in the bill were given, as alleged, in fraud of the bankrupt law; and that they are consequently void. It also admits the usury alleged against the banks, and that the proceeding by the Buckinghams, in obtaining their judgment and execution, on which a certain amount of personal property was levied, was also void. And the demurrer rests upon the ground that there is an improper joinder of distinct matters, in which the defendants have no common interest.

Before this point is examined, it is important that we should understand the nature and object of the present bill. The assignee not only represents the bankrupts, but their creditors; and it is his duty to contest the validity of all liens set up by a part of the creditors to the exclusion of others, where there is any reason to suppose that such liens have been created in violation of the bankrupt law. Under the eleventh section of the bankrupt act, he is authorised, by and under the direction of the proper court, in bankruptcy, to redeem and discharge any mortgage or other pledge, or deposite or lien, upon any property, real or personal, of the bankrupt. The bill then may be considered in a double aspect. First, to set aside the liens which are fraudulent; and secondly, under the general prayer of relief, and the special one that the lands, &c., may be sold, and that such liens as shall be found valid, shall be discharged according to their priority. The bill alleges that there is little or no property of the partnership effects; and that the real and personal estate named in the bill, constitute the only property out of which a dividend can be paid to the general creditors. That the debts of the bankrupts far exceed their means of payment. And first, on the supposition that the liens set out in the bill were executed in fraud of the bankrupt act, can the defendants be joined in a bill to set them aside? It is true, as alleged in support of the demurrer, that interests wholly distinct and separate, it is said by decisions of courts and by elementary writers, cannot be united in the same bill. and the reason assigned is, that individuals ought not to be subjected to the expense and delay of investigating matters in which they have no common interest. That the pleading in chancery should rather conform to the simplicity of pleadings at law. Lord Cottenham, in a late case, well observed, "that to lay down any rule applicable as to multifariousness, or to say what constitutes multifariousness, as an abstract proposition, is, upon the authorities, utterly impossible. The cases upon the subject are extremely various; and the court in deciding them, seems to have considered what was convenient in particular circumstances, rather than to have attempted to lay down any absolute rule." The decisions are contradictory, and each case, as it arises, must be governed by the peculiar circumstances connected with it. The matters of costs and hardship are the principal objections urged to such a proceeding; and the court must always determine from the case itself, whether these objections shall prevail. There is, in fact, no principle involved in this question, beyond the inconvenience and hardship stated. Where the inhabitants of a parish had a right of common under a trust, a suit has been sustained by one in behalf of himself and all the other inhabitants. "In such cases, although there were or might be distinct interests in the different tenants or parishioners, yet there was a general right and privity between them as to the claim asserted in the bill." Story, Eq. Pl. § 121. This is conformable to the decision in the case of Mayor of York v. Pilkington, 1 Atk. 282–284, that, says Lord Eldon, "was a case of a claim to an exclusive fishery against many others who also claimed a right, in which Lord Hardwicke observed, where the plaintiffs stated themselves to have the exclusive right, it signified nothing what particular rights might be set up against them." In Dilly v. Doig, 2 Ves. Jr. 486, it was held that an author cannot file a joint bill against several booksellers, for selling the same spurious edition of the work, for there is no privity between them; and his right against each of them is not joint, but perfectly distinct." Story, Pl. Ch. § 277.

Now, the above cases are irreconcilable In the case of the fishery, there being a joint interest asserted in the bill, "it mattered not what particular rights might be set up against them." And in the case of the author, who asserted a sole interest, the suit could not be maintained, because there was no privity between the defendants, who had violated the copyright. It seems to me there is no sufficient reason in the distinction drawn between these two cases, that the one interest was local and the other general. The trespassers on the fishery may have been as numerous, and probably were more so, than the violators of the copyright. "Upon a bill of peace, persons claiming by distinct titles, not in privity with each other, may be joined." Story, Eq. Pl. § 278. In the case of Brinkerhoff v. Brown, 6 Johns. Ch. 157, Chancellor Kent, after an elaborate view of the cases, said: "The principle to be deduced from those cases is, that a bill against several persons must relate to matters of the same nature, and in which all the defendants are more or less concerned, through their rights in respect to the general subject of the case may be distinct. And when we consider that the plaintiffs in the case now before me, are judgment creditors, having claims against the Genessee Company perfectly established, and not the subject of litigation in this suit; and that the general right claimed by the bill, is a due application of the capital of the company to the payment of their judgments; that the subject of the bill, and of the relief, and

the only matter in litigation is, the fraud charged in the creation, management, and disposition of the capital; and in which charge all the defendants are implicated, though in different degrees and proportions; I think we may safely conclude, that this case falls within the reach of that principle, and that the demurrer cannot be sustained." The same doctrine is sustained in Fellows v. Fellows, 4 Cow. 682, and in Boyd v. Hoyt, 5 Paige, 55. This doctrine may have been carried farther by Chancellor Kent, in the above case, as Mr. Justice Story suggests, in his Equity Pleadings (page 234), than it has been carried in England. But whether such a case may have occurred in the English chancery, is not so much the question, as whether, by the decision, any salutary rule has been violated. The rule as to multifariousness, as before observed, is one founded on convenience, and if, in carrying it out, Chancellor Kent has imposed no peculiar hardship on the Genessee Company, or subjected it to unnecessary expense, the rule is not of less authority than if it had been sanctioned in the English chancery.

There was no privity among the complainants. They were judgment creditors, and they united in filing their bill against the company, alleging a fraudulent application of their capital. The case under consideration, it seems to me, is a stronger one for the exercise of jurisdiction, than the case before Chancellor Kent. The complainant represents the interests of the creditors in this procedure. He alleges fraud in the several liens set up by the defendants. Now, although the frauds charged consist of various and distinct transactions, yet these frauds are of the same character, and for the violation of the same section of the bankrupt act. In every instance where the allegation of fraud is made, as against the respective liens asserted by the defendants, it consists in the bankrupt having created the liens in contemplation of bankruptcy, and to give an illegal preference to certain creditors. Now, these allegations are admitted by the demurrer, and in view of this fact, can the defendants, who have demurred, complain of hardship and oppression in being connected with others, who are charged with having committed similar frauds on the rights of the general creditors. The liens of the Buckinghams cover the same property that is embraced by the liens of several of the other defendants. This is particularly the case as regards the mortgages on the two lots named, the lien of the judgment, and also as to the claim set up to the personal property. Indeed, from the statements in the bill, it would seem that the scramble for the property of the bankrupts was so great by the defendants, and their interests have become so interwoven with each other in endeavoring, according to the averments of the bill, to evade the bankrupt act, that it is difficult to act on the allegations of fraud, without having spread out before the court a connected chain of the facts.

In his Equity Pleadings (section 533), Mr. Justice Story says: "The result of the principles to be extracted from the cases on this subject seems to be, that where there is a common liability and a common interest, a common liability in the defendants and a common interest in the plaintiffs, different claims to property, at least if the subjects are such as may without inconvenience be joined, may be united in one and the same suit." And in section 534, he says: "Indeed, where the interests of the plaintiffs are the same, although the defendants may not have a co-extensive common interest, but their interest may be derived under different instruments, if the general objects of the bill will be promoted by their being united in a single suit, the court will not hesitate to sustain the bill against all of them." Campbell v. Mackay, 1 Mylne & C. 603. There is a common interest among all the general creditors, represented by the assignee, to set aside the liens named in the bill. The complainant's case, then, comes within the rule laid down in Campbell v. Mackay. How is it in regard to the defendants? Their interests arise under distinct instruments, but several of them claim liens on the same property; and, indeed, it may be said that they are all interested in a greater or less degree in the mortgaged estate of the bankrupts. The Buckinghams obtained a judgment by confession against the bankrupts, which, if valid, binds all the real estate of the bankrupts in Hamilton county; they are then interested to postpone all prior liens. And so it may be said of the mortgages under which they claim. It would be impossible for any court to act upon the liens of the Buckinghams, and especially to enforce them, without affecting, to some extent, the interests of other liens on the same property. There is, then, such an interest as makes it proper to include the Buckinghams in the suit, unless it shall subject them to unnecessary costs. And on this ground it is not perceived they have any cause to complain.

When the rule is established that all conveyances made by an individual, in contemplation of bankruptcy, and for the purpose of giving a preference to one or more creditors over the general creditors, it only remains to apply the rule to the different liens of the defendants. And it is not necessary to inquire into the intent of the bankrupt when he made the conveyance, but to show that he was in a state of insolvency, from which the intention is inferred, and the act makes the conveyance void. Now, although the mortgages were executed at different times, yet all subsequent mortgagees are interested in the question, whether the mortgagor was in a state of insolvency when the first mortgage was executed; for if that fact shall be established, it makes fraudulent, equally with the first, all the subsequent

mortgages. In this most material fact then, the defendants, who set up liens to the bankrupt's estate, have a common interest. The bill asserts the fact, and the Buckinghams, by their demurrer, admit it. How then can they insist that they are improperly united in this suit with the other defendants, and that a great hardship will be imposed upon them to enter into a controversy in which they have no interest. The turning point, in all the mortgages, is the one above stated. And in this the defendants have all a common interest. If this be so, the objection that the Buckinghams can have no interest in the allegation of illegal interest, in the amended bill, cannot sustain the demurrer. It is not necessary that the common interest of the defendants should extend to all the matters in the bill. If they have an interest in one or more leading facts in the bill, it is enough to sustain the jurisdiction, though in some other things there shall be no common interest. But the interests of the defendants cannot be said to be wholly disconnected with that which is to be destroyed or lessen any one of the special liens. By this, the general creditors' dividend is increased; and this is especially the case to those who have other mortgages on the same property. In overruling the demurrer on this ground, I cannot see that any hardship or expense is imposed upon the Buckinghams. They are not necessarily subjected to any expense or even delay in investigating a matter in which they have no interest.

The question of jurisdiction on the other aspect of the case, is clear of all difficulty. The assignee has a right to pay the liens on the estate of the bankrupt under the order of the bankrupt court. He has a right to come into this court to set aside all fraudulent liens, and jurisdiction being acquired, the court, as a matter of course, will direct such liens as shall be held valid, to be discharged. On a broader ground the jurisdiction may be assumed. The assignee has a right to ask the aid of a court in chancery to assist him in the duty of discharging incumbrances. First, to ascertain their amount and their priority, and for this purpose, all who claim liens upon the bankrupt's estate, may be united as defendants, and called upon to answer. Under the extensive powers given to the assignee by the bankrupt act, he might, perhaps, sell the equity of redemption in the mortgaged premises in question. But such a procedure, under the circumstances of this case, would be exceedingly improper, as it might sacrifice the interests of the creditors. Here is an estate amounting in value, probably, to forty thousand dollars, and which, with the exception of a very inconsiderable amount, constitutes the entire estate of the bankrupts. There are many creditors of large amounts who have no interest in the liens enumerated in the bill, and who claim a distributive share of the estate. With the view then to ascertain the validity, the priority, and the extent of the liens, the assignee has an unquestionable right to bring a suit, in chancery, against all the incumbrancers, to test the validity, priority and amount of their claims. And should the liens stated be found legal, or any part of them, this court will ascertain their priority and amount, and direct the money from the sale to be applied by the assignee accordingly. This proceeding is in the nature of one to foreclose a mortgage. In such a case, all incumbrances, whether prior to or subsequent to the mortgage on which the procedure is had, are proper parties. This enables the court to ascertain the priority and extent of the liens, and on a sale of the mortgaged premises, properly to apply the proceeds. In such a proceeding, the object is not to ascertain pretended, but real incumbrances. The last mortgagee has a right to pay off all prior mortgages, and secure to himself the liens under them. But this is authorised only by a person who has a valid incumbrance; consequently, the court, in ascertaining all the incumbrances, must necessarily ascertain their validity.

The proceeding under consideration arises, necessarily, from the provisions of the bankrupt act. Effect could not be given to those provisions, in a case like the present, except through the interposition of a court of chancery. It is only in such a court that the priority of the liens can be ascertained. To determine this, the instruments must be before the court, so that they may be compared. The objection of usury, as averred in the amended bill, and which is the principal ground of demurrer to this procedure, can have no weight. The court must inquire into the validity and the amount of the liens, to enable the assignee to discharge them; and, indeed, such discharge must be made under the decree of the court. The interest of the general creditors, and, also, the interest of the mortgagees, are all adjusted and finally settled by the decree. For this purpose, then, the jurisdiction of the court may not only be exercised, but it is not perceived how such a case can be properly settled in any other mode. A sale on any mortgage does not affect the rights of other mortgagees, unless they are made parties. A mortgagee, whose mortgage is prior to that on which the sale is made, cannot be affected, as his right is paramount to the junior mortgage. Nor is the interest of a subsequent mortgagee affected; for, notwithstanding the sale, he may, not having been made a party, pay the purchase money and interest, and claim that the property shall be again sold in satisfaction of his mortgage, and of the sum paid by him to the first purchaser. The rights, therefore, of these mortgagees can only be settled by bringing them before the court, as has been done in this case. And the allegation in the amended bill, as to the rate of interest charged by the banks, whether, if sustained, the effect shall be to avoid the instruments or the

interest only, it was proper to make it a charge in the bill. In the decision of this point, the general creditors are not only interested, but also all the other mortgagees. For if the bank mortgages shall be set aside or reduced in amount, their mortgages, if valid, being for, in part, the same property, will secure the payment of a larger amount. Whether the court can direct the sale of the land mortgaged in Kentucky, need not now be considered. The mortgagee is a party to the suit, and if, on no other ground, it would be proper to have that mortgage before the court, to see how it stands connected with other mortgages and liens, which the same mortgagee holds on other property in this state.

Upon the whole, I can entertain no doubt, that under this last head, the jurisdiction is sustainable. The force of the objection as to misjoinder of parties is not perceived. The defendants in Kentucky have voluntarily answered, and that makes them parties to the suit. And if the interests of the defendants are properly brought before the court, as has been shown, there can be no objection to the joinder of those who claim such interests. The demurrer is overruled.

[NOTE. The case was again heard upon motion of complainant to appoint a receiver to take charge of a farm, part of the real estate alleged to have been fraudulently conveyed. The motion was allowed. Case No. 8,887. It was then heard upon the question of the validity of the transfers alleged to be fraudulently made by the bankrupts. Some of these were held to be invalid. Id. 8,888. Finally it was heard on exceptions to the master's report. Id. 8,889.]

Case No. 8,887.

McLEAN v. LAFAYETTE BANK et al.

[3 McLean, 503;[1] 2 West. Law J. 441.]

Circuit Court, D. Ohio. Dec. Term, 1844.

BANKRUPTCY — APPOINTMENT OF RECEIVER — NOTICE—POSSESSION RELINQUISHED TO INCUMBRANCER.

1. Previous notice of a motion for the appointment of a receiver is not necessary, when counsel for the opposite party are present in court.

2. Where a bankrupt owned real estate incumbered by previous liens, which are before this court for adjustment, a receiver will be appointed on the application of the assignee in bankruptcy, although the bankrupt may have relinquished possession to some of the prior incumbrancers.

[Cited in Foster v. Ames, Case No. 4,965.]

[This was a bill by Nathaniel C. McLean, assignee in bankruptcy of John Mahard, Jr., and William Mahard, partners as John Mahard & Co., to set aside certain transfers of stock of the Lafayette Bank and mortgage of real estate made by the bankrupts, and claimed to be fraudulent as to their creditors. An injunction was granted to stay proceedings in the state court seeking to enforce the alleged fraudulent preferences. The case was formerly heard upon motion to dissolve this injunction. Case No. 8,885. Subsequently an amended bill was filed, to which the defendant demurred. The demurrer was overruled. Id. 8,886. It is now heard upon motion of complainant for the appointment of a receiver to take charge of certain of the real estate alleged to have been fraudulently conveyed.]

N. C. M'Lean, Mr. Wright, and Coffin & Miner appeared for complainant.

Mr. Corry, for J. & M. Buckingham.

Mr. Chase, for Lafayette Bank.

LEAVITT, District Judge. The complainant has submitted a motion for the appointment of a receiver, based on his affidavit, setting forth that J. Buckingham and Mark Buckingham, shortly after the decree in bankruptcy against Mahard, entered into the possession of, and have since occupied, without rightful authority, a farm described in the bill, formerly the property of the bankrupt; and that there is now a large amount of rent, in kind, upon the premises, the product of said farm, and under the control of said Buckinghams, who, as judgment creditors of said Mahard, are made defendants to the bill, and whose rights are, therefore, before the court for adjustment. The counsel for the Buckinghams, and the counsel for the Lafayette Bank, appear, and resist the application for the appointment of a receiver. They set forth, in substance, in their statements, that the Buckinghams, having a lien on the said farm, by virtue of a judgment and levy upon it, as creditors of said Mahard, with the consent of the Lafayette Bank, took possession, after it was abandoned by Mahard, and have since continued to occupy it. It is also stated, that said bank has the prior lien by mortgage upon said farm, and is content that the Buckinghams shall continue in the occupancy thereof, without the intervention of a receiver; they being, as it is alleged, men of substance, and able to respond to the parties interested for the rents and profits which have been or may be received by them.

It is insisted, in the first place, by counsel who oppose this motion, that it ought not to be granted, because previous notice has not been given to the parties interested, of an intention to submit it. The authorities referred to do not sustain the position, that this notice is necessary, under all circumstances. On the contrary, it appears that a court of chancery will sometimes appoint a receiver, on an ex parte application for that purpose; but ordinarily it will not do so until the time for the defendant's appearance has expired, and without an exhibition of facts rendering such summary proceeding necessary. 1 Barb. Ch. Prac. 669. It is believed that no authorities can be produced, proving that no-

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

tice of the motion is required, in any case, where the parties to be affected by the appointment of a receiver are in court, represented by counsel, who appear in resistance of the motion. It seems to be supposed by counsel that the third rule, of the rules of practice for the courts of equity of the United States, adopted by the supreme court, and, consequently, obligatory on this court, requires a previous formal notice of the pending motion. This rule, however, obviously embraces only applications for "interlocutory orders, rules, and other proceedings," preparatory to the hearing of causes on their merits, made to a judge at chambers, or on rule days, at the clerk's office. It does not apply to a motion made in term, and in the presence of counsel. This motion is also opposed on the ground that the case pending, in which the motion is made, involves a question of jurisdiction between this court and one of the courts of the state; and that until this conflict of jurisdiction is finally settled, the power of this court to appoint a receiver cannot be rightfully exercised. In reply to this objection, Judge McLean, at the last term of this court, after full argument and mature consideration, refused, on a motion for that purpose, to dissolve the injunction granted in this case—maintaining that this court had jurisdiction, under the provisions of the late bankrupt law [of 1841 (5 Stat. 440)], both of the subject matter of, and the parties to, the pending suit. [Case No. 8,885.] After analysing and commenting on the 6th and 8th sections of the bankrupt act, he concludes, that "the jurisdiction vested in this court, under these sections, is complete, and reaches every possible controversy that can arise in the collection and distribution of the effects of the bankrupt." And again, "the act of bankruptcy brings into the bankrupt court all the interests of the bankrupt; and it seems reasonable that the court should exercise an exclusive jurisdiction over those interests." It is true, that in overruling the motion to dissolve the injunction, the judge remarks, that the parties will not be precluded from the discussion of the question of jurisdiction on the final hearing. [See Case No. 8,886.] In this posture of this question, the court will not overrule the present motion, on the ground of a defect of jurisdiction.

These preliminary objections being disposed of, the question is presented, whether, from the facts before the court, it will be a rightful exercise of its power, to appoint a receiver, according to the prayer of the complainant. The power to appoint a receiver pertains necessarily to every court having chancery jurisdiction. In 1 Barb. Ch. Prac. p. 658, it is said: "A receiver is a person appointed by the court, to receive the rents and profits of land, or other property, or things in question in this court, pending the suit, where it does not appear reasonable that either party should do it." "The immediate moving cause of the appointment, is the preservation of the subject of litigation, or the rents and profits of it from waste, loss, or destruction." In Story's Equity Jurisprudence (volume 2, p. 158) it is laid down, that "the appointment of a receiver is a matter resting in the sound discretion of the court." The same principle is asserted in 1 Pow. Mortg. note 294; 1 Johns. Ch. Cas. 57. "It (the appointment of a receiver) may be granted, in any case of equitable property, upon suitable circumstances." 2 Story, Eq. Jur. p. 157, § 829.

What is the case before the court? A bill has been filed in this court by the complainant, as the assignee of Mahard, a bankrupt. It is averred in the bill, that Mahard, at the time of his bankruptcy, was possessed of a large real estate, incumbered by various mortgages and judgments, which he represents as having been procured in fraud of the bankrupt law, and, therefore, void; that proceedings had been instituted by some of the lien holders, in the superior court of Hamilton county, for the purpose of obtaining an adjudication upon their rights; and that in order to the final and satisfactory adjustment of the interests of all the creditors, it was necessary that the liens should be brought into this court, which, under the ample powers conferred on it by the bankrupt law, would possess complete jurisdiction to settle the rights of all concerned. The bill prays an injunction, restraining the mortgagees and judgment creditors from further proceeding in the state court to enforce their liens. The injunction was granted, and still continues in full force. The whole case is, therefore, before this court for a final hearing, and the equitable adjustment of all the interests involved in this controversy. During the pendency of these proceedings, the Buckinghams have been in the occupancy of the farm in question, and are now in possession of a large amount of its products, the rightful ownership of which depends on the final decree and order of distribution to be made by this court. By the operation of the decree in bankruptcy against Mahard, all his interest in the premises, at the time of filing his application, was divested from him, and passed to and vested in his assignee. The assignee, therefore, stands in the position of legal owner of all the bankrupt's estate, and is also the legal representative of all his creditors. Ascertaining there were numerous and conflicting claims and liens on the large real estate of the bankrupt, and having reason to believe, as alleged in the bill, that some of these were fraudulent and void, as being in contravention of the bankrupt law, it was his duty to institute proceedings to test their validity, and to settle the priorities of such as should be adjudged valid. This court, in taking jurisdiction of the case, and enjoining further proceedings to enforce the liens, divested the holders of these liens of all

right and power to interfere with the property to which the incumbrances attached, until the final hearing. Pending the suit in chancery, and while the injunction continued in force, none of the parties could rightfully exercise acts of ownership over the property in controversy. The Lafayette Bank, though represented as having a prior and undisputed lien on the farm, could not, in this posture of the case, without the sanction of this court, either take possession of the property, or give to another a valid assent to take possession. Neither did this right pertain to the Buckinghams, in virtue of their judgment and levy—especially as that judgment is distinctly alleged to be void under the bankrupt law, and as it is one of the objects of the bill to procure the adjudication of this court on that point. The property of the bankrupt may be justly said to have been in the keeping of the law from the time of issuing the injunction, and the rights of the lien holders in a state of suspension till the final hearing.

It would seem, that under these circumstances, the Buckinghams are not in the rightful possession of the farm in question; and it is equally clear that the case made, is one in which a court of chancery should exercise the power pertaining to it, of appointing a receiver. All the lien holders, as well as the general creditors of the bankrupt, Mahard, have an interest in the products of the farm, now under the control of the Buckinghams, and also in the rents and profits accruing, pendente lite; and there is great propriety in placing these in the keeping of a responsible officer of this court, to be held by him, subject to its final order. It is not perceived that this course can, by any possibility, injuriously affect the rights of any of the parties concerned. The assignee, as the representative of the general creditors, asserts that the appointment of a receiver is necessary. And, although the fact be conceded that the Buckinghams are now solvent, and will in all probability be able to respond hereafter to any claim that may be set up against them, growing out of their use and occupancy of the premises, yet, will it be proper to refer the numerous other creditors of the bankrupt to this troublesome, not to say doubtful, remedy, for the recovery of their rights? It is impossible to foresee what change may take place in the circumstances of the Buckinghams before the final adjudication of the rights of the parties concerned in this suit. If they should, in the intervening time, by any adverse fortune, become insolvent, the parties would be without any remedy. But, if no such change shall occur, it is altogether probable that, after the termination of this suit, should it be adverse to their claim, further litigation will be necessary to ascertain and enforce their liability; and, after the lapse it may be of years, such a proceeding would be attended with serious difficulties and embarrassments, and put the rights of other creditors in great jeopardy.

THE COURT, therefore, entertain no doubt that the case submitted calls for the exercise of its discretionary power in the appointment of a receiver; and the motion of the complainant is, accordingly, granted.

[NOTE. The case was subsequently heard upon the question of the validity of the transfers alleged to be fraudulently made by the bankrupts. Some of these were held to be invalid. Case No. 8,888. Finally it was heard on exceptions to the master's report, which exceptions were overruled. Id. 8,889.]

Case No. 8,888.

McLEAN v. LAFAYETTE BANK et al.

[3 McLean, 587.] [1]

Circuit Court, D. Ohio. July Term, 1846.

BANKRUPTCY — ADJUSTMENT OF LIENS — FRAUD—PREFERENCE—INSOLVENCY — EFFECT OF TAKING MORTGAGE — BONA FIDES — BANKS—AUTHORITY TO DISCOUNT—USURY.

1. In bankruptcy, the circuit court will exercise jurisdiction over distinct interests and parties, on allegations of fraud, in order to adjust liens and make distribution of assets.[2]

[Cited in Foster v. Ames, Case No. 4,965.]

[Cited in Olney v. Eaton, 66 Mo. 564.]

2. The assignee of the bankrupt may take advantage in behalf of creditors, of any preference or other acts by the bankrupt, in violation of the bankrupt law.

3. The books and schedules of the bankrupt are evidence under this head.

4. The taking of a mortgage by a bank from its debtor, does not show that the bank considered him to be insolvent, nor that the mortgagor contemplated bankruptcy.

5. The second section of the bankrupt act [of 1841 (5 Stat. 440)] does not render void a contract or conveyance made two months before the bankruptcy, whatever may have been the intention of the bankrupt, if the other party acted fairly and had no notice of his intention.

6. The party impeaching a contract, on the ground of fraud, must prove the fraud.

7. A contemplation of bankruptcy means—in contemplation of a state of bankruptcy. This means more than an inability to pay debts promptly. It means a thorough breaking up of his business by the bankrupt.[2]

[Cited in Ashby v. Steere, Case No. 576.]

8. The charter of the Franklin Bank, which authorizes it to discount notes, &c., on banking principles, does not make void a contract or note, reserving more than six per cent. interest.[2]

[Approved in Darby v. Boatman's Sav. Inst., Case No. 3,571.]

[Quoted in Rock River Bank v. Sherwood, 10 Wis. 182.]

9. The words, "principles and usages of banking," mean the right to receive interest in advance.

[Cited in Pape v. Capitol Bank of Topeka, 20 Kan. 447.]

10. The general law regulating interest applies to the Franklin Bank.

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

[2] [See note at end of case.]

11. The purchase of a bill, at any price, is not usurious. The statute gives, on the loan of money, "six per cent. per annum, and no more." [2]

[Approved in Darby v. Boatman's Sav. Inst., Case No. 3,571.]

12. A bill purchased, must be complete, so as to enable the purchaser to bring suit on it. A bill not accepted is not of this character.

13. When paper is the basis of exchange, it may be shown as influencing the rate of exchange.

14. The rate of exchange is a fact to be established by evidence, like any other fact.

15. If the rate of exchange charged be only colorable, it is usurious.

16. The court will not presume that a combination existed to increase the rate of exchange. Such a charge must be proved by the clearest evidence.

17. A discount of a bill, on which exchange is charged to take up a prior bill, is not usurious, unless it be shown that such an agreement was made at the discount of the first bill.[2]

18. A prior mortgagee has a right to release his claim on the payment of his debt, unless he have actual notice of the claims of subsequent mortgagees.

[Cited in George v. Wood, 9 Allen, 82.]

19. The lien of a satisfied judgment cannot be revived in favor of one of the defendants, who was surety, to the prejudice of third parties.

20. A surety, having paid the debt, has a right to all the collaterals held by his principal, but cannot claim the assignment of the instrument which is evidence of the debt against the principal and himself.

21. By giving collateral security to the Franklin Bank, by its debtor, the charter lien is discharged.

22. A judgment lien is good under the bankrupt law, and, being prior to a mortgage, must be first satisfied.

23. The charter of the Lafayette Bank provides, that it shall not take more than six per centum per annum, in advance, on its loans or discounts. This provision is similar to the one in the Bank of Chillicothe, and to the general act regulating interest. The rule of construction should be the same, on words of the same import, whether found in the charter of a bank, or in the general law.

24. On general principles, a contract made against law, or in violation of the policy of the law, is void.

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

25. The law in Ohio is settled, that usury voids the contract only for the excess.

[Approved in Darley v. Boatman's Sav. Inst., Case No. 3,571.]

26. If the bills were void, and the mortgages, the money actually paid by the bank could be recovered. But the bills were not usurious. The regular interest only was paid in advance, and the established rate of exchange was charged for bills.[2]

27. Stock transferred to the bank as collateral security, for the time, extinguishes the charter lien.

28. A note being renewed, omitting one of the indorsers, he is not liable, and can claim no lien as such.

29. A co-security may claim that property, given to indemnify the other surety, may be sold for the benefit of both. But this cannot be done where the other surety is discharged by the payment of the debt.

30. Where parties, not within the jurisdiction of the court, appear voluntarily, the court can take jurisdiction.

31. Where a mortgage is given on personal property, which remains in the possession and under the control of the mortgagor, and he sells the property, in part, in payment of other debts, &c., the mortgage must be considered fraudulent and void.

[Cited in Fairbanks v. Amoskeag Nat. Bank, 38 Fed. 634.]

32. A concealment of a mortgage, by fraudulent representations to the injury of third parties, is void.

33. A mortgage to indemnify, may be subjected to the rights of the creditor, though the mortgagee may not have paid the debt.

34. Where a lien is common to two or more creditors, and one of the creditors has a lien on a separate property, equity will require the separate lien to be enforced first.

35. A contract made within the two months previous to the filing of a petition by a bankrupt, does not stand as if made prior to that time.

36. Such a contract is prima facie fraudulent—or, at least, it must be shown to be bona fide.

37. A judgment confessed within the two months before filing the petition, where the bankrupts had broken up their business, &c., is fraudulent, and also the proceedings under it.[2]

[This was a bill by Nathaniel McLean, assignee in bankruptcy of John Mahard, Jr., and William Mahard, partners as John Mahard & Co., to set aside certain transfers of stock of the Lafayette Bank and mortgage of real estate made by the bankrupts, and claimed to be fraudulent as to their creditors. An injunction was granted to stay proceedings in the state court seeking to enforce the alleged fraudulent preferences. The case was formerly heard upon motion to dissolve this injunction. Case No. 8,885. Subsequently an amended bill was filed, to which the defendant demurred. The demurrer was overruled. Id. 8,886. Complainant moved for a receiver to take charge of a farm, a part of the property alleged to have been fraudulently transferred. The motion was allowed. Id. 8,887. It is now heard upon all the papers in the case as to the validity of the alleged fraudulent liens and transfers.]

Wright, Fox, Miner, Corry, Russel & Corwin, for complainant.

Groesback, Chase, King & Anderson, for defendants.

OPINION OF THE COURT. In this bill the complainant prays, that the property of Mahard, real and personal, may be brought into the bankrupt court for distribution, and that the various liens under which the defendants claim may be set aside and annulled as fraudulent under the bankrupt and state laws. An injunction was granted to

[2] [See note at end of case.]

[2] [See note at end of case.]

stay proceedings in the state courts on the mortgages and other liens set up by the defendants. The case in all its branches has been argued with much research and distinguished ability. As many of the defendants assert distinct interests, which are in no respect connected, a demurrer on that ground was filed to the bill. At a former term this demurrer was overruled, and the jurisdiction of the court sustained. Since then, the case of Ex parte Christy, 3 How. [44 U. S.] 308, has been decided, which maintains the ground assumed by this court. In February, 1837, John Mahard, Sen., and John Mahard, Jun., having been co-partners in a commercial business in Cincinnati, dissolved; and a new co-partnership was formed between John Mahard, Jun., and William Mahard. The same persons constituted a partnership in New Orleans. On the 27th of May, 1842, John Mahard, Jun., filed his petition under the bankrupt law, and on the 20th of July ensuing, obtained a decree of bankruptcy. William Mahard on the 12th of August following, petitioned for the benefit of the act, and, in due course of proceeding, was declared a bankrupt. The Cincinnati firm exhibited an amount of debts exceeding one hundred and seven thousand dollars, while its assets were little more than the sum of five thousand dollars. The firm at New Orleans seems to have owed, independently of its indorsements, about the sum of thirty-eight thousand dollars; and it returned nominal assets to nearly the same amount. In the list of debts are included the sums due to the defendants, and a statement of the mortgages given to them. There is no suggestion that the schedules filed in the bankrupt court do not contain a correct statement of the condition of the respective firms. The mortgage to the Franklin Bank of Cincinnati will be first considered. This instrument is dated the 3d of April, 1841, and was recorded the 18th of October ensuing. It was given on in-lots 404 and 460, in Cincinnati, by John Mahard, Jun., to secure the payment of about the sum of sixteen thousand dollars; for which he was then responsible to the bank, and "all other liabilities to the bank which he might afterwards incur." This mortgage was signed and acknowledged before the bankrupt law was passed, but, under the Ohio statute, it did not take effect until it was recorded, which was subsequent to the passage of the bankrupt act. That act did not go into operation until the 1st of February, 1842. The validity of this instrument is objected to on several grounds. 1. That it was intended to give a preference to the Franklin Bank over other creditors, the firm being at the time insolvent. 2. That it is void, as it was designed to secure debts which the bank had no power to contract. 3. That the debts secured by it were usurious.

To show that both firms commenced business without capital, and rested entirely upon credit, through the whole course of their business, in the concluding argument the books of the partnerships were referred to, and other evidence in the case. John Mahard, Jun., is a witness, and swears that until about the time of filing his petition, he considered himself solvent; and that the firm at Cincinnati were able to go on with their business. The books and the schedules are evidence, if for no other purpose than to lessen the weight of this statement. But they are clearly admissible on general principles, as facts which may conduce to invalidate liens created to benefit certain creditors to the prejudice of others. In this respect the assignee represents the creditors, and may take advantage of a preference and fraud which the bankrupt could not do. By the fifth section of the act of Ohio, of the 11th of February, 1832, a fraudulent transfer of property to defeat creditors is made a penal offense. And by the third section of the act of the 14th of March, 1838, it is declared that "all assignments of property in trust, which shall be made by debtors to trustees, in contemplation of insolvency, with the design to prefer one or more creditors to the exclusion of others, shall be held to enure to the benefit of all the creditors in proportion to their respective demands." The assets of both firms may be considered nominal at the time of their failure; and from their books it would seem that the partnership business was carried on mainly, if not exclusively, by discounts and the sale of bills. The property mortgaged was owned by John Mahard, Jun. It may be that funds from the proceeds of the partnership were used in the purchase of a part of this property. Of this, however, there is no positive evidence. The fact of taking this mortgage, it is insisted, goes to show that the Franklin Bank doubted the solvency of the Mahards. Such security to banks is not unusual, and although it may show on the part of the bank a desire for a higher security than that of an indorsement, yet it does not prove that the borrower is considered insolvent. Mahard may have executed the mortgage in preference to giving an additional indorser. At the date of this mortgage the credit of the Mahards seems to have stood fair. No facts have been proved in the case, which conduce to establish the fact, that at that time they contemplated bankruptcy, or a state of insolvency, within the bankrupt or state law. Much less is there any evidence that the bank, in taking the mortgage, acted under a knowledge that a state of bankruptcy or insolvency was contemplated by the mortgagor. A rigid scrutiny into the affairs of the firms, so as to ascertain the amount of their capital by their creditors, is not to be presumed. They did a large and, apparently, a prosperous business in the winter of 1840 and 1841. And it was not until the 2d of August, 1841, that any one of their notes was protested. Subsequent to this period, their bills were occasionally protested, sometimes

for non-acceptance, and at others for non-payment. In the summer of this year, Mr. Groesbeck, the president of the Franklin Bank, refused to increase Mahard's indebtment.

In this part of the case, it may be proper to give a construction to the second section of the bankrupt act, which, it is contended, vitiates all the liens set up by the defendants. That section provides, "that all future payments, securities, conveyances, or transfers of property, or agreements made or given by any bankrupt, in contemplation of bankruptcy, and for the purpose of giving any creditor, indorser, surety, or other person, any preference or priority over the general creditors of such bankrupt; and all other payments, &c., in contemplation of bankruptcy, to any person or persons whatever, not being a bona fide creditor or purchaser, for a valuable consideration, without notice, shall be deemed utterly void, and a fraud upon this act." "Provided, that all dealings and transactions, by and with any bankrupt, bona fide made and entered into more than two months before the petition filed against him or by him, shall not be invalidated by this act: provided, that the other party to any such dealings or transactions had no notice of a prior act of bankruptcy, or of the intention of the bankrupt to take the benefit of this act." Then follows the clause: "If it shall appear to the court that the voluntary bankrupt, since the 1st of January, 1841, or at any other time, in contemplation of the passage of a bankrupt law, by assignment or otherwise, has given a preference to one creditor over another, he shall not receive a discharge unless a majority of his creditors shall consent thereto." And by another proviso, in the same section, liens valid under the state law are not to be affected by the act, if not inconsistent with its provisions. This section has given rise to much controversy, and the courts have not altogether concurred in its construction. It has not been construed by the supreme court. Where, in contemplation of bankruptcy, and to give a preference to one creditor over another, a payment or transfer of property is made, it is void under the first part of the section. But, by the first and second provisos, all bona fide transactions, more than two months before the petition was filed, and where the other party had no knowledge of an act of bankruptcy, or notice of an intention by the bankrupt to take the benefit of the act, are not invalidated by the act. From this it is clear, that before the two months a creditor or purchaser, acting bona fide, and without knowledge that the bankrupt had committed an act of bankruptcy, or intended to apply for the benefit of the act, might, in every respect, make as valid contracts with him as with any other citizen. And where a contract is impeached under these provisos, the party impeaching it must show that it was not made bona fide. A fraud at common law, or under this act before the two months, is not presumed. The above refers to the good faith of the purchaser or creditor, without regard to the motives of the bankrupt. He may have committed an act of bankruptcy, or intended to apply for the benefit of the act, and, consequently, acted in bad faith, still the contract is valid, if the other party has acted in good faith, and without the knowledge or notice specified.

But the important inquiry remains to be answered, what shall amount to a "contemplation of bankruptcy," and a preference of a creditor, within the section. It would seem, from some of the arguments in this case that nothing short of an avowal of an intention to take the benefit of the act and to give a preference, is within this section. This is clearly wrong. The courts, or juries under the instructions of the courts, must determine in this, as in other cases of fraud. This, being a fraud under the act, may not possess that turpitude which attaches to a fraud at common law. It may, indeed, separated from the statute, have the appearance of a just, if not a meritorious act; but whether it violate the statute, must be ascertained as in a common fraud. We may give a definition of fraud, but no court or jurist can lay down an unvarying rule, applicable to all cases, by which an act shall be held fraudulent. The character of the act, not unfrequently, depends upon the intention with which it was done. And we can only judge of the intention from the act and its attending circumstances. These are as diversified as human transactions. It is contended that the words, "in contemplation of bankruptcy," must be construed to mean, an "intention to take the benefit of the bankrupt law." An individual may be reduced to a state of bankruptcy, and yet, from pride, or other motives, not intend to take the benefit of the law. Now, if the construction contended for be correct, such an individual might, in contemplation of a state of bankruptcy, prefer certain creditors to others, without any violation of the act. This would defeat the great object of the law, which was, to secure to creditors a pro rata distribution of the estate of the bankrupt. A construction which leads to this, requires no further comment. The term bankrupt, as used in the act, has no technical significancy which sustains this view. "In contemplation of bankruptcy," means, in contemplation of a state of bankruptcy. Had congress meant more than this, they would have said so. Had an intention to take the benefit of the act been the thing "contemplated," it would have been expressed in appropriate terms. But such a provision would not have reached the evil to be remedied. A state of bankruptcy reaches the evil, and the above provisions of the act give a remedy.

A state of bankruptcy, or insolvency, means more than a mere inability to pay debts promptly. Such are the vicissitudes of trade,

that but few of our enterprising merchants have not, at different periods in their course of business, been in this predicament. They were, perhaps, unable to meet the demands against them under any reasonable indulgence, had they closed their concerns. But their credit was good; they met promptly the current demands against them, and soon retrieved their affairs. A bankruptcy within the law, not only presupposes an inability to pay debts, but to continue in business. The preference of one creditor over another, implies an inability to pay both, and a determination to prefer one to the other. If, at the time Mahard executed this mortgage to the Franklin Bank, on a strict account of the partnership funds, they had been found inadequate to meet the partnership debts, it would not follow that the firms were insolvent. The private property of John Mahard, Jun., was liable, and this, being of large amount, gave credit to the partnerships. That the Mahards, at this time, did not contemplate closing their business is clear, as they continued it through the summer and fall of 1841. In October of that year, their embarrassments became so great as to induce them to apply to the "Lafayette Bank" for relief, to enable them to carry on their business. Whether this application was made known to the Franklin Bank does not appear. Why this mortgage was withheld from record, from the 3d of April, the day of its date, to the 18th of October, is not shown. This circumstance is not proved to be so connected with other facts as to authorise an unfavorable presumption against the bank. On a full consideration of the facts and circumstances connected with the execution and recording of this mortgage, it cannot be held void under the second section of the bankrupt act, nor does it come within the state law above cited.

Under the second head, it is argued, that this mortgage is void, as it was given to secure a debt which the bank had no power to contract. In support of this position, it is alleged, that the charter of the Franklin Bank prohibits it from taking more than six per cent. interest, and that a larger amount than that was received on the loans made to the Mahards, which, consequently, makes void the contract. In the case of Bank of Chillicothe v. Swayne, 8 Ohio, 254, the court held, that a bill of exchange which the bank had discounted at a greater rate of interest than six per cent. per annum was void, under a provision in its charter, that it should "not take more than at the rate of six per cent. per annum on its loans or discounts." The same principle has been sanctioned by the same court in subsequent cases. Before these cases are more particularly referred to, it may be proper to examine the charter of the Franklin Bank, to see if it contains a prohibition which will bring it within the principle of the above cases. It is admitted that, in terms, no prohibition against taking more than six per cent. interest is in the charter, but is supposed to be contained in the following words. "And it shall be lawful for said bank to loan money, buy, sell, and negotiate bills of exchange, checks, and promissory notes, and to discount upon banking principles and usages, bills of exchange, post notes, promissory notes, and other negotiable paper or obligations for the payment of a sum of money certain."

The power to "discount upon banking principles and usages," it is contended, imposes upon the bank a prohibition against receiving on its loans and discounts more than at the rate of six per cent. per annum. And this prohibition, thus brought into the charter, is to make void any contract made by the bank in violation of it. It, therefore, must be made to operate as a penalty. Now, that penal laws must be construed strictly, is a rule from which, it is believed, no court has departed; and yet, without such departure, it would seem the above prohibition cannot be made to operate in this charter. What is the plain and obvious meaning of the words, "principles and usages of banking?" It is, that the bank may take, on loans and discounts, the interest in advance. Many bank charters give this power specially. Without it, courts have held that taking the interest in advance is usurious. And strictly, this is so. But other courts have decided, that they would regard the usages of banks so far as to legalise this practice, though the charters may contain no provision on the subject. That this was the main object of the above provision, there would seem to be no doubt. If it include the prohibition contended for, because such prohibition may be found in other charters, it must equally include all other provisions in these charters, which are not found in the Franklin Bank charter. This would be a new rule for construing a contract. And especially would it be a new mode of introducing a prohibition into a charter. There can be no doubt, that the general law regulating interest applies to the Franklin Bank.

This leads us to the question of usury, which is the third objection made to this mortgage. This objection equally applies to the mortgages taken by the Lafayette Bank, and as the facts which bear upon this point apply, substantially, to both banks, the objection will be now considered. John & William Mahard, of the Cincinnati firm, were in the practice of drawing bills, at four months, on Mahard & Brother, of the New Orleans firm. The same persons, it will be observed, composed both firms. These bills were discounted by the banks, and, in addition to the rate of six per centum interest, per annum, was charged, from one to two per cent., for exchange; and on one or two occasions, three per cent. Several witnesses proved, that the rates of exchange thus charged were regulated principally by the banks who discounted the bills, and brokers and grocers, who, to a limited extent, were in the practice

of purchasing such bills. It was proved that sight bills drawn on New Orleans, at Cincinnati, with the exception of the months of March and April, in the year 1842, commanded, uniformly, a premium. This exception arose from peculiar causes, and, being subsequent to the transactions before us, does not affect the question now under consideration. On time bills on New Orleans, exchange was charged at the rate of about a half per cent. per month for the time the bill had to run. The act fixing the rate of interest declares, "that all creditors shall be entitled to receive interest on all money, after the same shall become due, &c., at the rate of six per cent. per annum, and no more." A question is made, whether the banks did not purchase these bills. A purchase of a bill, at any price, is not usurious. It may be bought in the market, like a commodity, as the parties shall agree. But a bill to be thus sold must be complete. It must be in such a state as to enable the holder to bring suit on it. There is no evidence that these bills were in this condition. On the contrary, it appears that they were bills drawn by the house on New Orleans, to be accepted by the firm there. The proceeds of the bills were placed to the credit of the drawers. John Mahard, Jun., conducted the house in Cincinnati, and his brother William the one in New Orleans. If these bills were not accepted before they were negotiated with the banks, and the holders had paid no valuable consideration for them, they were discounted and not purchased. It is probable, that this distinction was not adverted to by the banks, but it was important, as it gave the character to the transaction. If the bills had been purchased at a discount of twenty per cent., there could be no legal objection to them. But, if they were discounted, with a reservation of interest exceeding the rate of six per centum per annum, it was usurious. And this is the question we are now to examine. There is nothing on the face of the bills which indicates usury; and it is not pretended that interest, as such, above the legal rate was charged. But it is contended, that the exchange charged was colorable only, and with the view of extorting illegal interest. That this allegation is not without plausibility, must be admitted. It seems the banks discounted these bills, when they refused ordinary discounts. Bills were preferred, one of the witnesses says, because they afforded, by the exchange, a higher profit to the banks. And then it appears, that sight bills on New Orleans uniformly sold for a premium. It seems that the exchange charged had no reference to a specie basis. At the time, the banks had suspended specie payments, and the paper of these banks, in both cities, constituted the medium of circulation. This paper was at a discount, for specie, of from five to ten, perhaps a greater, per cent. Its value was effected as the prospect of resumption of specie payments by the banks became more or less remote. The resumption by the Cincinnati banks, in March and April, 1842, caused exchange in that city to sell for a premium in New Orleans. It is true, that the holder of bills, payable in either city, could demand payment in specie, unless by the contract currency was to be received; but the paper basis is stated as having some influence on the present question. The laws of trade equally apply to the business of exchange. The balance must be adjusted by specie or its equivalent. And it is often said, but not with strict accuracy, that the difference of exchange between two places, is the expense of transporting specie from one to the other. That this expense is one of the principal elements of difference is undoubted. But there are other things which materially influence the rate of exchange. When specie becomes a commodity, as it does when used to restore the balance of trade, like every other commodity its price depends upon the demand and supply. The value of this article is regulated by the vicissitudes of trade. Great as are the fluctuations of exchange in reference to a specie basis, they must be still greater when the basis is a depreciated currency. This introduces a new element, the solvency of the banks, which must be greatly influenced by public opinion. It was in this disturbed state of the currency, that the transactions under consideration took place. The currency of either city became more or less valuable, as it might enable the holder to make profitable investments in foreign merchandise, or other property, or to pay debts.

It is objected that these facts can have no influence on the question under consideration. That they influenced the rate of exchange between the two cities is undoubted. And if they did this, are they not a part of the case? No just and legal result can be come to, which shall exclude them from consideration. And more especially are they important as conducing somewhat, perhaps, to show the great difference in value in the Cincinnati market, between bills at sight and on time. The longer the time the bill had to run the greater the risk. I do not speak of the legal result, but of the practical and commercial view which influenced the rate of exchange. This view seemed to be necessary from the evidence in the case. But on this question it is unnecessary to go into the grounds of the charge for exchange. The rate of exchange is a fact to be ascertained and established by the evidence. Like the price of any vendible commodity it depends upon the market. If the charge for exchange is a mere shift or device to cover usury, the act is not the less usurious. Many most respectable witnesses have been examined on this point, and there is no conflict in their testimony. They all agree that the rates of exchange charged by the banks, were the market rates. Banks, brokers, grocers, and all others who purchased similar bills on

time, received them at the same rates of discount. No market rate of any thing could be more clearly established. Shall the court inquire into the grounds of this charge, and upon their own views of its propriety and justice, set aside and disregard this evidence? If they may do this in regard to the rate of exchange, why not do the same in regard to the market price of flour or any other article of merchandise? These depend upon the same principle and must be proved in the same way. When the court or jury as the case may be, are not brought by the evidence to the conclusion that the pretence under which the charge was made was a mere cover for usury, they cannot pronounce the act usurious.

It is suggested that a combination may have been formed by bankers, brokers and others, to establish the market rate of these bills. No evidence is produced to establish this, except the supposed unreasonableness of the charge. Whether the banks realised a profit or loss in this business, cannot affect the legal question; but it may not be improper to say, in reference to the character of the persons implicated, that one of the cashiers stated they found it a losing business. The court would require strong evidence to pronounce such a combination against a community so respectable, intelligent and commercial, as that against which the imputation is made. It includes a considerable portion of the most enterprising citizens of Cincinnati. Not only the grocers, brokers, and bankers of the city are included, but the stockholders of the banks.

These views seem to be sustained by the supreme court in the case of Creed v. Commercial Bank of Cincinnati, 11 Ohio, 495, where the court say: "On the Louisville bills (which were for sixty and ninety days) the bank charged six per centum interest per annum, and one per centum exchange, which was the market value of such bills, and the same rate at which they were purchased by other banks in Cincinnati; although exchange between the two places, Cincinnati and Louisville, on sight bills, was at par." And in page 498: "If certain rates of exchange were received, they were the fair market rates at the time." Some of the bills, it is said, were renewals of former discounts. It is not perceived that this can be material, unless it be connected with the original agreement to renew. Such an agreement would conduce strongly to establish a device to cover usury. Where a bill is drawn on New Orleans, or any other place, bona fide, and the acceptor is unable to meet it, there can be no objection to a discount of a new bill at the same rate, to pay the first one. This, it is true, would show an extravagant rate of interest and charges, in the course of a year; but the bills discounted are as distinct, as if the proceeds were to be applied to different objects. And in this latter case, the same rate would be charged.

On the 15th of February, 1837, John Mahard, Jun., executed a mortgage on the above lot 460, to secure the payment of an annuity to John Mahard, Sen., of seven hundred dollars per annum, during his life. Afterwards at the instance of John Mahard, Sen., John Mahard, Jun., conveyed a part of this lot to William Mahard, who agreed to pay John Mahard, Sen., a life annuity of one hundred dollars per annum. At the decease of John Mahard, Sen., there was a balance due of the annuities, and there is no doubt that both these liens are paramount to that of the Franklin Bank. Subsequent to the mortgage on lot 404, to the Franklin Bank, Mahard sold it to Dyer for ten thousand dollars; and the bank, at Mahard's request, released its mortgage on receiving of the purchase money seven thousand two hundred ninety-seven dollars and thirty-three cents, which is admitted as a credit on the claim of the bank. This credit, it is insisted should have been, and should now be, for the full value of the property sold. That the Franklin Bank has no right to release any thing which may prejudice subsequent mortgagees, who, on principles of equity, have a right to impose certain restrictions on the first mortgagee in the sale of the mortgaged premises, and, in fact, to redeem them and claim under the first mortgage.

These general principles must be admitted, but they can only apply where notice was given to the first mortgagee of the subsequent liens as in case of a mortgage to secure future advances; and there is no proof of actual notice in this case. The bank in its answer denies notice, and constructive notice from the recording of the subsequent mortgages is insufficient. It appears that the balance of the consideration was paid to Buckinghams, who were subsequent mortgagees. Guion v. Knapp, 6 Paige, 35; Nelson's Heirs v. Boyce, 7 J. J. Marsh. 401; Sherras v. Craig, 2 Pet. Cond. R. 411. The Franklin Bank also claims a lien on twenty shares of stock under an arrangement with John Mahard, Jun., before the 8th of March, 1842, and also under the charter lien of the bank. Bodman having made a purchase of real property from John Mahard, Jun., on which he was to pay the above stock in the Franklin Bank, which he owned, in part consideration; and finding after the purchase there was a lien on the property under a judgment obtained by Tron, against John Mahard, Sen. and John Mahard, Jun., he retained the stock in his own name to indemnify him against the judgment. This judgment was paid by John Mahard, Sen.. who now claims that he paid the judgment as the security of John Mahard, Jun., and therefore has a right to be subrogated to all the rights of the plaintiff in the judgment, which must be satisfied by a sale of the property purchased by Bodman, or the stock which was received in part consideration for the property.

The charter lien is set up under the tenth section of the act which provides, "that the shares of the capital stock of said bank shall be considered and held in law as personal property, and assignable and transferable, only on the books of the same in the presence of the president or cashier thereof, and in such manner as the directors shall prescribe; but no stockholder indebted to said bank, for any debt or demand due and payable, shall have power to assign or transfer any share or shares he may own of the capital stock therein, &c., until such debt or demand shall be paid or discharged, or collateral security be given," &c. "And said bank shall have the first lien in law on all stock due." To make a legal assignment of the stock the requisites of the charter must be observed; but the equitable interest of the stockholder may be conveyed bona fide, in any other mode, and a court of equity will give effect to such conveyance, as between the parties, if there be no paramount lien on the stock. After the judgment of Tron was paid by John Mahard, Sen., Bodman, on account of the lien of that judgment, had no right to retain the stock. But it is claimed by Mahard Sen., who, as surety, paid the judgment. The Mahards, senior and junior, were doing business in co-partnership, when the note, on which Tron obtained his judgment, was executed. Before the judgment this partnership was dissolved, and John Mahard, Jun., agreed to pay the debts of the firm. Suit was brought on the note to Tron, which, having been given jointly, authorised judgment against both the Mahards. An execution was issued on the judgment, which was paid by Mahard, Sen., and which was returned satisfied. Now the question is made whether, under these circumstances, Mahard, Sen., can claim so much of this stock as will indemnify him under the Tron judgment. The judgment constituted a lien on the property of Tron, and the stock was intended by Tron to save him from loss from that lien. That a surety having paid the debt has a right to all the collateral securities held by the creditors is not controverted. But it is insisted beyond this, that the surety is entitled to be subrogated to all the rights of the creditor; and to this effect was the decision in Morley v. St. Alban, 11 Ves. 21; and in the case of Lidderdale's Ex'r v. Executor of Robinson, 6 Pet. Cond. R. 656, a sanction is given to the same doctrine. This latter decision was given under a Virginia statute, but in their opinion the court say: "This then is the settled law of the state in which this contract and this cause originated." "But we feel no inclination to place our decision upon that restricted ground, since we are well satisfied with its correctness as a general principle." In that case the court held that the surety, being a joint indorser on a bill of exchange, which, by a statute of Virginia had the rank of a judgment, could claim the priority of a judgment creditor from his co-endorser for the amount paid above one half of the debt.

Mr. Justice Story says in his Equity Jurisprudence (section 499): "It seems formerly to have been thought that the surety had the right to claim of the creditor, on paying the debt, an assignment to him of the instrument by which it is evidenced." But, he says, "the doctrine is now fully established that the surety has no such right to be enforced in equity." Formerly a surety paying a bond debt, in the marshaling of assets, was considered as having a priority over simple contract creditors; but this doctrine was overruled in the case of Copis v. Middleton, 1 Turn. & R. 224; and has since been considered as settled by that decision. After a bond or other instrument evidencing a debt shall be fully paid, it is not perceived how it can be made the ground of a suit. If the surety on the bond shall take an assignment of it, in equity, it might give a control of a suit brought in the name of the obligee; but where the bond is paid the obligee has no claim on the obligor. John Mahard, Sen., was not the surety of John Mahard, Jun. He was a principal in the note and in the judgment, and the undertaking of John Mahard, Jun., to pay the debts of the firm, at the dissolution of the partnership, could only give a remedy on such contract. When one partner pays more than his proportion of the debts of the partnership, a contribution will be decreed as between co-securities. And in such a case the partner who has made the payment, will be substituted to the rights of the creditor as against the co-partner. To this effect was the case of Sells v. Hubbell's Adm'rs, 2 Johns. Ch. 393. Hubbell and Bedient were partners, and gave two notes to Sells; Hubbell died, and judgment was obtained against Bedient as surviving partner. Bedient took the benefit of the insolvent act, and executions on the judgments were returned nulla bona. Suit was brought on the judgments against the representatives of Hubbell, and the money was obtained from them. Afterwards it was discovered that Bedient had not returned his real estate in the city of New York on his schedule. The court ordered that a moiety of the judgments should be assigned to the representatives of Hubbell, that the money might be made out of the real estate of Bedient. Here the judgments against Bedient which had been discharged were set up and a remedy given on them. And this seems to be the doctrine in New York and in some of the other states. Eddy v. Traver, 6 Paige, 521. But, it is opposed to the modern English doctrine which seems to me to be founded in reason. How a judgment or a bond, having been discharged, can be resuscitated, so as to affect the rights of third parties, I cannot perceive. And if the rights of third parties cannot be affected by such a procedure, I can see no advantage in the principle asserted. As between the parties, it cannot be material in what mode the liability

is enforced. And if the remedy contended for can go no farther than this, it is of no value.

A judgment lien cannot be revived after satisfaction of the judgment, to the prejudice of a third party. Why then attempt to set up the judgment, when a direct decree for the payment of the money will give the same remedy? It is a form without substance, unreasonable in its nature, and without benefit in its result. The judgment obtained against the Mahards has been satisfied, which appears from the return on the execution. Can this judgment be revived and a consequent lien be made to attach on the house and lot purchased by Bodman? I think it cannot. The stock has been transferred to John Mahard, Jun. Can the rights of the bank or of other creditors be affected by the resuscitation of the judgment? The same principle is involved in this as in the lien above stated. Third parties are prejudiced by it, who are innocent and in the nature of things could have no notice to affect their consciences. The collateral security given by John Mahard to the bank, discharges its charter lien. Until his debt is paid or secured to the bank by the stockholder, the bank is declared to have the first lien in law on the stock. In its answer the bank claims the stock under an agreement made with Mahard to receive it at par on account. There is no proof of this agreement, which, in the answer, is stated to have been made on or before the 8th of March, 1842. The fact is not denied by the counsel, and is understood to be admitted. As soon as the lien of the Tron judgment on Bodman's lot became extinct, the stock virtually became vested in Mahard, and in equity, was subject to the charter lien. And although the lien might not attach from debts collaterally secured, yet the arrangement to take the stock at par, though made on the 8th of March, 1842, must be held valid. There is no knowledge possessed by the bank, shown by the evidence, which can invalidate the transaction. At the July term, 1841, of the superior court of Cincinnati, a judgment was obtained in the name of the Bank of the United States against John Mahard, Jun., and John M'Laughlin, for twenty-seven hundred and twenty-eight dollars and sixty-three cents, which was appealed to the supreme court, where the judgment was affirmed. As the lien took effect from the time judgment was entered in the superior court, it is paramount to the mortgage of the Franklin Bank. An execution was issued on the judgment, which was levied on lots 404 and 460 and other real estate. The Franklin Bank, it seems, agreed to indemnify Dyer, who purchased lot 404, against the lien of the above judgment. This lien under the judgment, extended equally to all the real estate of John Mahard, in the county of Hamilton.

We come now to consider the mortgage executed by Mahard to the Lafayette Bank. It is dated the 7th of December, 1841, and recorded the 13th of January, 1842; and was given to secure the payment of two notes amounting to the sum of fifteen thousand dollars, on one of which John M'Laughlin was indorser, and on the other Andrew Johnson. In its answer the bank denies that the mortgage was executed in contemplation of bankruptcy, or that Mahard was then known or considered to be in a state of insolvency; and it had good reason to believe and did believe he was solvent, and fully able to pay his debts. To the validity of this mortgage the following objections are made: 1. That it is void, as it purports to secure a demand on which a greater rate of interest is charged than six per centum per annum. 2. That it covers a usurious debt, and is consequently void. 3. That it is void under the second section of the bankrupt law, as it was given in contemplation of bankruptcy, and to give a preference to the bank over other creditors. The second section of the charter provides, that the "corporation shall not, at any time, take more than six per cent. per annum in advance, on their loans or discounts." Assuming that a greater amount of interest has been charged than this, the counsel rely upon the case of Bank of Chillicothe v. Swayne, 8 Ohio, 257, to show that it makes void the instrument. This decision was referred to in treating of the mortgage to the Franklin Bank, but it will now be more particularly examined. The charter of the Bank of Chillicothe declares, that "the said corporation shall not take more than at the rate of six per centum per annum, on its loans or discounts." This provision is nearly in the same language and in effect the same, as the provision in the Lafayette Bank charter. The general law of Ohio regulating interest declares that all creditors are entitled to interest "at the rate of six per cent. per annum, and no more." And in the above case the court very properly remark, "It will be observed that the language is substantially the same with that used in the statute regulating interest." From this similarity of provision it was insisted that as the general statute, by the well settled construction of the court, made the contract for usurious interest void only for the excess, the same rule of construction applied to the charter of the Chillicothe Bank. To this the court replied: "There is certainly much plausibility and no little force in the argument. But there is another question involved in construing a contract made by a corporation, and that is the question of capacity of the corporation to make such contracts. There is a great difference between natural persons and corporations. Natural persons have capacity and power to make and enter into any contracts which are not prohibited by law, and will be bound by such contracts," &c. "But it is otherwise with corporations. A corporation is a body created by law, composed by individuals united under a common name, &c.,

and derives all its powers and capacities from the law of its creation." This citation contains the ground on which the court held the contract void. It may be a matter of some doubt whether, under the rule observed by the courts of the United States, to follow the settled construction of the statutes of the states, by their supreme courts respectively, this is an open question. And if this were a general statute there could be no doubt. But it is special, and partakes both of the character of a contract and a law. In this respect we are inclined to think the case does not come within the above rule.

From the view we have taken, the decision of this question is not necessary; but as it has been elaborately argued, it may not be improper concisely to notice it. In doing this we shall suggest some considerations, with the utmost respect, which are not without weight in our own mind. It is admitted that the "powers and capacities of a corporation are derived from the law of its creation." What are the powers and capacities of the "Lafayette Bank of Cincinnati?" It has power in its corporate name "to contract and be contracted with, to sue and be sued, &c. And it is authorised to loan money, buy, sell and negotiate bills of exchange, checks, and promissory notes, and to discount upon banking principles," &c., under the restriction in regard to interest, &c. Now here is a capacity imparted to do every thing which a natural person could do, in relation to the business specified. The natural persons who compose the corporation are authorised to do in their aggregate capacity, what each one might do in his natural capacity. Now what is the difference between the natural and artificial capacities here spoken of? It is admitted that an artificial person has no power to violate the law of its creation, or any other law. Has a natural person power to violate the law? We suppose not, and in this respect no difference is perceived between the two capacities. It is not a question of capacity, but of prohibition. A natural person is prohibited from taking more than six per centum per annum interest. If it were not for this prohibition, he might agree for any reasonable rate of interest. And if the bank had not been prohibited in like manner, might it not have charged in the same way? Is there any doubt of this? It has power to loan money on interest, and no rate of interest being established by law, may it not contract for the rate of interest as a natural person? If it may not do this, it can do nothing. The prohibition in the charter acts upon the artificial capacity, as the general law, of the same import, acts upon the natural capacity of every citizen. Repeal the proviso in the charter, and the power of the bank remains, subject to the general law. Is it not, then, clearly a question of prohibition; and is not the only inquiry, whether it does not operate alike upon all capacities, artificial or natural? This question would seem to be sufficiently answered by the admitted axiom, that all laws must be equal in their operation. But they are not equal, if the same provision is made, by construction, to have a different effect. Can this difference of effect arise from the mere circumstance, that in the one case the provision is in the charter of the bank, and in the other in the general law? Suppose the charter had contained no such provision, could the general law have been so applied, as in the one instance to make void the contract, and in the other to avoid it only for the excess of interest? This, I suppose, would not have been contended by any one. And yet, is not this the question under consideration?

But it is contended, that, there is a material difference between the general law in regard to interest and the provision in the Lafayette Bank charter. The supreme court said there was no substantial difference between the general law and the provision in the charter of the Bank of Chillicothe; and that provision is in no respect different from the one in the Lafayette Bank. The general law establishes the "rate of interest," on moneys due, at "six per centum per annum and no more." The Bank of Chillicothe "shall not take more than at the rate of six per centum per annum." Now a reservation of more than six per cent. interest is usurious under the general law, as well as under the above charters. They are, then, substantially the same provision. And if a different effect be given to these charters from that which is given to the general law, it must be on the ground that the words, or provisions, in the charters are to be construed by a different rule from that which governs the construction of the general law.

It is admitted, that where a contract is made in violation of a statute, or of the policy of the law, it is void. And that a usurious contract in Ohio is not only against the statute, but in violation of the policy of the law. But the law seems to be well settled in this state, that usury constitutes an exception from the general principle; so that the contract is only void for the excess of interest. Other states have construed their laws against usury in the same way. Now, whether this construction be right or wrong, is a matter of no importance; it is the law. And if the same rule of construction be applied to the charters of the above banks, the same effect must result, on a usurious contract. That this would be the effect of a usurious contract with a bank under the general law, has not been, and indeed cannot be, controverted. So that the only ground of distinction is, that the same provision against usury in a bank charter renders the entire contract void, while, as a general law, it avoids only the excess of interest. Can this distinction be sustained on the ground that there is a want of power in the bank to make the contract. This would be

unanswerable, if there were not the same want of power to make a usurious contract by an individual. In this respect, the bank and the individual occupy the same ground. Neither can have any implied power to make a contract in violation of law; and the argument, that a bank can do nothing for the doing of which power is not given, whilst an individual may do any thing which is not prohibited, is without force, because it can have no application to the case. The act is prohibited, alike to the bank and the individual. On what principle, then, can the distinction be sustained? As has been shown, the bank has the same power, under its charter, to make a contract for the loan of money as an individual; and if more than six per centum per annum had not been prohibited, it might have charged more. But the prohibition acts upon the bank as well as upon the individual; and the only question is, does it act alike upon both? I think it does, and that there is no reason arising out of the limited powers of the bank which can affect the question.

The case of Bank of U. S. v. Owens, 2 Pet. [27 U. S.] 533, which is so much relied on, gives no support to this distinction. On the contrary, the question is treated as a general one, arising out of all contracts made in violation of law; and the cases referred to, as illustrating the principle sustained, were contracts between individuals. If the court had supposed that the charter of the Bank of the United States, which prohibited more than six per cent. per annum interest, was to be differently construed from a general law on the same subject, they would have said so, as the case arose under the charter; but no such distinction is made or referred to in their opinion. They seem not to have considered the limited powers of a corporation as having any bearing on the question. If the bills of exchange were void on the ground assumed, does it follow that the mortgage is void? The mortgage was given to secure the payment of the bills, and it is not denied, that where a contract is infected with usury, the same vice is carried into subsequent contracts covering the same transaction. But the objection now under consideration is not that the bills of exchange were usurious, but that they are void, having been given in violation of the charter. Now, does it follow that the mortgage must also be void? It is not pretended that there is a forfeiture of the sums paid by the bank on the discount of the bills. At most, it can only be argued that the instruments, as evidence of the debt, are void. Is there not, then, a bona fide consideration for the mortgage? On a general count, the bank could recover from Mahard the money loaned. And had he filed his bill for relief, setting up the same objection that is now urged, chancery would not have relieved him, except upon the payment of the money loaned, with interest; and this is the light in which the present case might be considered. The assignee represents the interests of the bankrupt and of the creditors. But, except in the case of fraud, the interests of the creditors can only be asserted through the bankrupt. There is no pretence of fraud, in this view of the case; so that the claim set up in the bill, in principle, is the same as if it had been set up by Mahard himself. But it is not necessary to a decision of the case to determine this point, or whether more than legal interest reserved on the bills discounted would make them void, in whole or in part. Were the bills discounted by the Lafayette Bank usurious? The facts in relation to the discount of these bills have already been considered, in reference to the Franklin Bank. No more than the legal rate of interest, in advance, was charged by the Lafayette Bank, to which was added the same premiums as charged by the Franklin Bank on time bills. Nothing more need be said on this head.

The third ground remains to be considered, whether the mortgage is void under the second section of the bankrupt law, as having been given in contemplation of bankruptcy and to give a preference to the bank over other creditors. As the construction of this section has already been discussed, nothing more is now necessary than to examine the facts on which this charge against the Lafayette Bank is attempted to be maintained. From the evidence it appears that in October, 1841, John Mahard addressed a letter to the bank asking for the loan of fifteen thousand dollars, to secure the payment of which the mortgage was given, to enable the company to carry on its business at Cincinnati and at New Orleans. The bills on the latter place, discounted by the bank, were about becoming due, and the loan was necessary to enable the firm to pay them.

By this application to the bank it satisfactorily appears, that Mahard had no intention to break up his business, as the loan was obtained to enable him to carry it on. In this view then, it was no violation of the bankrupt law. His object being to continue his business, he could not have executed the mortgage in contemplation of bankruptcy. The time given for payment of one, two and three years, shows great embarrassment; but unless from the circumstances attending the execution of the mortgage the inference is clear, that he intended to break up his business and to give a preference to the bank over the other creditors of the firm, the instrument is not void. This loan was not made, by extending previous loans, but to enable the Mahards to take up drafts which would soon become due. The money was paid by the bank and the mortgage taken at the same time. So that there was no preference in the case; and indeed there could be none under the circumstances. The bank stood more in the light of a purchaser, than in that of a creditor. And the question is, whether Mahard was in a condition to ex-

ecute a valid mortgage on the advance of money, there being no pretence of fraud in the transaction. I can entertain no doubt on this subject. There is no provision of the bankrupt law which invalidates it. There is no principle in morals which makes it questionable. John M'Laughlin states that he believes now the Mahards were insolvent in the beginning of the year 1842, but at that time he thought otherwise. In the latter part of the year 1841 or the beginning of the year 1842, Josiah Lawrence, the president of the Lafayette Bank, in a conversation with the witness, said, "that the Mahards had failed or would fail shortly; or were in failing circumstances, or words of similar import." This conversation with Lawrence, in all probability, was subsequent to the execution of the mortgage. But whether this be the fact or not it cannot affect the mortgage; and the opinion of M'Laughlin in 1842, that the Mahards were solvent, goes rather to strengthen their business transactions at that period. Upon the whole we think that the mortgage to the Lafayette Bank must be considered and treated as a valid instrument. The above loan of fifteen thousand dollars was to be paid in three equal annual instalments. On the 12th of January, 1842, Mahard transferred forty-nine shares of stock, which he held in the Lafayette Bank, to that bank, as collateral security for the payment of the first instalment of this loan. On the 15th of December, 1841, the bank discounted a bill for $3,420 at sixty days, drawn by M'Laughlin on Mahard & Brother, of New Orleans, and indorsed by J. & W. Mahard. This was a renewal of a prior bill of the same amount, same drawer and acceptors, and indorsed by the Mahards and Andrew Johnson. But the indorsement of Johnson on the renewal was omitted, as alleged, through inadvertence. On the 1st and 8th of February, 1842, two notes were discounted, one of $163 and the other $162, same drawer and indorsers. No collateral security at the time of these discounts was taken by the bank. But on the 16th of February, 1842, Mahard mortgaged to Johnson lots 404 and 460, on Water street, to indemnify him as indorser on these bills, one held by the Commercial Bank, one by Milne & Co., which has since been paid, and the other, the above bill of $3,420, held by the Lafayette Bank. This mortgage, it is contended, should be made to enure to the benefit of the bank.

It is also insisted that the forty-nine shares of bank stock should be applied in payment of the above sum and of the two smaller discounts under the lien given by the charter of the bank. The tenth section of the charter provides that the "bank shall have the first lien in law on all stock and dividends owned by its debtors; and no debtor to the bank is permitted to transfer his stock, unless he shall have given collateral security for the payment of his debt." This stock, shortly after the discount of the bill for $3,420, as above stated, was transferred to the bank as collateral security for the payment of the first instalment of the $15,000 loan. And the bank now insists that as that instalment was not paid, through the default of Mahard, and as the bank was injoined from enforcing the mortgage, it is now entitled to a sale of the real property under the mortgage to satisfy it, and that the stock not being applied as was intended, and being released from the transfer, should be appropriated under the charter lien to the payment of the above bill, and the two smaller discounts. On the same paper which contained the assignment of this stock to the bank, John Mahard, Jun., indorsed, the 13th of April, 1842, "the forty-nine shares of stock are transferred to John S. Buckingham for value received."

Nearly a month after the discount of the above bill for $3,420, this stock was transferred to the bank as collateral security for the payment of the first instalment on the large loan. This shows that the bank did not rely upon the lien on the stock for the payment of the above bill. Mahard having given a mortgage to secure the payment of the fifteen thousand dollar loan, that debt was no obstruction to the assignment of the stock. It was assigned to the bank with its assent, and the question is, whether such assignment extinguishes the charter lien. There would seem to be no doubt that at least for the time being, it does extinguish such lien. If the first instalment of the large loan had been paid by Mahard, by the condition of the assignment the stock was to be re-transferred to him. But the payment was not made, and the stock still remains pledged. It stands, therefore, on the pledge and not on the charter. Had the stock been re-transferred, the charter lien would have attached, but at present it is extinct, and can only be revived by a re-investment of it in Mahard. Opposed to this re-investment stands not only the first instalment of the large loan, but the assignment of the stock to Buckingham. This assignment could not prejudice the lien of the bank under the transfer; but the stock being placed by the transfer beyond the provisions of the charter, it is no longer under its restriction; and the residuary interest may be assigned, it is supposed, as any other mortgaged property. Whether the assignment to Buckingham is not void, it having been made within sixty days preceding the filing of the petition of Mahard, will be examined hereafter. It is enough to know, in this part of the case, that the charter lien having been destroyed or suspended by the transfer, does not attach to the stock as it now stands to secure the bills discounted subsequently to the large loan. The final disposition of this stock is reserved until the proceeds of the mortgage shall be realised. As regards the general creditors it can be of no importance whether the stock or the land shall be first sold; but if there be additional valid liens on either, it

will influence the order of distribution. The bank also claims that the mortgage given to Andrew Johnson should be made to enure to its benefit. This is opposed on several grounds, but chiefly because the name of Johnson does not appear on the bill, to indemnify him against which the mortgage was given. In answer to this fact, it is alleged that the omission was inadvertent. That the above bill was the renewal of a former bill of the same amount on which Johnson was indorser.

A creditor may claim all the liens held by the sureties of the principal debtor; and to avoid circuity of action, he may enforce those liens. This procedure is founded upon the liability of the sureties; for if they are not liable, there can be no ground of claim by the creditor. Now as the name of Johnson is not on the bill held by the Lafayette Bank, it is not perceived how any liability can attach to him on that bill. It may have been given to renew a former bill, of the same amount, which had the indorsement of Johnson. But that bill has been paid by the renewal, and consequently the indorser is discharged. Now the liability of an indorser is a matter of law, there being no consideration by which, in equity, he can be made liable. Had there been an express agreement by Johnson to indorse the bill, by reason of which it was discounted, and through inadvertence his name had not been indorsed, on sufficient proof equity might compel him to indorse the bill. But this is not the case before the court. There is no other evidence of Johnson's connection with the bill, than his indorsement of the one paid by it, and the provision in the mortgage to him in relation to it. The mortgage seems to have been executed by Mahard, and delivered for record without the knowledge of Johnson.

It is not perceived on what ground of equity M'Laughlin, who is surety on the bill for $3,420, can claim to be indemnified under the mortgage to Johnson. A co-security may claim that property given to indemnify one security shall be sold for the benefit of both; but, in this case, Johnson cannot be considered as a co-security, seeing his name is not on the bill. At the July term of the superior court of Cincinnati, a judgment was obtained by the trustees of the Bank of the United States against John Mahard, Jun., as principal, and John M'Laughlin as security, for $2,728.63; which was appealed to the supreme court, in which at April term, 1842, a final judgment was rendered for $2,979.69. Execution was issued on this judgment, which was levied on all the real estate of Mahard in Hamilton county. This constitutes a lien on the above property from the date of the judgment in the superior court, and is prior to that under the mortgage to the Franklin Bank, and all the other mortgages of subsequent date. On a sale of the property the proceeds must be so distributed as to satisfy the largest amount of valid liens. This will conform to the principles of equity. M'Intyre, it appears, holds a mortgage on the farm recorded the 22d of March, 1832, to secure the payment of two notes of four hundred dollars each. This mortgage, being the earliest lien on the farm, must be first paid.

On the 13th of January, 1842, John Mahard, Jun., mortgaged, to the Northern Bank of Kentucky, certain real estate in Kentucky, to secure the payment of certain bills drawn by J. & W. Mahard, indorsed by Andrew Johnson, accepted by Mahard & Brother, of New Orleans. Some of the bills were indorsed by Johnson and John M'Laughlin. This mortgage was recorded two days after its execution. The bank filed its bill in July, 1842, and obtained a decree for the sale of the mortgaged premises, which were sold for $11,203.63, including rents. This left a balance on the mortgage debt of more than $5,000, with which the indorsers of Mahard were charged. The bank also claims the benefit of a mortgage on personal property, executed by Mahard to Johnson, March 18th, 1842, to secure the bills indorsed by him to the bank. This mortgage was assigned to the bank, June 3d, 1842, and the bank agreed to release Johnson from his indorsements, provided the property mortgaged should be decreed to it. On this assignment, proceedings were instituted, in the names of Johnson and the bank, in the superior court of Cincinnati; and, by an order of that court, the property was sold for about $1,300, after paying costs. And this sum the court decreed to Buckinghams, who had levied an execution upon it, holding the mortgage to Johnson void. On the bills discounted by the bank, the same interest was reserved, and exchanges charged, as in the discounts of similar bills about the same time, by the Franklin and Lafayette Banks. There is nothing in this case which distinguishes it from the discounts of those banks which have been considered. We, therefore, hold that these discounts were not usurious, nor the instruments given to secure the same void, under the charter of the bank. Nor are there any facts conducing to show that, in the execution of this mortgage on the real property, Mahard contemplated bankruptcy, or that the bank could have had any notice of such intention. From the evidence, it appears that, in obtaining the loans from the bank, and the extension of them, he was endeavoring, in good faith, to surmount his embarrassments. By the frequent conversations of John Mahard, Jun., and his oath, at this time, it appears he hoped to sustain himself, and that he cherished the same hope for several months afterwards; and there is nothing in the case which authorises a doubt that he acted in good faith. Like hundreds of others struggling under embarrassments, he did not see or apprehend the bankruptcy which was before him.

A question is made, whether the court can

take jurisdiction of the mortgage on the real estate in Kentucky. As no ground is perceived on which that mortgage can be invalidated, or the proceedings on it in the state court avoided, the question of jurisdiction becomes measurably unimportant. On this point, however, it may be proper to remark, that the bank having submitted to the jurisdiction of the court, by filing its answer in this case, it must be considered as before the court, for the purposes of the complainant's bill. A decree cannot operate as a conveyance of land out of the state, as it does, under the statute, within the state; but this is a matter which does not affect the jurisdiction. Having jurisdiction of the parties, by a voluntary appearance, the court may decide the controversy between them, and effect may be given to the decree, as the law shall authorise. The validity of the mortgage to Johnson on the personal property will now be considered. This mortgage was dated the 18th of March, 1842, and was given to secure the mortgagee against certain indorsements referred to. It was executed by Mahard without the knowledge of Johnson, and delivered to the recorder of deeds. This is not, of itself, a circumstance which would excite strong suspicion against the deed. It might be shown to have been done with a bona fide intention. The property covered by the mortgage was personal, and it remained in possession of Mahard. This is a badge of fraud, though it may be susceptible of a satisfactory explanation. One or two articles were delivered in the name of the whole. By an agreement of the same date as the mortgage, Mahard was to take charge of the property, and to make sales thereof, in whole or in part, consulting and advising with Johnson, and paying the proceeds to his benefit. This mortgage was executed but little more than sixty days before Mahard filed his petition. The house of Mahard & Brother failed about the 1st of March, and the mortgage was dated the 18th of the same month. It was executed without the knowledge of Johnson. Mahard continued to exercise acts of ownership over the property, selling a part of it at different times, and offering to sell the whole of it. At one time, he proposed to sell at auction; at another, to take the property down the river for sale. Occasionally, though not generally, in selling and offering to sell parts of the stock, he would refer to Johnson's mortgage, and say he was acting with his consent. But, upon the whole, he seemed to exercise in every respect, acts of ownership over the property; and, indeed, he says that Johnson consented that he should sell the property, at the prices proposed, in payment of other debts than those indorsed by him. About the middle of May, 1842, in a conversation with one of the witnesses, Johnson said he held a mortgage on the property, for the benefit of Mahard's creditors generally; that he had a claim, but that he did not consider the mortgage as securing it more than the claims of other creditors. Upon the whole, we think that this mortgage, under the circumstances, cannot be sustained. It was given to protect the property from other claims, and, under such protection, to enable Mahard to pay his debts, by selling the property at exorbitant prices. To this Johnson assented. This deferred and hindered creditors, which avoided the instrument under the state law. It was also void, as having been given in contemplation of bankruptcy. At the date of this instrument, Mahard could have had no rational hope of paying his debts. Whatever may have been his declarations to the contrary, the accumulation of his embarrassments must have convinced him that the crisis could no longer be postponed; and he resolved to adopt the desperate expedient, to cover his personal property by the mortgage to Johnson, that he might pay his debts with it at any price he might impose. For a cow, he asked $1,200; for some of his Berkshire hogs, $300 a piece; small pigs, $60 a pair; for calves, $100 a piece; cows, of common stock, $50 a piece, not worth more than from ten to twelve dollars. A schedule of the property, at these prices, was exhibited by Mahard, which made an amount of about $26,000. It was, no doubt, expected that, seeing his embarrassments, and knowing that this property was under mortgage, his creditors would become purchasers at any price. This object is fairly inferrible from the facts, and as, from the face of the mortgage, a preference was given to Johnson, it is void under the bankrupt law, and also under the state statute.

The mortgage set up by the Commercial Bank will be now examined. On the 16th of February, 1842, John Mahard conveyed to Andrew Johnson all his interest in lot 460, in Cincinnati, conditional that the mortgagor should cause to be paid unto the said Johnson, or rather protect and save him harmless from "his liability as indorser" of a certain bill of $3,500 indorsed by him for Mahards; the mortgage being "to secure said Johnson on his indorsement as aforesaid." In October, 1842, a judgment was obtained by the bank on the above bill against the Mahards as drawers and M'Laughlin and Johnson as indorsers. On which judgment execution was issued and returned no property found. This mortgage was executed and recorded without the knowledge of Johnson. Mahard states that he believed at the time this mortgage was given, they would be able to meet all their liabilities; but he was desirous of securing his indorsers against any contingency, and with that view the mortgage was executed. The debt to the bank was a bona fide one, and Johnson was liable for it as indorser. At this time the house in New Orleans had not failed, and there is no reason to doubt that Mahard believed, as he has sworn, that they would be able to sustain themselves. And from the facts, there is

reason to believe, that Johnson did not consider the Mahards insolvent. As the mortgage was executed without his request, it appears he could have felt no very great solicitude in regard to his liabilities as their indorser. On the whole we think this instrument cannot be held void under the second section of the bankrupt law, as having been made in contemplation of bankruptcy and with a view to give the Commercial Bank a preference over other creditors. But this mortgage was afterward declared on the record to be canceled through the influence of the Buckinghams, who were interested in annulling it. This procedure was procured through the misapprehension of Johnson, and cannot operate to the prejudice of those who might claim under the mortgage. Being indorser to the bank, Johnson, as mortgagee, became the trustee of the bank, and could not destroy that which was designed by the mortgagor, if such be the construction of the mortgage, for the benefit of the bank. And more especially would a court of equity disregard the cancelment of such an instrument by the trustee, through the fraudulent representations of interested persons.

It is objected that this is a mortgage of indemnity merely, and that unless Johnson be damnified, neither he nor the bank can claim any thing under it. A judgment has been obtained against Johnson as indorser, on the bill of exchange named in the mortgage, and this fixes his liability. Must the bank proceed against him and sacrifice his property, if he have any, before it can reach the property pledged for his indemnity? On the contrary, may not the bank proceed directly against the mortgaged property? This would seem to be equitable. It saves the security and subjects the property of the debtor, as it should be subjected, to the payment of the debt. No objection is perceived to this principle. The solvency or insolvency of the surety cannot affect it. If the procedure against the property pledged in any degree is made to depend upon the amount of property the surety may have, then in every case the surety must pay the money, by suffering a judicial sale of his property or otherwise, before the mortgaged property can be reached by the creditor. This would be in violation of the plainest equity, and contrary to the established mode of chancery proceedings. When justice can be done and a circuity of action avoided, chancery will do it. A surety is damnified, when a judgment is obtained against him. And this gives him a right to proceed against the pledged property of his principal; and with the consent of the creditor, it may be made answerable for the payment of the debt. 1 Story, Eq. Jur. §§ 502, 638; Bank of U. S. v. Stewart, 4 Dana, 27; Green v. Dodge, 6 Ohio, 85; Wright v. Morley, 11 Ves. 22; West v. Belches, 5 Munf. 187; M'Mahon v. Fawcett, 2 Rand. [Va.] 514; Tankersley v. Anderson, 4 Desaus. Eq. 44.

The Commercial Bank has only the lien, through Johnson, on lot 460, and as the judgment of the Bank of the United States against Mahard and M'Laughlin is a lien upon that lot, and the other real estate of Mahard, and also of M'Laughlin's, it is claimed that the judgment should be made out of the other property of the defendants, or at least that their property should be exhausted before the lien is enforced against the above lot. It is a common principle in equity where two or more tracts of land are covered by a lien, and there is another lien upon one of the tracts, to require the lien common to the whole property first to exhaust that part which is not common to both liens. And this will be done in the present case. As the whole property must be sold, the distribution of the proceeds will be made in accordance with this principle. The two mortgages executed by Mahard to Mark Buckingham and to Mark and John S. Buckingham, dated 21st February, 1842, on lots 404 and 460, will be next examined. This instrument, it is alleged, is void under the second section of the bankrupt law, it having been given in contemplation of bankruptcy and to prefer the mortgagees to other creditors. As Buckinghams had some connection with the Mahards in the fall of 1841, it is insisted, that they must have known that they were insolvent and on the verge of bankruptcy before the mortgage was executed. It is not shown that the connection referred to extended farther, by the Buckinghams, than to occupy the pork house of Mahard in Cincinnati, and to ship pork to the house of Mahard & Brother in New Orleans. These shipments go very strongly to refute any presumption of knowledge injurious to the credit of the Mahards; and on the contrary show that the Buckinghams had confidence in their ability and integrity. And there is nothing in the evidence which goes to destroy this confidence, until the failure of the house in New Orleans. About that time, Mark Buckingham, being in New Orleans, seems to have been fully apprised of the desperate condition of that house, and of the urgent necessity of using the utmost circumspection and vigilance to secure their claim against the Mahards. This was in the early part of March, 1842, subsequent to the date of the mortgage. These facts, therefore, cannot be made to have any bearing upon the execution of that instrument. And aside from these, no facts have been proved which show that the mortgage was given in contemplation of bankruptcy, and to give an illegal preference. There are prior liens on the property covered by this mortgage, which may exhaust it; and if this shall not be the case, the Buckinghams must show that they are liable for the debts secured by it, or have paid them. This is a matter which will necessarily come up on a final distribution of the proceeds.

The judgment confessed by Mahards, in

favor of Buckinghams, is the next question to be considered. On the 7th of April, 1842, a power of attorney was executed by John Mahard, Jun., to William Corry, Esquire, authorising him to confess a judgment in favor of the Buckinghams, for about the sum of fourteen thousand dollars; and on the succeeding day a judgment for that sum was confessed. This was within sixty days before the petition of Mahard was filed. An execution was issued on the judgment, which was levied on the personal property of the bankrupt. Was this proceeding void under the bankrupt law? The first proviso of the second section is, "That all dealings and transactions by and with any bankrupt, bona fide made and entered into more than two months before the petition filed against him or by him, shall not be invalidated or affected by this act." Now, this very clearly implies that transactions within the two months, though bona fide, are not valid. For, to make transactions valid before the two months, they must have been entered into in good faith. The proviso, therefore, if it mean any thing, as to transactions within the two months, intended to place them upon a different footing from transactions beyond that limitation. This is the clear inference from the language of the section. But it is asked, is every sale across the counter, within the two months, void? This is not a fair test of the principle. For although it may be impracticable to avoid minute transactions, yet is this any reason why large and important transactions should be held valid? A man, to defeat his creditors, may distribute his property in such small parcels, as to render any attempt to reclaim them impracticable. But from this it would not follow that creditors might not set aside the entire stock of a merchant, fraudulently transferred. That congress have power to adopt a provision having the above effect, is undoubted. Under the bankrupt power, they annihilate the contract—not being restrained or prohibited, as the states are, from impairing its obligation. It is, then, a question of policy with congress, and, with the courts, a question of construction. And it must be admitted, that some effect must be given to the proviso; and if this be done, it follows, that a contract made within the two months is not to be treated as a contract made before that time. But, in disposing of this judgment and the execution which issued upon it, we need not rely upon this construction of the proviso. At the time this judgment was entered, Mahard had no visible means, except the property afterwards levied on. The house at New Orleans had failed. Mark Buckingham's letters from that place show how utterly hopeless was the prospect of finding any assets of that concern. He imposed on his friends at Cincinnati the utmost caution, in order to reach the property of Mahard at that place. The business of both houses had been broken up; their credit gone. Mortgages had been multiplied on the real and personal property of Mahard; and even this personal property had been covered by a mortgage. In this desperate condition of Mahard's affairs, he was induced to yield to the pressure of the Buckinghams, and give a warrant of attorney to confess the judgment. The judgment was entered, and the execution was issued and levied. And yet it is contended, that these facts do not show a contemplation of bankruptcy by Mahard, or a preference of the Buckinghams as creditors. The judgment, if valid, constituted a lien on the real estate, and the levy of the execution a lien on the personal property. These proceedings were had with the consent of Mahard, and could only have been had with his consent. The warrant of attorney was not signed by William Mahard, until some time after the rendition of the judgment.

In the first section of the bankrupt act, it is declared, that if a debtor "shall willingly or fraudulently procure himself to be arrested, or his goods and chattels, lands or tenements, to be attached, distrained, sequestrated, or taken in execution," he is guilty of an act of bankruptcy. Do not the acts of Mahard bring him within this provision? By the confession of the judgment, did he not procure the lien consequent upon that judgment, and also the execution which was levied on his property? Is not the judgment lien a "security," within the second section of the act? It is a matter of surprise, that a procedure so open as this—a procedure so plainly in violation of the bankrupt act, and coming, too, within the two months before filing the petition, should be attempted to be sustained. The judgment and execution were void under the act. Where a suit had been commenced in the ordinary course of judicial proceeding, and a judgment had been entered within the two months, it might not be void. But where, by the consent of the bankrupt, the proceeding is commenced and consummated in a few days, within the two months, there could be no more glaring and indisputable act of fraud against the bankrupt law. No analogies drawn from the bankrupt laws of England, which, in many of their provisions, are wholly different from this act, can aid us in giving a construction to it. And the same remark may be made in reference to our former bankrupt act, and to the constructions given to it by the state courts. The transfer, by Mahard, of the forty-nine shares of the stock of the Lafayette Bank, having been made to John S. Buckingham on the 13th of April, 1842, but little more than one month before the petition in bankruptcy was filed, and under a knowledge of the above facts, must be held as void under the bankrupt act.

[NOTE. The case was finally heard in the circuit court on exceptions to the master's report. Case No. 8,889. An appeal was then taken from the decree entered to the supreme court,

which affirmed the decision of the circuit court. Mr. Justice Curtis delivered the opinion. 13 How. (34 U. S.) 151.]

Case No. 8,889.

McLEAN v. LAFAYETTE BANK.

[4 McLean, 430.] [1]

Circuit Court, D. Ohio. July Term, 1848.[2]

BANKRUPTCY—INCUMBRANCES—PRIORITY OF SALE—INCIDENTS OF JUDGMENTS—MORTGAGE—APPLICATION OF SURPLUS.

1. Where a mortgage is given on land and personal property, and other liens are set up to the personal property, the court will direct the real estate to be first sold. But if it should be insufficient to discharge the mortgage, the lien on the personal property will be enforced, it being prior to the others.

[Cited in Foster v. Ames, Case No. 4,965.]

2. When a judgment is appealed from the common pleas to the supreme court, the judgment below remains a lien on the real estate of the defendant, in the county, and it would seem that the accruing interest and costs and penalty ought also to be considered as an incident to that judgment.

3. A mortgagor is not responsible, without notice, for the application of any surplus which may remain on the sale of the mortgaged property, after satisfying his mortgage.

[This was a bill by Nathaniel C. McLean, assignee in bankruptcy of John Mahard, Jr., and William Mahard, partners as John Mahard & Co., to set aside certain transfers of stock of the Lafayette Bank and mortgage of real estate made by the bankrupts and claimed to be fraudulent as to their creditors. An injunction was granted to stay proceedings in the state court seeking to enforce the alleged fraudulent preferences. The case was formerly heard upon motion to dissolve this injunction. Case No. 8,885. Subsequently an amended bill was filed, to which the defendant demurred. The demurrer was overruled. Id. 8,886. Complainant moved for a receiver to take charge of a farm, a part of the property alleged to have been fraudulently transferred. The motion was allowed. Id. 8,887. The case then came up for a determination of the validity of the alleged fraudulent liens and transfers, some of which were held invalid. Id. 8,888. It is now heard upon exceptions to the master's report.]

Mr. Gholson, for plaintiff.

Mr. Chase, for defendant.

OPINION OF THE COURT. From the case of McLean v. Lafayette Bank [Case No. 8,888], it appears that the bank loaned to John Mahard & Co. fifteen thousand dollars, to be paid in three equal annual installments, with interest. A mortgage on real property was given to secure the payment of this loan, on the 7th of December, 1841. About a month after the mortgage was given, Mahard transferred forty-nine shares of stock to the bank, as collateral security, for the payment of the first installment of the above loan. On the 13th of April following, Mahard, on the same paper on which the assignment of the stock had been made to the bank, indorsed, "The forty-nine shares of the stock are transferred to John S. Buckingham, for value received." This last transfer was made on the supposition that the real estate would pay the fifteen thousand dollars. But the court held in the above case that the assignment to Buckingham was void under the bankrupt law [of 1841 (5 Stat. 440)]. And they directed the real property to be first sold, under the mortgage, which has been done, and the proceeds do not pay the above loan. And the question now is, whether the transfer of the stock to the bank, remains a lien to pay the first installment.

The court, on the principle that the bank held two liens, directed the real estate to be sold first, and applied to the discharge of the fifteen thousand dollars loan. But this did not affect the lien of the stock, and was not intended to affect it, if the real estate should prove insufficient to pay the above loan. In their opinion in the original case, the court say, "The final disposition of this stock is reserved until the proceeds of the mortgage shall be realized." And in the concluding part of their opinion, they say, "The transfer by Mahard, of the forty-nine shares of the stock of the Lafayette Bank, having been made to John S. Buckingham, on the 13th of April, 1842, but little more than one month before the petition in bankruptcy was filed, and under a knowledge of the above facts, must be held as void under the bankrupt act." As the transfer of this stock to the Buckinghams was declared to be void, under the bankrupt law, by the court, the stock must be considered as held under the valid transfer, preceding that to Buckingham, to the Lafayette Bank. This stock was intended to secure, to the extent of its value, the first installment of the fifteen thousand dollars loan, and the court will now direct that it shall be so applied.

Exceptions are taken to the report of the master by the Lafayette Bank, as to the judgment of the Bank of the United States, and as to interest allowed on the Franklin Bank debt:

1. That the original judgment of the Bank of the United States, was recovered July, 1841, for $2,728.63, from which an appeal was taken to the supreme court, when the bank recovered a second judgment, 4th April, 1842, for $2,837.84 damages, and $141.89 penalty and costs of supreme court. And it is contended that the judgment for the penalty can only operate from the date of its rendition. The penalty was imposed under a statute by the supreme court, and can not be considered as a part of the judgment of the common pleas, as the amount

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

[2] [Affirmed in 13 How. (54 U. S.) 151.]

could not be known to that court, nor to any one before the judgment of the supreme court. That an appeal bond was given which would secure the penalty and costs in the supreme court. And this penalty and costs in the supreme court, it is argued, can not constitute a lien as a part of the judgment of the common pleas. This is a small point to be brought up at this stage of the proceedings, in a case which involves numerous and intricate question of lien covering a large estate. There is, undoubtedly, plausibility in the grounds taken, and it is not stated the supreme court of the state has ever decided the question. It could only arise where liens had intervened after the rendition of the judgment in the common pleas, and before the judgment in the supreme court. That happens to be the case in the present instance. And the counsel contends that the addition to the judgment, by adding the penalty and costs in the supreme court, should not attach to the original judgment which constitutes a lien, but should be thrown upon the securities on the appeal bond. There seems to be no reason why the accumulating interest should not be included in the judgment of the supreme court as an incident of the judgment below; and the costs of the supreme court and the penalty which it annexes are a consequence of the appeal. As such sums must generally if not uniformly, be small, it is presumed they have been considered as partaking of the character of the first judgment. As against the defendant there can be no objection, and as against the opposing lien holders, I suppose that such has been the course. It may not have been considered of sufficient importance to make the question before the supreme court, and I do not feel disposed in the present case, under the circumstances, to allow the exception; it is, therefore, overruled.

2d exception: Can interest be allowed on a debt of the mortgager to the mortgagee after the mortgagee has purchased, at judicial sale, the property mortgaged to an amount sufficient to satisfy the debt? If the purchase money does not equal the debt, must not the interest stop on the amount of it, whatever it may be? So soon as the sale shall be confirmed and the purchaser has a legal right to enter into the possession of the property, the interest on the mortgage money must cease, because the amount bid is payment. But when sales are ordered by a court sitting in chancery or bankruptcy, the mere sale is not a title until it shall be confirmed by the court, and a title ordered to be made. For until that time, the bidder at the sale is not considered the owner of the property. The counsel for the Franklin Bank, however, admits the above exception, and, of course, it must so stand.

3d exception: The counsel for the Lafayette Bank claims that the Franklin Bank must pay a pro rata proportion of the amount of the judgment of the Bank of the United States, except the penalty and interest. The facts on which this position is founded are: The judgment of the bank was rendered July term, 1841. The mortgage of the Franklin Bank on lots 404 and 460 was recorded October 18th, 1841. The mortgage of the Lafayette Bank on the country property January 13th, 1842. And the judgment on the appeal was entered April term, 1842. On the 8th of March, 1842, the Franklin Bank assented to the sale of Mahard to Dyer, released to him all her interest in the part sold; and agreed with him to indemnify him against the judgment of the United States Bank. Of the price paid by Dyer, $10,000, the Franklin Bank received $7,297.33, the balance, $2,702.67, was paid to the Buckinghams with the assent of the Franklin Bank. The Buckinghams had, according to the adjudications made in this case, no valid liens on any of the property: as all the incumbrance of their judgments was prior to that of the Lafayette Bank, and that of their mortgage on lots 404 and 460 junior to that of the Franklin Bank.

And it is contended, that this being the state of facts, prior to the mortgage to the Franklin Bank, that corporation acquired, as against Mahard and the Bank of the United States, a right in equity, to compel the latter institution to resort to lands then unincumbered, for the satisfaction of its judgment; or in case the judgment should be satisfied out of the mortgaged property to have the judgment assigned to it and its lien on the property preserved for its benefit. And when the Lafayette Bank took its mortgage on the country property, it acquired a similar right, as between itself on the one side, and Mahard and the Bank of the United States on the other. And it is contended that the right of the Franklin Bank remained the same after the mortgage was taken by the Lafayette Bank as before. The Franklin Bank has no right to throw the judgment of the Bank of the United States upon the property mortgaged to the Lafayette Bank. Every mortgagee must inquire before taking a security, not only what mortgages and assignments bind the particular parcel proposed to be mortgaged, but also what mortgages bind every other part of the mortgager's estate. And from these premises the counsel concludes that the judgment of the United States Bank should be paid, pro rata, by the whole property which it bound. And he insists that the Franklin Bank, at most, could do no more than throw the Bank of the United States' judgment over on the Lafayette Bank property, so far as is necessary for its own protection. That if the property and other securities was sufficient to pay its own debt and also the Bank of the United States' judgment, it could not by any arrangement, throw that judgment upon the property mortgaged to the Lafayette Bank to favor junior liens. It is admitted that when an individual is about taking a mort-

gage or other security, it is incumbent on him to ascertain whether there are not other and paramount liens on the same property. And if in this respect he shall be negligent, he must suffer the consequent loss. But it is apprehended that the principle contended for is not the one just stated. It is not the acquisition of a lien, but an abandonment of one. The complaint against the Franklin Bank is, that it was content to receive a part of the consideration for which one of the lots mortgaged to it sold, and consented that the residue of the purchase money should be otherwise appropriated; and the question is, whether by so doing it rendered itself liable to account for the whole amount of the consideration for which the lot sold.

The general principles of equity argued by the counsel, may be admitted, and yet, it is supposed, they can not apply to the case before us. The same argument was pressed upon the court in the original case; and the court then said: "Those general principles must be admitted, but they can only apply where notice was given to the first mortgagee of the subsequent liens, as in case of a mortgage to secure future advances: and there is no proof of actual notice in this case. The bank in its answer denies notice, and constructive notice from the recording of the subsequent mortgages is insufficient. It appears that the balance of the consideration was paid to the Buckinghams, who were subsequent mortgagees. Guion v. Knapp, 6 Paige, 35; Nelson's Heirs v. Boyce, 7 J. J. Marsh. 401; Sharras v. Craig, 2 Pet. Cond. R. 411." The reason of this rule is apparent. The Franklin Bank looks to the property covered by its mortgage for payment, and that being received, not knowing that there are junior mortgagees whose rights may be affected, is indifferent as to the appropriation of the surplus. A notice, then, which puts the party on his guard, is essential to make him responsible; and of so much importance is this notice, that it must be actually given, and not by the recording of a mortgage which determines the lien.

The above exceptions are overruled.

[NOTE. The decree entered in this case was affirmed upon appeal to the supreme court. Mr. Justice Curtis delivered the opinion of the court. 13 How. (54 U. S.) 151.]

McLEAN (LOMBARD v.). See Case No. 8,471.

Case No. 8,890.

McLEAN v. MELINE et al.

[3 McLean, 199; [1] 1 West. Law J. 51.]

Circuit Court, D. Ohio. July Term, 1843.

BANKRUPTCY—VOID ASSIGNMENT — UNDER STATE LAW—LIABILITY TO LEVY—ADJUSTMENT OF LIENS.

1. An assignment, by an insolvent person, of all his effects for the benefit of his creditors, to one who is not a bona fide creditor or purchaser without notice, is void under the second section of the bankrupt law [of 1841 (5 Stat. 440)].

[Cited in Perry v. Langley, Case No. 11,006.]

[Cited in Cook v. Rogers, 31 Mich. 391.]

2. Such an assignment is valid, under the laws of the state.

3. But, being void under the bankrupt act, the property assigned was liable to be levied on by a judgment creditor.

[Cited in Re Beisenthal, Case No. 1,236.]

4. The circuit court has jurisdiction of such a case, to set aside the transfer, direct the liens to be paid pro rata, and the property not levied upon to be distributed among the creditors of the bankrupt.

[Cited in Globe Ins. Co. v. Cleveland Ins. Co., Case No. 5,486.]

In bankruptcy.

Brown & McLean, for complainant.

Wright, Chase, Walker, Coffin, Miner & McLean, for defendants.

OPINION OF THE COURT. This bill is filed to set aside a conveyance of the effects of Lucas to the defendants, which is alleged to have been done in contemplation of bankruptcy. The assignment was made in May, 1842, Lucas then being insolvent, for the benefit of his creditors generally. At the July term of this court, in 1842, Cowperthwaite and others obtained judgment against Lucas, and at the same term Little & Co. obtained judgment. These judgments were upon suits commenced after the assignment to Meline & Young, and were obtained in the ordinary course of proceedings. On the former judgment, execution was issued on the 4th of November, 1842, and on the latter the 8th of the same month. They were both levied on the 8th, upon the personal property assigned, and in the hands of the assignees. By agreement, the assignees were permitted to sell, and hold the proceeds, subject to the opinion of the court as to the right of property. On the 16th November, 1842, Lucas filed his petition for a discharge, under the bankrupt law, and a decree of bankruptcy was entered on the 28th of January, 1843.

The second section of the bankrupt act declares that "any conveyances or transfers of property in contemplation of bankruptcy, to any person whatever, not being a bona fide creditor, or purchaser for a valuable consideration, without notice, shall be deemed utterly void." The transfer, in this case, was not made to a creditor or to a purchaser, within the act; and although it was made for the benefit of creditors generally, yet, under the act, it was void. That Lucas was bankrupt, at the time of the assignment, is admitted. The court have no difficulty in setting aside the assignment to the defendants; but a question is raised by the judgment creditors, who claim under levies by execution, before the petition of the bankrupt was filed. In answer to this, the assignee contends, that the assignment to the

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

defendants, being an act of bankruptcy, all subsequent liens are void, and in opposition to the claims of creditors, which he represents, should be disregarded. This is the doctrine in England. An act of bankruptcy overreaches an attachment or an execution. Barker v. Goodair, 11 Ves. 84; 9 Ves. 78. A trader, after an act of bankruptcy, cannot create a lien upon his property. Copland v. Stein, 8 Term R. 199. By various statutes, however, all bona fide transactions with the bankrupt, two months before the date of the commission, are protected, if there be no notice of the act of bankruptcy. In this respect, our statute is more restrictive than the English statute; and I am not prepared to say, that an assignment, which is fraudulent under the bankrupt law, and in itself an act of bankruptcy, overreaches, under our law, an attachment or execution. The act of bankruptcy in England is tantamount to a filing of the petition under our statute, in most respects. In either case, any subsequent transfer of property by the bankrupt, is void. But whether liens are void or not, under our act, which were created more than two months before the petition was filed, must depend upon the peculiar circumstances of each case. The levies in this case were only made a few days before Lucas filed his petition: but the executions were issued on judgments obtained in a regular course of proceeding; and there are no circumstances in the prosecution of the suits, the obtainment of the judgments, or in suing out the executions, which conduce to show fraud. Fraud is never to be presumed, against the apparent fairness of a transaction; therefore, these judgments, and the proceeding under them, must be held valid.

It is further contended, that the assignment, being valid by the state law, the subsequent levy could create no lien. A levy binds the personal property; but if such property had been transferred, a subsequent levy could not affect the right of the assignee. By the third section of the act, "to amend the act directing the mode of proceeding in chancery" (Swan & C. Rev. St. 71), it is provided, that, "all assignments of property in trust, with design to prefer one or more creditors to the exclusion of others, shall be held to enure to the benefit of all the creditors," &c. But the above assignment, being for the benefit of all the creditors, does not come under this provision, and is valid on its face. On this ground, it is insisted that the lien set up by a levy of the executions, is not within the bankrupt act, as it is not a valid lien under the laws of the state. The assignment is void, under the bankrupt law, as being expressly against its letter; and consequently the property attempted to be transferred was liable to be taken in execution by judgment creditors. Whether a state court could take jurisdiction of this question, which arises under the bankrupt act, need not be considered, as the bill has been filed in this court. Of the jurisdiction of this court, there can be no doubt.

The assignment will be set aside as void, under the bankrupt act, and the proceeds of the property levied upon will be applied pro rata in discharge of the above liens. The effects assigned and not levied upon will be decreed to the complainant, deducting the expenses of sale, &c.

McLEAN (MINER v.). See Case No. 9,630.

Case No. 8,891.

McLEAN v. ROCKEY et al.

[3 McLean, 235; 1 1 West. Law J. 300.]

Circuit Court, D. Ohio. July Term, 1843.

BANKRUPTCY—ASSIGNEE — WHEN RIGHTS ATTACH —JUDGMENT OBTAINED BEFORE PETITION—LEASE FOR NINETY-NINE YEARS—JUDGMENTS AT SAME TERM.

1. From the time of filing a bankrupt's petition, the right of the bankrupt, by relation, is vested in his assignee. And no subsequent lien created by the bankrupt, or by a judgment, can be valid.

[Cited in Phelps v. Sellick, Case No. 11,079.]

2. But a judgment obtained before the petition was filed, having been obtained bona fide, is a lien within the second section of the bankrupt law [of 1841 (5 Stat. 440)].

[Cited in Clarke v. Rist, Case No. 2,861.]

3. A lease for ninety-nine years, renewable forever, by the common law is only a chattel.

4. A judgment binds the real estate of the defendant, from the first day of the term at which it was rendered.

5. Under the construction of the Ohio statute, by the supreme court of the state, a permanent leasehold estate is land, within the execution law, and is bound by a judgment.

6. All judgments rendered at the same term have equal liens, on the real estate of the defendant, however the executions may have been issued and levied, provided the levy has been within a year from the rendition of the judgment.

7. Where there is no allegation of fraud in the bill, and the liens will more than absorb the property of the bankrupt, there is no reason why this court should exercise jurisdiction.

[Cited in Re Bowie, Case No. 1,728; Re Hufnagel, Id. 6,837; Kimberling v. Hartly, 1 Fed. 575.]

In bankruptcy.

Mr. Worthington, Mr. Brown and N. C. McLean, for complainant.

Storer, Chase & Van Metre, for defendants.

OPINION OF THE COURT. On the 8th November, 1842, Coffin filed his petition under the bankrupt law, and on the 3d of February ensuing he obtained a decree of bankruptcy. On the 25th of June, 1839, he pro-

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

cured a leasehold estate of ninety-nine years renewable forever. At October term, 1842, the following judgments were entered against him. In favor of Henry Rockey, for $199.64; Springer & Whiteman, for $675.50; Matthias Roosa, for $712.87. The court commenced its session the 3d of October, and adjourned the 7th of December. On Roosa's judgment execution was issued the 21st of October, and was levied upon the leasehold premises the 14th of November, 1842. The execution was issued on Rockey's judgment the 22d of October, and on Springer & Whiteman's judgment, execution was levied, as the above levies were made, on the leasehold property the 17th of November. The Northern Bank of Kentucky, at the same term obtained judgment for $2,049.32, on which an execution was issued within the year, which was levied on the same premises. At January term, 1843, of the superior court of Cincinnati, Marriott & Hardesty obtained a judgment for $668.72, on which an execution was levied on the leasehold property the 21st of the same month. As the above levies were all made subsequently to the time the bankrupt filed his bill, his assignee insists, that under the bankrupt law, the leasehold estate is vested in him, and he prays an injunction, &c.

Several questions have been raised and discussed, which will now be considered.

At common law a leasehold is only a chattel interest, and it is contended that it is nothing more under our statute. The 2d section of the act concerning "judgments and executions" (Swan & C. St. 468) declares that "the lands and tenements of the debtor shall be bound for the satisfaction of the judgment against such debtor, from the first day of the term at which judgment shall be rendered." Lands out of the county, and goods and chattels, are bound from the time execution shall be levied. The October term, at which all the above judgments were rendered, except one, commenced on the third day of October, so that unless the leasehold estate can be considered "lands and tenements" within the statute, and bound by the judgment, there is no lien paramount to the right of an assignee. By relation, his right to all the estate of the bankrupt, commenced from the filing of the bankrupt's petition.

The bankrupt from the time his petition is filed, is civiliter mortuus, "as to all suits at law or equity pending, in which he is a party" [Ex parte Foster, Case No. 4,960]; and that consequently, after that time, no judgment could be recovered against him. That the court will inquire whether in fact the judgment was not entered after the petition was filed; and if so, will treat the judgment, as of no more validity than if entered against a deceased person. So far as regards the disposition of his property, or the control of suits pending against him, the bankrupt, from the time his petition is filed, may be considered as civiliter mortuus. But the suits are not abated, and should be prosecuted to judgment, against the bankrupt. 1 Term R. 463; 3 Term R. 437; 15 East, 622. Whether the judgments, therefore, were entered before or after the petition was filed, is of no importance. The legislature of the state have an undoubted right to say, as is declared in the above act, that a judgment shall be a lien on lands and tenements from the first day of the term at which it was rendered. The important question is, whether the above leasehold estate was bound by the judgment. That a judgment constitutes a lien on real estate, which is recognized in the second section of the bankrupt law, is undisputed. And there is no allegation in the bill, that either in the causes of action, or in the prosecution of the above suits to judgment, there was fraud. The judgments therefore having been rendered against the bankrupt before his petition was filed, create a valid lien on his real estate. But if the leasehold property be not "lands and tenements," within the statute, there can be no judgment lien.

The act of January 29th, 1821 (Swan & C. St. 289, note), declared, "that all lands of whatever description, held by permanent leases, shall, in cases of judgments had and executions levied thereon, be considered as real estate; and the officer levying the execution or executions, shall conform to, and be governed by the provisions of the several acts regulating judgments and executions," &c. This act continued in force until the act of the 22d of March, 1837, (Swan & C. St. 289, note), which provided that leasehold estates renewable forever, should descend as estates of inheritance. And that law was repealed by the act of the 5th March, 1839, which contains a similar provision. The act of 1821 declared, that in case of judgment and an execution levied upon a permanent leasehold estate, it should be considered as real estate; and the officer was bound to conform to the law regulating sales of real estate on execution. Prior to this act, as the supreme court of Ohio say, in the case of Reynolds v. Commissioners of Stark Co. (5 Ohio, 204), that "a lease is personal property. Although the lease contains a stipulation, that it shall be renewable forever; yet any estate short of freehold gives the heir no interest." And it would seem that the act of 1821, in this respect has made no alteration in the law. It only provides that where a judgment has been obtained, and an execution shall be levied on a permanent leasehold estate, it shall be considered as real estate, and sold as such. In other words, such an estate shall be subject to valuation, and must be sold, if improved, for two-thirds of its value. This it is supposed is the extent to which the above act can affect permanent leases. But the acts of 1837 and of 1839, above cited, provided that a permanent leasehold estate should descend as land. This innovation, it would

seem, should not change the nature of such an estate beyond the express words of the statute. It would not subject such an estate to the lien of a judgment. In Kentucky, by an express statute, negroes descend as real estate, and yet this does not make negroes land. The same quality, at the legislative discretion, may be imparted to any other personal property; but that would not change the nature or legal designation of such property, beyond the words of the statute. It does not make negroes in Kentucky, lands and tenements, any more than the acts of 1837 and 1839 make a leasehold estate, renewable forever, lands and tenements within the statute, subject to a judgment lien.

In the case of Murdock v. Ratcliff, 7 Ohio, 119, the court say in regard to a lease upon an annual rent, for ninety-nine years, renewable forever, "We know that such interests are usually treated as fees simple by the holders, and that the law requires them to be appraised as real estate in sales under execution; and that by statute they are liable to dower, &c.; but no proposition has been better settled, from the earliest days of the common law, than that a lease, of whatever duration, is but a chattel." But in Loring v. Melenda, 11 Ohio, 355, a different view has been taken of this question. The court there held that "permanent leasehold estates, are lands, subject to all the rules and laws which attach to land, for all purposes, and that judgment liens attach to them as lands." And they say that the point thus decided was fairly presented in the case, and "that it was the point upon which the case was reserved." This being the construction of a statute which makes a judgment a lien on lands, &c., it is conclusive of the point. We take as a rule of decision the construction of a statute by the supreme court of the state. The four judgments, first above named, must, therefore, be considered a lien on the leasehold estate in question, from the 3d day of October, 1842, which was the first day of the term.

It is contended, however, that as no execution was issued on the judgment in favor of the Northern Bank of Kentucky, until after execution had been issued and levied, on the judgment in favor of Marriott & Hardesty, entered at January term, 1843, of the superior court, that the lien of the Northern Bank is postponed in favor of the subsequent judgment. This must depend upon the construction of the statute.

The fourth section of the execution law, (Swan & C. St. 470) provides that "when two or more writs of execution against the same debtor, shall be sued out during the term in which judgment was rendered, or within ten days thereafter, and when two or more writs of execution against the same debtor, shall be delivered to the officer on the same day, no preference shall be given to either of such writs," &c. "In all other cases, the execution first delivered to the officer shall be first satisfied." "Provided, nothing herein contained, shall be so construed as to affect any preferable lien, which one or more of the judgments, on which such executions issued, may have on the lands of the judgment debtor." The twelfth section of the same act declares that "unless execution shall be taken out and levied within twelve months after its rendition, it shall not operate as a lien on the estate of any debtor, to the prejudice of any other bona fide judgment creditor." In Patton v. Sheriff, 2 Ohio, 395; Waymire v. Staley, 3 Ohio, 366; Riddle v. Bryan, 5 Ohio, 52, it is laid down generally that in the above fourth section "the legislature intended to provide for three classes of cases:" (1) "Where there are two or more judgment creditors, having equal rights, and where there is no priority of lien, as where judgments are recovered in the same term." (2) "In cases where judgments do not operate as a lien, but the property is bound only from the time when seized in execution, as goods and chattels and lands not situated in the county where the judgment is recovered." And (3) "for cases where the creditor in consequence of not having an execution levied within one year from the date of his judgment, has lost the benefit of his lien, so far as that it shall not operate to the prejudice of any other bona fide judgment creditor."

From the above cases it appears that a judgment lien remains in full force, if execution be issued and levied within the year, as was done in the case of the Northern Bank.

As there is no allegation of fraud in the bill, and as the judgments will absorb the whole of the leasehold estate, and leave no surplus for the general creditors, there seems to be no reason why this court should take any further jurisdiction in the case. The bill is, therefore, dismissed at the complainant's costs.

Case No. 8,892.

McLEAN v. ST. PAUL & C. RY. CO.

[16 Blatchf. 309; 25 Int. Rev. Rec. 249; 8 Reporter, 69; 20 Alb. Law J. 78.] [1]

Circuit Court, S. D. New York. May 24, 1879.[2]

REMOVAL OF CAUSES — PETITION — SUFFICIENCY — CITIZENSHIP — COPY OF RECORD NOT FILED IN TIME.

1. Under sections 2 and 3 of the act of March 3, 1875 (18 Stat. 470, 471), a suit may be removed into this court from a state court, on a petition by the defendant, averring that the defendant is a corporation created by, and a citizen of, one state, and that the plaintiff is a citizen of another state, without averring that the plaintiff was, at the time of the commencement of the suit, a citizen of a different state from the defendant.

[Cited in Chicago, St. L. & N. O. R. Co. v. McComb, Case No. 2,670; Wehl v. Wald,

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission. 25 Int. Rev. Rec. 249, 8 Reporter, 69, and 20 Alb. Law J. 78, give only partial reports.]

[2] [Affirmed in 108 U. S. 212, 2 Sup. Ct. 498.]

Id. 17,356; Clarkson v. Manson, 4 Fed. 262; Curtin v. Decker, 5 Fed. 387, 388; Glover v. Shepperd, 15 Fed. 835. Disapproved in La Montagne v. T. W. Harvey Lumber Co., 44 Fed. 648.]

2. The defendant in a suit, after taking steps to remove it into this court, did not file in this court a copy of the record of the suit until three days after the day named in the removal bond as the day on which the copy of the record was to be filed. The case was not within the exceptions provided for in section 7 of the said act. The plaintiff had not waived the delay, and the defendant offered no excuse except an allegation that the non-filing on the proper day was an inadvertence. The plaintiff moved to remand the cause: *Held*, that the motion must be granted.

[Cited in McLean v. St. Paul & C. Ry. Co., Case No. 8,893; Woolridge v. M'Kenna, 8 Fed. 667; Stoutenburgh v. Wharton, 18 Fed. 2, 3; McGregor v. McGillis, 30 Fed. 390, 391.]

[This was a suit originally brought in a state court of New York by Samuel McLean against the St. Paul & Chicago Railway Company, for breach of contract. It was removed to this court on motion of defendant, and is now heard on motion of plaintiff to remand to the state court.]

D. M. Porter, for plaintiff.

Charles W. Bangs, for defendant.

BLATCHFORD, Circuit Judge. On the 7th of February, 1879, this suit was commenced in the court of common pleas for the city and county of New York, by the service of a summons. A complaint was afterwards put in in the state court, which demands judgment against the defendant for $105,000 and interest, for breach of a contract. The complaint, which is sworn to February 27th, 1879, sets forth that the plaintiff "is a resident of the city of Brooklyn, county of Kings and state of New York." The defendant is a corporation created by the state of Minnesota. On the 17th of March, 1879, the state court made an order in the cause, in these words: "It appearing by the complaint in this action, that the defendant, the St. Paul and Chicago Railway Company, is a corporation created under and by virtue of the laws of the state of Minnesota, and that the plaintiff is a resident of the state of New York, and the said defendant having, before the term at which this cause could be first tried in this court, made and filed a petition in this suit, in this court, whereby it appears that the plaintiff in this action is a citizen of the state of New York, and that the defendant is a citizen of the state of Minnesota, and that, pursuant to the second and third sections of the act of the congress of the United States, approved March 3, 1875, this being an action between citizens of different states, and the matter in dispute, exclusive of costs, exceeds the sum of value of $500, the defendant having prayed for the removal of this suit into the circuit court of the United States for the Southern district of New York, and having made and filed with the said petition a bond, with good and sufficient surety, for the defendant entering in said circuit court, on the first day of its next session, a copy of the record of such suit in this court, and for paying all costs that may be awarded by the said circuit court of the United States, if the said court shall hold that this suit was wrongfully or improperly removed thereto, and also for the appearing and entering special bail in such suit, if special bail was originally requisite therein, now, on reading and filing a copy of the pleadings in said action in this court, and the said petition and bond and proof of service of a copy thereof, and of notice of application for this order, on the attorney for the plaintiff, and on motion of Mr. C. W. Bangs, attorney for the defendant in this action, no one appearing to oppose, it is ordered, that the said petition and bond be accepted and filed, and that this court will proceed no further in this suit, and it is hereby declared that the said suit is removed to the said circuit court of the United States for the Southern district of New York." The petition to the state court is dated March 3d, 1879, and sworn to the next day. It sets forth, that the defendant "is, and is alleged in the complaint to be, a corporation created and existing under and by virtue of the laws of the state of Minnesota, and that it is alleged in the complaint that the plaintiff is a resident of the city of Brooklyn, county of Kings and state of New York, and the plaintiff is, as your petitioner is informed and believes, a citizen of the state of New York, and the defendant corporation is a citizen of the state of Minnesota." The bond referred to in said order contains this recital: "Whereas the said Samuel McLean, a citizen of the state of New York, has commenced an action in the court of common pleas for the city and county of New York, against the St. Paul and Chicago Railway Company, a citizen of the state of Minnesota, * * * and the said action involves a controversy between citizens of different states."

The first day of the next session of this court after the 17th of March, 1879, was the 7th of April, 1879. The defendant did not file a copy of the record in the suit in this court on the 7th of April, nor did it enter an appearance in this court in this suit on the 7th of April, nor until the 10th of April, on which latter day it did file in this court a copy of such record, and enter its appearance in this suit in this court, and enter a rule in this court that this action proceed in this court as if originally commenced therein, of which notice was given to the plaintiff's attorney on the 10th of April.

The plaintiff now moves this court to remand this cause to the state court, on two grounds: (1.) Because the proceedings for the removal do not show that, at the commencement of the suit, the plaintiff was a citizen of the state of New York, but only

show that the plaintiff was a citizen of the state of New York at the time the defendant applied to remove the cause; (2.) Because the record was not filed in this court until the 10th of April.

In Insurance Co. v. Pechner, 95 U. S. 183, a petition for removal on the ground of citizenship was presented to the state court under section 12 of the act of September 24, 1789 (1 Stat. 79), which provided, that, "if a suit be commenced in any state court," "by a citizen of the state in which the suit is brought, against a citizen of another state," "and the defendant shall, at the time of entering his appearance in such state court, file a petition for the removal of the cause for trial into the next circuit court," "it shall then be the duty of the state court to" "proceed no further in the cause." The petition was dated ten days after the suit was commenced, and was sworn to the next day after its date, and it was presented to the state court at the time the appearance of the defendant was entered in that court. The statement of the petition as to the citizenship of the plaintiff was, that the plaintiff "is a citizen of the state of New York." The state court denied the application for removal. The plaintiff had a judgment. The case went to the court of appeals of New York, which held (Pechner v. Phoenix Ins. Co., 65 N. Y. 195), that the state court had a right to proceed with the cause, because the petition for removal did not show that the plaintiff was a citizen of the state of New York when the suit was commenced. The case was then taken to the supreme court of the United States. That court held that section 12 of the act of 1789, in the language above quoted, had reference to the citizenship of the parties when the suit was begun. It added: "The phraseology employed in the acts of 1866 (14 Stat. 307), 1867 (14 Stat. 558), and 1875 (18 Stat. 470), and in Rev. St. § 639, is somewhat different, and we are not now called upon to give a construction to the language there used. As to the act of 1789, we entertain no doubt in this particular. This right of removal is statutory. Before a party can avail himself of it, he must show upon the record that his is a case which comes within the provisions of the statute. His petition for removal, when filed, becomes a part of the record in the cause. It should state facts which, taken in connection with such as already appear, entitle him to the transfer. If he fails in this, he has not, in law, shown to the court that it cannot 'proceed further with the cause.' Having once acquired jurisdiction, the court may proceed until it is judicially informed that its power over the cause has been suspended. It remains only to apply this rule to the facts as they appear in this record. The suit was commenced June 1, 1867. At that time there was nothing in the pleadings or process to indicate the citizenship of the plaintiff. The defendant, in its petition for removal, bearing date June 11, simply stated that the plaintiff is—that is to say, was at that date—a citizen of New York. This, certainly, is not stating affirmatively that such was his citizenship when the suit was commenced. The court had the right to take the case as made by the party himself, and not inquire further. If that was not sufficient to oust the jurisdiction, there was no reason why the court might not proceed with the cause. We think, therefore, that the court of appeals did not err in its decision."

As there was nothing before the state court in this case, and there is nothing before this court, to show that the plaintiff was a citizen of the state of New York when this suit was commenced, it follows that this court would have no jurisdiction of this suit if the removal were sought under a statute worded as is section 12 of the judiciary act of 1789. But the order of removal shows that the state court regarded the case as one of removal under sections 2 and 3 of the act of March 3, 1875 (18 Stat. 470, 471). Section 2 of that act provides, "that any suit of a civil nature, at law or in equity, now pending or hereafter brought in any state court, * * * in which there shall be a controversy between citizens of different states, * * * either party may remove said suit into the circuit court of the United States for the proper district." Section 3 of that act provides, "that, whenever either party * * * entitled to remove any suit mentioned in the next preceding section shall desire to remove such suit from a state court to the circuit court of the United States, he or they may make and file a petition in such suit in such state court, * * * for the removal of such suit into the circuit court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such circuit court on the first day of its then next session, a copy of the record in such suit, * * * and also for there appearing * * * in such suit, * * * it shall then be the duty of the state court to accept said petition and bond and proceed no further in such suit * * *; and, the said copy being entered as aforesaid in said circuit court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said circuit court."

The defendant contends, that, under the act of 1875, it is not necessary, in order to a removal in the present case, that it should appear that the parties were citizens of different states when the suit was commenced.

The act of March 2, 1867 (14 Stat. 558) provided, "that, where a suit is now pending or may hereafter be brought in any state court, in which there is controversy between a citizen of the state in which the suit is brought and a citizen of another state, * * * such citizen of another state, whether he be plaintiff or defendant, if he will make and file in

such court an affidavit stating * * * may, at any time before the final hearing or trial of the suit, file a petition in such state court for the removal of the suit into the next circuit court of the United States to be held in the district where the suit is pending, and offer good and sufficient surety * * *; and it shall be thereupon the duty of the state court to accept the surety and proceed no further in the suit."

In Johnson v. Monell [Case No. 7,399], the plaintiff, being a citizen of Iowa, brought a suit in a state court of Nebraska against a citizen of Nebraska. During the pendency of the suit the plaintiff became a citizen of Nebraska, and the suit was tried in the state court while both of the parties were citizens of Nebraska. The plaintiff had a verdict. A new trial was granted on the application of the defendant. The plaintiff, having again, and voluntarily, become a citizen of Iowa, then petitioned, under the act of 1867, for the removal of the suit into the circuit court of the United States for the district of Nebraska, the defendant having remained throughout, and being still, a citizen of Nebraska. The state court made an order removing the cause, and the defendant then moved the circuit court to dismiss the case, or remand it to the state court, for want of jurisdiction. The motion was heard before Mr. Justice Miller and Judge Dundy. The court held that the act of 1867 was within the constitutional power of congress. The court then proceed, Mr. Justice Miller delivering the opinion: "The next question is, whether the fact that, pending the litigation in the state court, the plaintiff changed his citizenship from Nebraska to Iowa, stands in the way of the removal of the cause? The act does not, in terms, prescribe the time at which the citizenship of the moving party must be acquired. Nor is there anything from which to imply that a time was intended to be limited in that regard. Had congress intended to confine the privileges of the act to parties who were citizens of different states at the commencement of the suit, it would have been very easy so to have provided. It did not see fit so to do. On the other hand, in express terms, or, at least, by the strongest implication, it provided otherwise. The language is: 'Where a suit is now pending, or may hereafter be brought, in any state court, in which there is a controversy between a citizen,' &c., which is as much as to say, whenever a controversy shall arise, in a suit pending in a state court, the parties to which shall at any time be citizens of different states, the cause may be removed. No time at which the citizenship shall be acquired is limited. So, the inference is, that it may be acquired at any time. Nor is the case changed by the circumstance that the citizenship in Nebraska was abandoned, and that in Iowa acquired voluntarily, or even for the purpose of securing the right of removal. It has been repeatedly held, that the fact that a party had removed from one state to another, in order to be able to bring his suit in the federal court, did not affect the jurisdiction." The conclusion of the court was, that congress intended, in reference both to plaintiffs and to defendants, to confer the right of removal from the state courts, at any stage of the proceedings before the final trial was begun, and when the requisite citizenship was found to exist, on the making of the proper affidavit and the giving of the required bond. In the particulars involved in the suit now before us, the provisions of the act of 1875 are like those of the act of 1867. This suit is within the terms of section 2 of the act of 1875. It is a civil suit, brought in the state court after the passage of the act of 1875, the matter in dispute exceeds the requisite amount, and there is a controversy in it between citizens of different states. The petition and bond were in proper form. The state court accepted them and made the order of removal. The expression in the act of 1875, "any suit now pending or hereafter brought, in which there shall be a controversy between citizens, either party may remove it," is in the same form, and must have the same meaning, in respect to the point now under consideration, as the expression in the act of 1867, "where a suit is now pending or may hereafter be brought, in which there is a controversy between a citizen and a citizen, the latter citizen, whether plaintiff or defendant, may file a petition for the removal of the suit." The observations of Mr. Justice Miller in regard to the act of 1867 apply fully to the act of 1875.

In McGinnity v. White [Case No. 8,802], the plaintiff, in February, 1870, brought a suit in a state court of Nebraska, against five defendants. One of them, White, after answering, and in April, 1875, filed a petition for the removal of the suit into the circuit court of the United States for the district of Nebraska, under the act of July 27, 1866 (14 Stat. 306). The petition set forth that White "is now, and, since the 19th day of February, 1873, has been, a citizen of the state of New Jersey," and that "the plaintiff is, and was at the time of bringing the suit, a citizen of Nebraska," and contained the other necessary averments. The state court made an order removing the cause. A motion was made before the circuit court, held by Judges Dillon and Dundy, to remand the cause to the state court. The opinion of the court was delivered by Judge Dillon. He cites the case of Johnson v. Monell [supra] as having determined, that, under the act of 1867, "a party to a suit, who, while it is pending, becomes a bona fide citizen of another state, is entitled, if the other required conditions are met, to have the case removed." He adds: "As both acts give the right to apply for the removal 'at any time before the trial or final hearing of the cause,' I can see no difference in this respect between the act of 1866 and the act of 1867, and the reason-

ing in the case cited seems to be applicable here and to favor the right of removal. Pending the suit in the state court, the defendant has, in good faith, become a non-resident of the state of Nebraska, and a citizen of another state, and it is this which constitutes the substantial ground upon which the right, under the act of 1866, to the removal, is based." The motion to remand was denied. See, also, Yulee v. Vose [99 U. S.] 539.

On the facts set forth in the petition in this case, this suit was and is one properly removable into this court, under the act of 1875.

As to the non-filing of the record by the 7th of April, the 3d section of the act of 1875 provides, that, when the proper petition and bond, in a proper suit, are presented to the state court, it shall be the duty of that court to accept them and proceed no further in the suit. It then goes on to provide, that "the said copy," that is, a copy of the record in the state court, in the suit, "being entered as aforesaid in said circuit court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in said circuit court." The words "as aforesaid" are found in the same connection in section 12 of the act of 1789, and in section 5 of the act of March 3, 1863 (12 Stat. 757) and in the act of 1866, and in the act of 1867, and in section 2 of the act of July 27, 1868 (15 Stat. 227), and in section 639 of the Revised Statutes. They cannot properly have any other meaning than that, when the copy is entered by the party removing the cause, it must be entered at the time mentioned before as the time to be named in the bond, namely, the first day of the then next session of the circuit court. It is true, that there are exceptional cases provided for in section 7 of the act of 1875, in which it is declared that the bond may be satisfied and discharged by the filing of the copy of the record by the party removing the cause after the day named in the bond. But the present case is not one of such exceptional cases. The term of this court to which this suit was removable commenced more than twenty days after the petition and bond were filed in the state court, and it does not appear that the clerk of the state court refused to furnish a copy of the record. On the contrary, the certified copy of the record filed in this court was certified by such clerk on the 18th of March, 1879. The two cases in this court, of Broadnax v. Eisner [Case No. 1,909], and Bright v. Milwaukee & St. P. R. Co. [Id. 1,877], are authorities to show that the defendant has lost its right to perfect the removal of this cause, and that this cause must be remanded. The plaintiff has not waived the delay in filing the copy, nor does the allegation in the affidavit of the defendant's attorney, that, by inadvertence, the copy was not filed on the first day of the term, furnish a sufficient excuse to authorize this court to say that it acquired jurisdiction of the cause by the filing of the copy on the 10th of April. The case last cited is authority, also, for holding, that there is nothing in section 5 of the act of 1875 which prevents this court from remanding this cause. The case of Osgood v. Chicago, D. & V. R. Co. [Id. 10,604] was, on the facts involved in the decision of it, not like the present case. The copy of the record of the state court had, in that case, been filed in the circuit court in time by the party removing the cause, and the cause had, in all respects, been "removed" to the circuit court, within the language of section 5. The present case has not been "removed" to this court, because that has not been done which, under section 3 of the act, authorizes this court to proceed in the suit. In regard to what is said in the case of Osgood v. Chicago, D. & V. R. Co. [supra] respecting the authority of the circuit court, since section 5 of the act of 1875 was enacted, to dismiss and remand causes, it may be observed, that the provisions of it are enabling and not prohibitory, and that they are such as not to indicate any intention in congress to take away from the circuit court the power of remanding a cause to the state court, on the ground that the prescribed prerequisites necessary to authorize the circuit court to proceed in the cause have not been complied with.

The motion to remand this cause to the state court is granted, with costs to be taxed.

[This order, together with the subsequent order of December 22, 1879 (Case No. 8,893), was affirmed by the supreme court, on writ of error. 108 U. S. 212, 2 Sup. Ct. 498.]

Case No. 8,893.

McLEAN v. ST. PAUL & C. RY. CO.

[17 Blatchf. 363; 26 Int. Rev. Rec. 43; 21 Alb. Law J. 47; 14 Am. Law Rev. 163.] [1]

Circuit Court, S. D. New York. Dec. 22, 1879.[2]

REMOVAL OF CAUSES — SECOND PETITION — SAME TERM OF COURT — EDITION OF UNITED STATES STATUTES—BOND ON REMOVAL—WAIVER BY NEGLECT—EXCUSE.

1. On March 17th, the state court in which this suit was pending made an order, on the petition of the defendant, that it be removed into this court. The defendant ought to have filed the record in this court by April 7th. It was not filed till April 10th. This court, on May 24th, made an order remanding the cause. June 2d, on a new petition filed that day by the defendant, which set forth that the suit was then pending in the state court, that court made an order that the suit be removed into this court: *Held*, that, as the removal was provided for by sections 2 and 3 of the act of March 3, 1875 (18 Stat. 470, 471), the petition was in time if filed before or at the term at which the cause "could be first tried, and before the trial thereof."

[Cited in Davies v. Marine Nat. Bank, 24 Fed. 195.]

[Cited in Continental Life Ins. Co. v. Kessler, 84 Ind. 313.]

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission. 14 Am. Law Rev. 163, gives only a partial report.]

[2] [Affirmed in 108 U. S. 212, 2 Sup. Ct. 498.]

2. The publication of the second edition of the Revised Statutes, under the act of March 2, 1877 (19 Stat. 268), did not re-instate subdivision 1 of section 639 of the Revised Statutes, as applicable to this suit. The proper condition of the bond on removal was that prescribed by section 3 of the act of 1875.

[Cited in Norris v. Mineral Point Tunnel, 7 Fed. 273; Shelbrick v. Cockcroft, 27 Fed. 579.]

3. The petition of June 2d was filed before or at the term at which the cause could be first tried.

[Cited in Johnson v. Johnson, 13 Fed. 194.]

4. As the defendant had once removed the cause to this court and had failed, by neglect, to perfect the removal, and the cause had been remanded for that reason, the right to remove it had been waived and lost.[2]

[Cited in Rowell v. Hill, 28 Fed. 434.]

5. The defendant could not now be allowed to furnish an excuse for not having in time filed the record on the first removal, and it had acquiesced in the first remand by averring, in the second petition, that the cause was then pending in the state court.[2]

[Cited in Woolridge v. McKenna, 8 Fed. 667.]

[This was a suit by Samuel McLean against the St. Paul & Chicago Railway Company.]

D. M. Porter, for plaintiff.

C. W. Bangs, for defendant.

BLATCHFORD, Circuit Judge. A petition by the defendant and a bond for the removal of this suit into this court were filed in the state court in which the suit was pending, on the 17th of March, 1879, and on that day the state court made an order that the petition and bond be accepted and filed, "and that this court will proceed no further in this suit, and it is hereby declared that the said suit is removed to the said circuit court of the United States for the Southern district of New York." The defendant ought to have filed a copy of the record in this court by the 7th of April, but did not until the 10th of April. For that cause, this court made an order, on the 24th of May, on motion of the plaintiff, remanding the cause to the state court. [Case No. 8,892.] On the 2d of June, 1879, the defendant filed in the state court a petition and bond for the removal of the cause into this court, and the state court made an order, on that day, that said petition and bond be accepted, and "that this court will proceed no further in this suit, the said suit being removed to the said circuit court of the United States for the Southern district of New York." A copy of the record in the suit having been filed in this court in due time by the defendant, and the defendant having appeared in the suit in this court, the plaintiff now moves, on various grounds, to remand the cause to the state court.

It is contended that, under subdivision 1 of section 639 of the Revised Statutes of the United States, the petition for removal in this case should have been filed in the state court at the time the appearance of the defendant was entered in the state court. This is on the idea that such subdivision was in force, as respects this suit. But, as the removal of this case is provided for by sections 2 and 3 of the act of March 3, 1875 (18 Stat. 470, 471), those sections supersede, and take the place of, in regard to this suit, such subdivision. Under the act of 1875, the petition was in time if filed before or at the term at which the cause "could be first tried, and before the trial thereof." It is suggested, for the plaintiff, that the second edition of the Revised Statutes, printed and promulgated in 1878, is a re-enactment of the Revised Statutes in 1878, and that subdivision 1 of section 639, found in it, displaces the act of 1875. This is an error. The Revised Statutes were enacted June 22, 1874. The new or second edition authorized by the act of March 2, 1877 (19 Stat. 268), is the Revised Statutes, as enacted June 22, 1874, with all amendments made between December 1, 1873, and March 4, 1877. By section 5601 of the Revised Statutes, all acts passed after December 1, 1873, are left in force as if passed after June 22, 1874. The publication of the second edition of the Revised Statutes does not affect any statute passed subsequently to December 1, 1873. It does not affect the act of March 3, 1875, nor re-instate subdivision 1 of section 639, as applicable to this suit.

It is urged, that the bond in this case is not the proper bond, because its condition was not that provided for by section 639, Rev. St., but that provided for by section 3 of the act of 1875. As the suit is one mentioned in section 2 of that act, the proper condition of the bond was that prescribed by section 3 of that act.

It is further urged, that the petition filed June 2d, 1879, was not filed before or at the term at which the cause "could be first tried" in the state court, although filed before the trial of the cause in that court. Issue was joined in the suit, by the answer of the defendant in the state court, February 27, 1879. The order of removal made by the state court March 17, 1879, states that the petition for removal that day filed is filed "before the term at which this cause could be first tried in this court." This is an adjudication of that fact by the state court. Even if such an adjudication would be reviewed by this court, it is apparent, that the cause could not have been tried before the March term, 1879, of the state court, and at that term the petition was filed. It is plain, from sections 977, 980, of the Code of New York, that the cause could not have been noticed for trial, or put on the calendar of the state court, for the March term, or regularly brought to trial at that term, except by consent. The term at which the cause "could be first tried" is the term at which, under the legislation of the state and the rules of practice pursuant thereto, the cause is first triable, that is, subject to be tried on its merits. Dill. Rem. Causes (2d Ed.) p. 57; Ames v. Colorado Cent. R. Co. [Case No. 325]; Fulton v. Golden [Id. 5,155].

[2] [Affirmed in 108 U. S. 212, 2 Sup. Ct. 498.]

On the 17th of March, 1879, the state court declared, by the order of that date, that it would proceed no further in the suit and that the suit was removed to this court. This was equivalent to saying it would not try the cause. This state of things continued until this court, by its order of May 24th, remanded the cause to the state court. Then, under the state legislature and practice, the term at which the cause could be first tried was the June term, and at or before that term the new petition for removal was filed. So far, therefore, as the question of time is concerned, the new petition was filed in time, under the act of 1875.

It is further urged that, the defendant having once removed the cause to this court, and having failed to perfect the removal by neglect to file the record in time in this court, and the cause having been remanded to the state court for that reason, the right to remove the cause has been lost, because the delay is prejudicial to the plaintiff; and that, if the right to remove is to be allowed in this case, under such circumstances, the same course might be repeated ad infinitum. That a defendant may waive his right to remove a cause is plain. Hanover Nat. Bank v. Smith [Case No. 6,035]. He ought to be held to have waived it where he has attempted to exercise it once, and has failed, by neglect, to perfect the removal, and where, to allow the subsequent removal, would make effective the delay of the cause, to the presumed prejudice of the plaintiff, for the time elapsed after the failure to perfect the removal occurred. That is the present case.

The defendant calls attention to the recent decision of the supreme court in Meyer v. Construction Co., 100 U. S. 457, and claims that, under that decision, this cause ought not to have been remanded before, and, therefore, ought to be retained here now. The supreme court, in that case, says, that it does not appear, by the statute, that the circuit court is to be deprived of its jurisdiction, if "by accident" the party is delayed until a later day than the first day of the term of the circuit court, in filing a copy of the record of the state court; and that, if the circuit court, for good cause shown, accepts the transfer after the day and during the term, its jurisdiction will, as a general rule, be complete and the removal properly effected. The affidavit of the defendant's attorney, furnished to the court on the first motion to remand, purporting to give an excuse in this case for not filing the copy of the record, on the first removal, on the first day of the April term, and to make out a case of "accident," contained the following on that subject and nothing more: "And deponent says, that, by inadvertence, during his, deponent's, absence from his office on the 7th April, instant, the record, in said cause, of the said proceeding, in the court of common pleas of the city and county of New York, in the said action, and a copy of the pleadings therein, was not filed in the court on that day, and that deponent did not discover that the same had not been filed until the 10th instant." This affidavit does not make out a case of accident. Facts are not stated from which the court can see that there was an inadvertence or an accident. The conclusion of inadvertence is sworn to. The certified copy of the petition for removal, bond, and order of removal, filed in this court on the 10th of April, was certified by the clerk of the state court on the 18th of March. No reason is shown why it was not filed here before the 7th of April, as it might have been. This court did not accept the transfer, but remanded the cause. It did so on what then appeared, and still appears, to be a proper ground. This court could not now vacate the order of May 24th, remanding the cause, on the furnishing now, by the defendant, of an affidavit showing what would have been held to be a satisfactory excuse for not having filed the first record in time, or a case of "accident." The defendant had his day in court, at that time, and the matter became res adjudicata, not to be re-opened because of any facts then existing and which might have been then shown. Moreover, the defendant has acquiesced in the former remand, and waived all right to claim that the cause is in this court under the first removal, by averring, in its second petition for removal, that the suit "is now," May 28th, 1879 (that being the day the petition was sworn to by the president of the defendant corporation), "pending in the court of common pleas for the city and county of New York," and praying for its removal from that court to this court.

The motion to remand the cause to the state court is granted, with costs.

[This order, together with that of May 24, 1879 (Case No. 8,892), was affirmed by the supreme court, on writ of error. 108 U. S. 212, 2 Sup. Ct. 498.]

McLEAN (SMITH v.). See Case No. 13,074.

McLEAR (CANBY v.). See Case No. 2,378.

Case No. 8,894.

In re McLELLAN.

[The case reported under above title in 6 Law Rep. 440, is the same as Case No. 17,887.]

McLELLAN (BUTLER v.). See Case No. 2,242.

McLELLAN (RUSSELL v.). See Case No. 12,158.

Case No. 8,895.

McLELLAN v. UNITED STATES.

[1 Gall. 227.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1812.

COURTS—APPEAL IN ADMIRALTY—WRIT OF ERROR—CIRCUIT COURT—CONDEMNATION—JUDGMENT ON BAIL BOND.

1. The circuit court of Massachusetts has no cognizance of causes of admiralty and maritime jurisdiction from the district court of Maine, except by appeal; and a writ of error thereon will be quashed.

[Cited in U. S. v. Jarvis, Case No. 15,469.]

2. Semble, that in cases within the collection act of March 2, 1799, c. 128, § 89 [1 Story's Laws, 653; 1 Stat. 695, c. 22], judgment cannot be rendered on the bail bond until after twenty days from the decree of condemnation, and then in open court.

[Cited in The Hollen, Case No. 6,608. Cited in brief in Nelson v. U. S., Id. 10,116. Cited in The Wanata v. Avery, 95 U. S. 616; U. S. v. Ames, 99 U. S. 41.]

[Cited in Bartlett v. Spicer, 75 N. Y. 532; Mitchell v. Chambers, 43 Mich. 158, 5 N. W. 63.]

See The Struggle [Case No. 13,550].

This was a writ of error brought to reverse the decision of the district court of Maine in a cause of admiralty and maritime jurisdiction. A motion was made to dismiss the writ of error, upon the ground that this cause was cognizable only by way of appeal, and not by writ of error. On inspection of the record it appeared, that the libel was filed against certain goods, for being unladen within the district of Saco without a permit from the collector of the district, contrary to the act of 2d March, 1799, c. 128 [chapter 22]. Pending the prosecution, on application of the claimant [Joseph McLellan] the goods were delivered to him on appraisement and giving a bond pursuant to, or intended to be pursuant to, the 89th section of the same act. A decree of condemnation passed against the goods at January term, 1812, and it was thereupon, in the same decree, further awarded by the court, that the appraised value thereof should be paid to the clerk of the court, together with the costs of prosecution, in twenty days from the award of judgment, and in default thereof, that execution should issue for the sums aforesaid against the claimant and his surety on the bond. No appeal was interposed from the decree to the next circuit court, and the cause had been removed to this court at this term upon the writ of error.

Mr. Jackson for plaintiff in error. The judgment on the bond is distinct from the decree, though coupled with it. The one is at common law; the other, is of admiralty jurisdiction. The bond under the collection act differs from the stipulation under the embargo acts, and is not analogous to the stipulations in admiralty. The judgment, therefore, is a judgment at common law, on which error may well lie. By section 89 of the collection act, judgment on the bond is to be rendered in open court on motion, unless the appraised value is paid within twenty days from the decree of forfeiture. The motion is equivalent to a scire facias, where there is a recognizance. This judgment having been rendered forthwith, without waiting the expiration of the twenty days, is erroneous.

Mr. Lee, district attorney of Maine, contended that the bond resembled a stipulation, and therefore the decision below was a decree of the admiralty, not a common law judgment.

STORY, Circuit Justice (after reciting the facts). On examining the language of the judiciary act of 24th September, 1789, c. 20 [1 Stat. 73], I am satisfied that a writ of error is not the proper process, to remove the decree of the district court of Maine for re-examination into this court. The mode prescribed by law is by appeal to the next circuit court, and as no such appeal was claimed or allowed, the party cannot now take advantage of any errors of fact or law apparent in the cause, so far as it is a cause of admiralty and maritime jurisdiction. But it has been contended by the counsel for the claimant, that although the original decree of condemnation cannot now be inquired into, yet the award of judgment and execution upon the bond is to be considered as a distinct judgment at common law, and that a writ of error lies to correct the errors of law in such judgment; and it is further contended, that the award of judgment and execution in the case at bar, not having been in open court after the lapse of twenty days from the rendition of the decree, is irregular and voidable.

On examining the 89th section of the act under which this bond is taken, it appears that "if judgment shall pass against the claimant, as to the whole or any part of such ship or vessel, goods, wares or merchandize, and the claimant shall not within twenty days thereafter pay into the court, or to the proper officer thereof, the amount of the appraised value of such ship, &c., &c., so condemned, with the costs, judgment shall, and may be granted upon the bond on motion in open court, without further delay." It would seem, therefore, that the judgment on the bond ought to be in open court, after the lapse of the twenty days, and not before. If we had cognizance of the present suit, I should incline to think, that the judgment was irregularly rendered. But I am well satisfied, that upon the true construction of the act, this judgment cannot be considered as a distinct, independent judgment at common law; but as a mere incident and attendant upon the original cause. If the claimant had appealed from the decree of condemnation, the bond would have followed the cause into this court, and upon affirmation of

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

the decree, the fruits of the bond might have been obtained in the same manner, as in the court below. The bond, in fact, is nothing more than a security taken to enforce the original decree; and is in the nature of a stipulation in the admiralty. It matters not whether a security in an admiralty and maritime cause be by bond, or recognizance, or stipulation. The court have an inherent authority to take it, and to proceed to award judgment thereon according to the course of the admiralty, unless where some statute has prescribed a different course. I consider this act as merely providing a new practice, as to admiralty proceedings on bonds within the purview of it, but by no means as separating the bond from its connexion with the original cause. Following, therefore, the nature of the original cause, it operates as a stipulation, and the court as a court of admiralty may rightfully award execution thereon. See Brymer v. Atkins, 1 H. Bl. 164.

Strictly speaking, a decree of condemnation, in cases like the present, is but an interlocutory having the effect of a final decree, and the ultimate adjudication of the cause is not complete, until judgment has been awarded upon the bond. In the case of The Alligator [Case No. 248], at the last term, the court had occasion to consider the nature and effect of bonds given in admiralty suits, and I refer to that case, as containing my own settled opinion. I am of opinion, that the writ of error should be quashed as having issued improvidently.

As the district judge concurs in this opinion, let the writ of error be quashed. Writ quashed.

McLELLAN (UNITED STATES v.). See Case No. 15,698.

McLELLAN (WEAVER v.). See Case No. 17,309.

McLELLAN (WINSOR v.). See Case No. 17,887.

Case No. 8,896.

McLELLAND v. The ROBERT MORRIS.

[3 Pa. Law J. 493; 1 Wall. Jr. 33; 2 Pa. Law J. Rep. 220.]

Circuit Court, E. D. Pennsylvania. Nov. 12, 1842.

MARITIME LIENS—REPAIRS TO VESSEL—STATE AND FEDERAL COURTS.

The repair of a vessel used to navigate tide-water, although used partly on inland navigation, is a maritime contract, and the mechanics and material men may proceed in the courts of the state or of the United States, and they may take a reasonable time to commence their proceedings. And the jurisdiction of the admiralty court cannot be ousted by any proceeding in the state courts by the owners or agents of the vessel.

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

The Robert Morris is a large canal boat, decked and rigged as a schooner, employed in carrying lime, &c., from Norristown, on the Schuylkill Canal, down the rivers Schuylkill and Delaware, to Salem, New Jersey, and occasionally through the Chesapeake and Delaware Canal into Maryland, returning with wood or such other cargo as could be procured. In February and March, 1842, she was repaired at the shipyard of the libellant, who retained possession of her until she was taken from his custody by the sheriff of the city and county of Philadelphia, under a replevin issued from the state courts. The libellant then filed a libel in the admiralty, and the vessel was attached for the amount of his demand. The claimant moved to have the attachment quashed, for want of jurisdiction in the court. (1) Because neither the vessel nor the contract was of a maritime character. (2) Because by the replevin the state courts had possession of the subject-matter, and therefore exclusive jurisdiction.

After argument by H. Hubbel, for the claimant, and Vandyke for the libellant, a motion was dismissed by Randall, J., and the claimant ordered to answer over. After a final decree for the libellant, the cause was removed to the circuit court, where the following opinion was delivered by

BALDWIN, Circuit Justice: In the case of The General Smith, 4 Wheat. [17 U. S.] 443, the supreme court declared that by the common law "material men and mechanics furnishing repairs to a domestic ship have no particular lien on the ship itself for the recovery of their demands. A shipwright, indeed, who has taken a ship into his own possession to repair it, is not bound to part with the possession until he is paid for the repairs, any more than any other artificer. But if he has once parted with the possession, or has worked upon it without taking possession, he is not deemed a privileged creditor, having any claim upon the ship itself." "No lien is implied unless it is recognized by the municipal law of the state to which the ship belongs." In the case of Peroux v. Howard, 7 Pet. [32 U. S.] 341, it was held that a proceeding in rem against a steam-boat for materials found and work performed in repairing the vessel in the port of New Orleans, under a contract entered into between the parties for that purpose, that it was a maritime contract, and if the service was to be performed in a place within the jurisdiction of the admiralty, and a lien was given by the law of Louisiana, it would bring the case within the jurisdiction of the district court, and may be enforced in the admiralty. "The service was to be substantially performed, on the sea or on tide-water, because there is no doubt that the jurisdiction exists, although the commencement or termination of the voyage may happen to be at some place beyond the reach of the tide; the material consideration is whether the service is essentially a maritime service." The Jefferson, 10 Wheat.

[23 U. S.] 428. "A contract made at land within the body of a county is maritime in its nature, if it concerns the navigation of the sea." Zane v. The President [Case No. 18,201]. The true test (of the admiralty jurisdiction) in all cases of this sort is whether the vessel shall be engaged substantially in maritime navigation, or in interior navigation, and trade not on tide-waters. In the latter case there is no jurisdiction, nor where the services are not maritime, for its jurisdiction in matters of contract is limited to those, and those only, which are maritime. The Orleans v. Phoenix, 11 Pet. [36 U. S.] 183, 184. In that case the court thus explains the principles laid down in the case of The General Smith and Peroux v. Howard [supra]: "The contract was treated as a maritime contract, and the lien under the state laws was enforced in the admiralty, on the ground that the court under such circumstances had jurisdiction of the contract as maritime, and then the lien being attached to it might be enforced according to the mode of administering remedies in the admiralty. The local laws can never confer jurisdiction on the courts of the United States; they can only furnish rules to ascertain the rights of parties, and thus assist in the administration of proper remedies where the jurisdiction is vested by the laws of the United States." Id. 184.

Reluctant as I have been, and yet am, to extend the jurisdiction of the courts of admiralty beyond the limits defined by the common law, it would not comport with my duty to hesitate to follow the rules and be guided by the principles laid down in the preceding cases. They are the law of the case, and must be taken to be the law of this court, till changed or modified by the tribunal which has established and prescribed them for the observance of all inferior courts. The record and admitted facts in this case bring it within these decisions. The Robert Morris was employed in navigation on tide-water. That the commencement of her voyages was on one canal and their termination in another, both above tide-water, does not make her intermediate courses "interior navigation." The contract is maritime, for it was the navigation of tide-water which was substantially the service of the schooner. The repairs were made in this port, which is within admiralty jurisdiction. The state law gives a lien, and consequently the libellant has made out a case cognizable by the district court according to the course of the admiralty.

It is, however, contended by the counsel of the claimant, that the lien given by the state law was superseded by the replevin under which the schooner was taken from the possession of the libellant by the claimant, and retained by him at the time she was attached on the libel at a place above tide-water. Had the replevin been issued under any provision of the state law which gave the lien, it might have been considered as a qualification of the lien, and made it subject to be defeated by that process; but the law does not so qualify the lien, or in any way subject it to the forms or delay of proceedings according to the course of the law; above all not to the effects of an action of replevin, which is one of the most tedious cases, if not the most so, when conducted through all its stages, which is known to the law. On the contrary, the state law gives to the state court powers to enforce the lien according to the course of courts of admiralty, which would be utterly defeated if the possession of the vessel was to be taken under a writ of replevin while in the hands of those to whom the law gives a lien, and who have a right to enforce it by the process and course of proceedings appropriate to a court of admiralty, unless they had in some way lost their lien before the replevin was taken out. Having an acknowledged lien, the material men and mechanics have an election to proceed in the courts of the state or of the United States. They may take a reasonable time to commence their proceedings, and cannot be deprived of their remedy by any act of the owners or agents of the vessel, which affects to displace the jurisdiction of admiralty, and send those who have a right to its remedies into another tribunal, where they would lose, or could but partially enjoy the benefits which the maritime law permits privileged creditors in maritime courts. I very much doubt whether a court of the state would permit its jurisdiction, under the law of the state giving the lien in such a case as this, to be thus ousted; but certainly this court, in the administration of the jurisprudence of the United States, cannot sanction the doctrine contended for on the part of the respondents as to the effect of the replevin he has sued out; nor can we consider the consequent removal of the vessel to a place beyond the flow of the tide, as at all impairing the admiralty jurisdiction of the district court over her, resulting from the lien in a case completely covered by the decisions of the supreme court.

Decree of the district court affirmed, with costs, and interest from the date of the decree.

McLENNAN (PARKER v.). See Case No. 5,334.

Case No. 8,897.

McLEOD v. CALLICOTT.

[Chase, 443;[1] 10 Int. Rev. Rec. 94; 2 Am. Law T. Rep. U. S. Cts. 113.]

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

WAR — CAPTURED AND ABANDONED PROPERTY — TREASURY AGENT—HOW PROPERTY RECOVERED—COURT OF CLAIMS.

1. No agent of the U. S. treasury department under the captured and abandoned property act, was justified in receiving after June 30, 1865, any captured or abandoned property unless theretofore surrendered by Confederate agents or officers, much less making any seizure of unsurrendered property.

2. Property surrendered by the military authorities of the Confederate government could not be released by any state or provost court.

3. A treasury agent, acting under color of the captured and abandoned property act, under which he is appointed, or under a mistaken sense of duty, can not be held responsible in a suit at law, or other personal proceeding.

[Cited in Lamar v. McCulloch, 115 U. S. 163, 6 Sup. Ct. 11.]

4. The only remedy provided for the injured party is his right to prosecute his suit before the court of claims, within two years after the close of the war.

During the Civil War, the congress of the United States, on March 12, 1863, passed a law known as the "Captured and Abandoned Property Act" [12 Stat. 820], which directed the secretary of the treasury to appoint certain agents, whose duties were to receive from the military officers and from private soldiers, all property captured by the forces of the United States within his agency. They were also to take possession of property abandoned by its owners, and all property thus received was sold by them, and it was provided that the proceeds should be paid into the treasury. The act further provided that all citizens of the United States who had remained loyal to the government of the United States during the war, should have the right at any time within two years after the close of the war to file their petitions in the court of claims, and on furnishing proof of their loyalty, that court was authorized to order the proceeds of such property to be returned to them out of the treasury of the United States. This being the law, and the war having practically terminated in May, 1865, the secretary of the treasury, on June 27, 1865, addressed a circular to those treasury agents charged with the duty of collecting captured or abandoned property, directing them to dispose of the property then on hand, and to refrain from receiving any more after the 30th inst.—except such as had been actually captured or surrendered by military or naval officers or agents of the Confederate States, and which had not been delivered before that day. On July 27, 1868 [15 Stat. 243], the congress passed another act declaring the intent of the several laws relating to captured and abandoned property, by which it declared that the true intent and meaning of those acts was that the remedy given before the court of claims, should be exclusive of all other remedies, and that the owner of any property taken as captured or abandoned by agents of the treasury department, in virtue or under color of said act, "should be precluded from suit at common law or any other mode of redress whatever, before any court or tribunal other than the court of claims." Under these circumstances, Callicott being a supervising agent of the treasury department of the United States, under the captured and abandoned property act, operating in South Carolina, on October 21, 1865, seized and carried off thirty-nine bales of cotton belonging to the plaintiff, Alexander McLeod. Thereupon McLeod made divers attempts to have his property restored to him. He took proceedings before the provost court, one of the military civil tribunals established in South Carolina by the military authority for this purpose, and failed, that tribunal adjudging that the seizure was proper, or that he had no remedy before it. He then applied to the secretary of the treasury, who ordered a restoration of it, and Callicott refused to do so, unless a bond of indemnity should first be given to himself. Thereupon, at the opening of this court in this district, this suit was brought, —an action of trespass to recover the value of the cotton, together with vindictive damages for the tort. The defendant plead specially that what he did was as special supervising agent of the treasury department, acting by virtue and under color of the captured property act, to this general replication. On the trial the plaintiff proved the taking of the cotton on October 21, 1865, and its value. That Callicott had told the witness Townsend, that he knew he had no authority to take the cotton, and that he would return it to McLeod, if he would pay him two hundred dollars, or some such matter. That a considerable correspondence had taken place between the plaintiff's counsel and Callicott, on the subject of a restitution of this cotton, in which they urged and argued the wrongfulness of the seizure, on the law and the facts, and on his refusing to restore it, they had made application to the secretary of the treasury, who eventually ordered its restitution. But that Callicott had suppressed in his report on the case to the department very material—the most material portions of this correspondence with counsel, and had refused to obey the order of the secretary unless the plaintiff gave him a bond to indemnify him from all future liability for his conduct. The defendant, on his part, proved and relied on the proceedings in the provost court as evidence of his bona fides in making the seizure, and as being the sentence of a court of competent jurisdiction, which had

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

adjudicated the rights between the parties in a suit before it, between the same parties, and about the same subject-matter.

J. B. Campbell, for plaintiff.
Corbin, U. S. Dist. Atty., for defendant.

CHASE, Circuit Justice (charging jury). The district attorney has asked for various instructions which the court will decline to give, not that we doubt the general correctness of most of the legal propositions contained in them, but we prefer to give you what we conceive to be the law in the case, in our own language, embodying the instructions asked, so far as we think them correct, in what we say. This is an action of trespass brought by Alexander McLeod against T. C. Callicott. The plaintiff alleges that thirty-nine bales of cotton belonging to him, were wrongfully taken by defendant and converted to his own use. The defendant pleads in justification, not denying the taking, but averring that what he did was done as special supervising agent of the treasury department of the United States, and in accordance with law. The plaintiff replies, denying the truth of this averment, and insisting that in what Callicott did he did not act as agent, but wrongfully and without justification in law. The pleadings present the issue which you are to try. First, did this cotton belong to Alexander McLeod, the plaintiff, in October, 1865? Was it his property at that date? And second, was the defendant justified in what he did by virtue of his office as supervising agent of the treasury? That the cotton belonged to the plaintiff, unless his title had been divested by capture, seems not to be questioned. The second question alone, therefore, is important. Under several acts of congress, during the late war, supervising agents of the treasury department were appointed in the several insurgent states, and charged with certain specific duties. Among these duties was that of receiving from the military officers of the United States all property captured by them, with instructions to turn it over to the proper authorities, for sale and for account. In respect to citizens of the United States, who had maintained a loyal adhesion to the government of the United States, it was provided by law that this property or proceeds should be returned to them upon making the necessary proofs in the court of claims, at any time within two years after the close of the Rebellion. It is alleged, and not denied, that Callicott was supervising agent, and had the general authority. It was his duty to receive from military officers, and from private soldiers, all property captured by the forces of the United States, during the recent war, within his agency.

If this case depended on this general authority, the only question to be determined would be whether the cotton in question was captured property. But there is something more in this case. These supervising agents were appointed by the secretary of the treasury, under regulations approved by the president of the United States, and were subject in all respects to his direction and control; and the general regulations established had relation only to a state of war. Now, actual hostilities between the insurgent states and the United States terminated practically in May, 1865. In the state of South Carolina a provisional government was organized, under a proclamation of the president, in June or July of that year, and the secretary of the treasury, having reference to the changed condition of affairs, on June 27, 1865, addressed a circular to those treasury agents, in which he prescribed a rule for their government in the new state of things. (The chief justice here read the fourth section of the circular.) This section provides that officers "charged with the duty of receiving and collecting, or having in their possession or under their control, captured, abandoned, or confiscable personal property, will dispose of the same in accordance with regulations heretofore prescribed, and refrain from receiving such from military or naval authorities after the 30th instant." The general regulation which required Mr. Callicott to receive all captured property from officers of the United States was thus rescinded on June 27, 1865, with the following limitation: "This will not be considered as interfering with the operations of agents now engaged in receiving or collecting the property recently captured by or surrendered to the forces of the United States, whether or not covered by or included in the records delivered to the United States military or treasury authorities by rebel military officers or cotton agents." The new regulation or prohibitory order, therefore, did not extend to property which had been captured or surrendered by military officers of the Confederate government to the United States. But with that exception the prohibition is complete and final, and no agent of the treasury department was justified in receiving, after June 30, 1865, any captured property, unless theretofore surrendered; much less was any such officer warranted in making any capture of unsurrendered cotton himself, after that date, with or without military aid. He had no authority to do so. All his powers, as we have said to you, were derived from the treasury department, and when the treasury department withdrew that general authority it was at an end. The question, then, in this case, is whether this was a part of the property which had been surrendered by the military authority of the Confederate government to the United States prior to June 27, 1865. You have heard all the evidence, and it is your province to determine whether or not this property was in that category. If it was, then it was Callicott's duty to receive it and transmit it to the authorities of the United States for sale, and the only remedy which the owner or claimant of the

cotton could possibly have would be by application to the court of claims of the United States. The whole matter seems to be narrowed down to the simple proposition whether the evidence before you satisfies your minds that the cotton was included in the surrender referred to in the secretary's instructions of June 27. If it was so included, then the court charges you that neither the action of the provost court, relied on by the defendant, nor the action of any state court could withdraw it from that category without the consent of the United States. If it was on June 27 captured property, in this sense, that is, property surrendered by the military authorities of the Confederate government to the United States, then it remained captured property, and could not be released by the action of the provost court. That action, if intended to have this effect, was without sanction of law, and of no avail. If it was such property, it was the duty of the defendant to take possession of it; if not, his seizure was unlawful. But there is another question, not necessarily determined by the character of the property, on which it is the duty of the court to make some observations. By an act passed on July 27, 1868, congress declared the intent of the several acts relating to captured property. Among these was the abandoned or captured property act of March 12, 1863, of which, as well as of the others, the true intent was declared to be that the remedy given in cases of seizure by preferring claims in the court of claims should be exclusive, precluding the owner of any property taken by agents of the treasury department as abandoned or captured property, in virtue "or under color of said act" from suit at common law or any other mode of redress whatever, before any court or tribunal other than the court of claims.

It will be for you to say whether the defendant, in taking this property, proceeded under color of that act. If he was proceeding in good faith, believing himself to be warranted as the officer of the national government in taking charge of the cotton under that act, we think he is covered by its provisions. We adopt this view the more readily because in a subsequent part of the act it is provided that "in all cases in which suits of trespass" (which is this case) "may have been brought, or shall hereafter be brought, against any person for or on account of private property taken by such person as an officer of the United States, by virtue of any act relating to captured or abandoned property, and the defendant shall plead, or allege in bar thereof, that such act was done or omitted to be done by him as an officer of the United States, in the administration of one of the acts aforesaid, or in virtue or under color thereof, such plea or allegation, if the fact be sustained by proof, shall be deemed and adjudged in law to be a complete and conclusive bar to any such suit or action. It is our duty, under this act, to say to you that the plea of the defendant in this case is a conclusive bar to this action, if you find affirmatively that the acts of his complained of in the declaration were done by him in virtue or under color of any of the acts referred to. If it was done by him as supervisory or special agent, under a mistake as to the character of the property, he is in our judgment protected by this act. It would not protect the United States from a demand in the court of claims for this property, but it would protect the officer against a private suit, if he acted under color of this law, or under a mistaken sense of duty, though not in strict pursuance of the law. You have heard all the evidence, and it is for you to judge whether he acted under a sense of duty or not. You can weigh the whole evidence and determine that matter for yourselves.

The only remaining point on which it is proper to instruct you is this:—It is claimed by counsel that in the event you should find for the plaintiff, you may assess what are called vindictive damages. The court can not say that to you. If you find for the plaintiff, it will be your duty to assess the value of the property at the time of the conversion, October 21, 1865, with lawful interest from that date.

THE CHIEF JUSTICE added:—If there is anything in the evidence which satisfies you that the defendant acted without any color of law, willfully and in flagrant disregard of his duty—then you have a right to assess vindictive damages. But it is for you to say whether there is anything of that sort in the proof.

The jury returned the following verdict: We find for the plaintiff, eleven thousand seven hundred and sixty-eight dollars.[2]

The defendant then moved for a new trial. (1) Because the finding of the jury was against the evidence. (2) Because it was against the law as laid down by the court.

On a subsequent day, the motion for the new trial having been argued by counsel, the court pronounced its opinion.

CHASE, Circuit Justice.—This is a motion for a new trial. The grounds assigned are that the verdict was contrary to the charge of the court. The court left to the jury the question of the good faith of Callicott as an officer of the government intending the honest exercise of his functions in the seizure of the cotton. We also left to the jury the question whether the cotton itself was part of that surrendered by the military authorities of the Confederate government, upon the termination of hostilities.

Upon the second question, we think the finding was clearly right. It is not impossible that this cotton was in fact the prop-

[2] [10 Int. Rev. Rec. 94, and 2 Am. Law T. Rep. U. S. Cts. 113, give $11,700.68.]

erty of the Confederate government during the Rebellion, and included in the surrender made by the generals of the Confederate armies at the conclusion of hostilities. It is enough to say that no evidence to this effect was offered to the jury. But there was some of a contrary tendency.

It was, therefore, clearly a seizure unwarranted of law. The only question was whether Mr. Callicott was protected by his official character. We thought he was, if he was acting in good faith, in the exercise of his authority as supervising agent, though mistaken as to the character of the cotton. The question of good faith, of honest mistake, was left, and, we think, properly left to the jury. We thought that the evidence taken altogether warranted a verdict in favor of the defendant, and should have been quite satisfied had such a verdict been rendered.

We can not say that there was no evidence that warranted the conclusion of the jury. Townsend's statement, admitted by the district attorney, was that Callicott told him that he knew he had no authority to make the seizure; that he was willing to take two hundred dollars or some such sum, and release the cotton. There was testimony also which showed an omission in Callicott's report to the secretary of the treasury of an important part of the correspondence between himself and the counsel of the defendant. And there was evidence also that when the whole matter had been submitted to the secretary of the treasury, and he had directed that the cotton should be released upon the defendant giving the usual certificate of probable cause, Callicott required, as an additional condition of release, a bond of indemnity to himself. The jury might possibly have inferred, from all these things, that Callicott was not acting in good faith. We can not say that the conclusion was wrong.

Upon the whole evidence, and we do not go into that in favor of the defendant, our conclusion was the other way. But the matter of fact was fairly left to the jury, and was peculiarly within their province.

We can not set aside their verdict because the jury did not agree with us as to the preponderance of the evidence.

The motion for a new trial will be overruled.

Case No. 8,898.

McLEOD v. DUNCAN.

[5 McLean, 342.] [1]

Circuit Court, D. Michigan. June Term, 1852.

REMOVAL OF CAUSES—ON CERTIFICATE—VALIDITY OF PROCEEDINGS PRECEDING REMOVAL—INJUNCTION.

1. Where a case has been certified from a state court to the circuit court, under the 12th section of the judiciary act of 1789 [1 Stat. 79], the case stands as though the suit had been originally commenced in the circuit court.

[Cited in Moynahan v. Wilson, Case No. 9,897; Woolridge v. M'Kenna, 8 Fed. 657.]

[Cited in Rigg v. Parsons, 2 S. E. 83.]

2. An injunction allowed before the filing of the bill, in the state court, necessarily falls, as the circuit court cannot punish for a contempt of that court.

[Cited in Hatch v. Chicago, R. I. & P. R. Co., Case No. 6,204.]

3. A motion for an attachment, for a violation of the injunction in the state court, cannot be allowed; nor a motion to dissolve the injunction, as it necessarily falls by the removal of the case.

[Cited in Hatch v. Chicago, R. I. & P. R. Co., Case No. 6,204; Northwestern Distilling Co. v. Corse, Id. 10,335.]

4. An motion for an injunction may be heard on the face of the bill, in this court, the same as if it had been originally filed here.

[This was an action by John R. McLeod against Jeremiah W. Duncan. Heard on motions for an attachment and to dissolve an injunction.]

Mr. Backus, for plaintiff.

Howard & Chickering, for defendant.

OPINION OF THE COURT. This case was certified from the state court, under the act of congress. It was a bill in chancery on which an injunction had been allowed and issued. A motion was made to dissolve the injunction by the defendant, and also a motion by the plaintiff, for an attachment against the defendant, for a violation of the injunction.

The 12th section of the judiciary act of 1789, under which this case has been brought from the state court, provides, "that if a suit be commenced in any state court against an alien, or by a citizen of the state in which the suit is brought against a citizen of another state, and the matter in dispute exceeds the aforesaid sum or value of five hundred dollars, exclusive of costs, to be made to appear to the satisfaction of the court; and the defendant shall, at the time of entering his appearance in such state court, file a petition for the removal of the cause for trial into the next circuit court, to be held in the district where the suit is pending, &c., and offer good and sufficient security for his entering in such court, on the first day of its session, copies of said process against him, and also for his there appearing and entering special bail in the cause, if special bail was originally requisite therein, it shall then be the duty of the state court to accept the surety, and proceed no further in the cause, and any bail that may have been originally taken shall be discharged, and the said copies being entered as aforesaid, in such court of the United States, the cause shall there proceed in the same manner, as if it had been brought there by original process. And any attachment of the goods or estate of the defendant by the original process shall hold the goods or estate so attached to an-

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

swer the final judgment in the same manner as by the laws of such state, they would have been holden to answer final judgment, had it been rendered by the court in which the suit was commenced."

This, I presume, is the first case removed from a state court, where an injunction had been issued by the state court, and motions similar to those now submitted have been made in the circuit court. At least no reported case has been cited, and we have no recollection of such a case. In the circuit court, a case thus removed from the state court, the law seems to have contemplated no other process as having been issued, except the original process which brought the defendant into court. The attachment provided for, is in reference to the mode of original process in a suit, through which an appearance of the defendant is procured. The property attached, is to remain bound, the same as if the cause had been continued in the state court.

It seems to us that a disobedience of the injunction being a contempt of the state court, can only be punished by that court. The statute does not contemplate the enforcement of any order by the state court, as the petition for a removal of the cause, is to be filed on the appearance of the defendant. On the requisites of the statute being complied with, it is made the duty of the state court to certify the case. An injunction having been allowed before the bill is filed, is not embraced in the act. As this court cannot punish for a contempt of a state court, the motion for an attachment must be overruled. And we suppose that by the removal, the injunction must fall, so that the motion to dissolve is unnecessary.

A motion to grant an injunction, on the face of the bill, as it now stands before this court, would be proper; and this obviates all hardship in the case. In this court the case stands as if the bill had been originally filed here, and the defendant having been served with process, is subject to the order of the court. The motions, therefore, for an attachment, and to dissolve the injunction, are overruled.

Case No. 8,899.

McLOON v. LINQUIST et al.

[2 Ben. 9.] [1]

District Court, S. D. New York. Nov., 1867.[2]

EQUITABLE ASSIGNMENT—GARNISHEE—SHIPPING—ADVANCES ON BILL OF LADING—RIGHT TO REIMBURSE.

1. It is the law of the courts of the United States, that, where an order is drawn either on a general or a particular fund, it does not amount to an assignment of that part, or give a lien as against the drawee, unless he consents to the appropriation, by an acceptance of the draft, or an obligation to accept may be fairly implied.

2. Where a firm had chartered a vessel for a voyage to New Orleans, and obtained advances on the bills of lading of her cargo from T., who took them under an agreement that the cargo should be sold in New Orleans by D., and the whole proceeds remitted to T., who was to take his advances out of it and pay the rest over to the firm, and the firm, being indebted to other parties, gave them a draft on D., "payable out of proceeds of consignment" by the vessel, which draft was not accepted, but D. gave T. notice of its presentation; and where, in a suit by the owners of the vessel, to recover the charter money, an attachment was served on T., who afterwards received the proceeds of the cargo from D., and, claimed the right to reimburse himself therefrom for his advances, and for the amount of the draft, which he had paid after receiving such proceeds, taking a bond of indemnity: *Held*, that the proceeds which came into T.'s hands were unincumbered by any appropriation or assignment which could bind him or them, and the surplus above his advances became subject to the attachment, and must be paid to the libellants, with costs.

The libel in this case was filed by the libellants [William McLoon and William Grant], as sole owners of the bark Caroline, to recover the sum of $3,368.39, with interest from July 26th, 1864, being the balance due on a charter party, whereby the libellant Grant, as master and part owner of the bark and agent for the libellants, chartered her to the respondents [Maurice F. Linquist and others] for a voyage from New York to New Orleans. On the filing of the libel, process in personam was issued, with a clause of foreign attachment commanding the marshal to attach the credits and the effects of the respondents, to the amount sued for, in the hands of Thomas Thacher, of the city of New York. To this process the marshal returned that the respondents were not found, and that he had attached funds in the hands of Thacher. On the return of such process, no person appearing, the default of the garnishee was entered, and it was referred to a commissioner to compute the amount due to the libellants. The report of the commissioner found the amount due to be $3,368.39, with interest from July 15th, 1864. Subsequently the garnishee, Thacher, appeared and answered the libel. His answer set up, that he held in his hands $88.67 belonging to the respondents, and that he did not hold any larger sum when the process was served or afterwards, and that he was ready to pay that sum. In answer to the written interrogatories propounded to him, Thacher testified, that, on the 1st of June, 1864, he received from the respondents a cargo of merchandise, and made advances to them thereon, and paid out charges thereon for them, under an agreement with them, that he should consign said cargo to New Orleans and dispose of it and reimburse himself out of the proceeds for such advances and charges, and pay over the balance, if any, to the respondents; that he consigned the

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

[2] [Affirmed by the circuit court. Case unreported.]

cargo to New Orleans and it was sold, and he received the proceeds; and that, after deducting the amount of his advances and cash paid out for the respondents, and the amount of a draft for about $1,200 drawn on those moneys and payable out of them to the order of Husted & Brownson, he had in his possession $88.67 belonging to the respondents.

The controversy in the case was about a sum of $1,259.49, which Thacher paid, in June, 1865, at New York, out of the proceeds of the consignment. The charter party was made May 20th, 1864. Thacher, at the request of the respondents, who composed the firm of Linquist, Norton & Co., advanced to them, in June, 1864, $5,561.43, on shipments of goods by them to New Orleans by the bark. The advances were made on the bills of lading and invoices of the goods, which were sent by Thacher, at the request of the respondents, to F. D. Darling of New Orleans, under an arrangement that Darling should sell the goods and remit the whole proceeds to Thacher at New York, and that, out of them, Thacher should reimburse himself and hold the surplus for the respondents. In May, 1864, Husted & Brownson sold to the respondents a quantity of barley malt, some $2,000 worth, on which they paid about $800. This malt was part of the cargo of the bark so consigned to Darling. Being pressed for payment, the respondents told Husted & Brownson they could not pay till they got a return from the consignment, but they would give as security a draft on Darling. Accordingly they gave to Husted & Brownson a draft on Darling, drawn by Linquist, Norton & Co., dated June 14th, 1864, for $1,182.90, payable at sight, to the order of Husted & Brownson, payable "out of proceeds of consignment per bark Caroline, with current rate of exchange on New York." This draft was sent by Husted & Brownson to New Orleans for collection, and was not paid, but was returned with the message that it could not be paid because the balance due on the consignment was not ascertained. Thacher was advised by Darling, in July, 1864, of the existence and presentation of this draft, and was told at the time by Darling, that he had not paid the draft because he was not authorized by Thacher to do so. The attachment in this suit was served on Thacher, September 6th, 1864. Thacher did not receive from Darling funds enough to reimburse his advances till after the service of the attachment. The draft was not accepted or paid by Darling, nor did Thacher put his name on it. Thacher paid the $1,259.49, in June, 1865, as a payment of the draft, taking a bond of indemnity.

Joseph H. Choate, for libellants.
Geo. R. Thompson, for Thacher.

BLATCHFORD, District Judge. It is claimed, on the part of Thacher, that the giving of the draft by the respondents to Husted & Brownson, coupled with the presentation of the draft to Darling and the knowledge of its existence communicated to Thacher by Darling, operated as an equitable assignment to the holder of the draft of an amount of the proceeds of the consignment equal to the amount specified in the draft, and cuts off the claim of the libellants, under their attachment, against such amount.

But there are two objections to this view: (1.) There were no such relations between the respondents and Darling as authorized the respondents to draw the draft on Darling. Darling was the agent and the consignee of Thacher and not of the respondents. He was responsible to Thacher and not to the respondents. The respondents could look to Thacher alone for the proceeds of the consignment. A request by the respondents to Darling to appropriate a part of the proceeds in a particular way imposed no liability on Darling to do so. The drawing of the draft on Darling and its presentation to him were ineffectual to bind him to respond to the holder of the draft. This being so, the fact that he advised Thacher of the existence of the draft cannot be regarded as binding Thacher to respond to the holder of the draft. There was no draft drawn on Thacher to support any notice to Thacher, and all the notice that Thacher had was in respect to a draft which was drawn on a party who was not liable to respond to the drawers of the draft.

(2.) There was no assent by Darling, much less by Thacher, to the assignment of so much of the proceeds as the draft purported to cover. Whatever may be the law in some of the states, it is the law of the courts of the United States, that, where an order is drawn, either on a general or a particular fund, for a part only, it does not amount to an assignment of that part, or give a lien as against the drawee, unless he consents to the appropriation by an acceptance of the draft, or an obligation to accept may be fairly implied. Mandeville v. Welch, 5 Wheat. [18 U. S.] 277, 286. The reason assigned for this principle is, that a creditor shall not be permitted to split up a single cause of action into many actions, without the assent of his debtor, since it may subject him to many embarrassments and responsibilities not contemplated in his original contract; that he has a right to stand upon the singleness of his original contract, and to decline any legal or equitable assignments by which it may be broken into fragments: and that, when he undertakes to pay an integral sum to his creditor, it is no part of his contract that he shall be obliged to pay in fractions to any other persons. 3 Hare & W. Lead. Cas. 355, 356; 1 Pars. Notes & B. 331, 334.

In this case, there was no assent by Darling, so that, even if the consignment had been made by the respondents to Darling, so as to authorize the drawing of the draft on

Darling, the presentation of it to Darling would have created no liability on his part to respond to its holder. Nor did Thacher in any way make himself liable to Husted & Brownson, or to the holder of the draft, or to any other person, by any assent or promise, so that he could be held to account to any other person than the respondents for the amount of money covered by the draft. That amount came into his hands, on being sent to him by Darling, unincumbered by any appropriation or assignment which could bind it, or could bind him in respect to it, and the moment it came into his hands it became subject to the attachment in this suit, his advances being reimbursed otherwise. The attachment was served on him before he received the amount which he afterwards paid on the draft.

It follows, that the libellants have a right to have the $1,259.49 as well as the $88.67 applied towards the payment of the amount due to them by the respondents, and a decree will be entered to that effect, and confirming the report of the commissioner finding the amount due to the libellants. Thacher must also pay so much of the costs of this suit as have been caused by his defence thereto.

This decision was affirmed by the circuit court, on appeal. [Case unreported.]

McLURE (MURGATROYD v.). See Case No. 9,943.

Case No. 8,900.

McMAHON v. The PRIMERA.

[N. Y. Times, Jan. 24, 1855.]

District Court, D. Connecticut. Jan. 23, 1855.

MARITIME LIENS — REPAIRS — ABANDONMENT BEFORE COMPLETION.

[Abandonment of repairs by a contractor before the completion thereof bars recovery for more than a quantum meruit.]

[This was a libel by James McMahon against the brig Primera. A decree was rendered for libelant (unreported). Heard on claimants' exceptions to the commissioner's report.]

Mr. Byrne, for libelant.
Lapaugh & Andrews, for claimants.

INGERSOLL, District Judge. This case was tried in last October, and a decree rendered in favor of the libelant, with a reference to a commissioner to ascertain and report the amount of damages. The libel is filed to recover for repairs and supplies furnished to the brig. At the time of trial the question was raised upon what basis the damages should be calculated, it being claimed by the libelant that not only should he be paid for the actual repairs put on the vessel, but also that the profits should be included which he would have made if he had concluded all the work which he had contracted to do. The commissioner was thereupon directed to report the actual value of the repairs, and also to report what would have been his profits. The commissioner now reports the amount of the repairs at $414.10, and the profits which he would have made at $1,800; and to this latter item in the report the claimants except. The libelant alleges that this ship, having sailed from this port for Glasgow, and having put back in need of repairs, was placed in his hands by the master to be repaired. He does not allege that any contract was made as to how the work was to be done, but only that he was to do the needful repairs. After he had begun the work some one, who claimed to be agent for the owners, told him not to go on in the work, and intimated that he might have difficulty in collecting his pay for what he had done, and upon this the libelant ceased his work. The claim in the libel is in the nature of a quantum meruit. The libelant could have gone on in his work, but he voluntarily discontinued it, and I cannot conceive how he can recover any more than he has actually expended upon the ship. He does not claim profits in his libel. That part of the report, therefore, which allows the profits must be stricken out.

McMAHON (UNITED STATES v.). See Case No. 15,699.

McMAHON, The JAMES. See Case No. 7,197.

McMANN (NELSON v.). See Case No. 10,109.

McMANUS (CAMPBELL v.). See Case No. 2,364.

Case No. 8,901.

McMARREN v. KEAN.

[The case reported under above title in 6 Chi. Leg. News, 398, and 1 Cent. Law J. 454, is the same as Case No. 7,004.]

McMASTER (BOARD OF FOREIGN MISSIONS OF PRESBYTERIAN CHURCH v.). See Case No. 1,586.

McMECHEN (AMBLER v.). See Case No. 273.

McMILLAN (GAULT v.). See Case No. 5,274.

McMILLAN (KUHN v.). See Case No. 7,945.

McMILLAN v. SCOTT. See Case No. 5,620.

McMILLAN (WRIGHT v.). See Case No. 18,083.

Case No. 8,902.

M'MILLIN et al. v. BARCLAY et al.

[5 Fish. Pat. Cas. 189; 4 Brewst. 275; 3 Pittsb. Rep. 377; 19 Pittsb. Leg. J. 149; Merw. Pat. Inv. 433.] [1]

Circuit Court, W. D. Pennsylvania. Nov., 1871.

PATENTS — PUBLIC USE — UNAVOIDABLE DELAY — HOW RIGHTS ENFORCED — LAW — EQUITY — PREVENTION.

1. Where prevention of the violation of an inventor's rights is sought, the equity jurisdiction of the court must be invoked, as alone competent to furnish adequate relief. A court of law possesses no such power; its remedies afford redress only for past infringement, but no effectual security against future aggressions.

2. A trial at law is not a prerequisite to the exercise of the equity jurisdiction of the circuit court.

3. There is a broad distinction between the jurisdictional right to take cognizance of a complaint, and a denial of the relief which the complainants ask. Want of equity does not imply a defect of jurisdiction.

[Cited in Atwood v. Portland Co., 10 Fed. 285.]

4. The public use, for more than two years before the application, which renders a patent void, may be a public use by the inventor himself of a single machine.

[Cited in Consolidated Fruit Jar Co. v. Wright, 94 U. S. 94; Henry v. Providence Tool Co., Case No. 6,384; Manning v. Cape Ann Isinglass & Glue Co., Id. 9,041; Perkins v. Nashua Card & Glazed Paper Co., 2 Fed. 453; Andrews v. Hovey, 124 U. S. 710, 8 Sup. Ct. 681.]

5. The patentee completed his invention in 1855, and placed it on a steamboat which he owned, and used it as long as the boat remained under his control. He applied in April, 1865, for a patent, which was granted in February, 1866: *Held*, that the patent was void.

[Cited in Andrews v. Hovey, 124 U. S. 710, 8 Sup. Ct. 681.]

6. The act of 1861 [12 Stat. 246], which requires "that all applications for patents shall be completed and prepared for examination within two years," also provides that the delay may be condoned by proof to the satisfaction of the commissioner, that it was unavoidable. If a patent be granted, it must be assumed that there was evidence before the commissioner to show that there was no unavoidable delay in preparing the application for examination.

[Cited in Goodyear Dental Vulcanite Co. v. Willis, Case No. 5,603.]

7. The decision of the commissioner upon a question of fact, upon which he is authorized to pass, is unimpeachable, except upon the ground that it is ultra vires. An infringer can not assail it for fraud, much less for mere error of judgment.

[Cited in brief in Fassett v. Ewart Manuf'g Co., 58 Fed. 364.]

8. The proof of actual abandonment, after application filed, ought to be indubitably clear. It ought not to rest upon doubtful or disputable inferences.

9. During two years before he applies for a patent, an inventor may publicly sell and use his invention, without any presumption of abandonment.

10. If an inventor has furnished, by his application for a patent, conclusive evidence that he does not intend to abandon his invention to the public, the disproof of this intention ought to be by evidence of equal weight and significance.

11. M. applied for a patent July 23, 1855; after various proceedings, he was finally rejected August 25, 1856, on appeal to the commissioner. He did nothing more until the early part of 1867, when the specification was amended, and the patent was granted April 16, 1867: *Held*, that there was no abandonment of the application between 1856 and 1867.

[Cited in Johnsen v. Fassman, Case No. 7,365; Colgate v. W. U. Tel. Co., Id. 2,995; Andrews v. Hovey, 124 U. S. 710, 8 Sup. Ct. 681.]

12. If the defendants appropriated the invention of the patentee, without consulting him, and he was passive when he knew it, because he was powerless to prevent them, he is not estopped from asserting his right when he is in a condition to enforce it.

[Cited in Goodyear Dental Vulcanite Co. v. Smith, Case No. 5,598.]

13. Although prior publications may be remotely suggestive of the invention, yet if they do not describe it in such terms that the public could construct and put it in practice, without further invention, they can not destroy the patent.

14. If a new or improved useful result is effected by means before well known, or any useful result is produced by a new mechanical device, or combination of old mechanical devices, in both cases the exercise of invention must necessarily be presumed, because both are the proper subjects of a patent.

15. The presumption of law is that the patentee is the original inventor of that for which he has obtained a patent. The burden of disproving this is upon the party who denies it. Evidence of disputable or doubtful import will not meet this requirement, but it must be clear and convincing. To doubt is to be resolved against the party upon whom the burden rests.

[Cited in Cook v. Ernest, Case No. 3,155.]

16. Letters patent "for improvement in applying steam-power to the capstans of steamboats and other crafts," granted to John S. M'Millin, April 16, 1867, are valid.

17. The import of the claim is operating the capstan of a steamboat by power transmitted from an auxiliary engine, when both engine and capstan are placed on the deck of the boat, forward of the steam-boilers, so that their separate efficiency for all other purposes is preserved.

[Cited in McMillan v. Rees, 1 Fed. 723.]

Final hearing on pleadings and proofs.

Suit brought [by John S. M'Millin, Hugh Campbell, and John Shaffer against James Barclay and others] upon two letters patent, granted to complainant, John S. M'Millin, one for "improvements in capstans for steamboats and other vessels," dated February 20, 1866; and the other for "improvements in applying steam-power to the capstans of steamboats and other crafts," dated April 16, 1867.

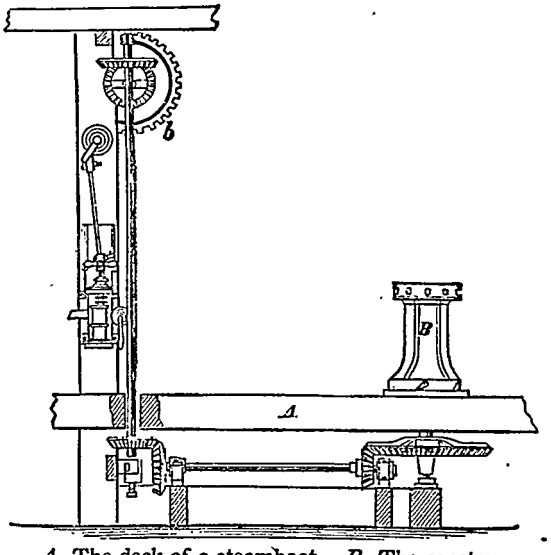
The claims of these patents were as follows:

Patent of 1866: "The arrangement of the wheels, l, m, n, o, k, j, i, h, e, and d, shafts, 6, 5, 4, 3, and B, capstan-barrel, p, heads, q

[1] [Reported by Samuel S. Fisher, Esq., and here reprinted by permission. Merw. Pat. Inv. 433, contains only a partial report.]

and r, and pins, Q, the whole being constructed, arranged, and operating substantially as herein described, and for the purpose set forth."

Patent of 1867: "Rotating a capstan, placed on deck of a boat, by means of an auxiliary engine, when said engine and capstan are placed forward of the steam-boilers of said boat, substantially as hereinbefore described, and for the purpose set forth."



A. The deck of a steamboat. *B.* The capstan.

The foregoing engraving represents the invention embodied in the patent of 1867, which is the only one which it is material to illustrate, in view of the opinion.

Bakewell & Christy, for complainants.

M. W. Acheson and John Barton, for defendants.

McKENNAN, Circuit Judge. June 9, 1855, John S. M'Millin, one of the complainants, filed a caveat in the patent office; and, on the 23d of July following, an application for a patent for a new and useful improvement in applying steam-power to the capstans of steamboats and other crafts. After several rejections and repeated renewals of his application, a patent was finally granted to him April 16, 1867, No. 63,917.

April 25, 1865, he applied for a patent for new and useful improvements in capstans for steamboats and other vessels, which was patented February 20, 1866, No. 52,730.

Of his interest in these patents he assigned two-thirds to Hugh Campbell and John Shaffer, and they are, therefore, joint complainants with him in the present bill, praying for an account and an injunction against the respondents for an alleged infringement of both patents.

To this bill the respondents interpose the plea "that its subject matter is not within the jurisdiction of a court of equity, there being a direct, certain, full, and adequate remedy at law for such alleged grievance." I am not aware that it has ever been held that the court has not jurisdiction of a bill to enjoin the use of a patented invention, and for an account of profits by an infringer, because an action at law may be maintained to recover damages for infringement. By section 17 of the act of July 4, 1836 [5 Stat. 124], re-enacted by the act of July 8, 1870 [16 Stat. 198], original jurisdiction is conferred upon the circuit courts, as well in equity as at law, in all suits for the violation of the rights of inventors, under the patent laws, and they are authorized, "upon bill in equity, filed by any party aggrieved, in any such case, to grant injunctions, according to the course and principles of courts of equity, to prevent the violation of the rights of any inventor as secured to him by any law of the United States, on such terms and conditions as said courts may deem reasonable." It is clear from this that the circuit court may rightfully take cognizance of every controversy arising under the patent laws, and that where prevention of a violation of an inventor's rights is sought, the equity jurisdiction of the court must be invoked, as alone competent to furnish adequate relief. A court of law possesses no such power; its remedies afford redress only for past infringement, but no effectual security against future aggressions. "The principle," says Mr. Justice Wayne, in Mott v. Bennett [Case No. 9,884], "upon which courts of equity have jurisdiction in patent cases, and upon which injunctions are granted in them, is not that there is no legal remedy, but that the law does not furnish a complete remedy to those whose property is invaded; for, if each infringement of the patent were to be made a distinct cause of

action, the remedy would be worse than the evil. The inventor or author might be ruined by the necessity of perpetual litigation, without ever being able to have a final establishment of his rights." Hogg v. Kirby, 8 Ves. 223; Harmer v. Plane, 14 Ves. 132; Lawrence v. Smith, Jac. 472.

Nor is a trial at law a prerequisite to the exercise of this jurisdiction. Such trial may be ordered; but if its allowance were demandable of right, still the jurisdiction of the court would remain untouched, because, in the end, its result might be adopted or rejected, as the exigencies of equity might require. But it is altogether within the sound discretion of the court to allow or refuse such trial. In Goodyear v. Day [Case No. 5,569], Mr. Justice Grier says: "It is a practice founded more on convenience than necessity. * * * A trial at law is ordered by a chancellor to inform his conscience; not because either party may demand it as a matter of right, or that a court of equity is incompetent to pass upon questions of fact or of legal titles. In the courts of the United States the practice is by no means so general as in England, or as it would be here, if the trouble of trying issues at law devolved on a different court."

The subject matter of this bill is an alleged infringement of the right of an inventor, and the relief prayed for is an injunction to restrain the further invasion of it. It is then within the express terms of the act of congress, defining the jurisdiction of this court, and authorizing the exercise of equity powers to effectuate it.

There is a broad distinction between the jurisdictional right to take cognizance of a complaint, and a denial of the relief which the complainant asks. Although the relief invoked may be refused, it does not follow that it is because the court can not inquire into the merits of the cause, and adjudge it accordingly. Want of equity does not imply a defect of jurisdiction. But it is only when the court is without power to pass upon the subject matter of the complaint, or to grant the relief sought, that its jurisdiction may be challenged.

These views are in no wise discordant with the manuscript opinion of Mr. Justice Grier, in Sanders v. Logan [Case No. 12,295], Western district of Pennsylvania, 1859. So far from disclaiming the jurisdiction of the court, he in effect affirms it, by adjudicating the case upon its merits, and denying complainant's prayer, for the reason that he only asked what could be better secured by an action at law, and that to grant his prayer would inflict irreparable injury upon the respondent, but could not benefit him. It is an authority only for a conclusion, founded upon special facts and circumstances, such as characterized the case before him.

The respondents' plea to the jurisdiction must, therefore, be overruled.

The answer of the respondents denies infringement, and sets up various defenses, involving mainly the novelty of the invention and the claim of the parties to originality. These several defenses will be noticed in their proper order.

Two patents are in controversy. The first of these, in the order of date, is the last one applied for. Its claim is much less comprehensive than that of the other. In fact, as describing the method of effectuating the invention claimed in the last issued patent, it is really within the scope of the patent, although the latter is not limited to the specific combination claimed in the former patent. It seems to have been sought for in its restricted form, by reason of the rejection of the first and broader application, and to have led finally to the allowance of that application. The claim is for an arrangement or combination of specified mechanical devices, for the purpose of connecting the capstan of a steamboat with what is commonly known as the "little nigger engine," the whole constructed, arranged, and operating as described in the specification. No one of these devices is claimed as the invention of the patentee; it is their combination and adaptation to the production of a new result, in which the novelty of the invention is alleged to consist. The application for this patent was filed April 25, 1865, and the patent was issued February 20, 1866. It is now alleged to be void, for the reason that the invention described in it was in public use more than two years before the application.

The patentee was engaged in the business of navigation on the Western rivers, and in 1854 bought the hull of a steamboat, upon which he proposed to introduce a mechanical arrangement to operate the capstan by a connection with the "nigger engine." The boat was finished in June, 1855, and was supplied with bevel gearing, by means of which the capstan was actuated by steam derived from the "nigger engine"—the whole embodying the same mechanical elements and arrangements which were described in this patent. The steamboat was called the "Silver Wave;" was chiefly owned by the patentee, and was commanded and navigated by him for many years afterwards. During all this time, this improved capstan arrangement was used upon her, without any, or at least any material change. More than two years, therefore, elapsed, during which this use continued, before the application for this patent.

The question then is, did such use of the invention invalidate the patent?

The act of July 4, 1836, forbids the granting of a patent for an invention which had, at the time of the application therefor, been in public use or on sale, with the consent or allowance of the inventor. This provision is modified by the act of March 3, 1839 [5 Stat. 353], so as to allow such use or sale for two years prior to the application. Different

opinions have been entertained as to the kind of use which these acts of congress contemplate. By some judges, they have been held to mean a use in public by persons other than the inventor, and again, others have held that a use in public by the inventor himself, which is not merely experimental, will have the effect of invalidating the patent. In Ryan v. Goodwin [Case No. 12, 186], Mr. Justice Story says: "It is clear by our law, whatever it may be by the law of England, that the public use or sale of an invention, in order to deprive the inventor of his right to a patent, must be a public use or sale by others, with his knowledge and consent, before his application therefor." But he must be understood to have predicated this of the facts in the case before him, in which only a use by persons other than the inventor was alleged. While the object of the law was to protect the public against the exclusive claim of an inventor who had dedicated his invention to their use, by allowing its practical employment in public, it was, at the same time, designed to require of him reasonable diligence in applying for his patent. As it is the public use of a completed invention against which this provision of the law is directed, it could scarcely have been intended to authorize such use by the inventor himself, which, if employed by another, with his consent, would work a forfeiture of his right to a patent. His own direct act is just as significant of an intended abandonment of his inchoate right as is that of another, with his consent. Indeed, it is difficult to comprehend that a use in public by an inventor himself is not as effectually "a public use with his consent and allowance," as where his invention is permissively so employed by another. So it was held in Pitts v. Hall [Id. 11,192]. Mr. Justice Nelson there says: "The patentee may forfeit his right to the invention, if he constructs it and vends it to others to use, or if he uses it publicly himself, in the ordinary way of public use of a machine, at any time prior to the period of two years before he makes his application for a patent. That is, he is not allowed to derive any benefit from the sale or use of his machine, without forfeiting his right, except within two years prior to the time he makes his application. * * * * On the other hand, if the machine was complete when it was constructed in June, 1843, and if the patentee put it into public use, or put it into operation himself publicly, deriving profit from it, and having no view of further improvements, or of ascertaining its defects, then, this use having occurred anterior to the two years, the effect would be to work a forfeiture."

It remains, then, to inquire whether the use by the patentee of his invention, more than two years before his application for a patent, was only a trial of it to test its efficiency, or ascertain its defects, and was, therefore, merely experimental. On this point, the proofs are decisively clear. On June 16, 1855, he filed in the patent office a caveat, in which he set forth that he had made certain improvements in applying steam-power to the capstans of steamboats, and that he was then engaged in experiments to perfect the same, preparatory to his application for a patent therefor; and he therein described the mechanism, substantially as claimed in the patent in question. On the 23d July following, he filed his application for a patent, accompanied by drawings, a model, and specification, in which are set forth the same mechanical devices, by means of which the invention therein claimed might be practiced. His invention then was complete. At this time, he had constructed and applied it on the "Silver Wave," and he continued to use it on her for years, as long as she remained under his control. In no sense, can this prolonged use be regarded as a mere trial of the invention to discover defects and make improvements. Indeed, on the first trip of the vessel its complete efficiency was demonstrated. It was obviously the use of an invention considered as complete, and with a view to derive such benefit from it, as might be due to a more efficient and economical mode of operating steamboat capstans than had been before applied. It was used, too, in the ordinary way of the public use of such mechanism. In the words of the act of congress, it was a public use of the invention, with the consent and allowance of the inventor. The result is that his patent of February 20, 1866, No. 52,730, is invalid, and can not be made the basis of a decree in his favor.

The patent of April 16, 1867, No. 63,917, stands upon a different footing. As already said, the invention claimed in it is of broader scope than that described in the patent of 1866. It is stated to be a "new and useful improvement in applying steam-power to the capstans of steamboats and other crafts," and, as set forth in the claim, consists in "rotating a capstan, placed on deck of a boat, by means of an auxiliary engine, when said engine and capstan are placed forward of the steam-boilers of said boat, substantially as hereinbefore described, and for the purposes set forth." The mechanical instrumentalities by which the prescribed result is effected are fully described in the specification. The import of the claim, then, is this —operating the capstan of a steamboat by certain mechanical means, actuated by steam derived from an auxiliary engine, where both the engine and the capstan are stationed on the deck of the boat forward of the steam-boilers. The mere effect indicated, however valuable it may be, is not claimed, for that would clearly be unallowable; but it is this effect, produced by means substantially as described, and employed under the conditions stated. If the result, thus accomplished, is new and useful, there can be no doubt of the validity of the patent, so far

as its subject matter is concerned. I do not understand this to be contested by the respondent; but a clear definition and comprehension of the nature of the invention described in the patent are important in considering the defenses set up in the answer.

These defenses are: 1. That under section 12 of the act of March 2, 1861 [12 Stat. 248], the patentee's application should be regarded as abandoned, and the patent, therefore, as having been improperly granted. 2. That the invention was, in fact, abandoned, and that the patentee is estopped from enforcing his exclusive right against any one using his invention. 3. That, in view of the state of the art when the patentee made his application for a patent, the invention was not novel. 4. That the invention claimed was not original with the patentee. 5. That the respondents are not infringers.

1. The application for this patent was filed July 23, 1855, and on August 25, 1856, on appeal to the commissioner of patents, it was finally rejected. It stood then until the early part of 1867, when the specification was amended, and its renewed consideration was urged upon the patent office. This effort resulted in the granting of a patent, April 16, 1867. Under these circumstances, it is urged that the application was not "completed and prepared for examination" within the time required by the act of 1861, and that the patent is invalid for that reason. The section referred to enacts: "That all applications for patents shall be completed and prepared for examination within two years after the filing of the petition, and, in default thereof, they shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the commissioner of patents that such delay was unavoidable; and all applications now pending shall be treated as if filed after the passage of this act." This undoubtedly puts applications pending when the act was passed, on the same footing with those subsequently made, and both alike are within its purview, and subject to its operation. Conceding, however, that the act is to be so construed as to bring the present application within its scope—which is by no means clear—it can not be invoked to invalidate the patent.

The act does not interpose an absolute bar to the granting of a patent, where the application has not been completed and prepared for examination within two years. The delay may be condoned by proof that it was unavoidable. The decision of this fact is committed to the commissioner of patents. If it is shown to his satisfaction that the delay was unavoidable, the application is not to be regarded as abandoned. He is invested with power to grant the patent, and he may exercise it, subject to the duty of determining that the preparation of the application for examination was not unnecessarily delayed after two years. This is the plain meaning of the act, and there can be no doubt about it. Now, it must be assumed that there was evidence before the commissioner to show that there was no unavoidable delay in preparing this application for examination, after two years from the passage of the act. Its sufficiency was for him, and, in the exercise of the judicial function intrusted to him, he has decided the fact in favor of the patentee. He was the only judge to be "satisfied," and his judgment is conclusive. This court, at least, has no power to revise it, at the instance of the respondents, but must take for granted the truth of the fact which the law authorized him to determine. This is too well settled to need any citation of authority to sustain it. It is to be found in the numerous cases which hold, in accordance with a familiar general rule, that the decision of the commissioner upon a question of fact, upon which he is authorized to pass, is unimpeachable, except upon the ground that it is ultra vires. An infringer can not assail it for fraud, much less for mere error of judgment.

2. Nor has the second branch of the defense, that the invention was actually abandoned, any better foothold. This must result from the intention of the patentee, expressly declared, or clearly indicated by his acts. There is certainly no evidence in the case of any express declaration of the patentee to that effect; and, if the lapse of years between the date of his application and of his patent, and his own conduct, can be fully explained upon any other hypothesis, they ought not to be imputed to an intention on his part to abandon his invention. The proof of actual abandonment, after application filed, ought to be indubitably clear. It ought not to rest upon doubtful or disputable inferences. During two years before he applies for a patent, an inventor may publicly sell and use his invention, without any presumption of abandonment. Upon what reason, then, should he be regarded as having given up his invention to the public, merely because a public officer has repeatedly denied his application for a patent, and the recognition of his right has thus been delayed for years, when he was powerless to prevent it? "By the application filed in the Patent Office," says Mr. Justice Grier, in Adams v. Jones [Case No. 57], "the inventor makes a full disclosure of his invention, and gives public notice of his claim for a patent. It is conclusive evidence that the inventor does not intend to abandon it to the public. The delay afterward interposed, either by the mistakes of the public officers or the delay of courts, where gross laches can not be imputed to the applicant, can not affect his right."

If an inventor has furnished, by his application for a patent, conclusive evidence that he does not intend to abandon his invention to the public, the disproof of this intention ought to be by evidence of equal weight and significance. The proof in this case falls far short of that standard. Indeed, if the applicant was required to disprove an imputation

of only sluggish diligence, the records of the patent office would more than meet such a demand. His application twice rejected, and as often renewed; appeals taken to the board of examiners and to the commissioner of patents; a new application filed in aid of his first; this one twice rejected, and as often renewed; an appeal and final rejection; another application limited to the combination of mechanical devices described in his first application; its rejection and renewal under an amendment of his specification, and the grant of a patent upon it; then a revival of his old application, accompanied by satisfactory proof that he had not abandoned his invention, and, some time after, followed by a decision in his favor and the issue of a patent. So far, then, from showing gross laches, this is a record of unexampled tentativeness, in the face of repulses by which most men would have been thoroughly disheartened. Not so the applicant here, but each failure only brought into stronger light the fixed purpose and unrelaxing diligence with which he sought to secure the recognition of his rights. He was not only a persistent, but an importunate solicitor, and to his importunity was largely due the ultimate result in his favor. Now, as the delay of the decision in his case is all that remains touching his alleged laches, it is hardly necessary to add that it is not to be imputed to him, because he did all he could to prevent it, but that the responsibility for it rests solely with the patent office.

I have failed to discover any evidence upon which an equitable estoppel in favor of the respondents can rest. It must necessarily grow out of some declaration or act of the applicant, by which they were induced to believe that they might rightfully or innocently use the invention now claimed by him. If they appropriated it without consulting him, and he was passive when he knew it, because he was powerless to prevent them, he is not estopped from asserting his right when he is in a condition to enforce it. If they took the risk of using what they did not own, the owner's helplessness then will not shield them from accountability to him now. This is the only effect of the proof; for, although the applicant publicly used his invention after he applied for a patent, he did not intend to abandon it, as has been already shown; and, as he had a clear right so to use it, the law does not presume from that fact that he assented to its use by others. Ryan v. Goodwin [Case No. 12,186]. Nor is this supposed estoppel invigorated by the fact that invasion of the patentee's rights has been wide-spread, and that all who may be found in that category may be held liable accordingly. Whoever reaps where he did not sow, wrongfully appropriates what belongs to another, and equity will not stay the hand of the rightful owner of the harvest against him.

3. The next objection to the patent is that the invention described in it was previously described in printed publications, and was anticipated by like mechanism devised by others. It would unnecessarily extend this opinion to point out in detail the specific differences between the several exhibits in evidence and the invention claimed by M'Millin. Of the publications exhibited, it may be said, generally, that they do not describe M'Millin's invention. Remotely suggestive of it they may be, but they do not describe it in such terms that the public could construct and put it in practice without further invention. Prior publications must come up, at least, to this measure of fullness and precision. Even a stricter rule is prescribed by high authority; for in Hills v. Evans, 6 Law T. (N. S.) 90, it is held that the publication must furnish "knowledge equal to that required to be given by a patent, namely, such knowledge as will enable the public to perceive the very discovery, and to carry the invention into practical use." No such exactness of description of M'Millin's invention is to be found in any of these publications. They indicate methods for the working by steam of coiling devices of different forms; but none of them, except Sickel's patent, contemplates the employment of an auxiliary engine, or the retention of the capstan on the forecastle of the boat, so that all the functions it is required to perform are unimpaired. In their mode of operation they are different from M'Millin's, and certainly, by conforming to the directions given for their construction and application, the public would not be able to construct and carry into practical use M'Millin's method. That a windlass or a drum, or any other form of coiling device might be operated by steam, or that a capstan might be so operated, when the place where it must be kept to perform its peculiar office is changed, and it is located in proximity to its motor, is not the problem which he proposed to solve. If that were so, he could not claim the merit of originality. But he aimed at the accomplishment of a result not before produced, under the conditions prescribed by him, by a new arrangement and organization of old instrumentalities adapted to that end.

It is satisfactorily shown by the proofs, that upon steamboats navigating the Western rivers, the operation of the capstan, in its usual place, by the main engine, is impracticable. Certainly it has not been done. Before M'Millin's invention, the capstan in these boats was worked by muscular power alone. If a method, then, could be devised by which the power of steam could be applied to the capstan, without changing its location, so that it could be worked more economically, easily, and efficiently, a new and useful result would thereby be produced. This was the problem which engaged the thoughts of M'Millin, and he solved it by taking the capstan in its accustomed place, and the auxiliary or "nigger" engine at the place usually assigned to it, both forward of the main en-

gine, and connecting them by appropriate, but well-known mechanical devices, thereby producing the desired result.

It is to be observed that the retention of the auxiliary engine and the capstan in the positions where they were before located, is an essential element of this method. The main object was to secure the unabridged performance of other valuable functions pertaining to them. Now, by the patents and other publications referred to, no information is furnished as to where the engine and capstan must be located to produce the results effected by M'Millin's invention. On the contrary, assuming that they all describe a capstan, or its fair equivalent, the capstan must be located so that its usefulness, derived from its position on the forecastle, is lost, or the engine, which actuates it, so that it can not be used for the purposes for which the "nigger" engine is employed.

But it is urged that, as the "nigger" engine and capstan were before used independently on steamboats, and bevel gearing was before used to connect machinery in mills, any mechanic of ordinary skill could supply the mode of connecting the "nigger" engine and capstan employed by the patentee, and, therefore, no inventive skill was exerted by him. This is a narrow view of the patentee's invention. If a new or improved useful result is effected by means before well known, or any useful result is produced by a new mechanical device, or combination of old mechanical devices, in both cases the exercise of invention must necessarily be presumed, because both are the proper subjects of a patent. If the patentee, then, has devised a method of rotating the capstan of a steamboat, by an organization of elements not before employed in the concrete, for that or an analogous purpose, or if his method produces an improved result, a sufficiency of invention to support his patent must be presumed. The proofs undeniably show that he did demonstrate the practicability of operating the capstan of a steamboat by power transmitted from the "nigger engine," without changing the place of either, so that their separate efficiency for all other purposes was preserved. They show more—that he was the first to do this, and that it was followed by the almost universal abandonment, on Western boats, of the old method of working the capstan, and the adoption of M'Millin's. With the suggestive help of all this literature of the art, and the stimulus of a result of such general interest and utility to be achieved, no one put in practice a method of effecting it, until M'Millin demonstrated it to the public. These are notable facts, and surely they are persuasive, not only that the result accomplished was novel, but that it was the fruit of inventive skill.

Of the other exhibits but little need be said. They all fall short of illustrating M'Millin's complete method, or of embodying all the essential features of his organization. The first of these is the capstan on the "John H. Bills." It was arranged horizontally on one side, and nearer the stern than the bow of the boat; was coupled to the starboard wheel, and could therefore only move with and in the direction of the wheels. It was operated by the main engine through the paddle-wheel, and, after some time, was abandoned. If it embodied M'Millin's invention, which it plainly did not, as an abandoned experiment, it can not affect his patent.

In 1851, A. Martin made a model of a freight-hoisting apparatus to be operated by the "doctor" engine, aft the main engine. It was not put into practical use, was left by Martin on the steamer "Georgia," in 1852, was shortly after burned up and was forgotten. However it may have been constructed, or what its intended use, it is plainly valueless as evidence in this case.

The marine railway at Cincinnati embodies in its construction several vertical shafts. On the upper end of each of these a spool is made, around which the ropes used in drawing boats up the ways are coiled. These shafts are located fixedly on the bank of the river, and are revolved by the power of the main engine. Taking them and their mode of operation as a guide, the highest degree of mechanical skill, without invention, would be found inadequate to construct and apply M'Millin's invention. Of the devices used on the "Hope," it is only necessary to say that they were constructed more than a year after the time to which M'Millin's invention relates back, and can not, therefore, impugn its novelty.

4. The only remaining question, affecting the validity of the patent, is, was M'Millin the author of the invention claimed by him? The presumption of law is that a patentee is the original inventor of that for which he has obtained a patent. The burden of disproving this is upon the party who denies it. Evidence of disputable or doubtful import will not meet this requirement, but it must be clear and convincing. To doubt is to be resolved against the party upon whom the burden rests. It is alleged here that John Shaffer, one of the complainants, is the author of the invention claimed by M'Millin; that he had a drawing of it prepared, in which are exhibited the essential features of M'Millin's plan; and that M'Millin saw and examined it, and derived from it the first knowledge he had of what he now claims to have devised himself.

There is no dispute that this drawing represented, substantially, the M'Millin invention, or that M'Millin saw and examined it. The earliest date of its existence, which the proofs can be claimed to show, is November 20, 1854; but M'Millin did not see it for a considerable time, perhaps several months, after that date. In August, 1854, he bought the hull of the "Silver Wave," and at once or-

dered such changes in its construction as would fairly indicate a purpose to operate the capstan by power transmitted from the "nigger" engine. This hull, in the spring of 1855, was brought to Pittsburg, to be supplied with its outfit of machinery. A main engine and a "nigger" engine were ordered for it, and different machinists were employed to make a connection of some sort between the latter and the capstan. It is evident, therefore, at this time, that M'Millin entertained the purpose, and had in his mind a plan, definite or indefinite, to operate the capstan by power derived from the "nigger" engine. During the progress of his efforts in this direction, the Shaffer drawing was shown to him, when he at once declared that it represented what he wanted, and the connections indicated by it were made acordingly. It is claimed by the respondents, that, up to this time, he had not devised any practical or determinate plan for carrying his purpose into effect, but that it was furnished to him by the Shaffer drawing. Much testimony has been taken in relation to his declarations, and as to conversations with him, after he bought the "Silver Wave," for which this effect is earnestly claimed. If this were the only evidence, it might, not illogically, be treated as sustaining the respondents' hypothesis; although the weight of most of it is dependent upon the accurate recollection by witnesses, after the lapse of years, of the full and precise import of conversations with M'Millin, and of the dates and order of time when they occurred, in relation to the time when he examined the Shaffer drawing. But such is not the conclusion to which a consideration of all the evidence would lead.

It is evident that this subject had occupied the thoughts of M'Millin for years. His experience in the management of steamboats on the Western rivers enabled him to comprehend the advantages to be derived from the operation of the capstan by steam. To accomplish this by a connection with the main engine was confessedly impracticable. The only possible mode was to make the "nigger" engine available for that purpose. But this engine and the capstan each had appropriate and indispensable functions to perform, and it was therefore a condition that they should be retained in their accustomed places. To effect their co-operation, and at the same time to preserve their separate efficiency, was the problem which engaged M'Millin's reflections. That he conceived a practical solution of it, I think is clearly proved. He had not tested it by experiment, and therefore he was prompt to heed, and even to defer to the suggestions of experience and mechanical skill. This may account for his adoption, at first, of Hartupee's suggestion of the endless chain to connect the "nigger" engine with the capstan. At any rate, it is obvious he had sought the aid of Hartupee, as a machinist, to embody in a practical form, on the "Silver Wave," a plan which he had before formed in his own mind. However this may be, the testimony of William O. Leslie and John E. Smith conclusively shows that, long before, his speculations had reached the maturity of a definite method of reducing them to practice. In the fall of 1853 he had a conversation with Mr. Leslie, in which he explained his mode of working a steamboat capstan by power transmitted from the "nigger" engine, by means of shafting and bevel wheels, substantially as described in his specification; illustrated it by a rough sketch on paper, and suggested its application to the Coal Hill inclined railway, in which they were both interested. Like conversations occurred between them afterwards, during the winter of 1853–54. In the spring or early part of the summer of 1854, a similar explanation was made by him to John E. Smith. He then described how the attachments between the "nigger" engine and capstan should be made, consisting of a "bevel-wheeled gearing and upright shaft from the 'nigger' down into the hold—the horizontal shaft with the same kind of gearing connecting that with the spindle of the capstan." The significance of this testimony is apparent. It is given by unimpeached and disinterested witnesses. Its accuracy as to approximate dates is supported by satisfactory reasons. It is, therefore, entitled to full credence. And it is decisive of the fact that more than a year before the Shaffer drawing is shown to have been in existence, or M'Millin had seen it, he had devised the mechanical means of practicing his invention, substantially as he has described them in his specification. The legal presumption that he invented what he has patented is not impugned.

5. The fact of infringement by the respondents is satisfactorily proved. The models exhibited in evidence clearly show this—"Oculis subjecta fidelibus." From the course of the proofs, the respondents' denial of infringement would seem to have been made upon the assumption that this patent also was for a technical combination of mechanical devices. As before stated, this is not so. It is for an improvement in operating capstans by steam, under prescribed conditions, and by means substantially as described. To produce the same result by a mechanical organization not essentially different from that described in the patent, is within its scope. On the respondents' boat, the "Armenia," the capstan is rotated by power derived from the "nigger" engine, both being forward of the main engine, through mechanical connections, which, in their mode of operation, are the same, and in their construction and arrangement are substantially the same as are described in the patent.

The result of the whole case is that the letters patent No. 63,917, dated April 16, 1867, are valid; that the respondents have infringed them, and that the complainants are

entitled to a decree for an injunction and an account, with costs.

A decree will be prepared accordingly.

[For other cases involving this patent, see McMillin v. Rees, 1 Fed. 722; Same v. St. Louis & M. V. Transp. Co., 18 Fed. 260; Same v. St. Louis & V. Anchor Line, 22 Fed. 169; Morris v. McMillin, 112 U. S. 244, 5 Sup. Ct. 218.]

McMUNN (CURRAY v.). See Case No. 3,489.

Case No. 8,903.

McMURDY v. CONNECTICUT GEN. LIFE INS. CO.

[6 Ins. Law J. 666; 4 Law & Eq. Rep. 69;[1] 9 Chi. Leg. News, 324; 4 Wkly. Notes Cas. 18; 24 Pittsb. Leg. J. 154.]

Circuit Court, E. D. Pennsylvania. April 14, 1877.

REMOVAL OF CAUSES—PETITION—CITIZENSHIP—MOTION TO REMAND.

[1. The petition by defendant for the removal to the district court of a case from a Pennsylvania state court states that the defendant is a citizen of Connecticut, but does not state the citizenship of the plaintiff. This is fatal, and the case will be remanded upon motion.]

[2. The filing of a proper bond by the party petitioning for removal is a condition precedent to the removal of a case to the federal court. A bond which is not conditioned for costs in case the cause is remanded to the state court is defective, under Act March 3, 1875 (18 Stat. 471, § 3).]

[Cited in Torrey v. Grant Locomotive Works, Case No. 14,105; Farmers' Loan & Trust Co. v. Chicago, etc., R. Co., Id. 4,665; Deford v. Mehaffy, 13 Fed. 491. Followed in Webber v. Bishop, Id. 49; Harris v. Delaware L. & W. R. Co., 18 Fed. 834. Cited in Austin v. Gagan, 39 Fed. 628.]

[Cited in Stone v. Sargent, 129 Mass. 512.]

[3. A party is not guilty of laches who afterwards moves the federal court to remand a cause because he did not in the first instance oppose in the state court its removal.]

On May 20, 1876, the court of common pleas No. 4 granted a rule to show cause why the above cause should not be removed into the circuit court of the United States. On May 27, 1876, this rule was made absolute (not being opposed by defendant's counsel,) and a petition and bond for removal to the United States court were filed. On August 27, 1876, a certified copy of the record of the above suit in the court of common pleas No. 4 was filed in the circuit court of the United States for the Eastern district of Pennsylvania. The defendant had entered his appearance, but there were no pleadings. The petition stated that the defendant was a citizen of Connecticut, but did not state the citizenship of the plaintiff. The bond was not conditional for the payment of costs by the defendant, in case the circuit court should be of opinion that the cause had been improperly removed thither. An affidavit was handed up, stating that the plaintiff was, from the commencement of the suit to the present time, a citizen of Colorado.

A. Sydney Biddle (D. G. Eshlemon and James W. Paul with him), argued that the petition was fatally defective in not stating that the plaintiff and defendant were citizens of different states. The defendant was only entitled to remove this cause by virtue of being a citizen of a different state from the plaintiff. Non constat that he is a citizen of a different state from the defendant. It is a general rule that where jurisdiction depends upon statute, the jurisdiction must appear upon the record. This is not the case here. The record is fatally defective in this respect, and cannot be amended: (1) Because a correct petition is a condition precedent to the possibility of removal, and because now, as several terms have elapsed, the time for removal, the cause being legally still pending in common pleas No. 4, has elapsed. (2) Because when the suit was brought, and at the time the petition was filed, the plaintiff was a citizen of Colorado, which, until August 1, 1876, was a territory. Stat. 1875–76 [18 Stat. 470]. And it has been decided in a suit between a citizen of a territory, or of the District of Columbia, and a citizen of a state, that the controversy is not between citizens of different states. Hepburn v. Ellzey, 2 Cranch [6 U. S.] 445; Wescott v. Fairfield Tp. [Case No. 17,418]; Vasse v. Mifflin [Id. 16,895]; New Orleans v. Winter, 1 Wheat. [14 U. S.] 91. Moreover, the bond filed was fatally defective, and cannot now be amended, inasmuch as the legal removal depends upon a bond of a certain form being filed with the petition. The act of congress, under which all removals now take place, of March 3, 1875 (18 Stat. 471, § 3), requires the party removing the case to the circuit court to "make and file therewith (his petition) a bond with good and sufficient surety for his entering in such circuit court, on the first day of its then next session a copy of the record in such suit, and for paying all the costs that may be awarded by such circuit court, if such court shall hold that such suit was wrongfully or improperly removed thereto." The bond filed in this case was conditioned merely for the filing of a copy of the record of the proceedings in the state court upon the first day of the succeeding term of the circuit court in the latter court, and did not provide, as is required by the act of congress, for the payment of costs if the suit should be, as is the case here, improperly removed.

M. Arnold and W. S. Price, contra.

In regard to the bond, the misapprehension has arisen from supposing that the cause was removed under the act of March 3, 1875, supra. It was properly removed under the former act of March 2, 1867, § 1 (14 Stat. 558), which is not repealed by the act of 1875.

[1] [4 Law & Eq. Rep. 69, contains only a partial report.]

It may fairly be inferred from the petition that the parties were citizens of different states, inasmuch as the plaintiff brought the case in a state court of Pennsylvania, against a citizen of Connecticut. In any event, an amendment would be permitted allowing the defendant to aver that the plaintiff is a citizen of Pennsylvania, to test that question.

Before McKENNAN, Circuit Judge, and CADWALADER, District Judge.

McKENNAN, Circuit Judge (orally). It must always appear upon the record that the United States court has jurisdiction. This is not the case here, since it does not appear that the controversy is between citizens of different states. The inference contended for by the defendant cannot be made. For all that appears, the plaintiff may be a citizen of Connecticut or a citizen of a territory, in each one of which cases the cause would have been improperly removed. Apart from this, the bond filed is fatally defective. The act of 1875, supra, certainly takes the place of all former acts in the requirements which it makes for the removal of all causes to which it is applicable. The language of the act is: "Section 2. That in any suit * * * in which there shall be controversy between citizens of different states * * * either party may remove said suit into the circuit court of the United States for the proper district." "Section. 3 * * * That whenever either party entitled to remove any suit mentioned in the next preceding section shall desire to remove such suit from a state court to the circuit court of the United States, he or they may make and file a petition in such suit, * * * and shall make and file therewith a bond * * * for his entering in such circuit court on the first day of its then next session a copy of the record in such suit, and for paying all costs that may be awarded by such circuit court, if such court shall hold that such suit was wrongfully or improperly removed thereto." The requirements as to the nature of the bond, therefore, extend to all cases mentioned in the second section, and to that extent, at least, this act repeals all prior acts upon this subject. The filing of the bond conditioned as required by the act, is a condition precedent to the removal of the cause to this court. If the required bond has not been filed, this court has no jurisdiction; though it belongs to it exclusively, and not to the state court, to decide that fact.

Nor has the plaintiff been guilty of such laches as prevents him from having the cause remanded. This court cannot proceed unless it has jurisdiction, whatever the conduct of the parties may have been. Moreover, the plaintiff could have done nothing further than what has been done, except that he might have made this motion at the last October session instead of now, and by this the defendant has not been injured. The fact that the plaintiff did not oppose the removal from the state court, was not laches upon his part, since that court had no jurisdiction to decide the right of removal, that being wholly within the jurisdiction of this court.

For these reasons the rule nisi to remove is made absolute, and the cause is ordered to be remanded, the defendant to pay all the costs of the removal of the case to this court and of the remanding of the suit to the state court.

Case No. 8,904.

In re McMURRAN et al.

[2 Hughes, 207.] [1]

Circuit Court, E. D. Virginia. 1877.

HOMESTEAD—WAIVER IN WRITING—PARTNERSHIP NOTE SIGNED BY ONE—BOTH BOUND.

Under the act of assembly of Virginia, allowing a waiver of the homestead exemption when done in writing, if a partner in a mercantile firm, in executing a negotiable note of the firm, inserts therein the homestead waiving clause, such clause is effective to defeat pro tanto not only the exemption of the partner who executes the note, but that of each member of the firm, not only in the estate of the firm as such, but in the estate of each and every member of the firm.

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

In bankruptcy.

BOND, Circuit Judge. On an appeal by William Devries & Co. to the supervisory jurisdiction of the circuit court, from a decree made in the district court of the United States for the Eastern district of Virginia, by the Honorable Robert W. Hughes, judge of said district court, on the 28th day of April, 1875. This cause coming on to be heard upon the petition of said William Devries & Co., upon a copy of said decree of the 28th of April, 1875, and upon copies of so much of the papers and proceedings in said district court filed with said petition as presents to the court the question to be reviewed, was argued by counsel. On consideration whereof the court is of opinion that the waiver of homestead exemption on the face of the notes to said William Devries and Co., executed by C. H. McMurran in the name of the firm of C. H. McMurran & Co. (said firm being then composed of said C. H. McMurran and J. P. C. Peters), for value received by said firm of C. H. McMurran & Co., is binding on both the members of the said firm, so that judgments rendered thereon constitute valid liens on the real estate of each and both, and operate so as to preclude either of the members of said firm from claiming his homestead exemption out of the proceeds of the sale of his real estate so far as said judgments are concerned.

Therefore the court doth adjudge, order, and decree that the said decree of April 28th,

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

1875, be reversed, and that the matter be remitted to said district court for further proceedings to be had therein in accordance with the opinion hereinbefore contained, and that the said John P. C. Peters be not allowed his homestead exemption as against the judgments of said petitioners, William Devries & Co., rendered by the county court of Culpeper, at its August term, 1871, and the assignee in bankruptcy of said J. P. C. Peters is directed out of the proceeds of the sale of said Peters's real estate to pay to said William Devries & Co. their costs in this proceeding expended.

McMURRAY (JONES v.). See Case No. 7,479.

Case No. 8,905.

McMURTRIE v. JONES.

[3 Wash. C. C. 206.] [1]

Circuit Court, D. Pennsylvania. April Term, 1813.

NOTES—ENDORSER—PROTEST—NOTICE—PLACE OF RESIDENCE—DILIGENCE.

1. Action upon a promissory note, endorsed by the defendant to the plaintiff. On the day the note became due, it was protested; and notice of its non-payment was left at the boarding-house of Mrs H., where the defendant was reported to reside. At the time of the drawing of the note, and for some time afterwards, the defendant continued to reside at Mrs. H's.; but before it became due, he went to New-York, without the knowledge of the plaintiff, and embarked for Europe. The notice left at Mrs. H's., was, under all the circumstances, sufficient.

[See Bank of United States v. Hatch, Case No. 918.]

[Cited in West Branch Bank v. Fulmer, 3 Pa. St. 401.]

2. Generally, notice to the endorser ought to be given, although he should be beyond sea, if the place of his residence is known; and a reasonable diligence to find out his place of residence ought to be used.

[Cited in Catlin v. Jones, 1 Pin. 132; Corwith v. Morrison, Id. 490.]

Action against the defendant, as endorser of a note of hand made by William Longstreth, 20th of October, 1806, payable six months after date; and assigned by the defendant to the plaintiff, before it became due. On the 23d of April, 1807, the note was protested for non-payment, of which, notice in due form, was left for the defendant, at Mrs. Hand's, in Philadelphia, the reputed place of residence of the defendant, as stated in the deposition of the clerk of the notary, who left it; and who says, that this was done acccording to the usage and custom of merchants of Philadelphia. Evidence was given, by a witness, that the defendant did lodge at Mrs. Hand's whilst he was in Philadelphia, until the time he left the city, which was some weeks before the note became due, when he went to New-York to embark for England. It appeared, that the defendant acted, whilst in this country, as the agent of a house in England, though he did some business for himself, and that this note was given for goods belonging to that house, and assigned to the plaintiff in part payment for a bill of exchange. That the defendant, whilst he had lodgings here, frequently went to the Eastern states on business. When the note became due, part of it was paid by the maker, who, at the same time, passed to the agent of the plaintiff, the note of one Isaac Jones, as a collateral security, on account of this note. Isaac Jones became insolvent before his note was due; and Longstreth, the day after his became due. One of the jurymen was examined, who thought it was the custom to leave a notice at the last usual place of abode of the endorser, but did not recollect any case exactly like the present.

M. Levy, for defendant, insisted—1. That notice of nonpayment by the maker of a note, must be given, and that this was not a good notice. It should have been sent to the defendant, as he had left Philadelphia, which, by inquiry, the plaintiff might have found out. 2. That the defendant acted as the agent of a foreign house, in this business, and is not liable personally. 3. That the note of Isaac Jones should be considered as a payment, it not appearing that the plaintiff had used due diligence to recover it. On the first point, he cited 2 W. Bl. 747; 2 H. Bl. 609; 1 Term R. 168; 1 Johns. 294.

On the same point, Mr. Tilghman, for plaintiff, cited Chit. 89.

WASHINGTON, Circuit Justice (charging jury). There is no weight in two of the objections made to the plaintiff's recovery. It is of no consequence, whether this note was made in consideration of goods sold to the maker by the defendant, as the agent of Bowerbank & Co., or on his own account; or whether the endorsement was made upon a consideration, in fact, passing from that house. If the defendant acted as the agent of that company, this circumstance might make that company liable, if they were the defendants; but still, the defendant is liable on his endorsement. So, in respect to the note of Isaac Jones, which was passed to the plaintiff by the maker of this note, as a collateral security;—no laches are imputable to the plaintiff, in respect to that note; it being proved, that the maker became insolvent before it became due; and the note is in court ready to be delivered to the defendant.

As to the question of notice, there is more difficulty. At the time the assignment was made to the plaintiff, the defendant resided in Philadelphia, as a boarder, at Mrs. Hand's. A few weeks before the note became due, the defendant left Mrs. Hand's and went to New-York, with an intention to embark for

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

England, which he carried into execution. This was known to Longstreth, but it does not appear that it was known to Mrs. Hand, to the plaintiff, or his agent Mr. Craig, or to any one else; and it is worthy of remark, that it is proved, that before this final removal, he was frequently absent from this city upon visits to the Eastern states. Generally speaking, notice to the endorser ought to be given, although he should be beyond sea, if the place of his residence is known; and a reasonable diligence to find out his place of residence ought to be used, of which you are the proper judges. But under all the circumstances of this case, it appears to the court, that the notice left at the known place of residence of the defendant, before his final departure, was sufficient. The court give no opinion respecting the custom which has been mentioned, and respecting which some evidence has been given, as it does not appear to be sufficiently proved.

Verdict for plaintiff.

McNAB, In re. See Case No. 10,292.

Case No. 8,906.

In re McNAB & H. MANUF'G CO.

[18 N. B. R. 388; [1] 21 Pittsb. Leg. J. 88.]

District Court, S. D. New York. Aug. 29, 1878.

BANKRUPTCY — COMPOSITION — DISCONTINUANCE — NOTICE—WAIVER—PERSONAL AND BUSINESS CHARACTER.

1. A provision in a composition agreement, that the proceedings may be discontinued at any time without notice to the creditors, is to be treated merely as a waiver on the part of the creditors of notice of an application to discontinue, and does not bind the court to grant such an application.

[Cited in brief in Weeks v. Prescott, 53 Vt. 69.]

2. A composition is none the less payable in money because the payment is postponed to a future day.

3. The composition was for seventy-five per cent., payable in twelve equal instalments, the first being in three months and the last in three years from the date of confirmation, to be evidenced by the notes of the bankrupt without other security. It was also provided that upon the giving of the notes all the property of the bankrupt should be surrendered to it. It appeared that the president of the bankrupt, who was also its treasurer, had used the funds and credit of the company to a large amount for his own benefit; that, after his defalcation was discovered, he resigned his office as treasurer, but was continued as president; that none of the trustees have manifested any disposition to punish him or to compel him to make restitution, but have settled the matter by taking his stock and crediting him on his account therefor, and by paying the notes outstanding which were either made or indorsed by him in the name of the corporation. *Held*, that the corporation in its managing officers was not of that unquestionable personal, and business character that it would be reasonably safe to trust it for three years, pending the payment of the composition, with the property on which the creditors had a hold, and confirmation was accordingly refused.

[In the matter of the McNab & Harlin Manufacturing Company.]

James P. Campbell, for bankrupt.

Niles & Bagley, for opposing creditors.

Gray & Davenport, for certain creditors approving.

CHOATE, District Judge. This is a motion for a final order confirming a composition. The composition, which has received the assent of more than the requisite number of creditors, is for the payment of seventy-five per cent., in twelve equal instalments, at intervals of three months from the date of confirmation, the first being in three months and the last in three years from said date, to be evidenced by the promissory notes of the bankrupt corporation without other security. One of the terms of the composition is, that, immediately upon the giving of the notes, all the property of the bankrupt, valued at about one hundred and twenty-five thousand dollars, is to be surrendered to the bankrupt, and that the proceedings may be discontinued at any time without notice to the creditors.

Several objections are urged by opposing creditors under the general ground that the composition is not for the best interests of all concerned.

1. The objection that the proceedings may under the composition be discontinued, so that the court would be disabled from enforcing it in case of default, is not a valid reason for refusing to confirm, because this provision is to be treated merely as a waiver on the part of the creditors of notice of an application to discontinue, and does not bind the court to grant such an application of the debtor, and the practice of the court is to refuse all such applications until the composition is fully performed.

2. The objection that the composition is not payable in money must be overruled. It is none the less payable in money because the payment is postponed to a future day or days, and the notes are to be given merely as evidence of and security for the several instalments.

3. The objection that the assets could be made to pay more than is now offered must also be overruled, because, upon a careful examination of all the testimony, it appears that, with the present assets and the present liabilities of the company, it could not be expected that the creditors could do better than this if the estate were wound up by an assignee. And on the question of the amount offered, I concur with the creditors and the register in their opinions, and on this question many matters discussed on the hearing relating to the mismanagement of the affairs of the corporation are wholly immaterial.

4. But the chief objection to this composition is, that the delay in the payment of the composition is unreasonable and that no se-

[1] [Reprinted from 18 N. B. R. 388, by permission.]

curity whatever is given for the payment except the notes of the bankrupt corporation.

The length of time proposed, three years, is certainly much beyond the usual period of credit given in these proceedings. It appears, however, to have been carefully considered and recommended by the creditors, and if the payments were reasonably secured this objection would not in this case be sustained. The time required for debtors to realize out of their property or business the amount requisite to pay the composition must vary greatly with the nature of the business and the property, the amount to be paid, and with other special circumstances. This objection of the length of the credit, however, is closely connected with the other, that there is no security for the payment of the composition. In two late cases,—In re Wilson [Case No. 17,785], and In re Bloch [Id. 1,551],—the objection that no security is given and that the property is surrendered to the debtor was carefully considered, and it was held that the principal element in the determination of the validity of the objection is what shall be shown as to the personal and business character of the debtor, and the composition in such case will be confirmed or rejected as upon the proofs it shall appear that the arrangement is or is not judicious and reasonably safe for the creditors. In the case of a debtor corporation the promises to pay which the creditors receive are necessarily of less value than in case of a natural person of the same means, because the natural person's promise may have a value in the future, notwithstanding the loss of his present property; whereas, in case of a corporation, if its property is gone, there is no chance of enforcing its promises against it. The principle of the cases cited applies therefore with even greater force to the case of a bankrupt corporation.

In the present case it appears that this corporation was organized in 1871 or 1872, and took the business and assets of James McNab and John Harlin, metal manufacturers and dealers. McNab and Harlin were the principal stockholders and managers of the corporation, the other stockholders being, with one exception, subordinates in the employ of the company. McNab was made the president and treasurer, and had exclusively the conduct of the financial part of the business, and Harlin was made the vice-president, and had the conduct of the mechanical part of the business. This continued until about the 1st of November, 1877. The business appears to have been prosperous, and large dividends were declared and paid, and the president and vice-president were each paid a salary of five thousand dollars. Then it was suddenly discovered, by the confession of McNab, that he had abused his trust, had used the funds and credit of the company for his own business in land speculations, to the amount of about one hundred and thirty thousand dollars; that there were then outstanding about eighty-three thousand dollars of paper of the said company, on which it was either maker or indorser, the proceeds of which had been thus used by McNab fraudulently for his own benefit. The evidence shows that up to that time Harlin knew nothing of these fraudulent transactions. The whole capital stock of the company was about one hundred and seventy thousand dollars, of which McNab owned fifty thousand dollars. The last previous account of stock or inventory showed a surplus of assets over and above the capital, so that this fifty thousand dollars stood on the books at the value of seventy-nine thousand dollars; but it is evident, from the testimony as to the actual value of the assets shortly after this period, that the valuation of the assets on the books, which was at their cost price, had become grossly excessive, and making allowance for this excess and for the debts thus fraudulently contracted by McNab on the part of the corporation, it was at least, a matter of doubt whether at the time of this discovery the corporation was solvent, if these fraudulent debts were assumed by it. McNab resigned his office as treasurer, but was continued as president till a few days before the commencement of these bankruptcy proceedings in April, 1878. The financial part of the business was at once assumed by, and has ever since been carried on by, Harlin. Under advice of counsel that the corporation was legally bound on the outstanding fraudulent notes, the trustees agreed to assume them, and they were either paid or renewed at maturity, and before the commencement of these proceedings had been fully paid. I do not think the criticism of the counsel for the opposing creditors, that the corporation thus assumed debts against which it could have been defended, is borne out by the evidence. Though the notes were usurious, this would have been no defense to a corporation, and the holders, so far as appears, were mostly, if not altogether, innocent holders, for value and McNab had apparent authority to issue the paper. The corporation took from McNab his stock, giving him credit for seventy-nine thousand dollars on his account. This was virtually forgiving him that amount of his indebtedness. Neither Harlin nor the trustees have manifested any disposition to punish him or to compel him to make restitution, and the settlement made with him and with the holders of the fraudulent notes was such as to release him from the consequences of his crimes, and to secure the payment of the paper fraudulently issued by him, regardless of whether the proper business creditors of the company would be paid in full or not. The case called for the most stringent measures against McNab; but instead of procuring his being sent to the penitentiary, the managers of this corporation have apparently in all things consulted his interests in conducting its affairs since the discovery of his frauds; and while there is nothing directly reflecting on the personal integrity of Mr. Harlin or the other

trustees, who indeed are mere nominal trustees of the corporation, I think it cannot be held that the corporation in its managing officers is of that unquestionable personal and business character that it is reasonably safe to trust it for three years, pending the payment of the composition, with the property on which the creditors now have a hold. I have not overlooked the very large majority by which the creditors have approved this composition; but giving the action of the creditors its due weight, I am compelled to withhold the confirmation of the resolutions.

Motion denied, unless within ten days proceedings are duly instituted for a modification of the terms of composition or for securing the payment thereof, in which case the motion may be renewed.

McNABB (CALLER v.). See Case No. 2,322.

Case No. 8,907.

In re McNAIR.

[2 N. B. R. 219 (Quarto, 77).] [1]

District Court, D. North Carolina. 1868.

BANKRUPTCY—WITNESS FEES.

A bankrupt summoned by creditor to appear as witness is not entitled to witness's fees.

[Cited in Re Paddock, Case No. 10,658.]

The following question arose, and was stated and agreed to by John D. Shaw, for bankrupt, and John W. Hinsdale, for J. J. Gilchrist, creditor, viz.: "Is a bankrupt attending before the court of bankruptcy for examination, entitled to the fees of a witness?"

The facts are: On the 6th day of May, 1868, Neill A. McNair, the above bankrupt, was ordered to appear before me at Fayetteville, N. C., on the 22d day of May, 1868, to be examined touching his said bankruptcy. In obedience to said order, on the said 22d day of May, the said bankrupt appeared before me, and was on examination two days. At the close of his examination the said bankrupt demanded of J. J. Gilchrist, the creditor, upon whose application the order for examination was issued, the usual fees allowed to witnesses attending the federal courts, which demand the said creditor declined to recognize, raising the question through his attorney, John W. Hinsdale, whether a bankrupt attending before courts of bankruptcy for examination, is entitled to the fees of a witness, when he is ordered to appear to be examined relative to any matter concerning his bankruptcy.

BROOKS, District Judge. At Elizabeth City, in the district of North Carolina, on the 5th day of October, 1868, this question is considered, presented by the certificate of Mr. Register Guthrie, of the 23d May, 1868: Is a bankrupt, when ordered to appear for examination in regard to his bankruptcy, at the instance of a creditor, entitled from such creditor to fees, as any other witness would be entitled to recover, for such attendance? I do not doubt as to the proper answer to be given to this question. The bankrupt summoned, or ordered, at the instance of a creditor, to be examined in reference to his bankruptcy, is not entitled to any compensation or fees for complying with such order from such creditor. Such a party does not stand as any other witness would, but he is expressly made subject to the order of the court, to be examined, when and where the court may direct, not as an ordinary witness, but it is one of the conditions that he shall do this if required; which entitles him to his discharge in the end, if no fraud is found against him.

[See Case No. 8,908.]

[1] [Reprinted by permission.]

Case No. 8,908.

In re McNAIR.

[2 N. B. R. 343 (Quarto, 109).] [1]

District Court, D. North Carolina. 1868.

BANKRUPTCY—PAPERS FILED—RIGHT TO WITHDRAW.

Original papers referred to in bankrupt's deposition, and annexed thereto, cannot be withdrawn from the files at the option of the bankrupt. The court may order a withdrawal for good reason shown by party interested.

John F. McNair, a witness summoned on behalf of the bankrupt, was on his examination before the register, Wm. A. Guthrie. He produced certain papers which were marked as a part of the deposition and filed with it. Whereupon application being made by J. D. Shaw, Esq., bankrupt's attorney, for the return of said paper, which was opposed by John W. Hinsdale, Esq., attorney for J. J. Gilchrist, creditor; the following question was certified to the judge for decision: Whether the original papers which have been exhibited to the court and annexed to the deposition of John F. McNair, being marked and referred to in said deposition as exhibits A, B, C, D, E, F, and G, have not thereby became a part and parcel of the deposition, and whether they should not remain with the deposition, and should copies of these be delivered to the assignee, or shall copies be retained and the original returned?

BROOKS, District Judge. The question presented by the certificate of the register in this case is—whether original papers, which have been exhibited to the court and annexed to depositions, being marked and referred to in deposition, have not thereby become so much a part of the deposition, that they cannot be withdrawn and a copy substituted?

[1] [Reprinted by permission.]

After full consideration of this question, I am not able to concur with the register in the opinion expressed. The papers in question were exhibited, referred to, and stated as exhibits in the deposition, and annexed to the deposition. The court passed upon the deposition as it was, exhibits and all. In further progress of the case, if objections should be made to any reference to the exhibits, upon the ground that in the deposition they are referred to as original papers, but upon inspection they appear to be copies substituted—such objections might be good. The deposition as it is must be complete. It would not be so complete with copies, for it must then be established that the papers substituted are copies. That the court may, upon cause shown, order the withdrawal of the original exhibits, to be used as evidence in behalf of any one having an interest in them, I have no doubt. But the court as clearly will not order or allow them withdrawn, unless upon the application of some party who can show the proper use for which he desires them. The original papers referred to in, and annexed to, the deposition, should be retained by the register with the deposition, against this demand of the bankrupt.

[See Case No. 8,907.]

Case No. 8,909.

McNALLY v. MEYER et al.

[5 Ben. 239; [1] 14 Int. Rev. Rec. 38.]

District Court, S. D. New York. June, 1871.

COLLISION — RIVER — UNRELIABLE TESTIMONY—HELMSMAN—APPROACHED FROM BEHIND.

1. Nothing is more unreliable than testimony from those on one moving vessel, as to the absolute actions of another moving vessel.

[Cited in The Mary Ann, 11 Fed. 338.]

2. The only safe reliance, as a general rule, as to the course and deflections of a vessel, is the testimony of those who hold her helm in their hands.

[Cited in The Doris Eckhoff, 1 C. C. A. 494, 50 Fed. 139.]

3. A steamer, being approached from behind by another steamer, coming up on her starboard side, on a rounding course, intending to cross her bows from starboard to port, is under no obligations to promote that movement.

[Libel by Thomas McNally against Christopher Meyer and others to recover for damages sustained by collision.]

J. H. Choate and W. G. Choate, for libellant.

C. Donohue and W. J. Haskett, for respondents.

BLATCHFORD, District Judge. This libel grows out of the same collision which is the subject of the previous case of The Newport [Case No. 10,185]. The libellant was the owner of the barge which was in tow of the Quickstep, and he sues the owners of the Quickstep, to recover the value of the barge, and of some property on board of her, and of the freight money for the cargo of coal, and the amount of money paid to the Quickstep for the towage service. He does not sue the Newport.

The testimony is the same as in the case referred to. The libel contains substantially the same account of the occurrence as the answer contains in the suit against the Newport. The libel further charges fault in the Quickstep, in unnecessarily and improperly delaying to begin to tow the barge from Jersey City to the Atlantic Docks, so that she encountered the Newport. No proof was offered to sustain this allegation.

There are some averments in the libel which are not found in the answer in the case against the Newport, and serve to illustrate some remarks made by me in deciding that case. The libel avers, that, just at the moment when the Newport was rounding on her course up the East river, outside of the Quickstep, the Quickstep, without notifying her intention by whistle or otherwise, sheered to starboard, with the barge, across the course of the Newport, and then, in that position, shut off her steam. The rounding of the Newport on her course up the East river, was a rounding to port, which required starboarding, and, therefore, indicates a swinging of the Newport to port by starboarding, which would, even if the Quickstep kept a straight course, cause the Quickstep to appear to those on the Newport to be swinging to starboard by porting. Daily experience in the trial of collision cases shows that nothing is more unreliable than testimony from those on one moving vessel as to the absolute actions of another moving vessel. The irresistible propensity is to regard your own vessel as stationary with reference to the other vesel, and to attribute all deflecting movement to the other vessel. The other vessel, a moving object, is alone in the eye. Unmoving objects are not kept in view, as tests of movements in the vessels. The testimony which results is honest, but illusory, deceptive and unreliable. The only safe reliance, as a general rule, as to the course and deflections of a vessel, is the testimony of those who hold in their hands her wheel or her tiller. A change of bearing between two vessels, which may be the result of three things—a change of course wholly by one, a change of course wholly by the other, or a change of course by both—can give no reliable indication to an observer on either vessel, who judges merely from looking at the other vessel, as to which one of the three things has produced such change of bearing.

The libel also states, that the Quickstep was proceeding in a nearly straight course towards the East river, at no great dis-

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

tance from the Battery, bound for the Atlantic Docks in Brooklyn, and that, as the Newport came behind, and outside of, the Quickstep, and manifested her intention of leaving the Quickstep on her, the Newport's, port side in her course up the East river, it was a fault in the Quickstep to sheer to starboard at the moment when the Newport was rounding up on the starboard side of the Quickstep, and across the intended course of the Quickstep, and to not take precautions to allow the Newport to pass up the river, before attempting to tow the barge across. In so far as this statement in the libel advances the view that the Quickstep, being approached from behind, when bound to the Atlantic Docks, by a steamer which she saw was coming up on her starboard side, and intending to cross her bows from starboard to port, was under obligations to promote such movement, it is contrary to the settled law. The Quickstep had a right to her course, and the Newport, bound up the East river, had no right to run around her, in the way claimed in the libel, or to call upon the Quickstep to give way.

Although the owners of the Newport are not parties to this suit, the observations growing out of the libel are especially pertinent, for the reason that the libel was signed and verified by the proctor for the libellant, who was also the proctor for the claimants in the suit against the Newport, and signed and verified the answer in that suit.

The libel must be dismissed, with costs, on the ground that no fault is shown to have been committed by the Quickstep.

[See Case No. 10,185.]

Case No. 8,910.

McNAMARA v. GAYLORD et al.

[1 Bond, 302.] [1]

Circuit Court, S. D. Ohio. Dec. Term, 1859.

CONTRACTS—EXPONENT OF INTENTION—EXTRINSIC EVIDENCE — SUIT FOR VIOLATION — OFFER TO COMPLY—PARTNERSHIP—SALE OF INTEREST—ADMISSION IN FIRM.

1. A contract free from ambiguity in its terms must be viewed as the exponent of the intention of the parties to it, and can not be varied or contradicted by extrinsic evidence.

2. A partner can not, by an agreement to sell a part of his interest, compel his other partner to accept the vendee as a member of the firm.

3. Where one party to a contract agrees to do an act at a time specified, in consideration of which the other party is to do another act at the same time, neither party can sue for a violation of the agreement, or insist on its specific performance without showing an offer to comply with the agreement, or a sufficient excuse for not doing so.

[1] [Reported by Lewis H. Bond, Esq., and here reprinted by permission.]

In equity.

Charles Fox, for complainant.

Taft & Perry, for defendants.

OPINION OF THE COURT. This is a bill in equity, prosecuted by Thomas McNamara, a citizen of the state of Pennsylvania, against Benjamin B. Gaylord and Thomas G. Gaylord, surviving partners of Thomas G. Gaylord & Co., and Thomas G. Gaylord and E. H. Pendleton, administrators of Thomas G. Gaylord, a former partner in said firm, now deceased. The bill avers, in substance, that in the spring of 1854, after some previous correspondence between the said Thomas G. Gaylord, deceased, and the plaintiff as to the purchase by the latter of an interest in the rolling mill and iron works of Portsmouth, in the state of Ohio, then owned and carried on by Thomas G. Gaylord & Co., on May 10, 1854, a written contract was entered into by which the said Thomas G. Gaylord, Sen., sold to the plaintiff an interest of one undivided eighth in the said mill and works for $15,000, of which $5,000 was to be paid on the 1st of July or October then next, and $2,500 annually thereafter with interest till the whole was paid; and it was also agreed that the plaintiff should take charge of the manufacturing department of the establishment, as manager, at a salary of $1,000 per annum. The plaintiff further avers, that on October 1, 1854, he took possession as a partner and manager, and that he continued as manager until October 1, 1855, and that at that time the profits for the year exceeded $70,000; that in consequence of his objections to certain improvements and additions to the works contemplated by the other parties, from October 1, 1855, he ceased to be the manager and took the place of a shipping clerk, and so continued till September 3, 1856, when he was notified that as he had not fulfilled his contract his connection with the concern must cease; that he left on said 3d of September, at which time the works were stopped to make repairs and improvements. He also avers, that from October 1, 1855, to the date of the stoppage of the works, the profits were $38,664, making an aggregate of profits from October 1, 1854, of upward of $110,000, of which he claims one-eighth part, after deducting payments received by him. The plaintiff also alleges that he proposed to and requested of Gaylord, on October 1, 1855, to settle with him, and that the $5,000, which he had agreed to pay, should be retained out of the profits to which he was entitled, which was refused; and he avers that he has been unable to procure a settlement, etc., and he prays for a dissolution of the partnership, an account of profits, and a decree for one-eighth part of such profits.

The exhibits and evidence show that on and prior to October 1, 1854, Thomas G. Gaylord, Sen., was the owner of an interest of three-fourths in the mill and works, and

that Benjamin B. Gaylord owned the other fourth; and that, in the spring of 1855, Thomas G. Gaylord, Sen., sold and transferred to his son, Thomas G. Gaylord, one-half of his interest, to take effect from October 1, 1854, from which date he was therefore a partner. The entire interest was then estimated at $120,000. Benjamin B. Gaylord and Thomas G. Gaylord have filed their answers, as surviving partners; and the administrators of Thomas G. Gaylord, deceased, have also answered. In their answers the administrators refer to and adopt the answer of Thomas G. Gaylord, Sen., filed by him in a suit brought by McNamara in the court of common pleas of Scioto county, Ohio, which involved essentially the matters now in controversy. It is not necessary to notice in detail the numerous allegations of these answers. They deny explicitly that the plaintiff had an interest in the iron works, as a partner, and aver that he has no claim for an account of profits. They insist that the rights of the parties must be settled by the terms of the written contract of May 10, 1854; that the plaintiff failed to comply with his obligation to pay $5,000 on October 1, 1854, which was the condition on which the interest of one-eighth was to vest in him; that he has not paid or offered to pay said sum, nor has he in any way been released from such payment; that he was at no time accepted or treated as a partner, and had no connection with the concern except as manager under the contract, for the first year after its date, and subsequently as a shipping clerk, for which he has been fully paid according to the terms of the contract. There are also averments in the answers to the effect that the plaintiff was incompetent for the discharge of the duties of a manager; and, also, that the contract of May 10, 1854, was entered into by reason of the false and deceptive representations of the plaintiff as to his ability to pay the $5,000, and the other payments specified in the contract, and that he then was and for some time before had been insolvent and wholly unable to meet any pecuniary liability, and therefore that said contract was fraudulent and void.

I do not propose to examine these points in the defense, as there are other grounds which I deem decisive of the merits of this case.

I will not notice the written contract between the plaintiff and Thomas G. Gaylord, premising that it is set forth in the plaintiff's bill in connection with many collateral facts which seem to have no bearing on the merits of this controversy. It is, however, referred to in the bill, as the basis of the plaintiff's claim, as a partner, and his right to an account for profits. The contract is perspicuous and free from ambiguity in its terms, and must be viewed as the exponent of the intention of the parties to it. And as it can not be varied or contradicted by extrinsic evidence, there would seem to be no occasion to notice in this place the correspondence between the parties which preceded its execution. Such a correspondence had taken place, and Gaylord, in one of his letters, stated that the arrangement could not be consummated without the presence of the plaintiff at Portsmouth. He came out, and after an examination of the works, the parties signed the contract. Without reciting it at length, I will state its essential provisions. Its date is May 10, 1854. Gaylord agreed to sell the plaintiff an undivided eighth of the rolling mill and iron works, including everything pertaining to them, except the land, and to give possession the 1st of July or October then next. He also obligated himself to keep a capital of $60,000 in the concern so long as it might be needed, on one-eighth of which the plaintiff was to pay interest and to have one-eighth of the profits, and to share in the same proportion in the losses. The plaintiff was to take charge of the works and manage and superintend the manufacture of iron and nails, for which he was to receive an annual salary of $1,000. He agreed to pay for the interest of one-eighth the sum of $15,000, of which $5,000 was to be paid on the said 1st of July or October, and the rest in annual payments of $2,500, until the whole was paid.

The first remark in relation to this contract is, that it is not by its terms, and does not purport to be, an agreement for a partnership. It is clear that Thomas G. Gaylord could not, by an agreement to sell a part of his interest, compel the other partners to accept the vendee as a member of the firm. It was doubtless intended to be preliminary to such an arrangement, but, per se, can have no such effect. Two objects were within the contemplation of the parties to the contract. It was, in the first place, a conditional sale by Gaylord of an interest of one-eighth in the iron works; and, in the second place, it provided for the employment of the plaintiff as a manager or superintendent at a fixed salary, payable without regard to profit or loss. Under this contract the plaintiff entered on the performance of his duties as manager and superintendent of the manufacturing department on October 1, 1854. It would seem that in the copy of the contract retained by Gaylord, the 1st day of July is named as the time when the plaintiff was to commence as manager, and when the advance payment of $5,000 was to be made; while in the other copy, as already noticed, it is stated in the alternative the 1st of July or October. This difference in the contract is not material, and can not affect the decision of any of the questions arising in this case. As before noticed, the plaintiff commenced his service on the 1st of October. He continued in that capacity until October 1, 1855. By an arrangement then made, he was transferred to, and accepted, the post of shipping clerk, which he held until September 3, 1856, when his connection with the concern finally ceased.

Without noticing the numerous facts brought into this case by the pleadings, exhibits, and evidence, it seems to the court it may be disposed of by ascertaining what are the legal obligations of the parties under the contract in question, and whether the plaintiff has complied with it, in the sense of giving him a right to insist on its strict execution by the other party, and to claim its benefits as if complied with on his part. The terms of the contract have been already stated. As the consideration of the sale by Gaylord of the interest of one-eighth in the iron works, the plaintiff agreed to pay $15,000, of which $5,000 was to be paid October 1, 1854, and the balance in annual installments of $2,500. There is no pretense that the first payment was made on the day named in the contract, or at any time since, or that there has been at any time an offer to pay by the plaintiff, except by a proposition that the profits of the first year should be appropriated as a payment. Now, if this contract had provided only for the payment of the $5,000, without any reference to subsequent payments, I suppose it to be clear the payment of the money, and the transfer of the one-eighth interest, must be regarded as concurrent acts, and that until there was a performance or an offer to perform by one party, the other was under no legal obligation to perform his part of the contract. Where the agreement is to do an act at a time specified, in consideration of which the other party is to do another act at the same time, the party in default can not sue for a violation of the agreement, or insist on its specific performance without showing an offer to comply, or a sufficient excuse for not doing so. By the contract in question the obligation of the plaintiff is not limited to the payment of the $5,000 on October 1, 1854. He was bound to make four other payments of $2,500 each to complete the purchase of the one-eighth interest in the iron works. The contract does not require the vendor to convey to the plaintiff the interest of one-eighth on the payment of the $5,000 in advance; and, by fair legal implication, he was under no obligation to make or tender a conveyance till the whole sum of $15,000 was paid or tendered. This contract admits of no other construction than that now indicated. And in this view there can be no ground for the claim asserted by the plaintiff, that Gaylord was bound to tender a deed for the one-eighth interest in the iron works on the day named in the contract for the advance payment of $5,000. It is clear, then, that the plaintiff has no ground for the claim that under the contract he is to be regarded as a partner, and entitled to an account for profits. But it is insisted that, irrespective of the contract, the plaintiff has proved facts entitling him in equity to a share of the profits, on the ground that Thomas G. Gaylord, Sen., has waived the performance of the stipulation requiring payment of the purchase money, and that his acts, and the acts of the other members of the firm of Gaylord & Co., show that the plaintiff was recognized and accepted as a partner from October 1, 1854. If this position is sustained by the evidence, it is within the competency of this court, as a court of equity, and it would certainly be its duty, to give the plaintiff the relief sought for by holding him to be a partner, and decreeing a participation in the profits of the firm. I have examined carefully the evidence with a view to this aspect of the case, and without attempting a critical analysis of the facts, will state the conclusions to which I have arrived.

As to the waiver of the first payment required by the contract, there is nothing in the evidence by which it can be established by fair implication. On the other hand, there are several facts and considerations that negative the presumption of such a waiver. That the provision requiring the advance payment was made a part of the contract is a strong presumptive proof that Gaylord viewed it as an essential condition, and expected it would be complied with. There is no reason, from the nature of the transaction, to infer that he was indifferent on this subject. And the correspondence between Gaylord and the plaintiff, subsequently to the date of the contract, so far from showing a purpose or consent to dispense with the payment of the $5,000, proves that it was always insisted on, and referred to, as a condition on which alone the plaintiff could be let into the concern as a partner. It is true, as the evidence conclusively shows, that before and at the date of the contract Gaylord was mistaken as to the pecuniary ability of the plaintiff to make this payment. He had reason to conclude, from his representations on the subject, that the plaintiff had means from which to raise the amount agreed to be paid; and, when he ascertained his inability to do so, he could at once have rescinded the contract. Gaylord did not pursue this cause, but indulged him by an extension of the time of payment, with the expectation that he would be able to procure the money needed. But this indulgence affords no reason for the inference, that he intended to release him from the obligation of his contract, especially as other facts expressly negative any such intention. But upon this point, it is sufficient to remark that at least for the first year of his connection with the iron works, the plaintiff did not pretend to claim an interest in them as a partner, without the payment of the five thousand dollars. That he so regarded the contract appears clearly from the fact, that during that year, as appears from his letters, he was making efforts to raise the money in Pennsylvania. And in one of his letters to Gaylord, he states, in substance, that he did not ask or expect a transfer of the one-eighth interest until the first payment was made.

As a last alternative, he proposed that Gaylord & Co. should receive the remnant of a stock of dry goods, in part payment of the sum due. This was agreed to, on the condition that the goods were suitable for their store at Portsmouth. Upon examination, they were found unsuitable for that purpose, and the negotiation therefore failed. And on this subject it is proper to state, that the plaintiff in his bill avers that in October, 1855, Gaylord claimed that the first payment was due and unpaid, and that unless it was paid the contract would be void, and that plaintiff then proposed that the $5,000 should be credited to him from the profits of the preceding year, which was declined.

But it is insisted by counsel that, conceding the plaintiff was bound to make the first payment, under the contract, on October 1, 1854, and that he has failed to do so, if the evidence shows that he was accepted and treated as a partner, the members of the firm of Gaylord & Co. are estopped from denying the partnership, and are liable to account to the plaintiff for one-eighth of the profits accruing while he was so connected with them.

To appreciate properly the force of this position, it is necessary again to recur to the contract between Gaylord and the plaintiff, and the relation in which the parties stood to each other. Now, if the contract had been merely for the sale of a part of Gaylord's interest in the iron works, without providing for the employment of the plaintiff, as a manager, and he had been permitted to participate in the business of the firm without objection by the old partners, and without insisting on the payment of the purchase money required by the contract, there would be a plausible ground for the claim that these acts were a waiver of the contract, and a virtual recognition of the right of the purchaser as a partner. There are a class of cases in which this principle has been properly applied and enforced; but its application to this case is not perceived. The contract in question provided for the sale of an interest in the iron works to the plaintiff, and also for his employment as a manager. The two objects are divisible; and it is necessary to a right understanding of the intention of the parties that they should be separated. They have no necessary connection with each other. There may have been a failure on the part of the purchaser to comply with his contract, affording a good ground for its rescission, and it may have been in fact rescinded, and yet as to the employment of the plaintiff as a manager, it may have been in full force. There is reason to suppose this state of things was in the contemplation of these parties, in entering into this contract. Gaylord was desirous of securing the services of the plaintiff as a manager, under a belief that he would faithfully and skillfully discharge the duties of the station, and thus promote the interests of the company. He therefore agreed to give him a fair salary, to be paid without regard to the success of the iron works, while he superintended them. In addition to this, he was willing to sell him an eighth interest, at the price and on the condition stated in the contract. The arrangement was obviously a desirable one for the plaintiff, as it secured to him the means of livelihood, beyond all contingencies, with a chance of being interested in the firm on payment of the purchase money. If he failed in making the payments, and thereby forfeited his rights under the contract of sale, he would still occupy his place as manager, and receive his compensation as such.

This view throws light on the true construction of the contract between these parties, and their intention in making it. It also assists in a proper understanding of those acts, which, it is claimed by the plaintiff, are equivalent to a waiver of parts of the contract, and his recognition and acceptance as a partner. It shows, conclusively, that the possession of the plaintiff, so far as he had any, and his participation and agency in the business of the company, did not result from his purchase of an interest in the works, but from the position he occupied under the other branch of the contract, as the manager of the manufacturing department. And hence, the inference is not admissible, that his continuance in the employment of the company, after the failure to make the payment required, and his acts as manager, are evidence of the intention of the other parties to dispense with the obligations of the contract, or that he was accepted as a partner.

But, it is contended by the plaintiff's counsel, that there is affirmative proof that McNamara was treated as a partner during the first year of his connection with the iron works. This is apparent, it is insisted, from the correspondence between him and Gaylord, Sen., subsequent to the date of the contract, and from the verbal statements and admissions of Benjamin B. Gaylord. From a careful examination of the elder Gaylord's letters, I have failed to notice anything that can be fairly construed into an admission that the plaintiff was a partner. On the contrary, he often refers to the contract, and its requirement to pay the $5,000 before the plaintiff can have an interest in the concern. And there are no expressions in the letters from which the inference can be drawn that Gaylord regarded the plaintiff in any other light than a manager. His language is that of an owner to his employe; though he obviously, for a time, contemplated and expected that the plaintiff would make the payment required by the contract, and thus entitle himself to an interest in the iron works. But what seems conclusive on this point is the fact, that at least for the first year there was no semblance of a claim by the plaintiff that he was a partner. In one of his letters,

before referred to, there is an explicit disclaim of any right as a partner, or to a transfer of the one-eighth interest, until the first payment was made.

Nor does the evidence of the acts or declarations of Benjamin B. Gaylord prove the recognition of the plaintiff as a partner. It is true that on several occasions he stated the fact that the plaintiff had purchased an interest in the establishment; and two witnesses testify that after the plaintiff became connected with it, Gaylord introduced him as a partner. It is obvious, however, when this evidence is taken in connection with other facts, that he had reference to the contract between the plaintiff and Thomas G. Gaylord, Sen., and to the expectation that the contract would be consummated, and that the partnership would thus take place. There can be no question that for the first year after the plaintiff began his service as a manager, the Gaylords supposed he was acting in good faith, and had the intention and the ability to comply with his agreement; and their conduct was consistent with this supposition.

It is insisted, also, as a strong proof of the plaintiff's recognition as a partner, that he negotiated a sale of a large quantity of iron to a mercantile house in St. Louis, with the knowledge and approbation of the Gaylords. Without noticing in detail the correspondence between the plaintiff and the St. Louis house, it is sufficient to state that while he intimates that he has an interest in the Portsmouth Iron Works, he does not use the name of the firm, as he properly might do, if a partner, but subscribes the letters T. G. Gaylord & Co., by Thomas McNamara. This fact repels any presumption that might otherwise arise from this transaction that he was a partner.

There is one fact, full of significance as to the understanding of the parties, in regard to the question of partnership. It is in proof, that, in accordance with an established usage of the firm of Gaylord & Co., an account of stock was taken in the beginning of October, 1854, and a few days after the plaintiff had assumed the duties of manager; and that in taking this account no notice was taken of his interest as a partner. It also appears that there was no change in the partnership books, and that no charge was made against the plaintiff as for stock purchased. Nor was any notice given to the public, through the papers or otherwise, of any addition to or change in the membership of the firm. It is incredible that a step of such interest to the parties should take place without being noticed in some or all the ways referred to. And on this question of partnership, it is proper here to notice that the proof is very explicit that Benjamin G. Gaylord often, and in very emphatic terms, denied the fact of the plaintiff's interest in the concern, and affirmed that his connection with it was exclusively that of a manager. But, without extending my remarks on this point, I may state it as my unhesitating conclusion, that the evidence wholly fails to establish affirmatively that the plaintiff was in fact a partner, or that he was recognized and accepted as such.

There is another aspect of this case, as presented by the plaintiff's bill, to which I will briefly advert. It is claimed, as I understand the allegations of the bill, that apart from the contract, if the court is satisfied the plaintiff has rendered valuable service to the firm of Gaylord & Co., and that during the period of such service large profits were made, he is entitled, on the broad principles of equity, to his proportionate share of such profits, and to a decree that will carry out that object. The basis of this claim is, that although the first payment of $5,000 was not made, the one-eighth of the profits from October, 1854, to October, 1855, were nearly, if not quite, enough to meet that payment, and that the plaintiff was entitled to credit on the contract for his proportion of such profits. He avers in his bill that in October, 1855, he requested a settlement with Gaylord & Co., on this basis, which they refused. It also appears from the plaintiff's letters written in 1855, that this proposition had been a subject of correspondence between him and Gaylord, Sen., and had been uniformly declined by the latter, with a protestation that the plaintiff was not entitled to anything on the ground urged by him.

It is only necessary to say on this point, that this was no part of the contract of the parties. The contract clearly contemplated the payment of the entire amount of $15,000. No principle of equity requires that the profits should be appropriated as claimed by the plaintiff; nor had the proposition a shadow of reason for its support. It was in effect saying, that without the contribution of a dollar to the capital of the firm, and after being paid his salary for his services as a manager, he was still entitled to all the benefits of an actual partner. The equitable phase of this matter would be different, if the plaintiff had devoted his labor and skill for the interests of the firm without any agreement for compensation as manager; but being fully paid for his services in that capacity, no reason is furnished for claiming a share of the profits.

But it is unnecessary to pursue this investigation. And without noticing the other points presented in the case, I have no hesitation in announcing the conclusion, that the plaintiff was not a partner of Gaylord & Co., and is not entitled in equity to an account of profits. The bill must therefore be dismissed.

Case No. 8,911.

McNAUGHTER v. CASSALLY.

[4 McLean, 530.] [1]

Circuit Court, D. Indiana. May Term, 1849.

CONTRACTS—NONCOMPLIANCE—WAIVER—ESTOPPEL—MEASURE OF DAMAGES.

1. A contract to deliver three thousand hogs, cleaned, at such times as should be required by the purchaser, not exceeding seven hundred in a day, may be waived by receiving a less number, and giving notice, under the contract, to furnish at subsequent periods.

[Cited in brief in Reggins v. Missouri River, Ft. S. & G. R. Co., 73 Mo. 600.]

2. On the failure of the plaintiff to deliver, the defendant might have put an end to the contract, and refused to receive any more.

3. This having been waived by defendant, he can not afterwards, set it up as matter of justification or defense, for not complying with his contract.

4. After the defendant's agents refused to receive any more hogs, there being one or two wagon loads, at the door of the pork house, ready to be delivered, and a great number killed and cleaned, it was unnecessary to make a tender of the hogs.

5. If the jury are satisfied that the plaintiff had the hogs ready to be delivered, a refusal to receive any more, was sufficient to charge the defendant.

6. The damages will be, the difference between the contract price, and the market value of the pork, in Madison, the place of delivery.

[Cited in Dolph v. Troy Laundry Mach. Co., 28 Fed. 557.]

[This was an action by A. McNaughter against William Cassally for damages for breach of contract.]

Sullivan & Chapman, for plaintiff.

Marshall & Judah, for defendant.

OPINION OF THE COURT. This action is founded upon a contract of the following import, agreement dated 17th June, 1847—McNaughter sold to defendant and partner, three thousand corn fed hogs, to be delivered on or between the 15th of November and 1st of January, next, at the option of Cassally, at Madison, Indiana, they giving twelve days notice for the delivery of the same, and to pay for the same $4.62½ per hundred, net weight; said hogs to average 190 pounds net, and no one to weigh less than 140 pounds, at Madison, to be killed one day and weighed the next; payment to be made $4,900 in advance on security by plaintiff, etc. This contract was modified on the 8th of November, 1847, so as to make the delivery at Madison, soon as the weather is cold enough to pack seven hundred hogs per day, until the completion of the contract. Payments were made by the defendant amounting to the sum of $15,640. Previous to the above modification of the contract, the defendant on the 2d of November, caused a notice to be delivered to the plaintiff as follows: "We want the three thousand hogs to be delivered to us on the 15th inst." On receiving this notice, the plaintiff informed the defendant that he would make his arrangements to furnish the hogs agreeable to contract—have them all killed in one day, and delivered the next. The plaintiff offered to prove that a large number of hogs were purchased, and forfeitures incurred by him by reason of the defendant's failure to take the number specified in the contract. But THE COURT refused to admit the evidence; that the contract of purchase by the plaintiff was not a matter to be proved. That the difference between the contract price with the defendant and the value of the hogs at the place of delivery were the facts to be proved, to show the damages sustained by the plaintiff.

In their charge to the jury, THE COURT said, it appears from the evidence, that the hogs delivered have been paid for under the contract. And the plaintiff claims damages for a violation of the contract in not receiving the whole number of three thousand, named in the contract. By the contract the hogs were to be delivered between the 15th of November and 1st of January ensuing, at the option of the defendant, he giving twelve days notice. This gave him the right to demand the delivery of the hogs in one day, and notice to this effect seems to have been given. But afterward, this notice was not insisted on, and the contract was so changed by the parties, as to require the delivery of seven hundred hogs per day, when the weather shall be cool enough. Schooley was engaged to cut and pack the pork, and he purchased the hams. He states that seven hundred hogs were required to be killed the 11th November, on Thursday. Mitchell and Payne, who acted for McNaughter in his absence, say that no such order was given, but that it was agreed that the hogs in the pens should be killed on the 11th, and delivered on the 13th. On the 12th November there was an order for seven hundred to be slaughtered on that day. But this order was waived by Irwin, the agent of the defendant. Irwin denies that he gave such an order, and declares that he had no authority to give it. It seems the defendant said to Payne and Mitchell, he was not, himself, a practical man, but that Irwin was, who would give instructions. An order was given the 13th, Saturday, for seven hundred hogs. Six hundred and sixty-three were weighed. Schooley agreed to make up the deficiency. Some of the hogs were sent which were supposed to have been killed on that day. Another order was given on the 15th of November for seven hundred to be delivered the 16th; six hundred and nine-

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

ty-seven were weighed. On the 16th an order was given for two hundred hogs, to be delivered on the 17th; two hundred were weighed and delivered, but the defendant's agents, acting under his orders, refused to receive any more. At this time there were several wagons at Schooley's pork house, loaded with hogs, which were refused. At the same time, it appears, there were in McNaughter & Mitchell's slaughter house eight hundred hogs cleaned. There remained eleven hundred and forty-two hogs to be delivered to complete the three thousand. To recover damages for the refusal to receive these hogs this action has been brought.

This is, no doubt, a hard contract on the defendant. Pork could be purchased at less than he agreed to give. But the court can not change the contract. The defense mainly rests upon the failures to deliver the hogs, under the notices given, as the plaintiff was bound to. This would have been a good defense for breaking up the contract and refusing to receive any more hogs if it had not been waived by the defendant. From time to time orders were given, notwithstanding the previous failure to deliver the number required. Such orders, given from time to time, must be considered as waivers of the previous default, as it declared a willingness to go on with the contract, and the plaintiff was bound to make the deliveries as required. He could not take advantage of his own failures. Under these circumstances, THE COURT think the defense set up can not avail the defendant. He might have taken advantage of any failure by the plaintiff, and put an end to the contract, but he failed to do so. The order for two hundred hogs to be delivered on the 17th of November was complied with, so that when the defendant refused to receive any more hogs under the contract, the plaintiff was not in default, as the previous failure had been waived by subsequent orders. At this time, Schooley refused, as the agent of the defendant, to receive any more hogs, though it appears from the evidence, a large number were ready to be delivered, having been killed and cleaned. And the last order having been complied with, the plaintiff stands in the attitude of having performed his agreement as he had been required, and was ready to complete it if he had not been prevented by the refusal of the defendant. A tender of all the hogs was unnecessary, they being on hand, after the refusal of the defendant to receive any more.

If these facts are fully sustained by the evidence, it will be your duty to find for the plaintiff such damages as the law authorizes. The measure of the damages will be, the difference between the market value of the hogs at the time of the refusal to receive them, and the price which the defendant in his written contract agreed to pay.

The verdict was for the plaintiff. Judgment.

Case No. 8,912.

In re McNAUGHTON.

[8 N. B. R. (1873) 44.] [1]

District Court, E. D. Michigan.

BANKRUPTCY — ORDER TO SHOW CAUSE — MOTION TO VACATE — SIGNATURE TO PETITION — ISSUE TAKEN — WAIVER — SINGLE ACT OF STOPPING PAYMENT.

1. On a motion to vacate the order to show cause, in a creditor's petition, for the reason that the verification and signature of the cashier of the bank is not a proper signature and verification, where no special authority is shown. The respondent also put in a denial of the act of bankruptcy and demanded a jury trial. *Held*, that the alleged bankrupt waived his objections by taking issue upon the petition and demand for trial.

[Cited in Re Simmons, Case No. 12,864; Roche v. Fox, Id. 11,974; In re Donnelly, 5 Fed. 787.]

2. It seems that a single act of stopping payment followed by a non-resumption for fourteen days is prima facie an act of bankruptcy within the meaning of the bankruptcy act [of 1867 (14 Stat. 517)].

[Cited in Re Hadley, Case No. 5,894.]

3. Motion to dismiss denied and case ordered to stand for trial.

[In the matter of Moses A. McNaughton, a bankrupt.] This is a motion to vacate the order to show cause on creditor's petition for adjudication, and to dismiss the petition on the ground that it "is not signed and verified as required by the rules and practice of this court."

Mr. Gibson (Digby & Gibson), for the motion.

Alfred Russell, opposed.

LONGYEAR, District Judge. The petitioning creditor in this case is "The Merchants' and Manufacturers' Bank of Detroit," a corporation organized and in existence under the laws of the state of Michigan. The petition is signed and verified by the cashier of the bank. The grounds of the motion to dismiss are: 1. That the cashier has no authority by virtue of his office or employment as such, to sign and verify a petition for adjudication of bankruptcy on behalf of the corporation bank; and, 2. That no special authority to the cashier to so sign and verify is anywhere averred or shown. I do not think any officer of a corporation has authority, by virtue of his office, to sign and verify a petition for adjudication of bankruptcy against a debtor of the corporation, unless specially authorized by some statute, by law or resolution of its board of directors. Such authority, being special, must in all cases be made to appear by the oath of the person signing and verifying the petition, or other competent evidence. This was done in this case, and if the respondent had stood upon his motion to dismiss, I should have come to the conclusion that the motion should be granted, so far, at least, as to vacate the

[1] [Reprinted by permission.]

order to show cause. I come to these conclusions by analogy to the provisions of the act and the forms and proceedings prescribed for proof of debts by corporations—section 22 and form 23. The motion to dismiss is in writing, and was filed on the return day of the order to show cause. Before the motion was heard, or any action whatever had upon it, and, in fact, on the same day, the respondent put in a denial of the act of bankruptcy alleged in the petition, and demanded a trial of that issue by a jury; and the usual order for such trial was then made and is now still pending.

The objections to the proceedings are not jurisdictional. They go to the sufficiency of the authentication of the petition only, and I have no hesitation in holding that the objections were waived by taking issue upon the petition and demand for trial. The court obtains jurisdiction of the proceedings by the filing of the petition for adjudication, and of the person of the respondent, in involuntary cases, by the issuing and service of the order to show cause. This is the usual mode by which jurisdiction of the person is obtained, and the only mode by which it can be enforced; but it is not the only means by which it may be conferred. A debtor against whom a petition for adjudication of bankruptcy is filed, may, no doubt, submit himself to the jurisdiction of the court without an order to show cause; and it is equally clear that he does so when he appears and confesses, or puts in a denial of the alleged acts of bankruptcy and demands a trial. By so doing he waives not only the necessity of an order to show cause, but the necessity of proof of the authority of the person signing the petition, and, in fact, of any verification whatever. Proof of the authority of a person signing a creditor's petition in a representative capacity, and a verification of the petition, like the accompanying proof of the petitioning creditor's debt, and deposition as to the alleged act or acts of bankruptcy, are requisite only to authorize the making of an order to show cause. When that is done their office is accomplished; and they never can be, and never are, of any further or other use in the case. It certainly does not need argument to show that the fact that an invalid order to show cause was made and served does not do away with or lessen the effect of the respondent's taking issue upon the petition, as a waiver.

On the argument an objection to the petition was raised, which does not appear, by the motion to dismiss, on file. It was this: That the only act of bankruptcy charged is a stoppage and fourteen days suspension of payment upon a single piece of commercial paper, whereas it is contended that nothing short of a general stoppage and suspension for fourteen days is within the meaning of the act. In the first place, the question cannot be raised in that manner. It must be done by way of exception or demurrer to the petition. But even if properly raised, the objection is not well taken. I am clearly of opinion that a single act of stopping payment, followed by a non-resumption for fourteen days, is prima facie an act of bankruptcy within the meaning of the bankrupt act. The prima facie effect of a single act, may, of course, be avoided more easily than in a case of general suspension, but it must be done by proper allegations by way of answer and proofs at the trial.

It results that the motion to dismiss must be denied, and the matter must stand for trial as heretofore ordered.

McNEAL (HOWES v.). See Case No. 6,789.

McNEAL (UNITED STATES v.). See Case No. 15,700.

McNEIL (BANTA v.). See Case No. 966.

Case No. 8,913.

McNEIL v. CANNON.

[1 Cranch, C. C. 127.] [1]

Circuit Court, District of Columbia. June Term, 1803.

JUDGMENT—CONFESSION—NO DECLARATION.

The court will permit a defendant to come in and confess judgment for the whole damages laid in the writ, although no declaration be filed.

Motion by the defendant to appear and confess judgment.

Mr. Simms, for plaintiff, contrá. Here is no declaration; and if no declaration, then no action; and if no action, then no judgment can be given. 3 Bl. Comm. 290; Rev. Code, p. 85, §§ 33, 88.

Mr. Youngs, for defendant, cited Laws U. S. March 2, 1793, § 7 (1 Stat. 335), power of the court to make rules of practice. Confession of judgment waives all error, even the want of a declaration. Judgment may be confessed to the amount of the damages in the writ. The plaintiff cannot lay more damages in his declaration than in the writ. A confession of judgment on the writ is a confession of judgment for every thing which the plaintiff can possibly demand in this action. The act of assembly requires that the cause of action shall be indorsed on the writ. The declaration is for the benefit of the defendant, to give him notice of the nature of the demand. The defendant is not bound to require it. The act of congress (1 Stat. 266), requiring the creditor to pay for the food of his debtor, imprisoned at his suit, applies only to debtors confined on execution, and not on mesne process.

Mr. Simms, in reply. The plaintiff may recover more than the damages laid in the

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

writ, if the defendant does not pray oyer of the writ, and plead the variance.

THE COURT permitted the defendant to be brought in and confess judgment for the amount of the damages laid in the writ.

MARSHALL, Circuit Judge, absent.

Case No. 8,914.

M'NEIL v. HILL.

[Woolw. 96.] [1]

Circuit Court, D. Minnesota. June Term, 1865.

SALES—WAREHOUSE RECEIPTS—INDORSEMENT—ESTOPPEL.

1. Warehouse receipts have, by custom, come to be considered in commercial transactions as representatives of the property mentioned in them.

2. The indorsement or assignment of such instruments are regarded as equivalent to the delivery of the article.

[Cited in Harris v. Bradley, Case No. 6,116; First Nat. Bank v. Bates, 1 Fed. 710; St. Paul Roller-Mill Co. v. Great Western Despatch Co., 27 Fed. 436.]

[Cited in Wichita Sav. Bank v. Atchison, T. & S. F. R. Co., 20 Kan. 523; Hale v. Milwaukee Dock Co., 29 Wis. 499.]

3. The warehouseman is estopped by his statement and promise in the receipt, to deny that he has the articles mentioned therein, in an action by an indorsee or assignee, who has purchased the paper in good faith.

[Cited in Rahilly v. Wilson, Case No. 11,531.]

[Cited in Babcock v. People's Sav. Bank, 118 Ind. 213, 20 N. E. 733.]

The defendants had given a warehouse receipt to Upham & Co. for 800 bushels of wheat. Upham & Co. agreed with the plaintiffs to sell to them a much larger amount of wheat, and, in part execution of this agreement, assigned to the plaintiffs the receipt of the defendants. The plaintiffs presented the receipt to the defendants, and demanded the wheat mentioned therein; and upon refusal to deliver it, they brought this suit to recover their damages. The cause came on to be tried to the court without a jury. The defendants offered to prove that they had never received the wheat from Upham & Co., and had no such wheat as mentioned in the receipt at the time it was given; but that they issued it to those parties, as a security for a loan of $400, or an advance made to them on a purchase of 800 bushels of wheat, to be delivered in future.

MILLER, Circuit Justice. As civilization has advanced, and commerce extended, new and artificial modes of doing business have superseded the exchanges by barter and otherwise, which prevail while society is in its early and simple stages. The invention of the bill of exchange is a familiar illustration of this fact. A more modern, but still not recent invention, of like character, for the transfer, without the somewhat cumbersome, and often impossible, operation of actual delivery of articles of personal property, is the indorsement or assignment of bills of lading and warehouse receipts. Instruments of this kind are sui generis. From long use in trade, they have come to have, among commercial men, a well understood meaning. And the indorsement or assignment of them as absolutely transfers the general property of the goods and chattels therein named, as would a bill of sale. Austen v. Craven, 4 Taunt. 647; White v. Wilks [5 Taunt. 176] 12 East. 614; Conrad v. Atlantic Ins. Co., 1 Pet.[26 U. S.] 386; Gardiner v. Suydam, 7 N. Y. (3 Seld.) 357; Gibson v. Chillicothe Branch of State Bank of Ohio, 11 Ohio St. 311. When a warehouseman issues such a receipt, he puts it in the power of the holder to treat with the public on the faith of it. He enables him to say, and to induce others to believe, that he has certain property, which he can sell or pledge for a loan of money. If the warehouseman gives to the party who holds such a receipt a false credit, he will not be suffered to contradict the statement which he has made in the receipt, so as to injure a party who has been misled by it. That is within the most exact definition of estoppel. If A. gives to B. his note for $100. although he has received no value therefor, and may defend against the note in a suit brought by B., yet if B. sells the note to a third party who does not know of the facts, A. then must pay the note. Just so in the case of a warehouse receipt. If A. issues such a paper to B., for articles which he has never received, a third party treating with B. on the faith of the statement and promise contained in the receipt, will hold A. for the goods or their value. It is of no consequence what the transaction may be between the original parties; whether the receipt, as is claimed here, was intended as a security for a loan, or was entirely false.

The defendant here offers to prove that he never received the property mentioned in the receipt which he has given, but that the paper was issued as a security for a loan, or as an advance on wheat to be delivered. But he has stated in this receipt that he has the wheat in his warehouse, and also promised therein to deliver the wheat to the order of Upham & Co. These plaintiffs, believing this statement to be true, and relying on this promise, bought of Upham & Co. the receipt and property mentioned therein. They were justified in doing this, and the defendants must respond to their promise. The evidence is not admissible.

[1] [Reported by James M. Woolworth, Esq., and here reprinted by permission.]

McNEIL (HURST v.). See Case No. 6,936.

McNEIL (McCORD v.). See Case No. 8,714.

Case No. 8,915.

McNEIL v. MAGEE et al.

[5 Mason, 244.] [1]

Circuit Court, D. Massachusetts. May Term, 1829.

REAL PROPERTY—AGREEMENT AND AWARD—CONCURRENT ACTS—SPECIFIC PERFORMANCE—LACHES—DAMAGES—RECORD OF DEED—NOTICE.

1. Bill for a reconveyance of an estate upon an agreement and subsequent award, dismissed upon the circumstances, the bill being brought against purchasers after a considerable lapse of time, the original vendee being dead and insolvent.

2. Where an award directed each party to release to the other certain estate, and the term of 20 days was directed, within which the acts were to be done; the acts are to be deemed concurrent acts, so that neither party can insist upon a release without offering to execute a release on his own part to the other party.

[Cited in Green v. Dyersburg, Case No. 5,756.]

3. Courts of equity have jurisdiction to enforce a specific performance of an award respecting real estate. But he who seeks performance must show a readiness to perform all the award on his own part.

[Cited in Akely v. Akely, 16 Vt. 459.]

4. After long delay and laches a court of equity will not decree a specific performance of an award, especially where there has been a material change of circumstances, and injury to the other party.

[Cited in Warner v. Daniels, Case No. 17,181.]

[Cited in brief in Akely v. Akely, 16 Vt. 455. Cited in Holden v. Purifoy (N. C.) 12 S. E. 850.]

5. A fortiori, it will not decree it against purchasers even with notice, if their vendee is dead and insolvent so that they can have no remedy over.

6. Quaere, in what cases a court of equity will award damages as a compensation for delay on a bill for a specific performance.

7. In what cases the registry of a deed is constructive notice.

8. The registry of a deed or paper not duly or legally recorded, is not constructive notice.

[Cited in Montgomery v. Dorion, 6 N. H. 255; Rushin v. Shields, 11 Ga. 636.]

9. Quaere, if an award respecting real estate is required to be registered by the laws of Massachusetts.

10. Notice, if denied by the answer, must be proved by two witnesses, or by one witness and circumstances.

11. If a bill admits the defendant to be a purchaser of the legal title, and the plaintiff sets up an equitable title, and demands a conveyance of the legal title to himself, he must aver and prove all the material facts to entitle him to such conveyance. If he relies on notice in the purchaser, he must aver it in his bill, and if not admitted by the answer, he must prove the notice before he can have relief.

[Cited in Dowell v. Applegate, 7 Fed. 887.]

12. A purchaser, who chooses to answer the bill generally, need not aver, that he is a purchaser without notice. The plaintiff must prove notice.

Bill in equity [by Archdeacon McNeil against James Magee and others]. The cause came to a hearing upon the bill, answers, depositions, and exhibits.

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

Sumner & Webster, for plaintiff.
William Sullivan, for respondents.

STORY, Circuit Justice. This is the case of a bill in equity, which was set down for a hearing at the last term, but from circumstances, to which it is unnecessary to allude, argued at so late a period of the term, that a continuance of it for advisement became indispensable. On the 13th of February 1808, McNeil (the plaintiff) executed two deeds of conveyance (which were recorded on the same day) to James Magee, (one of the original defendants but since deceased,) whereby, for the asserted consideration of $40,000, he granted to Magee, in fee simple, certain parcels of land in Charlestown, Massachusetts. On the same day an agreement under seal was executed between the same parties, whereby, after reciting the sale by the deeds aforesaid, and that Magee had given his notes for the $40,000 purchase money to McNeil, and that McNeil was indebted to sundry persons as by a schedule annexed, amounting to $18,850, Magee covenanted, "that whenever the said McNeil, his heirs, &c., shall feel dissatisfied with the said security of the purchase money aforesaid, or shall require a reconveyance of the estate described by said deeds, and shall give notice thereof to the said Magee, his heirs, &c., he or they shall forthwith reconvey to said McNeil, his heirs, &c., all right and title derived to him the said Magee by virtue of the two deeds aforesaid, the said McNeil giving up to the said Magee his notes aforesaid. And if the said Magee shall then have made any lease, sale, or other conveyance respecting any of the lands aforesaid, the same shall go to the benefit of the said McNeil, his heirs, &c., the notes, money, securities, or other property received in lieu thereof by said Magee to be transferred, &c., to the said McNeil, his heirs, &c., unless the said money, &c., shall have been previously applied in payment of any of said McNeil's debts as aforesaid." And it was therein afterwards declared, that "the true intent and meaning of the aforesaid contract is, that in case the said McNeil, his heirs, &c., shall elect to deliver up to the said Magee, his heirs, &c., the notes aforesaid, and have the land reconveyed to him or them as aforesaid, that the said McNeil shall account for, and repay all the sums paid by the said Magee on his said notes; and that the said Magee, his heirs, &c., shall account for all the lands sold, leased, or otherwise transferred, or incumbered either by applying the avails thereof to the said McNeil's debts as aforesaid, or any part thereof, or by transferring the said proceeds specifically to the value thereof to the said McNeil, his heirs, &c., on request; and all the residue of said estate, which may be unsold at the time of accounting as aforesaid, shall also be reconveyed to the said McNeil, his heirs, &c.; excepting however any and all incumbrances, whereby the said

McNeil is to be benefited by having the amount, for which the same may have been incumbered, applied to the discharge of his debts, as herein provided. The said Magee to retain sufficient property to pay all reasonable expenses he may incur, in all negotiations in said property, and a just and fair compensation for his own time and trouble." This agreement was not recorded until the 25th of September, 1809. There was a correspondent agreement executed by McNeil to Magee on the same day, giving Magee a like election to give up the purchase on the same terms, mutatis mutandis. Difficulties, as might naturally be expected, soon grew up between the parties in the execution of the trusts thus generally created, and carrying in their own bosom the elements of discord. On the 13th of April, 1811, McNeil and Magee entered into an agreement under seal, by which they submitted all claims and demands growing out of the deeds and contracts aforementioned, or otherwise, to three arbitrators, and covenanted to abide by any award, which they or any two of them should make in the premises, under a penalty of $50,000. It was specially covenanted, that for any sums of money which the arbitrators should award to Magee for expenditures, services, &c., he (Magee) should take in payment and satisfaction such portion of the lands conveyed to him, as the arbitrators should award; and that the arbitrators should make a valuation of the lands conveyed, and award what portion should be conveyed to Magee, and what to McNeil, and describe the same accordingly, and state the time when the deeds necessary to carry their award into effect should be executed; and that Magee should reconvey all the rest and residue to McNeil in fee simple, free of incumbrances by him made; and that McNeil, on receiving such conveyance, should release to said Magee all right, title, claim, and demand, in law and in equity, as to the portion of said land, which should remain to Magee, and be by him held. The promissory notes were to be deposited with the arbitrators; and upon delivery of such deed to McNeil, or tender of delivery, the said notes were to be given up to Magee.

The arbitrators, after many hearings of the parties, on the 21st of May, 1811 made their award. By it they awarded, that a balance of $27,100 was due from McNeil to Magee. They then proceeded to state their valuation and division of the lands conveyed, describing the same specifically, and awarded one portion, equal in value to $27,100, to Magee, and the other portion thereof, equal in value to $2832, to McNeil. They further awarded, that McNeil should within twenty days execute a deed or deeds of release to Magee, with covenants of warranty against incumbrances made by him, and of all lawful claims of persons claiming under him, as to the lands awarded to Magee. And that Magee should execute within twenty days a deed or deeds of gift, grant, bargain, sale, and release, to McNeil, of all the land awarded to him, with like covenants of warranty. On the 18th day of August 1811, Magee tendered a deed to McNeil duly executed and acknowledged by him, (Magee,) of the land awarded to McNeil, in conformity to the terms of the award; and at the same time requested McNeil to execute and acknowledge a deed of the lands awarded to him, (Magee,) which deeds were drawn up in conformity to the award. McNeil refused to receive the deed executed and acknowledged by Magee, and also to execute the deed prepared for him to execute to Magee. A suit was brought by Magee against McNeil at the January term of the court of common pleas for Suffolk county. 1812, for the penalty in the submission, to enforce the award. At the September term of the same court in 1812, a suit was brought by McNeil against Magee, upon the notes given for the $40,000 purchase money. Both of these suits were brought to a decision at the March term, 1814, of the supreme court of the state of Massachusetts, the first upon a demurrer to special pleadings; and the last upon an agreement of facts by the parties, bringing the validity of the award before the court. After a hearing and due proceedings had, the court appear to have adjudged the award good, as a bar to the suit upon the notes; and the other suit was decided in favour of McNeil upon the pleadings, the plaintiff's replication being adjudged to be bad and insufficient. In the years 1813 and 1814 Magee sold the lands awarded to McNeil, for various considerations, to certain of the defendants; and in December, 1814, he mortgaged the lands awarded to himself, (excepting that part, which had been mortgaged to Margaret Magee) to Simon Eliot for a large sum. By subsequent assignments, the same lands so conveyed to Eliot came into the hands of Amos Binney; but whether the equity of redemption had been foreclosed did not appear by any of the proofs in the cause. But it did appear, that McNeil in June, 1819, for the nominal consideration of $1, released all his title in the same lands to Binney.

To this summary of the leading facts it may be necessary, for a more full understanding of the case, to add, that the original bill was commenced at May term, 1823, against James Magee, and against sundry other persons claiming portions of the land as purchasers, &c., under him. The original bill was founded solely upon the deeds of McNeil to Magee, and the collateral agreements between them. After stating the substance of those instruments it charged, that on the 15th of October, 1810, McNeil became dissatisfied with the said security for the purchase money, and required a reconveyance of the lands then unsold from Magee; and that McNeil did then and afterwards offer and tender to Magee his notes, and to

account for and repay all sums of money paid by Magee on his notes, and on the debts of McNeil, and to permit Magee to retain sufficient property to pay all his reasonable expenses and a just and fair compensation. It then charged, that Magee, confederating with the other defendants, refused to reconvey, and that he made divers conveyances to his confederates, &c., under which they had entered and occupied; and then prayed for a discovery and account, and a delivery of possession of the lands, or of so much thereof, as he was equitably entitled to, and for further relief. Margaret Magee (one of the defendants) died in July, 1822, and James Magee died in December, 1823. Their deaths were accordingly suggested on the record. A bill of revivor was filed at May term, 1824, against the administrator of Margaret Magee, upon which process was duly issued. In January, 1825, the bill was amended in several particulars. The amended bill, among other things, stated, that James Magee was dead, having at that time no goods or estate whatsoever; and that the agreement of 1808 was recorded in September, 1809. It added other parties, as defendants to the bill, with apt words to charge them as purchasers under Magee. It then proceeded to state certain pretences, under which the confederates claimed title, denying the same; and, among other things, stated, that they set up the submission and award before mentioned, and the refusal of McNeil to comply with the same. It admitted the existence of the submission and award, but charged that the arbitrators had no authority to award a deed of any particular form, or containing any particular covenants to be made by McNeil to Magee; and that the arbitrators exceeded their authority in prescribing such form of the deeds to be given by McNeil and by Magee; and further, that the award was not pursuant to the submission in another respect, inasmuch as it did not fix the day, on which the deeds should be delivered by the parties, nor that Magee should first make, execute, and deliver to McNeil a deed of the lands set off to him, nor make any award respecting the notes; and that on these accounts it was null and void. But if valid, it charged, that Magee did not execute the proper deeds, nor were the lands free of incumbrances made by Magee; and that a delivery of such deed of the lands, free of incumbrances, was a condition precedent to any act to be done by McNeil, and that McNeil is now entitled to the lands so set off to him. It then charged, that the confederates had notice of the conditions and trusts, on which the lands were held by Magee, and of the award, and of the title of McNeil, &c., at the time of their respective purchases. It then stated another pretence, viz. that a large portion of the lands was mortgaged to one Simon Eliot, and by him assigned to one Amos Binney, to whom afterwards McNeil released all his right and title; and charged, that a part only of such lands contained in the original deeds was so conveyed, and that the mortgage had been paid off and satisfied. The amended bill then stated, that a part of the lands (to some of which Samuel Jaques, one of the defendants, claimed title) was mortgaged by McNeil to Margaret Magee, the defendant, on the 28th of August, 1801, as security for $7000, with power to sell; and on the 28th of August, 1807, was again mortgaged by McNeil to her for $7000, and that it was pretended, that she took peaceable possession for non-payment, and continued the possession until the 29th of March, 1811, and then granted the premises to James Magee in fee, who then executed a deed of covenant to reconvey the same to her on request; and that afterwards, on the 15th of October, 1813, he did reconvey the same to her in fee, and that the mortgage money was never paid, and the mortgage was thereby foreclosed. It charged on the contrary, that the mortgage money was paid, and the mortgages ought to have been discharged; that there was no foreclosure or possession as pretended, &c.; that these conveyances and release by James Magee to the said Margaret were without a valuable consideration, and she at the time well knew, that he held the equity in the same lands upon the conditions and trusts abovementioned; and had no right to give such a release.

At May term, 1827, a bill of revivor was filed to revive the cause against Simon E. Greene, administrator of James Magee, who subsequently appeared, and filed an answer. At May term, 1828, upon motion of the plaintiff the bill was dismissed as to Margaret Magee and her representative, and her name was struck out of the bill. And the like dismissal took place as to Jonathan Amory, one of the defendants, who died pending the proceedings. The general replication having been filed, the cause was, by the consent of the parties, set down for a hearing at October term, 1828; and upon breaking the argument, it having been intimated by the court, that the decision of the state court was conclusive as to the objections taken to the validity of the award, a motion was then made to amend the bill, so as to confine the relief prayed for to that parcel of the lands, which had been assigned by the award to McNeil. The motion was somewhat irregular; but under the peculiar circumstances of the case was allowed, as it would not occasion any further delay. The bill was then amended by confining the relief prayed for to the lands so awarded to McNeil, and by striking out all that portion of the bill, which stated objections to the validity of the award. And the bill was treated, as if it stood dismissed by consent against all the defendants, except Magee's administrator, and the defendants, who made claim to the lands so awarded to McNeil.

Such is the posture of the case, as it was presented at the final argument; and it has

been necessary to detail the proceedings somewhat at large in the order of time, that the pressure of some of the points made at the bar may be fully comprehended. It is obvious that the case made by the original bill has been abandoned. That case proceeded mainly upon the ground, that McNeil had become dissatisfied with his security in the notes for the purchase money; had notified that fact to Magee; had offered a full compliance, on his own part, of the terms and conditions, on which he was entitled to a reconveyance; and had demanded a reconveyance in October, 1810. His dissatisfaction is established, or rather admitted; but his compliance with the terms, on which he was entitled to a reconveyance, is not only not established, but is at war with the proofs in the cause. And no notice of that dissatisfaction, as averred, has been brought home to the purchasers under Magee, unless it be since the promulgation of the award. But if it had been otherwise, the subsequent submission and award, supposing the latter to be valid, would completely displace all equitable relief founded merely upon the original agreement in 1808. The validity of the award was effectually decided by the state court; and the subsequent amendment of the bill puts the right to relief upon the ground of the award; and, therefore, the case is now narrowed down to the consideration of the bill, as it stands connected with that award, and the accompanying facts.

The questions then, presented to the court for decision, ultimately resolve themselves into the following points: In the first place, whether the plaintiff would now be entitled to the relief prayed for upon the case made by the pleadings, and proofs against Magee himself, if living? If he would be so entitled, then, whether, under all the circumstances, the plaintiff is entitled to the relief sought against the defendants, who are purchasers of the lands under Magee.

Upon the first point the defendants have taken several objections to any relief, even against Magee himself. The first objection is founded upon the statements of the amended bill itself, the award being made a part of that bill. It contains no allegation of any compliance with the terms of the award on the part of McNeil, by his executing a deed of release, as therein required of him, nor of any tender of performance on his part. But it sets up as an excuse, that a delivery of a deed of the lands awarded to McNeil, free of any incumbrances by Magee, was a condition to be performed by Magee, precedent to any act on the part of McNeil; and that Magee never executed, or tendered any such deed; and that the lands so to be conveyed were not, at any time after the award, free of incumbrances. The objection is, that the award creates no such condition precedent; and therefore the plaintiff is not entitled to the relief he seeks, since there has been a total failure on his part to comply with the terms of the award. Upon examining the ward, it does not appear to me, that there is any ground for the suggestion, that the delivery of the deed by Magee was in that instrument made a condition precedent, as asserted in the bill, whatever might be the case standing upon the terms of the submission. Both deeds were to be executed and delivered within twenty days from the date of the award. There is nothing in the nature of the act to be done, which implies any priority on either side. And if any conclusion could be drawn (as I think it could not be) from the mere order, in which the acts are stated in the award, McNeil would be to perform the first act, since his act is first named. And as Magee was in possession of the legal title, which, by the terms of the original agreement in 1808, he had a right to hold, until he was fully indemnified and paid for all his advances, no inference can be deduced, that the arbitrators intended to diminish his security, until his indemnity was complete. The natural reasoning from the posture of the parties antecedent to the submission would be in favour of Magee, and that McNeil was to do the first act. But it appears to me, that the true view of the matter even at law is, that they are concurrent, or dependent acts; and that neither party had a right to demand a performance of the other, without a performance or tender of performance at the same time on his own part. If the case had been of mutual covenants to execute deeds, within the twenty days, of the lands awarded, neither party could in my judgment have recovered at law for a breach, without such an averment of performance. The one act would constitute the consideration for the other. It would be repugnant to all justice to require, that McNeil, refusing to perform his part of the award, should yet be entitled to demand a surrender of the legal title to the lands awarded to him from Magee. The submission does, indeed, contain a clause, which might be construed to require a prior performance by Magee, before McNeil would be in default on his covenant. The language there is, that Magee shall reconvey the land awarded to McNeil, and that McNeil, "on receiving such conveyance, shall release to Magee all right, &c., to the portion of said land" awarded to Magee. But it appears to me, that the true construction of the submission, taking into view its whole objects and terms, is that, which the arbitrators gave to it, that is to say, that the acts should be concurrent. Magee was to give a conveyance on receiving a release from McNeil, and McNeil was to give a release upon receiving a conveyance from Magee. The acts were to be concurrent, and to be executed at the same time. It was like the common case of covenants on a purchase, where one party covenants to give a deed on receiving the purchase money, and the other party covenants to pay the money on receiving the deed. In such a case, neither can recover at law without showing a perform-

ance, or tender of performance; on his part. It is not necessary to go into an examination of the cases at law on this subject, though the cases cited at the bar, and especially Glazebrook v. Woodrow, 8 Term R. 366, are strongly in point.[2] The general principles, by which questions of this sort, arising under agreements, are construed, are the same both at law and in equity. Where there are mutual covenants or acts, they are construed to be dependent, unless a contrary intention appears (Sugd. Vend. c. 4, § 3; Bank of Columbia v. Hagner, 1 Pet. [26 U. S.] 455, 465); and there is good sense as well as practical convenience in the rule.

But it is the less necessary to sift this matter minutely, because we are in a court of equity; and in such a court, he who seeks equity must do it. Now, the specific performance of a contract by a court of equity is not a matter of course, but rests in the sound discretion of the court; not, indeed, in an arbitrary discretion, but such as rests upon grounds of justice. Com. Dig. "Chancery," 2, c. 16; Sugd. Vend. c. 4, § 2. Goring v. Nash, 3 Atk. 186; Joynes v. Statham, Id. 387; Davis v. Symonds, 1 Cox, 402; Seymour v. Delancey, 6 Johns. Ch. 222. It may be refused, whenever there are circumstances, which show it to be inequitable or improper; and the party is then left to his remedy at law. And it may be laid down as a general rule, subject to few, if any, exceptions, that where specific performance is sought, the court will require the party, who seeks it, to show a performance or readiness to perform, on his own part, or a default on the other side, which utterly excuses him. 1 Madd. Ch. Prac. 331; Colson v. Thompson, 2 Wheat. [15 U. S.] 336; 1 Fonbl. Eq. bk. 1, c. 6, §§ 1, 2, and notes.

In respect to awards, whatever may have been the case formerly, no doubt at present exists, that courts of equity have jurisdiction to enforce a specific performance of them. But the ground is, that it is but an execution of the agreement of the parties, ascertained and fixed by the arbitrators. Hall v. Hardy, 3 P. Wms. 187; Norton v. Mascall, 2 Vern. 24; Blundell v. Brettargh, 17 Ves. 232; Wood v. Griffith, 1 Swanst. 43, 54; Bishop v. Webster, 1 Eq. Cas. Abr. 51; Thompson v. Noel, 1 Atk. 60, 62. So that the case falls clearly within the general rule laid down as to performance, where a specific execution is sought. The doctrine is well summed up in Mr. Fonblanque's treatise on Equity, in the text and notes. Book 1, c. 6, §§ 1, 2. The case of Ewes v. Blackwall, Finch, 22, goes farther; and seems to assert a principle, that unless the party seeking relief has strictly performed the award on his part, the other shall be let in to every equity without any regard to the award. Whether it can be supported to this extent, it is unnecessary now to consider; and the case (which is very imperfectly reported) may well have stood on its own peculiar circumstances. In this view, the case of the plaintiff is surrounded by some difficulties. The bill does not, as has been already suggested, aver any performance or tender of performance, or even a present readiness to perform, on the part of the plaintiff, the requisitions of the award. The excuse for nonperformance, as we have already seen, fails in point of law. There was no condition precedent on the part of Magee; and if there had been, I should very much doubt if in a court of equity, under circumstances like the present, the plaintiff could entitle himself to a decree for specific performance, without showing an ability and an offer to perform on his own part. But I should have no doubt, that if entitled to any decree, it ought to be a conditional one only, that is, a decree stipulating for a performance on his part, eodem flatu, as one of the terms of the decree. It by no means follows, that because Magee might not be in a condition to demand a specific performance, the plaintiff might have it without complying with the terms of the award. But passing by these considerations growing out of the frame of the bill. let us advert to the objections founded on the merits of the case, as against Magee, as they are disclosed upon the answers and proofs.

Some commentary has been made at the bar upon the nature and effect of the deeds and agreements in 1808. It has been said, that taking the whole together the transaction amounts to a mortgage to Magee with a power to sell. Putting it in the light contemplated by the parties upon the face of the instruments, the transaction seems rather to have assumed the character of a conditional purchase with an election in either party, by notice, to convert it into a conveyance on trust to reconvey to McNeil, he discharging all the claims of the other party, all the estate undisposed of by Magee at the time of such notice. But independent of such notice, Magee had an unlimited and absolute power of disposal, of all the property conveyed, in respect to third persons. The submission and award converted the conditional purchase into an absolute title in Magee, as to all the lands awarded to him, and as to the residue, awarded to McNeil, converted Magee into a trustee of the latter. After that award, he certainly had no power to give a good title in the trust property to any person having notice of the trust. What is sufficient notice, will become matter of subsequent inquiry. It is clear, that on the 18th of August, 1811, Magee did tender a deed, with the proper covenants, to McNeil, of the lands awarded to the latter. This is conclusively established by the deposition of Mr. Welsh. And it appears by the same testimony, that Magee at the same time tendered to McNeil the correspondent deed of release to be executed by the latter, which he utterly refused. There is no proof that any tender of performance had been made on either

[2] See, also, 1 Sandf. Ch. 320, note 4; Sugd. Vend. c. 4, p. 227, § 3; 1 Fonbl. Eq. bk. 1, c. 6, § 1, and notes.

side within the twenty days prescribed by the award, although there is an averment of performance by Magee within the time, in the answers of his administrator. It is asserted in the amended bill in somewhat loose and general terms, that Magee never did tender any such deed, and that the lands were not at the time of making the award, or at any time afterwards, free of incumbrances made by Magee. And this averment is connected with the assertion, that this was a condition precedent to any performance on his part. But this is an evident afterthought. There is not the slightest proof, that the refusal of McNeil originally proceeded upon any such ground. If he meant to rely upon it, it was his duty to have stated it at the time, for it was an objection capable of being removed; and if he had been willing to confirm and execute the award, on his part, there is scarcely a doubt that it would have been removed. The subsequent history of the case demonstrates, that McNeil never meant to comply with the award. He was dissatisfied with it. He contested its validity in the state court. He did not allude to, or admit, it in his original bill in 1823. When he stated its existence in his amended bill, it was mainly for the purpose of denying its validity; and down to the time of the last amendment in November, 1828, he never founded his title to relief exclusively upon it as a valid award. In short we cannot escape from the conclusion, that he never meant to perform it, if he could overthrow its authority; and in acceding to it now, he yields only to the force of circumstances, and the operations of law upon his title. Doubtless he had a right so to do; but in every such case a party must act at his peril, and must submit to those consequences, which his own delay and refusal unavoidably introduce in the way of relief. Now, nothing is better settled than that a court of equity will not interfere to decree a specific performance, where the party seeking it has been guilty of gross laches, or long voluntary delay, and in the meantime there has been a material change of circumstances. The party will be left to take his remedy at law, where the delay or neglect has been without just excuse, and there is no longer a prevailing and decisive equity to sustain his claim.[3] This is true not only as to agreements generally, but as to awards founded upon agreements, for equity interferes in respect to awards, only as growing out of agreements.[4] If therefore a court of equity perceives, that the delay, voluntary on the part of the party seeking a specific performance, has been very injurious to the other party, so that it would be inequitable to decree a specific performance, that alone is sufficient to induce the court to withhold its aid.[5]

It has been further suggested, on behalf of the defendants, that the plaintiff has disabled himself to comply with his part of the award, for he has released his equity in the lands awarded to Magee, to Binney, who is a purchaser claiming by a mesne conveyance, under the latter; and therefore a release to Magee afterwards became impracticable, in the sense of the award, since it would have been inoperative in point in law. There is some force in the objection; but whether to the extent, which the objection assumes, may admit of doubt. It certainly however cannot be admitted that McNeil could, in this manner, discharge himself, by his own act, from a strict compliance with the terms of the award. His release to Magee would operate at least as a confirmation of the absolute title of Magee in the land; and in this respect would be material to the covenants of warranty on any sale made by the latter. It is not denied, that McNeil did make a release, as stated, to Binney, in the year 1819; though it purports on its face to be for the nominal consideration of $1 only. The procurement of such a release, even at that late period, shows, that at least in the mind of the purchaser, the title was not absolutely perfect, and free from doubt. But it is the less necessary to dwell on this view of the matter, because there is one of far more importance pressing on the case, and which can never be lost sight of by a court of equity. It cannot admit of doubt, that the omission of McNeil to give the release required by the award, must have materially affected the marketable value of the property awarded to Magee. If the existence of the award, and of McNeil's dissatisfaction with it, and refusal to ratify it, were half as notorious as the plaintiff now contends it was, it must have materially injured any sale by Magee. No cautious purchaser could incline to take a title then in dispute, and over which such a cloud hung, unless at a sum far below its real value. The sum due to Magee was $27,100, and his whole means of reimbursement were exclusively confined by the award to the lands estimated at that value. The estimate of the arbitrators proceeded upon the ground, that Magee should possess an indisputable title. Its marketable value was essentially connected with the existence of such a title. A prompt compliance with the award on the part of McNeil was indispensable for this purpose; and every delay on his part was injurious to Magee. Mr. Welsh's deposition shows, that Magee offered at the time to give up

[3] See 1 Madd. Ch. Prac. 329, 330, 331; Sugd. Vend. c. 8, § 1; 2 Pow. Cont. 19, 22, 260; Hayes v. Caryll, 1 Brown, Parl. Cas. 127; Van Benthuysen v. Crapser, 8 Johns. 198; 1 Fonbl. Eq. bk. 1, c. 6, §§ 1, 2, 12; Harrington v. Wheeler, 4 Ves. 686; Alley v. Deschamps, 13 Ves. 225; Wright v. Howard, 1 Sim. & S. 190; Parker v. Frith, Id. 199, note; Pratt v. Carroll, 8 Cranch [12 U. S.] 471.

[4] See 1 Bac. Abr. "Arbitrament & Award," 1; Caldw. Arb. c. 7, p. 172; Kyd, Awards, 322; 3 P. Wms. 187; 17 Ves. 232; 1 Swanst. 43, 54.

[5] See Crofton v. Ormsby, 2 Sch. & L. 583.

the lands to McNeil, for $5,000 less than the sum for which they were set off to him; and McNeil was unwilling even to offer for them more than $20,000. All these lands (excepting those mortgaged to Margaret Magee) were mortgaged to Simon Eliot, by Magee, in December, 1814, (more than three years after the award,) as security for $9,800, and for other purposes, with a power to sell, and subject to a prior incumbrance to Jonathan Amory, in March, 1809, for $3,000 and interest. By subsequent assignments and conveyances, the whole became vested in Amos Binney; but there is no evidence of the exact amount realized therefor. But from the silence of all parties on this head, connected with the averments in the answers, and other circumstances in proof, there is no reason to presume, that it exceeded the mortgages. So that, at the utmost, the available proceeds of the lands awarded to Magee, (including the premises mortgaged to Margaret Magee,) so far as they can be traced, may be presumed not to have exceeded the sum of $22,550. In fact, the answer of Magee's administrator avers, that there was a loss to Magee of $5,000 exclusive of interest. In what manner this depreciation was occasioned, it would perhaps be difficult, if not impossible, at this distance of time, precisely to ascertain. But we have a right to presume, that the land was in 1811 worth the full amount at which it was estimated by the arbitrators. It did not realize. that amount when sold. The loss (whatever it was) actually fell upon Magee. This court has no right to say, that the same loss would have occurred if McNeil had punctually, when he was requested, executed the release. The original offer of Magee to take $5,000 less than his claim, is no proof that the land was not at that time worth the full sum awarded, for it probably was an offer to buy peace; and at all events it demonstrated, that a prompt realization of the value of the lands was, in Magee's own view, of great importance to his interest. In fact, if the court were compelled to judge of the injury to Magee by the imperfect facts before it, it would not be an irrational conclusion, that the refusal of McNeil up to the sale in 1814, had worked an injury to Magee exceeding the full value of the lands awarded to McNeil. He was entitled to a perfect, unclouded title, in a time of peace; and he was compelled to sell the lands, without any such benefit, in a time of war. Indeed, the argument from the defect of title, is pressed upon the court under another aspect by the plaintiff's counsel, against the defendants now in this cause; and it is urged, that they purchased cheaply from the very circumstance that there was a cloud upon the title. They purchased for $3300, upon the face of their deeds, though, from some unexplained circumstance, I find it stated in the answer of the administrator, that Magee realized no more than $2600.

The answer of the administrator relies upon this delay and refusal of McNeil, as a justification of Magee in selling the lands awarded to McNeil to indemnify himself for his losses and damages. Now, this court certainly cannot justify such a procedure. It is no excuse for A, that he sells B's lands, because B has injured him to an extent equal to their value. The act is, in point of law, utterly indefensible. But when a court of equity is asked to compel a specific performance in a case of injurious delay, voluntary and unjustifiable on the part of him, who seeks the aid of the court, it is bound to look at that fact, and to consider, whether it ought to be active in his favour. It has a right under such circumstances to say, that it will leave the parties to their respective remedies at law for mutual damages, rather than hazard a decree, which might administer justice only on one side. But to this presumption of loss and injury, there are to be added the lapse of time, and laches of the plaintiff, and a material change of circumstances in the intermediate period. Twelve years elapsed after the award, before the original bill was filed. Five years more, before the plaintiff admitted the validity of the award, and, by an amendment, confined his claim to the title derived under it. Magee died in 1823 insolvent, and before he had made any answer to the bill; and the equities between him and McNeil are now to be ascertained and litigated by persons, who are utter strangers to all the original transactions.

Now, I have not been able to find a single case, where a court of equity has decreed a specific performance under circumstances like the present. Lapse of time is sometimes overlooked, but only when there has been reasonable diligence by the party seeking a decree; or, as some of the cases say, where "he has shown himself ready, desirous, prompt, and eager." Milward v. Earl Thanet, 5 Ves. 720, note; Sugd. Vend. c. 8. § 1. Laches may be excused; but it must be under strong controlling circumstances. Sugd. Vend. c. 8, § 1; Benedict v. Lynch, 1 Johns. Ch. 370. But where a party has perseveringly, through a course of years, resisted the performance of an agreement, denying its validity; where he has taken no step towards a performance on his own part, and has repelled the advances on the other side, no case can, as I believe, be found. at least in modern times, in which a court of equity has interfered in his favour. Especially will such a court be disinclined so to do, where the other party has expressed a willingness to perform; where a presumed injury has arisen to him from the lapse of time; where the rights of third persons have intervened; where the circumstances of the parties have changed; and where death and insolvency have materially affected the remedy, which third persons may have in the premises, in respect to their own grantor. It is no suffi-

cient answer, as has been already intimated, that Magee was unable at the time to give a deed free of his own incumbrances. The objection was not insisted on at the time, and was capable of being removed. The award itself provided a remedy by the covenants in the deed to secure the party against any such incumbrances; and at law the existence of incumbrances would not have been fatal to the award. I do not say, that a court of equity would not upon an early application have given relief in such a case; and would not have withheld a specific performance from Magee, until he had removed those incumbrances; or upon the application of McNeil would not have decreed him a compensation or indemnity pro tanto.[6] But the remedy of McNeil was just as perfect then, as it ever could be; and his long delay had a natural tendency to aggravate every evil on the other side. At this distance of time, when Magee himself is dead, it is not in the power of any court of equity to ascertain with exactness the amount of injury to Magee by that delay.[7] And it is not the habit of courts of equity to decree compensation in cases of specific performance for mere laches or delay; but compensation is usually, if not invariably, decreed upon other distinct grounds.[8] Upon this point of the case, therefore, if the question were, whether Magee himself, being before the court, as sole defendant, ought to be compelled to a specific performance at such a distance of time, under all the circumstances, there would be much room for hesitation. How could this court assume, that he had not been damnified by the delay, and refusal to perform the award. If damnified, in what manner is this court to exercise jurisdiction to decree compensation; and how is it to measure the damages? But Magee having sold, and the interests of third persons having intervened, it is plain, that no decree for a specific performance can operate, except through a vendee's holding the title. The question then, even if Magee were living a co-defendant, would become far more complicated and difficult. A decree on the part of the court for a specific performance would require it to interpose its active aid to strip these vendees of their title and possession in favour of a party, who had chosen to lay by for a great length of time, and had exhibited no legal, or reasonable diligence. I will not attempt to disguise, that I should feel the most serious difficulties in arriving at such a decree, even if the vendees had the most unequivocal notice of the plaintiff's equity.

But let us see how the case stands as to the vendees now before the court, not only in respect to notice, but to the equities, which are set up by them in their defence. In the first place as to notice. The defendants claim under a registered title from Magee, whose title is also registered. The plaintiff originally claimed under the agreement of 1808, which was not registered until more than a year and a half afterwards. He now claims under the award, which has never been registered at all. In each case his claim is to an equity. Now, it is the settled doctrine, that under such circumstances, where relief is sought against a purchaser, there must be clear and undoubted notice; and that suspicion, even strong suspicion, is not sufficient. Sugd. Vend. c. 16, art. 4, § 5; Hine v. Dodd, 2 Atk. 276; Wyatt v. Barwell, 19 Ves. 439. It is contended in the first place, that the defendants had constructive notice of the original agreement from its registry, although not referred to in the conveyances to Magee; and that its contents were sufficient to put them upon inquiry. Unless that agreement was properly matter for registry under the Massachusetts statutes of registry, there is no pretence to say, that it was constructive notice to any person.[9] Now I very much doubt, whether the agreement, disconnected as it was from the conveyances, was proper matter for registry under the act of 1783, c. 37, or the act of 1802, c. 33. The agreement was not in any legal sense a defeasance. It was not intended wholly to defeat the conveyances in a given event. Nor was it an incumbrance on the estates conveyed. On the contrary, it was the intention of both parties, that Magee should have a complete power to make absolute titles to purchasers; and in the event of notice to him of dissatisfaction, he was to reconvey the lands remaining unsold by him, and account for all sales and purchases antecedently made. I do not know that it has ever been held under these acts of registry, that a collateral, disconnected agreement between the parties, merely affecting the title to lands, must be registered. But supposing it otherwise; still the agreement itself admits the right of Magee to make sales, until it is rescinded by a notice of the dissatisfied party; and such notice is independent of the record, and must be established by competent proofs, aliunde. No such proofs exist in this case. Magee, at the time of the sale, was in possession of the legal title. The deed, under which he claimed, contained no reference to any collateral agreement. He had a right to sell; and no purchaser was bound to make inquiry, whether there had been any revocation of such right. The existence of the right was fairly presumable, until notice of the contrary was given by

[6] See Sugd. Vend. c. 6, § 1.

[7] See M'Alpine v. Swift, 1 Ball & B. 285.

[8] See Sugd. Vend. c. 6, § 1; Halsey v. Grant, 13 Ves. 73; Horniblow v. Shirley, Id. 81; Binks v. Lord Rokeby, 2 Swanst. 222; Balmanno v. Lumley, 1 Ves. & B. 224; Paton v. Rogers, Id. 351; Wood v. Bernal, 19 Ves. 220; Sugd. Vend. c. 8, § 1.

[9] See Morecock v. Dickins, Amb. 678; Latouche v. Lord Dunsany, 1 Sch. & L. 137, 157, Sugd. Vend. c. 16, art. 4, § 5; Frost v. Beekman, 1 Johns. Ch. 288; Lessee of Heister v. Fortner, 2 Bin. 40.

McNeil, either personally, or by some act of public notoriety. Then as to the award, it was never registered; nor was it in fact entitled to registry. Notice of its existence therefore must be established by matter in pais. The defendants positively deny in their answers, that they had notice of any legal or equitable title in the plaintiff, at or before their respective purchases, or of the award itself, until the commencement of the present suit. The answers do not, as technically they should, deny notice at the time of the payment of the purchase money. But no exception has been taken to them on this head; and it may be fairly presumed, that they paid the money at the time of their purchases. They add, that McNeil must have known, that after the purchases, the defendants were going on, making valuable improvements on the lands; and yet that he never gave them any notice of his title; and in this respect suffered them to be misled. Against these positive denials in the answers, there ought to be strong evidence of notice to overturn their force.

The evidence of notice adduced on behalf of the plaintiff, with a single exception, is founded upon the notoriety of the submission and award, and the disputes about the title between McNeil and Magee in Charlestown, where the lands lie, and the defendants lived at the time of their purchases. To give the evidence any application, it should distinctly point to the period of the purchases, or payments of the purchase money. Any notoriety at a subsequent time cannot invalidate rights antecedently vested. There is abundance of testimony, that of late years there has been in Charlestown an extensive, if not a general, notoriety of some claim of title to the lands by McNeil. The exact manner, in which that claim of title was asserted by McNeil, whether under the award or otherwise, was not as well defined, nor marked with so much notoriety. It appears, however, to have created sufficient alarm in the minds of some of the purchasers under Magee, to induce them to obtain, for valuable considerations, quitclaims from McNeil. But the difficulty is, to trace back that notoriety to a period antecedent to June, 1814, that being the latest period at which any sale of the lands awarded to McNeil was made by Magee. Fosdick purchased in June, 1811; Wheeler purchased one parcel of land in June, 1813, and another in June, 1814; Adams purchased in November, 1813; and Collier purchased in April, 1814. These purchases include all the lands awarded to McNeil, except a strip, which has been appropriated as a street, called Lawrence street. Much of the testimony, as to the time of the notoriety, is quite loose and unsatisfactory; and that which approaches nearest to the period of the purchases is not exact, and does not (with one exception) fix personal notice upon any of the purchasers from Magee. That it is strong enough however, to be left to a jury to infer notice, may be admitted; but this, in a court of equity, is not sufficient to outweigh the direct denial of an answer. There must at least be one positive witness, and cogent circumstances in support of his testimony, to enable a court of equity to overrule the effect of such an answer. Now the inference, generally deducible from notoriety, is in the present case somewhat shaken by the fact, that numerous witnesses, living in the same town and neighbourhood, were ignorant of the claim of McNeil and of the award, until a comparatively recent period before the commencement of the present suit. This ignorance it is difficult to account for, unless upon the supposition, that the notoriety was far less than some of the other witnesses suppose. And at all events it demonstrates, that a purchase might well have been made without actual or constructive notice. To this extent it fortifies the denials of the answers. What adds some confirmation is, that almost all of the purchasers have since made valuable improvements and erections on their estates, and that McNeil, though living in Charlestown, or its vicinity, during this period, has suffered these improvements to go on, without, as far as the court can learn, ever having given personal notice or warning to any of the purchasers. The answers of the defendants put this fact sufficiently before the plaintiff to have drawn forth some evidence on this head, at least to repel the claim for improvements, if it could have been fairly rebutted. And I cannot but think, that the testimony of Mr. Holden, one of the arbitrators, who resided in Charlestown, is entitled to some consideration, in the statement which he makes, that the rumour or report of the award, and that a quitclaim was necessary from McNeil, was not, to his knowledge, current in Charlestown, until two or three years after the award was made, when purchases began to be made of lots of the land. In respect, therefore, to the purchasers generally, although there is strong evidence of the notoriety, sufficient to raise a just suspicion of notice, I cannot say, that according to the rules of a court of equity it is so strong, as to put the stamp of falsity upon the direct denials of the answers. The exception, to which allusion has been made, is the testimony of Mr. Sawyer in respect to the purchase made by the defendant, Adams. This witness testifies to a conversation with Adams, soon after his purchase, under circumstances so peculiar, that it is difficult to resist the belief that Adams had notice at the time of his purchase, if the credibility of the witness is not impeached. It is true, that the witness is manifestly mistaken as to time, for he puts the occurrences in 1815 or 1816, whereas Adams purchased in November, 1813. But such a mistake would not ordinarily be fatal to his general credit. Still,

giving the fullest effect to the testimony of this witness, it is but one witness against the positive denial of Adams's answer; and I am not satisfied, that the other circumstances do carry with them such positive force, as entitle the court to disregard that answer.

In respect to Wheeler, who was not an original defendant, but who died before he could answer, after he was made a party, I do not find, that it is any where stated directly in the answers of the defendants, that he was a purchaser without notice, though some of the averments seem intended to include him in this predicament, but are not pointedly drawn. It is matter of regret with me, that this omission, which is obviously a clerical slip, should have occurred. The point, which it raises, is somewhat nice and difficult, but upon which, after full deliberation, I have come to a settled conclusion. The point is this,—whether a plaintiff, setting up an equitable title against a legal title in purchasers, (it may be different, where it is an equity against an equity,) is not bound to aver in his bill, that these purchasers had notice of his title; and if so bound, then, whether he is not bound to prove at the hearing the fact of notice, unless it is distinctly admitted by the answers of the defendants. I think, that he is so bound in both respects. It appears to me, that the legal title is a sufficient protection to the defendants, and that a court of equity cannot displace that title, in favour of a mere equitable title, unless, assuming all the facts stated in the bill to be true, these facts justify a decree in favour of the equitable title. Now, where the bill itself sets up a legal title in purchasers, an equity does not attach to the estate in their hands, unless they have notice of it. And, therefore, notice must be averred in the bill; otherwise the plaintiff has no case. It is true, that upon a bill filed calling for a discovery of title from a purchaser of the legal estate, as well as for relief, he may, if he pleases, interpose, as a bar to the discovery and relief, the plea, that he is a purchaser without notice at the time of his purchase, and payment of the purchase money. And in such a case his plea will be bad, without such an averment and denial of notice; and if notice is charged in the bill without a supplemental answer, also denying that notice as charged in support of his plea. But the reason is, that by the plea he sets up a positive bar to all further inquiry and all discovery. If, instead of such plea, he chooses to answer generally and go to a hearing, he may well do so. And in such a case the parties stand exactly as they do in all other cases, that is to say, the plaintiff must prove all the allegations in his bill necessary to establish his right to a decree, unless so far as they are admitted by the answer. If the answer omits to deny the notice charged in the bill, that is no admission of the notice. The plaintiff may object to the answer for insufficiency in this respect, as he may for insufficiency as to any other fact charged. But if he takes no exception, and the cause goes to a hearing upon the general replication, it is a waiver of the exception, and the plaintiff must prove his case. If notice is essential to a decree, he must affirmatively establish it; for that is the whole foundation of equitable relief against the legal title. Some obscurity is thrown over this subject by confounding cases, where a preliminary objection is taken by way of plea, or special answer, as a bar to all further discovery and relief; with cases where there is a full and general answer and hearing, upon the whole merits. This is not the place to go into a full vindication of this doctrine, though it appears to me supported by a close comparison of the authorities, keeping in view the distinction alluded to.[10]

In my view of the matter, therefore, it is incumbent on the plaintiff to establish affirmatively, that Wheeler had notice, before the court can take from his grantees the legal estate vested in them, even supposing notice to have been brought home to the latter at their respective purchases from him. I do not dwell on this last consideration, though there is much room for observation, because there is not sufficient proof to affect the original purchasers with notice, and therefore it is not necessary to consider, how the case would otherwise stand as to notice to the subpurchasers under them. It is also a circumstance not altogether to be passed over, that Magee being dead and his estate insolvent, and the defendants having made expensive improvements upon their estates, they can, in case of a decree against themselves, have no remedy over upon their covenants of warranty against Magee, or his representatives. If McNeil, instead of lying by for so great a length of time, had pressed for redress at an early period, they might have had an effectual remedy over. I lay no stress upon the releases which the defendants have procured from Binney, because they operate as a simple extinguishment of his claim against them under the mortgage to Carey, assigned to Amory, and by him to Binney. They do not purport to assign any title, or grant an interest in or under that mortgage to either of the releases; and therefore create no bar in the way of the plaintiff.

Upon the whole, the conclusion to which my mind has arrived is, that there would be great difficulties in the way of relief for the plaintiff, if Magee were now before the court, as sole owner and defendant; that

[10] See Williams v. Williams, 1 Ch. Cas. 252; Harris v. Ingledew, 3 P. Wms. 91, 94; Eyre v. Dolphin, 2 Ball & B. 290, 302, 303; Jerrard v. Saunders, 2 Ves. Jr. 454, 458; Beames, Eq. Pl. 233, 245; Brace v. Duchess of Marlborough, 2 P. Wms. 491; Jones v. Thomas, 3 P. Wms. 244, note F; Sugd. Vend. c. 18, pp. 701, 702; Hardy v. Reeves, 5 Ves. 426; Coop. Eq. Pl. 312.

the equity is far less strong against the purchasers under him; and that, under all the circumstances, my duty is to dismiss the bill; but it will be without costs to either party. Bill dismissed.

McNEIL (WALTON v.). See Case No. 17,134.

McNEIL, The ALEXANDER. See Cases Nos. 1,988, 3,312a, and 13,186.

McNEIL, The J. G. See Case No. 7,317.

Case No. 8,916.

Ex parte McNEILL.

[The case reported under above title in 15 Int. Rev. Rec. 144, is the same as Case No. 966.]

McNEMARA (UNITED STATES v.). See Case No. 15,701.

Case No. 8,917.

In re McNULTY.

In re CLEMENT.

[2 Lowell, 270.] [1]

District Court, D. Massachusetts. Sept., 1873.

ARMY AND NAVY—ENLISTMENT OF MINOR—BY WHOM AVOIDED.

1. By the common law of Massachusetts, a minor has not the legal capacity to make a contract of enlistment in the marine corps.

2. The only statute which authorizes such an enlistment is that of June 12, 1858 (11 Stat. 318), which applies only to boys under eighteen years old, and requires the consent of their parents.

3. A minor over eighteen and under twenty-one years of age cannot be lawfully enlisted in the marine corps, without the consent of his parents.

[Cited in Re Chapman, 37 Fed. 330.]

4. Such a contract may be avoided by the minor himself, as well as by the parent, or the United States.

[Cited in Re Wall, 8 Fed. 86; Re Baker, 23 Fed. 31; Re Chapman, 37 Fed. 331. Disapproved in Re Cosenow, Id. 670.]

These two cases were alike in their facts, and were tried together. Two boys, eighteen years old, left their homes together, and enlisted in the marine corps, without the knowledge or consent of their parents. One of them had only a mother living. It was alleged that the boys were drunk; but the court did not examine that question. They told the enlisting officer that they were of full age, and there was no reason to suppose that he doubted their statement.

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

G. W. Searle, for petitioners.

E. P. Nettleton, Asst. Dist. Atty., for respondent.

LOWELL, District Judge. Until the year 1858 there was no statute expressly regulating the age, size, citizenship, or other qualifications for recruits in the marine corps. It was necessary to look to the law of the army, or to that of the navy, and the authorities were not, perhaps, entirely agreed which should be the guide. The importance of the decision, as far as minors were concerned, was this, that it was considered by many responsible authorities that boys might be enlisted in the navy, though they could not in the army, without the consent of their parents or guardians. Com. v. Gamble, 11 Serg. & R. 93; U. S. v. Bainbridge [Case No. 14,497]; U. S. v. Stewart [Id. 16,400]. It is not, however, unimportant to observe that U. S. v. Bainbridge, so often cited as a decision of this point, does not decide it; because the district judge agreed to the judgment on a wholly different ground, and upon this question expressed his dissent from the reasoning and conclusions of the presiding justice. Judge Davis' dissent had equal legal force with Mr. Justice Story's affirmation, though, being a mere statement of an opinion, without reasons, it may not be of equal persuasive power on the minds of others. So the case in Crabbe is not a decision, but notes collected by the judge in preparation for a decision which became unnecessary. On the other side is the able and elaborate opinion of Shaw, C. J., giving the judgment of the supreme court of Massachusetts, that a minor could not be lawfully enlisted in the navy without the consent of his guardian. Com. v. Downes, 24 Pick. 227.

A few months after this last decision was made, congress took up the matter, and passed the act of March 2, 1837 (5 Stat. 153), authorizing the enlistment of boys for the navy, between the ages of thirteen and eighteen, to serve until their majority, with the consent of their parents. This statute appears to dispose of the question. It was argued, indeed, in the cases now before me, that any one over eighteen years of age could be enlisted in the navy without consent, and that the marine corps follows the rules of the navy. But congress undoubtedly were informed that the main argument of those courts and judges who held the contract to be valid without consent was founded, almost entirely, upon the fact that the statutes provided for the enlistment of boys, and were silent as to consent. When, therefore, the legislature defined the persons who should be considered boys, and required the consent of parents to their enlistment, it destroyed this argument, and left other minors to be considered as men; and thenceforward those who would maintain their power to contract for naval service, without consent, must show that they have it by the common

law of the state where the contract is made. Whatever decisions there may be elsewhere, the supreme court of Massachusetts have always maintained that such a contract is not one that a minor is capable of making. Kimball's Case, 9 Law Rep. 500; Com. v. Cushing, 11 Mass. 67; Com. v. Downes, 24 Pick. 227.

In this court, since the statute of 1837, the decisions have been similar. No opinion has been published; but Judge Sprague has discharged minors from the naval service who were eighteen years old, and had enlisted without consent. Chapman's Case, 45 Dist. Ct. Rec. p. 174.[2] The statute of May 15, 1872, requires the written consent of parents for the enlistment of minors in the military service. The act of June 12, 1858 (11 Stat. 318), authorizes the enlistment of boys between eleven and seventeen years old in the marine corps, with consent, to serve until they shall be twenty-one years old.

Considering all these statutes, I think it may be taken as the will of congress, that minors shall not be enlisted in any branch of the service without the consent of their parents. Such has always been the rule in the army, excepting for a short time during war. In the navy, a difference of opinion in the courts was settled by congress in favor of the necessity for consent. In the marine corps, the only statute which touches this subject requires consent. In my opinion, therefore, this contract is one not authorized by the common law, nor by any act of congress. And I have no doubt the rule is the same throughout the United States. It certainly is so in this commonwealth. The colonel commanding who holds these recruits, submitting the case to the judgment of the court upon the law, very frankly admitted that he could not, consistently with his orders, knowingly enlist minors without consent; which shows that the executive department agrees with the courts in the construction I have put upon the law, or else that the government does not need or desire men between eighteen and twenty-one years old; and in either case these enlistments are voidable by the minors themselves, or by their parents, as well as by the government, who have been misled by a false statement. One of these boys has no father, and it has been held that a mother has no claim to her son's services. Com. v. Murray, 4 Bin. 487. But the same court held that the mother is a parent, within the enlistment acts. Com. v. Callan, 6 Bin. 255. And this is the plain meaning of the acts. But that matter is unimportant, as the minor himself desires to set aside this contract. Petition granted.

MACOMB (UNITED STATES v.). See Case No. 15,702.

[2] [No opinion on file in this case.]

Case No. 8,918.

MACOMBER v. CLARKE.

[3 Cranch, C. C. 347.] [1]

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

TRIAL—PRODUCTION OF PAPERS—ORDER OF COURT—REASONABLE NOTICE.

1. To enable a party to call upon the other party to produce papers at the trial, there must be an order of the court upon the party to produce them; that order must be served a reasonable time before the time for producing them; and there must be reasonable notice, also, of the motion for the order.

[See Bank of U. S. v. Kurtz, Case No. 920.]

2. When a juror is withdrawn on the motion of the plaintiff and consent of the defendant, who elects a continuance of the cause, he is not entitled to costs also.

R. S. Coxe, for plaintiff, having given notice to the defendant to produce them, called for a certain letter and notice of demand and notice of protest.

Mr. Morfit produced the defendant's affidavit, that he had searched diligently for the letter and could not find it. He contended that the defendant was not bound to produce the notice, as there had been no order of the court to produce it, and no notice of a motion for such an order.

THE COURT (THRUSTON, Circuit Judge, absent,) said that there must be an order of the court for the production of the papers, which order must be served upon the party a reasonable time before the time for producing them; and that the party must have reasonable notice of the motibn for the order.

On motion of Mr. Coxe, and with the assent of the defendant's counsel, a juror was withdrawn, and the cause continued; THE COURT said it must be without costs, as the defendant had elected a continuance.

Case No. 8,919.

MACOMBER et al. v. THOMPSON.

[1 Sumn. 384.] [2]

Circuit Court, D. Massachusetts. May Term, 1833.

MARITIME LIENS—SHARE OF WHALING VOYAGE—OFFSET—MISCONDUCT—DAMAGES—DIRECT AND IMMEDIATE.

1. In a suit for wages, or for a share in a whaling voyage, if the defence sets up misconduct, there must be a special allegation of the facts, with due certainty of time, place, and other circumstances; otherwise the court will reject it. Loose allegations of general misconduct are insufficient.

[Cited in The Cornelia Amsden, Case No. 3,234; Holmes v. Oregon & C. Ry. Co., 5 Fed. 76.]

[See The Almatia, Case No. 254.]

2. Damages can be recovered for the misconduct of a seaman, only when they are the direct

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

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

and immediate result of his acts or omissions, not when they are remote and contingent; Causa proxima non remota spectatur.

3. Under the circumstances, one hundred dollars deducted from the share of the libellant in a whaling voyage, for gross misconduct.

[4. Cited in The Crusader, Case No. 3,456, Joy v. Allen, Id. 7,552, Duryee v. Elkins, Id. 4,197, and Kellum v. Emerson, Id. 7,669, to the point that suits may be maintained either at law or in admiralty for shares or proportions of earnings in fishing voyages, such shares being the measure of the amount of wages.]

[5. Cited in Gurney v. Crockett, Case No. 5,874, to the point that the admiralty will entertain suits for the compensation of maritime services not necessarily performed by mariners.]

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

Libel [by John M. Thompson against Ichabod Macomber and others] for the share of the libellant, as cooper on a whaling voyage to the Pacific Ocean and back to the United States. The answer admitted the service and share of the party; but asserted gross misbehavior, as incurring a forfeiture. The decree of the district court was in favor of the libellant, from which an appeal was taken.

E. & F. Bassett, for libellant.

Simmons & Fletcher, for respondents.

STORY, Circuit Justice. This is a libel for the share of the libellant, as cooper of the ship Maine, of the proceeds of a whaling voyage to the Pacific Ocean and back to the United States, brought against the respondents, as owners of the ship. There is no controversy, that the service has been duly performed by the libellant for the voyage, and that he is entitled to the proceeds of his share of the earnings of the voyage, unless the matters of defence, set up in the answer, constitute a legal bar to the claim. The answer, in the first place, asserts, that the libellant "did not, and would not, though often thereto requested and ordered by the master and other lawful officers of the ship, obey the said master and officers having command and charge of the ship, but wholly neglected and refused so to do; and disobeyed their lawful commands, and violated his contract and agreement, and became mutinous, and attempted to excite a mutiny on board said ship, while at sea at divers times." Whatever may be the sufficiency of such an allegation in a declaration at common law, founded on the shipping articles, as it has no specification of time, place, occasion, or other circumstances, it is far too loose and general in its texture to found any defensive allegation in proceedings in the admiralty. Every charge of such a nature is there expected to be propounded, or, as it is technically phrased, articulated, in distinct articles in the answer, with due certainty of time, place, and other circumstances, so that the court may distinctly see, to what charges in particular the evidence applies. If, therefore, a preliminary exception had been taken to the admission of the charge, thus generally and loosely framed, I should not have doubted, that the charge ought to have been expunged from the answer. As it is, I am clearly of opinion, that it is wholly insufficient in point of law to be acted upon by this court; and therefore, I should, if I did not deem it unsupported by the evidence, (as I certainly do,) deliver myself from all consideration of it. Where a charge of general and habitual misconduct is to be made out, it should be propounded in exact terms for the purpose; where specific acts of misconduct are to be relied on, they should be specifically put in issue, with due certainty and exactness of statement.

But the more important matter of defence, asserted by the answer, is, that on the return voyage, to wit, on the 10th of February, 1832, while the ship lay at Stonington in Connecticut, where she had been waiting for the opportunity of favorable winds and weather to return to her proper home port of destination, (Fairhaven, in Massachusetts,) and when orders were given to prepare for going to sea, the libellant used abusive language to the second mate of the ship, and refused obedience to orders; and clenched and assaulted the second mate; and told the chief mate he ought to be murdered; and assaulted and abused the chief mate; and conducted himself in so insolent and mutinous a manner, as to excite a mutinous spirit in many of the crew; so that the pilot on board refused to proceed to sea with the libellant on board; and it was in fact unsafe so to do; and that when the libellant had been secured, and before the pilot could get the ship out to sea, the wind changed, and the ship got upon dangerous rocks, and was greatly damaged; all of which damage was sustained in consequence of the very gross and mutinous misconduct of the libellant, and his disobedience of the lawful commands of the master and officers. The answer farther asserts, that the libellant was logged for the said offence by an entry in the log-book; and that the master went on shore, and entered a protest against him; and was obliged to confine, and did confine him, and keep him confined until the ship was moored in Fairhaven, where he was committed to prison in due form for trial for his mutinous conduct; and he did not return to the ship again. And it proceeds to allege, that the premises constitute a legal cause of forfeiture of the libellant's share of the proceeds; and that the damage sustained exceeds the value of that share.

The charge thus set up in its actual presentation is certainly of a very high and aggravated nature. If it were completely borne out in its full extent by the evidence, it would call for the severe animadversion of the court. Some parts of the charge are, however, wholly unsupported, not only in form, but in substance. Thus, the answer

would lead us to suppose, that the ship's going on shore, and receiving an injury was the direct and immediate effect of the misconduct of the libellant. Now, the fact is, that the misconduct of the libellant, whatever it was, took place early in the morning of the 10th of February, 1832. The master went on shore and made a protest, and after several hours' absence returned on board again; and the wind having then shifted, it became improper to put to sea; and the ship during the succeeding night, by the violence of a storm, drifted her anchors and went ashore. So that the injury in no sense, legal or moral, resulted from the misconduct of the libellant, but was a mere maritime casualty. The damage, then, was not attributable at all to the libellant. It was not a consequence of his misconduct, but remote and contingent. And he is not in any measure responsible for it; for the rule of law, as well as of common sense, is, "Causa proxima, non remota, spectatur."

As little foundation is there, in my judgment, for the charge, that there was real danger to the ship in putting to sea with the libellant on board, from any mutiny of the crew. No such spirit was exhibited on their part, and no disobedience of orders ensued; although, if some parts of the testimony are to be believed, the libellant endeavoured to provoke them to it. And if the libellant's being on board was dangerous to the safety of the ship, it was clearly the duty of the master to put him on shore, and not to hazard the voyage by retaining him, as he did, on board in irons. This act cannot, as I think, be fairly under the circumstances attributed to a mere desire to provide for the safety of the ship; for that might have been accomplished by the more summary process of dismissal; but to a desire to punish the libellant for his misconduct. That all the rest of the crew duly performed their duty at Stonington, and until the termination of the voyage, without any insubordination, is manifested by the whole tenor of the evidence.

The case, then, stands singly upon the asserted misconduct of the libellant in disobedience of orders, in using insulting language, and in assaulting and striking the chief and the second mate at the time stated in the answer. And my opinion is, upon a review of the whole evidence, that the charge is distinctly in substance made out. It is sufficiently apparent, that the libellant and the second mate entertained no very good will towards each other; and that the libellant was not slow to use his opportunities to exhibit it. His conduct on the preceding evening was very gross and insulting, and utterly without excuse; though it did not amount to any thing more than contumacy and abusive language. And, as far as the conduct of the second mate has appeared in evidence, it was certainly that of a civil and humane officer. The truth seems to be, that the libellant is a man of quick passions and resentments, and could ill brook the commands and authority of the second mate, who was a foreigner by birth, (a Portuguese,) and towards whom he indulged a good deal of that contempt and pique, which is certainly an infirmity, if not a disease, in the American nautical character. That, in the affray on the morning of the 10th of February, the libellant was greatly to blame, if not wholly without excuse, is in my judgment clearly established by a decided preponderance of the evidence. I am also satisfied, that he struck both the first and second mate without any suitable justification. He was in a furious passion, and gave way the more readily to it, thinking that in the American waters he could more freely exercise his rights, according to his own boastful language, than he dared to do under the guns of a Portuguese fort. It is high time he should learn, that the American laws protect no man in insolence, disobedience of orders, mutinous conduct, or personal attacks; and least of all, protect the crew of a ship in such conduct towards their superior officers. The master was, therefore, fully justified in putting him in irons on this occasion by way of punishment, as well as of security. And I cannot but think, that the subsequent conduct of the libellant during the passage to Fairhaven was such as aggravated the original offence. It was not wholly without contrition, but in a spirit of cool and determined bravado. If a different course of conduct had been pursued, there might have been much to mitigate the offence; for repentance and an offer to return to duty are of high value and import in the maritime law. As the case stands, I should ill administer the true principles of that law, if I did not say, that the case called upon the court for an exemplary admonition. I do not think, that under all the circumstances I should be justified, for a single offence of this nature, in declaring a total forfeiture of the libellant's share of the proceeds. But I shall direct a deduction to be made of one hundred dollars from the amount remaining due; and each party must bear his own costs in this court. In other respects the decree of the district court is to be affirmed.

It is proper to add, that the main evidence, by which my judgment has been influenced in this decision, was never brought before the district court; so that there is no reason to consider, that there would have been the slightest difference of opinion upon this case between my learned brother and myself, if we had been called to decide it upon a similar posture of the evidence. Decree accordingly.

MACON (GARNETT v.). See Case No. 5,245.
MACON (SHORTRIDGE v.). See Case No. 12,812.
MACON (WHITE v.). See Case No. 17,553.
MACON COUNTY (JUDSON v.). See Case No. 7,568.

MACON & B. R. CO. (BRANCH v.). See Case No. 1,808.

MACON & B. R. CO. (CUNNINGHAM v.). See Case No. 3,483.

McPHERSON (BARRETT v.). See Case No. 1,049.

Case No. 8,920.

MACPHERSON et al. v. BLYTHESWOOD.

[1 Phila. 546; 12 Leg. Int. 58.]

District Court, E. D. Pennsylvania. March 16, 1855.

SEAMEN'S WAGES — DEDUCTIONS FOR BOARD AND TRANSPORTATION AFTER WRECK—BRITISH LAW.

[Under the acts of parliament it is the duty of British consuls in foreign countries to find conveyance home for the sailors of a wrecked British vessel; and where the master, without communicating with the consul, assumes his duties in this respect, the resulting expenses for board and transportation of the seamen cannot be deducted from their wages, which are to be estimated up to the day of the wreck.]

[This was a libel by Macpherson and others against the British barque Blytheswood, J. F. Long, master, to recover seamen's wages.]

R. P. Kane and B. Rush, for libellant.

B. Gerhard, for respondent.

Before KANE, District Judge.

This case was partially heard and was continued to hear an argument on the point "whether the expenses of boarding the men and transporting them to Philadelphia, after the wreck, formed a legal charge, to be deducted from their wages?"

THE COURT held, that under the acts of parliament, the responsibility is thrown upon her Britannic majesty's consul to find a conveyance for the seamen to their own country, upon receiving information of the wreck from the surviving officers of the vessel. In this case, no communication was made to the consul, and the master assumed the duties of the consulate. Although the consul might in his discretion, reimburse the captain, the expenses thus assumed and paid by that officer formed no legal charge against the wages due the men. These wages to be estimated up to the day of the wreck. Decree accordingly.

Case No. 8,921.

McPHERSON v. FOSTER.

[4 Wash. C. C. 45.] [1]

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

EXECUTION SALES—LAND—ERRONEOUS DESCRIPTION—SUMMARY RELIEF—CALL OF DEED—NATURAL OBJECTS.

1. A sale had been made by the marshal, under an erroneous description of the premises, and was set aside. "The court, exercising under the long established practice of the state courts, as well as of this court, a kind of mixed jurisdiction, will afford a similar relief. If the case were complicated, and especially if there were contradictory evidence, the court might think it most proper to rerer the parties to a more formal trial of their rights, on the law or equity side of the court, as might be selected. But no such objections arise in this case to prevent the court from granting relief in a summary way."

2. There is no principle of land law more firmly settled in this, and probably most of the states, in respect to country lands, than this: that where the calls of a deed or other instrument are for natural, or well known artificial objects, both course and distance, when inconsistent with such calls, must give way and be disregarded. This rule is founded upon the soundest reason and good sense, and is equally so in its application to town lots.

[Cited in Riley v. Griffin, 16 Ga. 141.]

At law.

Mr. Binney, for the rule.

Mr. Ewing, against it.

WASHINGTON, Circuit Justice. This case comes before the court upon a rule to show cause, why so much of the marshal's sale as regards a three story brick house and lot, in the borough of Carlisle, should not be set aside. The facts are, that under a fieri facias, issued upon a judgment obtained by the plaintiff against the defendant in this court, certain property was levied upon, amongst which was a house and lot, the sale of which has given rise to this rule. It is thus described in the schedule annexed to the execution, and referred to in the return; "levied on a three story brick house, and part of a lot of ground on Hanover street, in the borough of Carlisle, in the county of Cumberland, containing in breadth on the said Hanover street thirty feet, and extending in length or depth two hundred and forty feet, to an alley adjoining the bank of Carlisle; and other property." The lot, thus described, was afterwards condemned by an inquisition; was ordered to be sold by a venditioni exponas; and was so advertised and sold in the city of Philadelphia, and the purchase money paid to the marshal. Kelker, the deputy marshal, who made the levy, deposes that, at the time he made it, the defendant gave him a verbal description of this property, which corresponded with that stated in the advertisement; that he told the defendant the sale would take place in Carlisle, where it could be put up agreeably to any description which might then be furnished him; that he afterwards informed the defendant that the sale was advertised to be made in Philadelphia, of which the defendant said he had heard, and that he then objected to the description of the property, and to the place of sale, and either then, or at some other time before the sale, showed the witness a diagram of the property, as he wished it to be sold, by which the lot in question appears to run back from Hanover

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

street, one hundred feet, to a five foot alley adjoining the lot, on which is the bank of Carlisle. This witness further deposes, that at the sale, he put up this lot as running one hundred feet back; to which some persons present objected. But he does not say whether the objection induced him to make any, or what alteration in that description. It further appears, that under the above execution, a lot and stone building thereon, called the tavern lot, adjoining the above, and belonging to the defendant, was levied upon; but it was not sold. It is fully proved by the depositions, and it is also shown by the diagram exhibited upon this trial, that if the lot in question, which was sold, were to be extended two hundred and forty feet in depth, it would take in about one hundred and nine feet of ground, and nearly the whole of a large stone stable, standing on it, which since the year 1795, has been annexed to, and held and enjoyed by the occupants of the tavern lot, the loss of which, and also of three alleys with which the tavern lot communicates, and which would be the consequence of so extending the lot sold, would greatly impair the value of the tavern lot. At the time of the levy and sale, the tavern lot and stable, as laid down in the diagram, were in the possession of Mr. Armor, as a tenant to the defendant, and had been so for more than three years preceding. Upon these facts, it is perfectly clear, that the lot upon which the levy was made, extended back no farther than the five foot alley, adjoining the bank of Carlisle; that that part of the lot, and no other, was condemned, advertised, offered for sale, or sold. It is true, that the other part of the description, in regard to the number of feet back, cannot be answered by stopping at the above alley, and that there is consequently, an irreconcilable discrepance in the description.

We are therefore of opinion, that if the case stood singly upon the levy, inquisition, venditioni exponas, advertisement, and public declaration of the deputy marshal at the time of the sale, the purchaser could claim, and at law could recover, of this lot, only so far back as to the five foot alley adjoining the bank lot. No more of the lot was, in fact, sold, or intended to be sold, even by the marshal. There has then, obviously, been a mistake in this transaction; which, unless it be corrected by the court, would operate to the injury of the defendant, or of the purchaser, on whichever of them it might be visited. The purchaser, in fact, bought only to the alley, and yet it is manifest that he supposed he was buying to the depth of two hundred and forty feet, so as to include the stable adjoining the tavern lot. The defendant, on the other hand, never intended so to arrange these lots as to rob the tavern lot of improvements and easements so essential to its value, for the purpose of adding them to the other lot, without increasing its value in an equal degree. A court of equity, having such a case laid before it, would not hesitate to relieve the parties, or either of them, against the consequences of such a mistake, by setting aside the sale, unless the purchaser was willing to retain the property according to the boundaries, as they should be legally understood, that is, to the five foot alley. The court, exercising in this case under a long established practice of the state courts, as well as of this court, a kind of mixed jurisdiction, will afford a similar relief. If the case were complicated, and especially if there were contradictory evidence, the court might think it most proper to refer the parties to a more formal trial of their rights, on the law or equity side of the court, as might be selected. But no such objections arise in this case to prevent the court from granting relief in the summary way. We do not think that the purchaser is entitled either to interest, or to the costs of this motion, as he is, in truth, more benefited than the defendant, by having the sale set aside. We shall, however, permit the marshal to amend his return and the inquisition; the defendant's counsel having consented that he may do so, so as to extend the lot in question to the five foot alley. Rule made absolute.

Case No. 8,922.

McPHERSON v. GALLAGAN et al.

[1 Hayw. & H. 394.] [1]

Circuit Court, District of Columbia. Dec. 1, 1849.

CERTIORARI—MAGISTRATE'S COURT—ISSUES REGULARLY TRIED—AWARD BY JURY.

On a motion to dismiss a certiorari it was held that the writ would not lie to a magistrate's court where it appears on the record of said court that the issues below had been regularly tried on a traverse tendered by the petitioner, and the restitution awarded on an inquisition held by a jury.

Motion to dismiss certiorari and to award restitution.

The petition of Daniel McPherson respectfully showeth:

That in the month of March, 1846, General John P. Van Ness, late of the city of Washington, died seized of a large real estate situate in the said city, of which the north part of that lot of ground being on [Seventh] street, known and described on the ground plot of said city as lot numbered 1, in square 428, with the house thereon and appurtenances, formed a part. That in the summer of the year 1846, Governor Van

[1] [Reported by John A. Hayward, Esq., and Geo. C. Hazleton, Esq.]

Ness, a brother of the said John P., and one of his heirs at law, who had entire control of his real estate aforesaid, put your petitioner into the peaceful and lawful possession of the said part of said lot and house thereon, with the appurtenances, which your petitioner has had and held from the summer aforesaid hitherto, and still has and holds, as tenant of the said Governor Van Ness. That the heirs of General John P. Van Ness have not, nor has the said Governor Van Ness, nor any person claiming under him, notified your petitioner that he or they or any of them wished to have again and repossess the premises aforesaid, or any part thereof. That in the month of June, in the present year, a man calling himself Dant, and two other men, the said Dant professing to act as the agent of James and Thomas Gallagan, of the city of Washington, called at the premises aforesaid and there and then demanded of your petitioner immediate possession of the same, which your petitioner refused to give, whereupon the said Dant and his said comrades commenced to take the windows out of the said house aforesaid, and it was with great difficulty your petitioner prevented the said parties from taking forcible possession of the premises aforesaid. That the said Dant and his said companions have since been tried and committed in our criminal court of a riot for their breach of the peace and acts aforesaid. That the said James and Thomas Gallagan have caused your petitioner to be proceeded against before John L. Smith and Thomas C. Donn, esquires, justices of the peace for Washington county, for a forcible entry and detainer. That the only acts charged and relied on as constituting the forcible entry and detainer complained of are your petitioner's refusal to surrender up the premises aforesaid to the said Dant, and your petitioner's resisting the said Dant and his associates in their said attempt to take forcible possession of the same in the month of June aforesaid. And your petitioner further shows, that in pursuance of a warrant issued by the said justices a jury was summoned and appeared on the premises aforesaid on Friday the 11th inst., and then and there convicted your petitioner of a forcible entry and detainer. Your petitioner, advised by a counsel learned in the law, and verily declares, and therefore charges that the said proceedings are unlawful and oppressive, and a manifest violation of his rights as a citizen of the city of Washington, and as the legal tenant of the premises aforesaid. Your petitioner therefore prays your honors to grant him the United States writ of certiorari to be directed to the said John L. Smith and Thomas C. Donn, commanding them to return and certify to this honorable court the warrant aforesaid by them to the marshal of the District of Columbia, and all proceedings had thereon as fully as the same now remains before them, and your petitioner will pray.

Wm. F. Percell and G. L. Giberson, for the petitioner.

The United States of America, District of Columbia, to wit:

To John L. Smith and Thomas C. Donn, Esquires, Justices of the Peace in and for the County of Washington, in the District of Columbia, and Each of Them, Greeting:

Whereas, a certain inquisition for a forcible entry and detainer was lately depending before you or one of you in the name of James and Thomas Gallagan against Daniel McPherson, late of said county, for a forcible, &c., which said inquisition, as it is said, is still depending before you or one of you, undetermined, and the circuit court here being willing, for certain reasons, to be certified of the said inquisition, therefore you and each of you are hereby commanded, that the inquisition aforesaid, together with all the proceedings thereon, as fully and entirely with all things touching the same, as it now remains before you or some of you, by whatsoever name the said James Gallagan and Thomas Gallagan, or either of them, may be called in the same, you or some of you certify to the said circuit court to be held at the city of Washington on the 3d Monday of October next, together with this writ, so that the said circuit court may be able to proceed thereon and do what shall appear to them of right ought to be done. Hereof fail not at your peril, and have you then and there this writ.

Witness the Hon. W. W. Cranch, Chief Judge, the 14th day of August, 1848.

The following is a summary of the proceedings had before the justices of the peace:

Writ of Inquisition.

District of Columbia, County of Washington, to wit:

We, Thomas C. Donn and John L Smith, Justices of the Peace of said County and District aforesaid, to the Marshal thereof, Greeting:

Whereas, complaints have been made before us that Daniel McPherson, of said district and county, did on the 22d day of June, 1848, with force and arms and with strong hands did unlawfully enter into and make forcible entry and detainer into the dwelling-house situate on 7th street, west side, between H and I streets, on the north quarter of lot numbered one (1) in square No. 428, whereof James Gallagan and Thomas Gallagan, trading under the firm name of J. Gallagan and Son, of said county, was then seized in his demesne as of fee, against the form of the statute in such case made and provided; therefore, in behalf of the United States, we do command you that you cause to come before us, on Friday, the 11th day of August, 1848, at 4 o'clock a. m., at the premises in said county, twenty-four sufficient and indifferent persons, dwelling near and about the

said tenement so forcibly entered and detained as aforesaid, to enquire upon their oaths, for the United States, of and concerning the said forcible entry and detainer so made as aforesaid, and have you then and there this writ with the jury as aforesaid.

Given under our hands and seals this 12th day of August, 1848.

T. C. Donn, J. P. (Seal.)
J. L. Smith, J. P. (Seal.)

Plea of the Defendant.

United States vs. Daniel McPherson.

Forcible Entry and Detainer.

The defendant, by his counsel, Wm. F. Percell and G. L. Giberson, comes and denies and defends the alleged forcible entry and detainer or either, and upon this he puts himself upon his country.

Wm. F. Percell, Att'y.
G. L. Giberson, Att'y.

August 11th, 1848.

A jury was thereupon summoned and the inquisition was held and the jury found for the United States.

Upon which the defendant was required to appear before the justices, at the premises, on the 12th day of August, 1848, in the county, between the hours of three and four o'clock of the aforesaid day, to show cause, if any you can, why restitution of said tenement should be made to the said James and Thomas Gallagan.

The jury being summoned by the marshal to appear as aforesaid and being impanelled and sworn to speak the truth of and upon the premises before specified, do say upon their oaths that Daniel McPherson is guilty of the premises aforesaid in the inquisition above specified, as by the said inquisition is above found. Therefore it is considered by us, the justices aforesaid, that the said James and Thomas Gallagan have restitution of the premises aforesaid in as full and ample a manner as he had before the said disseizen by the said Daniel McPherson. And now here comes before us, the subscribers, &c., the writ of certiorari, &c.

Given under our hands and seals, this 14th day of August, 1848.

J. L. Smith, J. P. (Seal.)
T. C. Donn, J. P. (Seal.)

Carlisle & Ennis, for defendants.

BY THE COURT. This cause having been heard and considered by the court on a motion to dismiss the certiorari, and it appearing by the record that the matter of fact, to wit, the forcible entry and detainer had been regularly tried, upon a traverse tendered by the petitioner, before the service of the certiorari, and restitution awarded but not executed; it is now considered by the court that the certiorari be dismissed with costs, and the justices proceed in the premises as if the certiorari had not issued; and that the clerk of this court do certify the same to said justices.

McPHERSON (KITTY v.). See Case No. 7,860.

McPHERSON (TALBOT v.). See Case No. 13,728.

McPHERSON (UNITED STATES v.). See Cases Nos. 15,703 and 15,704.

McPORTER, The. See Case No. 6,288, note.

Case No. 8,923.

McQUAIN v. MELINE.

[4 Quart. Law J. 28.]

District Court, W. D. Virginia. Spring Term, 1858.

TAX TITLES—EJECTMENT—EVIDENCE.

1. Under the provisions of the Code of Virginia, when a sale of land has been made by a sheriff for the non-payment of taxes, and a conveyance has been made by the clerk of the county court, and recorded, such title as was in the person assessed with the taxes, at the beginning of the year for which the assessment was made, is vested in the purchaser, notwithstanding any irregularity in the proceedings, unless it appear on the face thereof.

2. Though the party in whose name the land was assessed, after the assessment, and before the sale, died, and under a decree against his heirs, the land was sold before the conveyance was made by the clerk in pursuance of the sale for the non-payment of taxes, the sale for the taxes will prevail against the sale under the decree.

3. The purchaser at the sale, for the non-payment of taxes, need not show the proceedings previous to the deed from the clerk to him, in order to recover on such title. The deed itself, when regular, is prima facie evidence that the proceedings were regular, and that the title passed.

4. The assessment of the land on the commissioner's book with the taxes, for the non-payment of which it is sold, is not a circumstance in relation to the sale, which is required to be recited in the deed from the clerk to the purchaser.

5. If the assessment be such a circumstance, a recital that the land was returned delinquent for the non-payment of the taxes, necessarily implies such previous assessment, and is sufficient.

At law.

John S. Hoffman and Benjamin Wilson, for plaintiff.

William A. Harrison and Charles T. Harrison, for defendant.

BROCKENBROUGH, District Judge. This is an action of ejectment, originally brought in the circuit court of Gilmer, by Hugh McQuain against George Spurgeon, the tenant in possession, to recover a tract of 130 acres of land, situated in the county of Gilmer, on the Bear Fork of Cove creek. James F. Meline, the lessor of the original defendant, and a citizen of the state of Ohio, appeared, and was made defendant in place of his lessee, in

pursuance of the provision of the Code of Virginia, p. 558, § 5. At the time of his appearance, the new defendant pleaded the general issue, and presented a petition to the state court, alleging that he was a citizen of the state of Ohio, and praying on that ground a removal of the cause to this court, in virtue of the act of congress in such case made and provided. The requirements of the act of congress having been complied with, the cause was regularly transferred to the docket of this court.

The cause comes on now to be heard on a case agreed between the counsel for the parties respectively, the important facts of which will here be stated. On the 30th of November, 1838, a patent was issued from the land office of Virginia, granting the land in controversy, described as containing 130 acres, situated in Lewis county, on Big Cove creek, and setting out the metes and bounds thereof, to one Cummins E. Jackson, in absolute fee simple. At a subsequent period, the legislature of Virginia created the county of Gilmer, embracing that portion of the county of Lewis in which the land in controversy is situated. The identity of the land granted to Jackson with that in controversy between the parties here, is a fact found by the special case agreed between them.

The plaintiff claims under a tax title deed, made to him on the 20th day of August, 1853, by C. B. Conrad, clerk of the county court of Gilmer, conveying the land in controversy to the plaintiff, as purchaser thereof, at a sale made by the sheriff of Gilmer, of said land, as delinquent for the non-payment of taxes due by C. E. Jackson, to the commonwealth. The conveyance was made by the clerk in virtue of the sixteenth section of chapter 37, p. 203, of the Code of Virginia. The fact of the due election and qualification of the grantor as clerk of Gilmer, is established by the case agreed. The material recitals in the deed are that it appeared from the papers in the clerk's office of Gilmer county, that the land in controversy, together with four other tracts conveyed by the same deeds, was included in a list of delinquent lands delivered by the auditor of public accounts, to the sheriff of Gilmer, to be sold by him, in the year 1850; that it was reported as being delinquent for the non-payment of taxes due thereon for the years 1845, '46, '47, '48 and '49; that the said list was copied three times, and that one copy was posted at the front door of the court-house, with a notice subjoined that the real estate therein mentioned, would be sold at September court, 1850, of Gilmer, as appeared by a copy filed in the said clerk's office; that it also appeared by a list of the lands reported as having been sold by said sheriff, in the months of September and October, of the last mentioned years, and filed in the clerk's office, that the land in controversy, described as number 5, at the September term of the court, 1850, and on the 23d day of that month, was sold for the amount of tax due thereon, being 76 cents, and that the plaintiff became the purchaser thereof for that sum; that the tract in controversy was returned delinquent in the name of Cummins E. Jackson, and that the purchase money, fees and commisssion, were paid by the plaintiff to the deputy sheriff who made the sale, as appeared by his receipts in the hands of the plaintiff; that two years had elapsed since the sale, and the land had not been redeemed; that the whole tract was sold; that the plaintiff after the expiration of two years obtained from the surveyor of Gilmer a report of the tract so sold, which was presented to the county court of Gilmer, at its August term, 1853, and no objection appearing to it, the court ordered it to be recorded, which was accordingly done. The land was conveyed by metes and bounds, conforming to those set out and described in the original patent from the commonwealth to Cummins E. Jackson, of November, 1838, before referred to. The deed was acknowledged by the grantor before a justice of the peace for Gilmer, and admitted to record on the day of its date.

The defendant claims title to the land in controversy under a judicial sale made under a decree of the circuit court of Lewis county. On the 21st of June, 1848, certain creditors of C. E. Jackson filed their bill in chancery in the circuit court of Lewis county against him and others, seeking to subject his real estate to sale for the payment of his debts, he being then a non-resident of the state of Virginia. Pending the said cause C. E. Jackson died intestate, and the cause was revived against his heirs at law. On the 26th of March, 1853, the court pronounced a decree directing the real estate which had descended to the heirs at law of the debtor, to be sold by certain commissioners named in the decree. The real estate embracing the land in controversy here, was sold by the commissioners on the 20th of August, 1853, Joseph H. Dis Debar became the purchaser of the last mentioned tract at the price of $400.50, which sale was confirmed by the court by a decree rendered on the 27th of August, 1853; and by another decree rendered on the 6th of September, 1854, the commissioners were ordered to execute a deed conveying said land to Debar when he should pay the purchase money. Cummins E. Jackson died in California in December, 1849. It is ascertained by the special case that the land in controversy was worth $400 at the time of the sale made by the sheriff of Gilmer, for the taxes. The purchaser at the judicial sale sold, or contracted to sell, the said land and make a deed of conveyance thereof, to the defendant Meline, and the original defendant Spurgeon took possession of the land as tenant of the present defendant, Meline.

The general question of vital interest resulting from the facts thus agreed is, was the deed of the 26th of August, 1853, from the clerk of Gilmer, effectual to convey the legal

title to the land in question, previously vested in C. E. Jackson by the commonwealth's patent of November, 1838, to the plaintiff here or not? If that deed was valid and effectual for that purpose, then, although its execution was subsequent in point of time to the rendition of the decree of the circuit court of Lewis, directing a sale of said land to satisfy the claims of the creditors of the patentee Jackson, yet it operated by relation to vest in the grantee such estate as was vested in the party assessed with the taxes, on account whereof the sale was made at the commencement of the year for which the said taxes were assessed, notwithstanding any irregularity in the proceedings under which the said grantee claims title, unless such irregularity appears on the face of the proceedings. Code Va. p. 240, § 22. If, on the other hand, there be any irregularity apparent upon the face of the proceedings, such as the act contemplates, such irregularity vitiated the deed, and made it a simple nullity. Accordingly the whole stress of the able and elaborate argument of the counsel on each side has been directed to this point, the counsel for the plaintiff maintaining the validity of the deed, and the counsel for the defendant insisting with great earnestness that it was inoperative and void. It is much to be regretted that, sitting as a federal court, I am called to break the way in the exposition of a most important statute of the state, not heretofore expounded by her own juducial tribunals; and my embarrassment is increased by the consideration that if I err in its interpretation, the error is one which cannot be reversed by writ of error from the supreme court of the United States, the amount in controversy not being sufficient to give jurisdiction to that tribunal. In construing the various sections of this statute which are pertinent to the question presented for solution, I am to place myself in the position of a state court called to expound them, and apply the same construction which that court would apply, as far as that can be ascertained by the light of reason and the analogies of the law; for it is a most wise and salutary provision of the judiciary act of 1789 [1 Stat. 73], that the laws of the several states shall be rules of decision for the federal courts exercising jurisdiction within the territorial limits of such states respectively. Had these sections of the act of 1850 been expounded by the highest judicial tribunal of the state, that exposition would furnish an authoritative rule for the guidance of the judgment of this court, for it is well settled that the decision of the highest appellate court of a state, involving the construction of the statute law of the state, is the highest evidence of that law, and that the federal courts of every degree, including the supreme court of the United States, as well as all subordinate tribunals, are absolutely bound by such decision. But although the recent law in relation to the sale of lands delinquent for the non-payment of taxes due to the state, has not yet been expounded by her own courts, the provisions of former laws on the same subject, and very similar to the law now to be interpreted, have been fully expounded by the court of appeals in several recent cases, and I derived great aid in reaching a conclusion satisfactory to myself, from the light furnished by the luminous opinions of that court in the cases of Flanagan v. Grimmet, 10 Grat. 421, and Hobbs v. Shumates, 11 Grat. 516.

It is insisted by the counsel for the defendant, that there is an irregularity on the face of the proceedings sufficient to vitiate the deed, under which the plaintiff claims. It is said there is no recital or averment in the deed that the land in question had ever been assessed at all. It is certainly true that there is no such averment in express terms. The statute requires that the deed of the clerk conveying land sold for the non-payment of taxes to the purchaser, shall set forth all the circumstances appearing in the clerk's office in relation to the sale. Another statute requires that the assessors of the lands of the commonwealth deposit in the clerk's office of their respective courts lists, showing the assessed value of all the lands in the county, and the law presumes, in the absence of direct proof, that the public duty thus enjoined has been properly and rightfully performed. There was, then, in the clerk's office of Gilmer county, on the 20th day of August, 1853, record evidence that the land conveyed by the clerk to the plaintiff had been regularly assessed, and the amount of tax with which it had been charged. Was the fact of such assessment, one of the circumstances appearing in the clerk's office in relation sale, the failure to set forth which vitiated the deed? If it was necessary to set it forth in the deed, has not this been substantially done in averring that the land in controversy was delinquent for the non-payment of taxes due thereon, and the amount of those taxes? I shall briefly address myself to each of these questions in the order stated.

Does the omission to aver in express terms, in the deed, that the land sold as delinquent for the non-payment of taxes was duly assessed, vitiate the deed? There can be no question that the assessment of the land, as a matter of fact, lies at the foundation of the plaintiff's title, for if there was no assessment, no taxes were due, and if no taxes were due there could be no delinquency for their non-payment. A sale, therefore, and conveyance of land for non-payment of taxes without a previous assessment would be a simple nullity. But though there must necessarily be an assessment in all such cases, it is one of those circumstances appearing in the clerk's office in relation to the sale, which it is indispensable to aver in the deed to give it validity. The case of Flanagan v. Brimmet is a strong authority in support of the negative of the question. This case required the court to construe the act of the 9th of

February, 1814, respecting the sale of lands delinquent for the non-payment of taxes. The act was passed to remedy evils growing out of past legislation, and the construction put upon the former laws on the same subject by the court of appeals. Very stringent rules had been previously applied by the court against the purchaser of a tax title. "When the act of February, 1814" [Laws (Va.) 1813–14, p. 15], says the court, "was enacted, the legislature was fully aware of the construction which had uniformly been put on laws of this description. Few principles of law are more firmly established, and from their influence on the transactions of others, more widely known, than that where the validity of a deed depends upon an act in pais, the party claiming under it is bound to prove the performance of the act; that in the case of a naked power not coupled with an interest, the law requires that every prerequisite to the exercise of such power should precede it; that the claimant under a sale made to enforce a forfeiture must show that the law has been strictly complied with; that the recitals in a deed of an officer selling for taxes were not even prima facie evidence of the regularity of his proceedings, and that these facts must be proved by evidence aliunde." The court held that these rules were essentially modified by the act of 1814. That act required the sheriff to advertise a sale of delinquent lands at the May, June and July terms of the court of his county, and to publish the advertisement at least once every week for two months preceding the time of sale, in some newspaper published in the city of Richmond. It also directed him to execute a deed to the purchaser at such sale, reciting the circumstances thereof, and setting forth particularly and truly the amount of the purchase money; and that after the time of redemption allowed had elapsed, the regularity of the proceedings under which the purchaser at the sale claims title shall not be questioned, unless such irregularity appears on the face of the proceedings. In the construction of this act it was held that by the circumstances of the sale, which are recited in the deed, was not meant all the steps to be taken by the various officers which preceded the sale, but the circumstances attending the sale itself, viz: that the sale was made at the time and place prescribed for the sale of lands returned delinquent; if less than the whole lot or tract was sold, how much was sold; who was the purchaser, and the amount of the purchase money; and that it was not necessary that the deed should recite that the land had been advertised; that even if an insufficient advertisement was recited, it would not be an irregularity on the face of the proceedings which would avoid the deed, but any recital of that fact being unnecessary, the recital of an insufficient advertisement was mere surplusage, not affecting the validity of the deed. The deed to the purchaser was held to be valid, though there was no express recital of the fact that the land had been assessed. The attention of the court does not seem to have been called to this omission, but it is not to be presumed that an omission fatal to the pretensions of the purchaser's claim would have escaped the vigilance of both bench and bar, in a case so elaborately discussed by each. The only reasonable deduction to be drawn from the case, touching the point under consideration, is, that the recital, in express terms, of the fact of assessment was not one of the circumstances of the sale, required to be recited in the deed to the purchaser. Has the law of 1850 made any change in this respect? The language of the two acts are very similar, but not identical. By the act of 1814, the sheriff who conducted the sale was required to execute the deed to the purchaser; by that of 1850, the clerk of the county is required to make it: by the former, it was contemplated that the sheriff should make the deed before the expiration of the two years allowed for the redemption of the land; by the latter the clerk is required to make the conveyance after the expiration of that time: by the former, it is required that the deed recite the circumstances of the sale, and set forth particularly and truly the amount of the purchase money; by the latter, that the clerk's deed set forth all the circumstances appearing in the clerk's office in relation to the sale. The former act seems to have required a more minute recital than the latter, and this discrimination was not an arbitrary one. The sheriff was required by the former act to recite in his deed all the circumstances attending the sale, which seems to have been reasonable as he was personally cognizant of those circumstances; but by the latter, the clerk is only required to recite those circumstances, in relation to the sale, appearing in the clerk's office. We have seen from the case of Flanagan v. Grimmet, that the recital of the fact of assessment was not one of the circumstances of the sale required to be expressly recited in the sheriff's deed; and if not, I can conceive of no reason why it should be so deemed under the act of 1850, which was designed to restrict rather than enlarge those recitals. The assessment, though the remote foundation of the purchaser's title, under either, cannot be affirmed to be a circumstance having immediate reference to the sale. It is an indispensable element of title in either case, but not a circumstance in relation to the sale itself, within the meaning of the act. But even if it were so, I apprehend that the fact that the land was regularly and duly assessed is substantially averred in the deed in this case. The recital that the land was delinquent for the non-payment of the taxes due upon it, not by reasonable intendments only, but by necessary implication, involves the averment that the land was assessed. The assessment of land by the prop-

er officers of the government is the only mode known to the law, by which the amount of tax chargeable on the lands, is fixed and determined. Until the assessment, the amount of tax due upon the lands is altogether indeterminate and uncertain, and no demand or levy for the tax, can lawfully be made, until the quantum of tax has been fixed and ascertained, in the mode prescribed by law. Lands may be assessed without a subsequent delinquency, because this may be prevented by the payment of the taxes, but the converse of the proposition is not true. There can be no delinquency without a previous assessment, and when it is affirmed, therefore, that lands become delinquent for the nonpayment of taxes, it is affirmed, by necessary implication, that the lands had been previously assessed. The silence of the court of appeals in the two cases of Flanagan v. Grimmet and Hobbs v. Shumates, above cited, as to the omission to recite expressly that the lands had been assessed, coupled with the decision in each case, that the deeds to the purchaser were valid to vest a good prima facie title in him, and such title, as at the time the land was returned delinquent was vested in the person in whose name it was so returned, seems pregnant with the admission, that the delinquency necessarily presupposes a previous assessment.

During my investigation of this case, I have felt a strong desire to sustain the title of the defendant, who appears to have acted in good faith, and to have paid full value for the land, rather than that of the plaintiff, who purchased it for a song. But it is the business of courts to declare and not to make the law, and as the plaintiff seems to have acquired his title, in accordance with the prescribed formalities of the law under which he acted, and as the court of appeals, in the two leading cases cited, have sustained the title of purchasers, in cases in which the recitals were much less special than in the case at bar, and in virtue of a statute not at all different in principle from that which is to govern the present case, I am constrained to say that judgment must be rendered for the plaintiff.

McQUEEN (CURRANEE v.). See Case No. 3,488.

McQUERRY (MILLER v.). See Case No. 9,583.

Case No. 8,924.

Ex parte McQUILLON.

[3 West. Law Month. 440; 9 Pittsb. Leg. J. 27.]

District Court, S. D. New York. Aug. 5, 1861.

HABEAS CORPUS TO MILITARY OFFICER—REFUSAL TO OBEY.

[Where a military officer made return to a writ of habeas corpus that he declined to obey it at the present time, under orders from his superior, which were produced in court, *held*, that the court could take no further action in the matter, and would deny a motion to execute the writ. Following Ex parte Merryman, Case No. 9,487.]

[This was an application for a writ of habeas corpus to procure the release of Purcell McQuillon, who was held in custody by the military authorities of the United States at Fort Lafayette, New York.]

Before BETTS, District Judge.

The judge asked if the matter of the habeas corpus of Purcell McQuillon was ready.

Mr. Edwards called for the return of the writ, which was addressed to the commander of Fort Lafayette, and commanding him to have the body of McQuillan brought before this court. A lieutenant handed Mr. Edwards the return.

Mr. Edwards said the return was merely altered. It read: "Headquarters, Fort Hamilton, New York, July 29, 1861. I beg leave to decline obeying this writ at this time, by authority of Lieutenant General Winfield Scott. Martin Burke, Brevet Lieutenant Col. Commanding, Fort Lafayette, New York."

Mr. Edwards objected to the sufficiency of the return, both as to date and substance.

The judge said the court could not take cognizance of the sufficiency of the order of General Scott until it was before it.

Mr. Woodford inquired if it was doubted that the return was made by the lieutenant colonel commanding at Fort Lafayette.

Mr. Edwards replied in the negative, but he respectfully insisted that it was not a sufficient or proper return.

The judge said it did not appear that such an order or interdiction upon the officer making the return, had been made.

Mr. Edwards remarked that if this was a matter against a civilian, he would ask an attachment to be issued. He would ask the judge, if he did not see fit to issue process against the officer, that the authority for his refusal to obey the writ be made a part of the return. This was merely the old return with three or four words added. The date was not as it should be, and the prisoner should be here.

Mr. Woodford said the lieutenant present had with him the authority under which his superior acted, with instructions to present it to the court. Mr. Woodford did not appear here to advise the form of the return. The military power in its wisdom had chosen to decline obeying this writ, and had furnished instructions to its officers accordingly. This was a matter not within his discretion as the law officer of the government, and he could not advise the making of this authority a part of the return.

Mr. Edwards took the order from the lieutenant and read it. It was as follows: "To Colonel D. D. Tompkins, Quartermaster's Department, No. 6 State Street, N. Y. Headquarters Army, Washington, July 24, 1861. Send orders immediately to commanding of-

ficer of Forts Hamilton and Lafayette to return to writ in case of Purcell McQuillan that he begs leave to decline obeying the writ at this time. (Signed:) Winfield Scott."

A copy of the order sent by Colonel Tompkins, in pursuance of the above authority, was then read.

Mr. Edwards still claimed that the return and orders were insufficient, and the prisoner should be brought here.

The judge said the officer made return that he could not bring the person here, as he was restrained by orders from Gen. Scott. He took it that the military authorities declined to obey the writ as a matter of right, and the civil power was not sufficient to enforce it. The court would not at this time grant any order to have the body brought here.

Mr. Edwards then argued that the return was insufficient in not showing the authority for suspending the writ of habeas corpus.

After argument, BETTS, District Judge, remarked that the question involved was a very grave one, and was similar in all respects to the case recently before Chief Justice Taney, in Baltimore [Ex parte Merryman, Case No. 9,487]. The questions raised in that case had never been solved. He would, however, follow out that case, but would express no opinion whatever, as it would be indecorous on his part to oppose the chief justice. He would therefore decline taking any action on the writ at all. The constitutional law must be upheld, and he would not cavil at the manner in which it was done. The public mind would settle itself into the conviction to let the matter rest as it is, without throwing open the habeas corpus to be used by every one during the progress of the war. The writ had been served, and the commanding officer had declined to produce the person by the authority of his superior officer, who claimed that the writ was not operative against him. The court could therefore not take any action in the matter, and would not direct the marshall to execute the writ. An order could be entered on the minutes stating that a motion had been made to execute the writ, which was denied.

Case No. 8,925.

McQUIRK et al. v. The PENELOPE.

[2 Pet. Adm. 276.] [1]

District Court, D. Pennsylvania 1806.

SEAMEN'S WAGES—SHIPS LOST BY CAPTURE—INSURANCE PAID.

1. Wages, otherwise lost, were claimed because the merchant had received insurance on the freight, and refused.

[See Adams v. The Sophia, Case No. 65.]

2. Wages cannot be insured.

[Cited in Joy v. Allen, Case No. 7,552.]

3. Seamen contract, with full knowledge of the course and nature of our trade.

4. Freight paid by captors, wages decreed, refused, if the loss is paid by the insurers.

A claim for wages for the voyage was instituted against a merchant, whose ship had been carried in by a belligerent, adjudicated, and ship and cargo condemned in the court of the captor. A point was made, that the owners had received insurance on the freight, and thereby the fund for paying wages was restored.

BY THE COURT. This point has often been made and over-ruled, and must be at rest, in this court. I have constantly held, that the insurers have all benefits accruing to the owner; and are not answerable to mariners, nor is the owner, in such cases. The fund for paying wages was lost to the owner by the condemnation, as much as if no insurance had been made. Seamen cannot, it is held, directly, insure wages; and if so, it ought not to be done circuitously, through the owner, who would in that case, lose so much of the insurance, for which he, and not the mariners, paid a premium. If, indeed, a ship be forfeited by the misconduct of the owner, and the seamen are not amenable to consequences, this may be shewn against the owner, whether he is insured or not. The contract for insurance is between the owner and underwriters; and the seamen are third persons, neither parties or privies to the agreement. If the freight be lost, the claims of mariners cannot be aided by the precaution of the merchant, who for compensation, procures others to bear his risks. Seamen generally know, as well as merchants, the nature of our commerce; and enter into contracts, under its circumstances. Freight being lost, is the ground of recovery against underwriters; but it is the reverse, as between owners and seamen. Capture, as much as wreck, extinguishes the fund, if the loss be total; and there is no difference between the effects of loss, in the one case or the other. In some instances, where the goods were condemned, and the freight paid by the captors,[2] I have allowed wages to the seamen, but never where losses have been paid by underwriters. I consider the cases to stand on very different grounds. The freight is saved by treaty or the laws of nations, in the case of payment by captors, and there is no difference, quoad hoc, whether the ship had earned it, by arrival at her port, or the amount paid in this way; but in the latter case, the freight must be actually lost to the owner, to induce a payment by the underwriters, not of the freight, but (for a reward previously given) an equivalent, or compensation, for its loss.

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

[2] The ancient laws forfeited the ship carrying contraband; but modern practice is to let the ship go free, unless the contraband articles also belong to the owner of the ship, or he is fraudulently concerned in the transaction. The freight is always forfeited on contraband. On enemy's goods it is paid to the neutral owner. 3 Rob. Prac. (Phila. Ed.) 182, 183.

McRAE (HUGH v.). See Case No. 6,840.

McRAE, The MARY. See Case No. 9,221.

McREA (MARSTIN v.). See Case No. 9,141.

McREA (PRIME v.). See Cases Nos. 11,422 and 11,423.

McROBERTS (IRWIN v.). See Case No. 7,085.

McSAUL (MILWARD v.). See Case No. 9,624.

McSHANE (UNION PAC. R. CO. v.). See Cases Nos. 14,381 and 14,382.

Case No. 8,926.

McSHERRY v. QUEEN et al.

[2 Cranch, C. C. 406.] [4]

Circuit Court, District of Columbia. April Term, 1823.

JUDGMENT—SUPERSEDEAS—EXECUTION—IMPROPER RECITAL.

The court will, on motion, quash an execution upon a supersedeas judgment and also the supersedeas judgment itself, if it does not truly recite the original judgment.

[Cited in Chesapeake & O. Canal Co. v. Barcroft, Case No. 2,644.]

[This was a suit by Dennis McSherry against R. T. Queen, Charles J. Queen, and James King & Co.]

Mr. Wallach, for defendants, moved the court to quash an execution issued upon supersedeas; and also the supersedeas itself, because it did not truly recite the original judgment. The original judgment was for $200 damages, to be released on the payment of $100 with interest from the 13th of April, 1820. A payment of $50 is noted on the docket. The supersedeas stated the debt to be $50, taking no notice of the damages to be released on the payment of a smaller sum.

THE COURT (THRUSTON, Circuit Judge, absent) quashed the execution and supersedeas, because the original judgment was not truly recited in the supersedeas judgment, and because a judgment against James King & Co. was too uncertain.

Case No. 8,927.

McSORLAY v. LUDLOW.

[2 Paine, 600.] [1]

Circuit Court, Second Circuit.[2]

REAL PROPERTY—AGREEMENT TO SELL—PRICE PAID—EQUITABLE TITLE—JUDGMENT CREDITOR—INJUNCTION.

[This was a bill in equity by James McSorlay v. Thomas W. Ludlow.]

This case differs from the others[3] only in this respect: that the purchaser, instead of giving a bond and mortgage to secure the purchase-money, actually paid the same to Mr. Bayard on receiving the deed, and after the judgment obtained against Bayard, which brings the case precisely within that of Hampson v. Edelen, 2 Har. & J. 64, and which rests on the same principles that governed the decision in the case of Finch v. Earl of Winchelsea, 1 P. Wms. 278.

The injunction in this case must be made perpetual, without requiring the complainant to make any further payment for the land purchased by and conveyed to him.

Before THOMPSON, Circuit Justice.

McSORLY v. LUDLOW. See Case No. 8,052.

McSPEDAN (JUNEAU BANK v.). See Case No. 7,582.

Case No. 8,928.

MACUBBIN v. LOVELL.

[1 Cranch, C. C. 184.] [1]

Circuit Court, District of Columbia. July Term, 1804.

EVIDENCE—COMPARISON OF HANDWRITING.

Comparison of handwriting is not evidence.

Mr. Peacock, for plaintiff, having proved that on a note filed in another case the plaintiff had confessed judgment, prayed the court to suffer the jury to compare a receipt purporting to be signed by the plaintiff with the said note and from thence to infer that the signature was in his handwriting.

Refused. KILTY, Chief Judge, absent. See Peake, Ev. 68–70, s. p. Watterstone v. Cook [unreported], at the same term.

Case No. 8,929.

MACUMBER v. ST. LOUIS LIFE INS. CO.

[6 Ins. Law J. 591.]

Circuit Court, D. Nebraska. May Term, 1877.

LIFE INSURANCE—EXPIRATION—RENEWAL PREMIUM—SUBSEQUENT TENDER.

[The renewal premium on a life insurance policy was due on or before noon Sept. 1st. On Aug. 31st the agent of the insurance company in a personal interview desired the assured to make payment. The assured replied that he was unable to do so, but was about to start for St. Louis in order to borrow money from his brother, and in case he was successful he would upon his return pay the premium. The agent notified him that in that case his insurance would expire the next day. On the 2d of September at about 2 p. m. the assured was killed in a railway accident while on his way to St. Louis. At about 4 p. m. of the same day the amount of

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

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

[2] [Date not given. 2 Paine includes cases decided from 1827 to 1840.]

[3] [The cases here referred to are Lane v. Ludlow, and others heard at the same time. Case No. 8,052.]

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

the premium was tendered by the friends of the assured. *Held*, that the insurance company was not liable on the policy.]

The case is upon a policy of life insurance in the sum of $2,500 executed by defendant, dated September 1st, 1874, upon life of Edwin Macumber, to plaintiff, [Lydia C. Macumber,] pursuant to application made by Edwin M., August 27th, 1874. Copy of policy is set out in the answer, and copy of application filed with the stipulation in the case.

The first premium, $54.63 was paid, and policy delivered September 9th, 1874. The second premium, by the terms of the policy, was due September 1, 1875, at noon, and was not paid before that time, nor yet tendered, until after Macumber's death, which occurred in consequence of a railway accident about 2 o'clock in the afternoon, September 2d, and tender was made about 4 o'clock in the afternoon of that day by friends of the plaintiff. It was in the policy, "agreed that if the assured shall fail to pay any premium due and payable after the date thereof, on or before the time and day above mentioned, (12 noon, September 1st in each year,) or fail to pay at maturity any note or draft taken in payment of any premium, then and in every such case this policy shall cease and determine, and said company shall not be liable for any sum whatever, on account of said policy." The policy also provided as follows: "Provided always, and it is hereby declared, * * * * nothing in this contract shall be construed to bind the said company by any declaration, admission, or assertion of its agent made before, during, or subsequent to the execution of this policy, or by any custom of said company or its agents, or by the act of said agent in receiving any payment after the same shall have become due and payable, it being hereby expressly understood that no agent of said company is authorized to make, alter, or discharge any contract of said company, or waive any forfeiture thereunder." The policy was not actually executed by the company in St. Louis, Mo., until the 2d or 3d day of September, 1874, and it was not received by the agent at Lincoln, Neb., where the assured resided, until several days afterward, and was not delivered to the assured until Sept. 9, 1874. The policy contained the provision that it "shall not take effect or become binding on the company until the first annual premium shall have been paid, to Henry Gerner, agent, evidenced by his receipt below." The first annual premium was paid Sept. 9, partly in cash and partly by a 30 day note, payable to Gerner personally, which was afterward paid. Renewal receipts were transmitted from the company's office at St. Louis to Gerner, the local agent of the defendant for the state of Nebraska, to be valid only when countersigned by the said agent, and delivered on the payment of the annual premium for the ensuing year. As between the company and the agent, the instructions of the letter were not to deliver the renewal receipts until actual payment in money to the agent of the premium, on or before the day named in the policy;—if not paid by the day named, the agent could accept payment after the day, within six days, upon the certificate of the company's medical examiner of the continued good health of the assured. The agent, if the assured was considered good, frequently delivered the renewal receipts and trusted the assured for the amount for 30 days or less, on taking his note or time check for the amount, and charging himself with the amount. The company did not know this, but did know that he held renewal receipts for collection after the day named in the policy, and that the agent afterward reported these as collected and forwarded the amount, and this was received by the company without objection and without requiring any certificate of the medical examiner of the company as to the continued good health of the assured.

The above relates to the general course of the defendant's business at Lincoln, where the policy in suit was issued, and where the assured and local agent of the company resided. In respect to the renewal receipt for the policy in suit, the facts are these: It was transmitted by the company to the local agent, Gerner, at Lincoln, early in August, 1875. The agent notified the assured, by letter, that it had arrived, and that the amount was payable Sept. 1, 1875, at noon; and on the last day of August, 1875, an interview was had between the agent and the assured, and the agent desired the assured to make payment. The assured replied that he was then unable to make payment; that he was about to start to St. Louis to borrow some money of his brother, and if he succeeded he would pay the premium on his return. The agent notified him that in that case he would be uninsured after Sept. 1, and until the premium was paid, and offered to countersign and deliver the renewal receipt to the assured if he would pay part of the premium and give a due-bill to the agent for the balance, payable in 30 days, which proposition the assured declined to accept, and the renewal receipt was not countersigned or delivered. The assured intended to keep his policy good, and to make payment within 30 days if he should be able. On the 2d day of Sept., 1875, the assured, when en route to St. Louis to see his brother and obtain money from him, was killed by an accident to the railway train on which he was traveling.

DILLON, Circuit Judge. Upon the foregoing facts, I find, as a conclusion of law, that the plaintiff is not entitled to recover, and that the defendant is entitled to judgment.

Case No. 8,930.

McVAUGHTER v. CASSILY.

[4 McLean, 351.] [1]

Circuit Court, D. Indiana. May Term, 1848.

REMOVAL OF CAUSES—PETITION—UNCERTAINTY—"CIRCUIT OR DISTRICT COURT."

A petition to remove a case from a state court to the circuit or district court of the United States, which was granted, creates no uncertainty, as the removal can only be to the circuit court.

At law.

Mr. Sullivan, for plaintiff.

Mr. Marshal, for defendant.

OPINION OF THE COURT. This case is brought from the state court, under the act of congress [3 Stat. 234], by the defendant. A motion is now made to dismiss the case, on the ground that the order for the removal was in the alternative, either to the district or circuit court. The petition to remove the cause to the next circuit or district court of the United States in Indiana was granted by the state court. The district court has no jurisdiction in such a case, consequently it is void; the order for the removal was irregular. There is some irregularity in the application, and in the order of the state court, but as there can be no uncertainty or surprise by the other party, the motion is overruled. As the district court has no jurisdiction, the removal could only be to the circuit court.

Case No. 8,931.

McVEIGH v. MESSERSMITH.

[5 Cranch, C. C. 316.] [2]

Circuit Court, District of Columbia. Oct. Term, 1837.

SALE — ADVERTISEMENT — SUBSEQUENT EXAMINATION—CAVEAT EMPTOR.

If a lot of bacon be advertised in the Gazette, by the vendor, as "prime," and the vendee examine it, and afterwards agree to purchase it, and it proves to have been unsound, he cannot recover damages upon the warranty, although he should have paid a sound price for it.

Case, on warranty of a lot of bacon.

The plaintiff [William N. McVeigh] offered in evidence a printed advertisement in the Alexandria Gazette, of a lot of "prime bacon," to be sold by the defendant [Samuel Messersmith] and that he paid for it the full price of sound bacon. The defendant offered evidence to prove that the plaintiff came to the warehouse of the defendant, and looked at the bacon as it hung, and, after examining it as much as he thought proper, agreed to take it. It was sent to his warehouse, and about a week afterwards he gave his note for the amount upon which the defendant recovered judgment at law. The bacon was unsound at the time of sale.

Mr. Semmes, for defendant, prayed the court to instruct the jury, in effect, that if there was no other warranty than that contained in the advertisement, and no fraud, and the plaintiff inspected the bacon before he purchased it, he cannot recover in this action. Calhoun v. Vecchio [Case No. 2,310].

Mr. Taylor, for plaintiff, prayed the court to add to the instruction, the following: "That if they should believe, from the evidence, that the plaintiff did not fully examine the bacon, and did not mean to rely on his examination, but to rely on the warranty in the advertisement, he did not waive the warranty." Starkie, Ev. pt. 4. p. 1660; Bridge v. Wain, 1 Starkie, 504; Yates v. Pym, 6 Taunt. 446.

Mr. Semmes, in reply. A representation of goods is no warranty. Caveat emptor. Seixas v. Woods, 2 N. Y. Term R. [2 Caines] 55; Chandelor v. Lopus (Case of Bezar Stone) Cro. Jac. 4; Jackson v. Wetherill, 7 Serg. & R. 480.

THE COURT (CRANCH, Chief Judge, contra,) gave the instruction asked by Mr. Semmes, and refused that asked by Mr. Taylor.

CRANCH, Chief Judge, was of opinion that it ought to be left to the jury to say what was the extent and object of the plaintiff's examination of the bacon, and whether he meant to rely upon that examination or upon the warranty.

Verdict for defendant.

Motion for new trial overruled.

CRANCH, Chief Judge, contra.

Case No. 8,931a.

McVEIGHT et al. v. McKNIGHT.

[2 Hayw. & H. 208.] [1]

Circuit Court, District of Columbia. June 25, 1856.

TO SATISFY EXECUTIONS.

The husband of the defendant was insolvent, and largely indebted to sundry judgment creditors, who sued out attachments against him and levied them upon the defendant's share in the sale of certain real estate left by her father, and now in the hands of commissioners appointed by the court to make partition. As the proceeds of the sale were never in the actual possession of the husband, it was held that the attaching creditors acquired no right to the proceeds of the sale.

Anthony Preston died intestate, leaving a large real estate in this city. His widow and heirs applied to the circuit court for the appointment of commissioners to make partition of it, which application was granted. On examining the various parcels of land the commissioners reported that they were so situated that they could not be equally di-

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

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

[1] [Reported by John A. Hayward, Esq., and George C. Hazleton, Esq.]

vided. The court thereupon, at the request of the petitioners, directed the lands to be sold, and the proceeds to be divided and paid to the widow and heirs. The sale was accordingly made, and the shares duly paid over, except that of the defendant, Mrs. Ann E. McKnight, who was a daughter of Preston. Her husband [James M. McKnight] was insolvent and largely indebted to sundry judgment creditors, who sued out attachments thereon against him, and levied them upon Mrs. McKnight's share, consisting of money and bonds, while in the hands of the commissioners. The creditors [William McVeight and others,] contended that the sale and confirmation thereof by the court converted her share into personal property, and that as such, it belonged to her husband and became liable to be attached for his debts. In behalf of Mrs. McKnight it was insisted that her share of the proceeds of her real estate continued hers until it came into the actual possession of her husband, or until he had exercised a legal control over it. A motion was made in her behalf to quash the attachments. During the pendency of this motion Mr. McKnight died, his wife and two children surviving him.

The cases were elaborately argued on both sides by—

Bradley, Davidge & Chilton, for plaintiffs.

R. H. Gillet and J. M. Carlisle, for defendants.

After full consideration THE COURT held: That the attaching creditors acquired no right to Mrs. McKnight's share in the proceeds of said sale, and thereupon quashed the attachments.

Case No. 8,932.

In re McVEY.

[2 N. B. R. 257 (Quarto, 85); 1 Chi. Leg. News, 103.] [1]

District Court, N. D. Mississippi. 1868.

BANKRUPTCY — OPPOSITION TO DISCHARGE — SECURED CREDITOR—PROPER TIME—ACCORDING TO RULE.

A creditor as assignee of a note of the bankrupt secured by a deed of trust on land, cannot come in and oppose discharge of the bankrupt unless he shall have entered his opposition and filed his specifications within the proper time and according to rule.

[Cited in Re Frizelle, Case No. 5,132; In re Boynton, 10 Fed. 279.]

[In the matter of a creditor of W. C. McVey, in his opposition to the bankrupt's discharge.]

HILL, District Judge. The question now presented to the court in this cause arises upon the following facts referred to the court upon the application of W. H. Miller, a creditor of said bankrupt, by his attorneys, Orr & Matthews, and said bankrupt, by his attorney, Fred. Bell. Said Miller, as assignee of said Dean, has proved a debt due by note payable in gold for a balance of three hundred and twenty-four dollars and seventy-nine cents, on the 12th March, 1868, the time when said debt was proved. That a deed of trust was executed by said bankrupt on the 15th November, 1866, conveying a tract of land, situated in Oktibbeha county, to James Kennedy, as trustee, to secure said note, which trust deed was filed in the clerk's office of the probate court of said county, on the 24th day of August, 1867. That said bankrupt filed his petition, praying to be declared a bankrupt on the —— day of ——, 186 , and was so declared on the —— day of ——, 186 , and afterwards, within the proper time, filed his petition praying for a discharge from his debts; that due notice was given to the creditors, and especially to said W. H. Miller, to appear before the Hon. J. W. Field, register, at his office in Columbus, on the 3d day of August, 1868, to show cause, if any, why said discharge should not be granted. That some months since said Orr & Matthews requested the register to enter their names as attorneys for said Miller, to oppose such discharge when application should be made. That on the 28th of August, 1868, said attorneys, as such counsel, filed in writing with said register, objections to said discharge, specifying the following reasons: (1) That said bankrupt had executed said deed in trust, and had not reported the same in his schedule, as required by law, and his oath in such cases made and provided. (2) That said bankrupt had not reported said debt in his schedule as secured by said trust deed, as required by law. To their specifications and objections said bankrupt filed his answer by way of demurrer, and assigned as causes: (1) That said Miller had not entered his opposition at the time required by the rules adopted in such cases. (2) That said specifications were not filed within the time required by the rules of this court in such cases. (3) That the specifications do not show a sufficient reason why said discharge should not be granted.

I will consider the questions in the order presented. First. Was the opposition entered at the time and in the manner required? By reference to general rules adopted by the justices of the supreme court, and which are part of the law, it will be seen that Rule XXIV. provides "that a creditor opposing the application of a bankrupt for discharge, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file his specifications of the grounds of opposition, in writing, within ten days thereafter, unless the time shall be enlarged by order of the district court in the case, and the court shall thereon make an order as to the entry of said cause for trial on the docket of the district

[1] [Reprinted from 2 N. B. R. 257 (Quarto, 85), by permission. 1 Chi. Leg. News, 103, contains only a partial report.]

court and the time within which the same shall be heard and determined." By this I understand that the opposing creditor must, on the day fixed to show cause, appear before the register, by himself or counsel, and enter his opposition, which should either be in writing or verbally, but an entry of such opposition should be entered by the register on his docket, which suspends further proceedings, until the filing of the specifications, and if not filed within ten days the cause progresses as though no opposition had been made, unless, for sufficient cause shown to the judge, the time is extended. Whether the opposition was made and entered on the 3d day of August does not appear from the proceedings before me; the mere request made to the register months before, is not a compliance with the rule, and could not be made, at least until after the petition for discharge was filed, and not after the day fixed to show cause, without leave of the court. The proof that the opposition was made at the proper time being on the opposing creditor, and not being produced, the first cause of demurrer is well taken and is sustained.

The next question is, were the specifications filed within proper time? This question is already answered. More than ten days having elapsed from the 3d to the 28th day of August, the time fixed to show cause, of which Miller had notice, and the time the specifications were filed, and no extension of time having been asked for or granted, this cause of demurrer is well taken and is sustained.

The remaining question is, had the proceedings all been taken in proper time, are the specified reasons why the discharge should not be granted sufficient? Upon a careful examination of the causes specified in the bankrupt act of 1867 [14 Stat. 517], why a discharge shall not be granted, or if granted, vacated, I find that it must be some act omitted which was required to be done, or some act done which was forbidden on the part of the bankrupt, and must have been in fraud of the law. Mere oversight or mistake is not sufficient; these are infirmities to which all are liable, and for the correction of which ample remedy is afforded to all parties interested. The specifications in general terms charge that he did not state that the debt was secured by the trust deed, or that the land was covered by it, as the law and the bankrupt's oath required, but does not state in what particular, and does not state that this omission was intentional and fraudulent. Miller was notified and proved his debt—the proof of debt was made March 12th, 1868. He could have examined the schedules and applied for their correction, could have had his lien enforced, if valid, either by the trustee or assignee; if his lien is valid, and the land has not been sold, can now have it done, or if sold can have the proceeds applied to the payment of his claim, so that the omission cannot prejudice his rights, especially as the land is stated to be of sufficient value to pay the claim. If the lien is valid and the sale was made without giving notice to Miller or the trustee, it is invalid, or does not affect his interests, if sold subject to the lien. For the reason stated I am of opinion the third cause of demurrer is well taken and is sustained, reserving, however, to the creditor the right to apply to the court for any other proceedings to which he may be entitled. This being the first question in opposition to a discharge which has been considered by me, I have stated the case more fully and given my reasons more at length than I would otherwise have done, as it will, unless I should be convinced I am in error, be regarded as the rule of practice in similar cases. The clerk will certify the same to Register Field, and the cause will progress as though the opposition had not been tendered.

McVICKER (GRAU v.). See Case No. 5,708.

McVICKER (MURPHY v.). See Case No. 9,951.

McWILLIAMS (GOLDSBOROUGH v.) See Case No. 5,518.

Case No. 8,933.

MACY et al. v. DeWOLF et al.

[3 Woodb. & M. 193.] [1]

Circuit Court, D. Rhode Island. June Term, 1847.

NEW TRIAL—INTEREST OF WITNESS—PART OWNERS—MORTGAGEE OF ONE—LIEN OF VESSEL—NEWLY DISCOVERED EVIDENCE—SHIPPING—SUPPLIES—COSTS.

1. A new trial will not usually be ordered on account of the interest of a witness, if, from the facts, it appears the interest would probably be released on another trial and the verdict be the same way.

[Cited in Aiken v Bemis, Case No. 109; Whetmore v. Murdock, Id. 17,509.]

2. Owners of whale ships are, in the absence of express proof making them partners, only part owners in the vessel, and a mortgagee of the share of one has no interest in the vessel to prevent him from being a witness in a suit against the part owners for supplies.

[Cited in Mitchell v. Chambers, 43 Mich. 160, 5 N. W. 64.]

3. The vessel is not under any lien to the creditor for his debt, or to the owners for contribution, if some pay more than others. Nor will the court presume that the proceeds of the voyage stand in any different position, if no special agreement is put in concerning them, as such an one generally exists and governs the nature of the interest rather than the rules of law, independent of such an agreement.

[Cited in The Jennie B. Gilkey, 20 Fed. 161.]

4. If a new trial is asked for newly discovered evidence, it must clearly appear not to have been known before, nor be merely cumulative of old points, nor left uncertain what it is and whether it be new and important; or whether the witness be credible who is to prove them.

[Cited in Aiken v. Bemis, Case No. 109; Whetmore v. Murdock, Id. 17,509; Vose v. Mayo, Id. 17,009.]

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

5. If one who advances supplies for a ship, does it at first on the sole credit of one part owner, or afterwards takes his separate note for the amount and gives time on it after due, so that the other part owners settle with him, as having paid or been accepted as paymaster of the amount, it bars a recovery against the other owners.

[Cited in The Daniel Kaine, 35 Fed. 787.]

6. Agreements between the part owners before fitting out, may be proved on their part by their conversations, testified to by others, as it is evidence of a contract made between them, and is a part of the res gestae of the fitting out.

7. A creditor with no specific lien is not incompetent to testify so as to increase the amount of his debtor's estate; nor is a mortgagee of a share in a vessel liable for supplies to the mortgager, while the latter is in possession.

8. The whole previous cost must be paid, if a new trial is had on newly discovered evidence.

This was an action of assumpsit in three counts. One was for goods sold and delivered. Another on an account annexed for like goods and one for money had and received. The plaintiffs [Josiah Macy and others] proved the sale of copper for the ship Corinthian, January 10th, 1842, to the value of $2,493. The vessel lay at Bristol, Rhode Island, where all the defendants [William H. DeWolf and others] resided, and who were part owners of her at that time, in different shares. The plaintiffs resided in New York, and made the bargain there as to the copper, with DeWolf, but charged the same on their books to the owners of the ship Corinthian. The bill for the same was presented to DeWolf, and his note taken for the amount, August 8th, 1842, and the account settled. This note had never been paid, but run for six months; and the plaintiffs then indulged DeWolf with further time, till June, 1843, when DeWolf became more embarrassed, and was considered as failing. After that a resort was made to the other owners, in August, 1843. In the meantime the owners had met and adjusted among themselves the expenses of fitting out the ship, and allowed DeWolf on his receipt from the plaintiffs, at the time the note was given, the amount of it as thus advanced by him. The note on its face did not purport to be signed by DeWolf as agent, for the owners, but simply in his own name. There was much evidence in the case as to difficulties among the owners in fitting out the Corinthian on this voyage, and the refusal of some to unite in it, and especially to make DeWolf their agent, though he had acted in that capacity in former voyages. It was also proved that several of the owners were themselves to furnish supplies in a ratio with their respective interests; and that DeWolf purchased some articles as an owner, while in buying others he seemed to act as agent for the other owners. To show the settlement of the owners with DeWolf, as having bought this copper on his own account, and towards his share, and also, to prove that some of the owners refused to make DeWolf their agent to procure supplies, Mr. Dimon was placed on the stand, who held a mortgage from DeWolf of his interest in this ship and her cargo. Objections were made to his competency, but for the purpose of proceeding in the trial of the whole matter he was admitted, subject to future consideration. The case was attended by much conflicting evidence, and the jury having once disagreed, found, on the second trial, a verdict for the defendants. There was a motion for a new trial, not only for various rulings then, but on the allegation of newly discovered evidence since.

It is not necessary to enumerate further the different points which arose, and the ruling on them, as they are detailed sufficiently in the written motion for a new trial, a copy of which is annexed:

"Rhode Island District, ss. U. S. Circuit Court, June Term, A. D. 1846. In the action, Josiah Macy & Sons v. William H. DeWolf et al. And now, on the fourth day of said term, and within two days after verdict rendered in said action at said term, the plaintiffs in said action come and move the honorable court that said verdict and the judgment rendered thereon, be set aside, and a new trial granted therein. 1st. Because the court allowed Byron Dimon, a witness offered on the trial of said action by the defendants therein, to be sworn and testify in said action; said Dimon being then and there objected to by the plaintiffs as incompetent, on account of having an interest in the result of said action—said Dimon at the time of giving said testimony having and holding a mortgage made and executed by W. H. DeWolf, one of the defendants in said action, to him, said Dimon, on certain shares of the ship Corinthian and cargo and proceeds thereof in the last voyage, of Bristol, R. I., to secure a debt due from said DeWolf to said Dimon; and that the plaintiffs in said action claim that said ship and owners were pledged and liable to respond to the plaintiffs for the amount of their claim in said action; and that the other defendants, as part owners and partners, have a prior lien on said ship, cargo and proceeds, to said mortgage; and that if said plaintiffs recover in said action, it takes the share of said DeWolf in said ship, cargo and proceeds, to pay the other owners their contributive share of outfits and charges of said W. H. DeWolf for the amount which said other owners and defendants may have paid or advanced for him, and from and under the said mortgage and mortgages of said Dimon; and here refer to the rulings and remarks of the court at the time on trial. 2d. Because (although said Byron Dimon was thus incompetent as witness,) he was allowed by said court on said trial to testify as to a private conversation between W. H. DeWolf, Mark A. DeWolf and Lemuel C. Richmond, all owners in said ship and defendants in said action, relative to an al-

leged limitation of the authority of said W. H. DeWolf as agent of said ship on her last voyage, and to the effect that the said W. H. DeWolf would not pledge the credit of said owners and defendants; and here refer to the rulings of the court and remarks at the time. Because the court allowed a bill of lading of the copper, (the subject matter of the suit,) produced and made out by the defendants or their agents, and not made out by the plaintiffs or by any one authorized by them to pass to the jury, being objected to by the plaintiffs and once rejected by the court, as evidence of a personal credit to W. H. DeWolf, the same being made out to him. Because since the trial of said action new and other material testimony for the plaintiff has been discovered, and which they could not have known before, the same being first by plaintiffs known from the cross-examination of one of the witnesses produced by the defendants in the action Fearing v. DeWolf [Case No. 4,711], tried at the same term of said court, viz: That W. H. DeWolf had been for a great number of years agent for the ship Corinthian, and held himself out to the public, and acted in fitting said ship in the voyage for which said copper was furnished, in the same manner that he had done for three or four previous voyages, and with the knowledge of the other defendants. And also, that they have since discovered, as aforesaid, that said defendants had entered into an agreement to appoint, and did authorize, said W. H. DeWolf to act as agent for said ship and said defendants, on said last voyage. And also, because the court in said case charged the jury that the defendants said and proved, adverting to (and meaning) the testimony of Gov. Dimon as to the private conversation between said defendants, when plaintiffs were not present, and never brought to knowledge of plaintiffs, and then objected to by plaintiffs—that the contract among and between the defendants was that each should fit his shares for himself, and that this copper was bought by DeWolf himself, and went to furnish and fit his shares, which was erroneous. Because said verdict was against the weight of the evidence as proved on the trial, and against the law and evidence, and unjust and erroneous. Wherefore they ask the honorable court to set aside said verdict and judgment, and grant a new trial thereon. By their attornies, Greene & Potter."

"It is agreed on the part of the defendants that the above may be modified and amended according to the facts. I. R. Bullock, of counsel for the defendants."

"Rhode Island District, ss. Clerk's Office, Circuit Court, at Providence, November 17, 1846. I hereby certify that the above and foregoing four pages contain a true copy of the 'Motion for new trial in case of Josiah Macy & Sons v. William H. DeWolf et al.,' now on file in this office, duly examined and compared by me. John T. Pitman, Clerk Circuit Court, R. I. District."

This motion was argued at the last November term, by—

Greene & Potter, for plaintiffs.

Blake, Bullock & Whipple, for defendants.

WOODBURY, Circuit Justice. This motion relates to causes for a new trial; some happening since the verdict, and some before. Those assigned for what occurred before, will first be attended to. They do not possess much difficulty, except that one in respect to the competency of the witness, Dimon. One is that the verdict is against evidence. But the principles just laid down in the case of Fearing v. DeWolf [Case No. 4,711], show that this is not one of the class of verdicts which this court feels justified to set aside on the ground that it is against the weight of evidence. For although it is not very probable that if the court had been in the place of the jury, its finding would have been the same way; yet on a review of the whole testimony put in, it is certain that the balance of it was, in fact, so doubtful, as to cause one disagreement of a jury, and some hesitancy in another pannel, at the first trial. The material facts were not without difficulty, as (1) whether the credit was not actually given to DeWolf alone, in the first instance; or (2) if not so, whether the plaintiffs did not actually receive his note alone, afterwards, in payment for the copper; or (3) if otherwise, whether they made him in any way their agent for this voyage so as to be bound by him in that capacity; or (4) whether the plaintiffs did not give to DeWolf a receipt in payment, and permit him to use it in a settlement with the other owners, and wait so long before a resort was had to them, as in justice to exonerate them, if before liable.

The testimony, and the circumstances bearing on these various matters, were in several respects conflicting. There were contradictions among the witnesses and the probabilities of the case, which it was necessary a jury should weigh, and one on which they might fairly come to a conclusion for the respondents, especially as the burthen of proof devolved on the other side; and they might do this without being clearly guilty either of mistake or abuse of power.

Their verdict in this case, therefore, cannot be set aside as against the weight of evidence, but on the contrary, accords rather with the conclusions formed by the court itself on the particular evidence in this case. Nor do I find that the instructions given as to the law connected with these points were erroneous, or that the finding of the jury was counter to any of them. They were as follows: Part owners of vessels are prima facie liable for supplies furnished to their vessels, as they get the benefit of them. Abb. Shipp. 105, 143; The Nestor [Case No. 10,126]; Story, Partn. 591–598; Rich v. Coe, Cowp. 636; Harrington v. Fry, 1 Car. & P. 289. But if credit was ac-

tually given at first to one of them, as contended here to W. H. DeWolf alone, the rest of the owners were not to be made liable for such supplies. Jennings v. Griffiths, Ryan & M. 42; 11 Mass. 40, 41; Curling v. Robertson, 8 Scott, N. R. 12; 13 Law J. (N. S.) 137; 7 Man. & G. 336; 6 Pick. 120; 9 Johns. 470. So, if the credit was not given to him alone, but his note alone was, in truth and design, afterwards taken in payment, and especially if renewed or indulged with extended credit. Abb. Shipp. 134; Reed v. White, 5 Esp. 122; Story, Ag. 441, 457. Cases of doubt, whether a note was so taken in fact, do not impair this principle. Leland v. The Medora [Case No. 8,237]; The Chusan [Id. 2,717]; and The Nestor [supra]. Because a note does not merge the debt without such an agreement, except in two or three states. Abb. Shipp. 134, note; 2 Johns. 311; 1 Conn. 290; 24 Pick. 20; 12 Johns. 411; 10 Mass. 47; 18 Me. 249. See cases last cited. If the note be signed by one part owner, without stating he is agent for the others, it is presumed to be signed in his own behalf alone. Stackpole v. Arnold, 11 Mass. 29. But this may probably be rebutted by other testimony conclusive as to his agency. Nor are the owners liable, if a note has been taken of one alone, and the amount receipted to him, and time elapses without a call on the owners, and thereupon they adjust the concern between themselves, as if the note was deemed a payment. James v. Bixby, 11 Mass. 40; 5 Eq. Cas. 152; Wyatt v. Hertford, 3 East, 147; Cheever v. Smith, 15 Johns. 276; 1 Greenl, Ev.; Story, Ag. §§ 431-435; Abb. Shipp. 136, note.

Again, another ground assigned for a new trial, because conversations between the owners as to fitting out, not in the presence of the plaintiffs, were allowed to be proved, is untenable, if we look a moment to the character of the case. Parol evidence by Dimon or any other witness ruled to be competent, was proper to show that the owners contracted with each other not to have DeWolf for an agent any longer, nor permit him to pledge their credit for supplies. This does not impugn the maxim, "res inter alias actae alteri nocere non debet," (Broom, Leg. Max. 432). This was one step, and a proper one, in their defence against his purchases, made in order, as they alleged, to furnish his own share in value of the supplies. But the jury were instructed that this would not exonerate them, if they had before empowered him to make purchases on their behalf and did not give notice that his agency had been terminated. Or unless in these voyages it was the usage to have a person, when agent, act only for one voyage without a new appointment. If the latter was the case, then the burthen devolved on the plaintiffs to show that DeWolf had been appointed as agent for this voyage in order to charge the other owners for his purchases, made in truth, on his own private account; and it was pertinent and competent evidence for them or any of them, to rebut any inferences or proof against them as to his agency, by showing that they had decided, on deliberation before hand, not to constitute him their agent. So, the other objection as to the bill of lading of the copper being admitted as evidence, though made out by the forwarding house, is not to be sustained. Because it was admitted and so expressed at the time, only to show as a part of the res gestae in forwarding the copper, to whom it was done, or how it was done, and understood at the time by those engaged in it; but not to bind the plaintiffs unless believed to be brought home or known to them.

Let us recur, then, to the only remaining objection to the verdict on account of any ruling at the trial,—the incompetency of Dimon as a witness, on the ground of interest in the result of this action. His interest, if existing, arises from the fact that DeWolf mortgaged to him his share in the Corinthian, and his interest in her cargo, with much other property, in order to secure him as endorser on several demands for DeWolf. One mortgage deed was given as early as December, 1842, and the other executed before this controversy, in July, A. D. 1843. Neither of them were shown to have been released or discharged at the time of this suit, though the witness testified that he considered the other property assigned to him at the same time as sufficient for his indemnity without DeWolf's share in this vessel. Firstly, what is his interest in the result of this action, in respect to the vessel—as the attention of counsel seems chiefly to have been directed to that? If the owners of the vessel at the time of the purchase of this copper are held to be liable for it, as already shown that primâ facie they are, this does not, of course, make the share of one of them in the vessel itself liable to the plaintiffs, and much less impose a lien on it in rem for contribution in favor of the other part owners. 6 Pick. 120. They had no remedy against the vessel in the first instance, she not being a foreign vessel, in and supplied in New York by the plaintiffs. Leland v. The Medora [Case No. 8,237], Abb. Shipp. 153. She was at Bristol, in Rhode Island, when and where the copper was wanted for her, and where all the owners lived; and no proceeding in rem could have been instituted against her in New York, though she, in some sense, and for some purposes, might be deemed foreign as to New York. Thus, had she been actually there and supplied there, when owned in Rhode Island, she might, perhaps, have been treated for this purpose as foreign. [The General Smith] 4 Wheat. [17 U. S.] 438; [The St. Jago De Cuba] 9 Wheat. [22 U. S.] 409, 416; The Nestor [Case No. 10,126]. But she was not there; away from home, without means, in a distant country, or nobody with her who was an owner; and hence does not come within the principle of the lien as a foreign vessel supplied in a foreign port.

Pritchard v. The Lady Horatio [Id. 11,438].

The special laws of Rhode Island, like those of some states in the Union, and in France, might have made her liable even for domestic supplies, but unless they do it expressly, the rule is the other way. [The General Smith] 4 Wheat. [17 U. S.] 438; The Nestor [supra]; The Marion [Case No. 9,087]; Read v. Hull of a New Brig [Id. 11,609]; Harper v. New Brig [Id. 6,090]; 14 Conn. 404; Abb. Shipp. (last Ed.) 142, note. There were other positions assumed, also, such as the subsequent taking of DeWolf's note as payment, that it would exonerate the vessel from any lien to the plaintiffs, if it ever existed; and these positions were believed by the jury to have been well sustained, so far as regards the facts. But, as the lien on the ship itself never existed in favor of the plaintiffs, it is unnecessary to examine them under this head.

It is next contended that if a claim of a creditor for supplies does not exist in rem in this case, the vessel itself is liable to each part owner for contribution, if subjected to pay more than his ratio; or in other words, that the shares owned by each are chargeable with their proportion of what may be recovered and collected from each owner, over his proportion, in an action like this, for supplies to the vessel. If this be so, then Dimon, as specially interested in DeWolf's shares, might feel interested to protect them from this charge. And though he has other security deemed sufficient, his special legal interest still remains in these shares, and if he did not wish to retain them as additional security, he should have released his interest in them or assigned it to other creditors of DeWolf before testifying. But is the share itself in the vessel under a lien in law to pay a part owner for his extra advances? It is clear that one part owner of a vessel, paying or being subjected to pay, as he is in solido, sometimes more than his ratio of the supplies, has a remedy against the others, in personam, for the excess. Helme v. Smith, 7 Bing. 709; 5 Moore & P. 744; Davis v. Johnston, 4 Sim. 539. But when they have no common agent in whom the title of all is fully vested, it is difficult to see how they could enforce such remedy against the shares in rem more than against any other property of each owner. They can attach them in a suit, if not in the meantime conveyed to others. But on the ground of principle it seems certain that such shares themselves, if in the meantime sold or mortgaged for a bonâ fide debt or liability, cannot be followed. In this instance, perhaps, there has been no such change of possession under the mortgage, as to dissolve the lien on that account, provided a lien ever existed; the vessel seems to have been still in the same hands and control after the mortgage as before, till the voyage was completed; and the proceeds of her last voyage, for aught yet shown, remain unsettled. Principle, then, being against such a lien, how does this point stand on precedents?

It seems settled that part owners of a ship are tenants in common, and not joint owners. 2 Ves. & B. 242; 4 Johns. Ch. 522. Hence they may sue each other. It is also settled, generally, that there is no lien by one on the share of another for outfits and supplies. Ex parte Young, 2 Ves. & B. 242; Merrill v. Bartlett, 6 Pick. 47; and Thorndike v. DeWolf, Id. 120; 14 Ves. 393; Id. 120; Braden v. Gardner, 4 Pick. 456; Patton v. The Randolph [Case No. 10,837]; Smith v. De Silva, Cowp. 469; Story, Partn. §§ 419, 497; 5 Ves. 469; 2 Rose, 79; 1 Mont. Partn. 102; Id. 89, note 88. These more modern cases seem to overrule Doddington v. Hallet, 1 Ves. Sr. 497, as understood by some, and so far as regards the general principle. They make part owners not partners, nor subject to the principles of copartnership, unless under special contracts or usages, changing the general character of the transaction. 20 Johns. 611. And so far as 1 Ves. Sr. 497, goes beyond this, it is not now considered sound law. The principle that part owners are not partners, is also the general principle on this subject, and hence it is the legal presumption; and whoever avers that these owners are partners in a particular case, must go forward and show it as an exception. 1 East, 20; 8 Barn. & C. 12; 3 Kent, Comm. 154. It is true that previous partners may together own shares in vessels, and then they may hold these shares as partners, and on principles of partnership, and subject first for partnership debts. 1 Story, Eq. Jur. § 490; Hoxie v. Carr [Case No. 6,802]; Ex parte Jones, 4 Maule & S. 450; Mumford v. Nicoll, 20 Johns. 611; 6 Mass. 279; 9 Mass. 490. So, when they agree to be partners, or when it is the usage to be so for the voyage. Doddington v. Hallet, 1 Ves. Sr. 497. In these ways it is admitted that there may be joint owners of a vessel, yet this is not the case when each proprietor, as here, merely owns an undivided share, since they then become tenants in common as before stated. To hold part owners to be partners, without an express contract to that effect, would not only violate the legal principles which govern other tenancies in common, but enable one part owner,—though of only one-hundredth part,—to sell the whole ship or whole property owned in common, which is neither in conformity to usage or the fitness of things in such adventures. 3 Kent, Comm. 151, 152; 8 Taunt. 774.

It seems, after much difference of opinion, to have been held in New York, that the owners of a ship, in shares, may be under special circumstances, quasi partners; and the property is then liable for all demands by third persons, before going to satisfy the private debts of any one partner to third persons. But that is not the case ordinarily, as before shown, the part owners being usually

tenants in common and not partners. Story, Partn. 649; Mumford v. Nicoll, 20 Johns. 611; 4 Johns. Ch. 532, 3 Kent, Comm. 152–154. The vessel here, then, not having been owned as partnership property among its part owners, the result of a lien as in case of partnerships, does not follow; and Dimon's right to it as mortgagee of one owner, is not affected by this verdict or any claim over by the other owners hereafter, for any excess collected from them for supplies. That claim extends only to De Wolf in personam, and any property in the ship not sold or mortgaged, or any residuary interest like an equity of redemption not conveyed. In respect to this interest in the cargo, that may be different, and will soon be examined. The ownership in a vessel is one thing, and stands by itself; and in the absence of any special contract, it is governed by the general principles of law, to which I have adverted,—no lien on it belongs to a creditor who furnishes supplies to a vessel when at home, without a special statute, nor belongs to a part owner for contribution; but usually whoever first attaches or first obtains a mortgage of the property of a part owner in a vessel holds it. Post v. Kimberly, 9 Johns. 470; Thorndike v. DeWolf, 6 Pick. 124, 125.

Having thus disposed of the objection to testimony on account of the shares in the vessel, the more doubtful question remains, as to the cargo and proceeds. It seems that they also were mortgaged to Dimon. But what the particular contract was in this case in respect to them, if any existed, was not shown at the trial, nor exhibited in the motion filed in this case for a new trial. Nor has it since been agreed to be made a part of the case, and examined by the court, as if a part of the original motion. In the absence of any proof at the trial what the special contract was, by the owners of the Corinthian, as to the cargo, or even whether there was any, the court must leap in the dark, or consider the case as if no special contract whatever was made. The part owners would then stand, as to the cargo, as they do in respect to the vessel, and their interest in both be those of tenants in common and not joint tenants or partners. Each owner, and the mortgagee of each, would then hold his share subject to no lien; but each owner and each mortgager be liable in personam only for contribution. This view is forced on the court by compulsion, from the absence of other evidence. And if it should be otherwise, after proving all the facts, it is the misfortune of the plaintiffs not to have put in evidence all the appropriate facts at the trial, to raise the question which would exist had the whole then been made a part of the case. The result, however, now may not be different from what it would be if another trial was had, and Dimon was made clearly a competent witness, under a release by him as to the cargo. The result now, too, does not seem to vary from the apparent justice of the case, after so much evidence as there was here, that DeWolf was either treated originally alone, or his note taken in payment afterwards, and unusual time given without a call on the owners, till he settled with the owners its amount, as if it had been advanced and accepted by the plaintiffs from him alone. This fact has been testified to in other cases, by other witnesses, and not by Dimon alone. It is customary under such circumstances, not to disturb a verdict, but only when injustice seems manifest, or some ruling or instruction in law was clearly wrong, and on a material point. 5 Ham. 109; Id. 117, 1 Chip. 304; 5 Ham. 509; U. S. v. Duval [Case No. 15,015]; 5 Mass. 547; 18 Pick. 13.

Under these views the court cannot, without travelling out of the record, say whether Dimon might not be technically an incompetent witness, in respect to his interest in the cargo, if there was a special contract between the owners and crew. I can conceive of such special contracts as would create such a lien, and render a part owner of the cargo, or his mortgagee, technically incompetent, and such an one as would not do this. It must exist,—be made a part of the case, and carefully examined before it can be decided on. The whole title of the cargo may be vested in the managing owners; and then they are trustees for the shareholders, including the owners, crew and seamen, to pay over the due portion to each, after deducting all expenses. See Joy v. Allen [Case No. 7,552]; Mumford v. Nicoll, 20 Johns. 611. This depends entirely on the agreement in each case. Story, Partn. § 427. The ship is one thing, and owned by one class of persons, in a whaling voyage; while the cargo is another, and may be owned, in part, by another class, the officers and crew in connection with owners; and owned often under agreed conditions and liabilities peculiar to that branch of business, and usually embodied in a special written contract. There are some analogies both ways, which may be adverted to, but as to which no decision is given. The seamen may sue in admiralty for their share, as wages, in such voyages, under some special contracts, after the cargo is sold, and are not driven to a suit at law on the special contract. Coffin v. Jenkins [Case No. 2,948], and cases there cited. Yet this arose, perhaps, from indulgence to the seamen for expedition, and does not show that, till the sale and readiness to account, but rather confirm that till then the whole legal title to the cargo is in the owners, under the special contract, when, as before described, it is made subject to all just charges on it before those interested in equity can prosecute for any separate share as wages, or otherwise. Sometimes, however, the owners and officers and crew, as to the cargo, become only quasi partners, and not actual partners. 8 Barn. & C. 612; Joy v. Allen

[supra]. Till then, as between the owners, whether this be called a copartnership in equity as regards their interest, or a trust in which each has a pro rata interest, the directors or owners of the ship are often specially made agents and trustees to sell and dispose of the cargo by the very terms and spirit of what is often an ordinary whaling contract. The legal title is in them, in such case. And where the master has, by usage, a lien on the lays (shares) of seamen for supplies furnished to them, as is often the case, it is not lost by delivering the oil to the owners for this special purpose of selling it in behalf of all interested. Barney v. Coffin, 3 Pick. 115. So, the ship's husband, if making advances in such a case, has a lien on the share of each in the cargo. Abb. Shipp. 138; Holderness v. Shackels, 8 Barn. & C. 612; Story, Partn. § 433. In such a case, also, if one part owner becomes bankrupt, the others may deduct from the profits of the voyage, enough to pay his share in the outfits. Cases just cited; Abb. Shipp. 140, 142; Story, Partn. §§ 408, 441, 444–448; Patton v. The Randolph [Case No. 10,837]. Of course, then, anything which is a new charge on these funds, such as a payment of the plaintiffs' claim out of it, instead of collecting it of DeWolf alone, would seem to tend to diminish the amount of interest of each part owner in them, and consequently of the interest of the mortgagee of the share of any in these funds. All just debts, advances and expenses, must be paid before a mortgagee or private and separate creditor can receive any balance. 20 Johns. 627; 1 Ves. Sr. 239; 4 Ves. 396; 17 Ves. 193; Camp. 445. As at present advised, though it might be different on examination, when such a whaling contract of this special kind between the owners and the crew shall make a part of any case, it looks very doubtful, whether a mortgagee of such a share is competent as a witness in a suit, the damages in which may legally become a charge on that share.

There is another reply urged by the respondents against setting aside the verdict, on account of Dimon's interest, viz: that the other testimony made out a case for them strongly enough without him. But I do not think that the case was, in all respects, made out so fully without Dimon's testimony as with it. Indeed, one point, the settlement among the owners on the faith that DeWolf had been accepted by the plaintiffs as alone responsible for the copper, was proved by him alone at this trial, and may be the very ground on which the jury found a verdict for the defendants. It may be said, further, that Dimon is interested to increase DeWolf's estate,—a debtor to him, though as mortgagee of a part owner, there is no lien on his share in this particular vessel, to be affected by the result. But such a general interest does not disable a creditor from being a competent witness for his debtor. It is too remote and contingent. Seaver v. Bradley, 6 Greenl. 60. But if he has a claim on specific property of the debtor as his assets, being a bankrupt he cannot be a witness to increase their amount. 1 Greenl. Ev. 436, 437; 5 Johns. 422; 2 Pick. 240; 9 Pick. 322. It is on this ground that a witness who is a legatee cannot testify as to the estate, to increase it. Greenl. Ev. 437. Nor can a person be a witness where he could use the verdict, or it could be used against him. 1 Greenl. Ev. 477; 10 La. 124. If, therefore, this case showed that this verdict could be used for or against Dimon, or that a lien existed on the share mortgaged to him, whether in the vessel or cargo, then it is quite manifest that his testimony ought to be excluded. But when facts have not been introduced which show such a specific lien, his general interest under the mortgage, in the property, does not appear to be necessarily increased or diminished by the result.

Lastly, under this head has been urged Dimon's interest, because liable merely as mortgagee of the share, and not because any specific lien exists on it in favor of creditors of the mortgager and other owners. But it is a general rule that a mortgager in possession as DeWolf was in this case, is still to be considered as owner for most purposes, except as between the parties to the mortgage. See the cases collected in Shapley v. Rangeley [Case No. 12,707]; Fiedler v. Carpenter [Id. 4,759]; 11 N. H. 40; 12 N. H. 558. The suit then here by the plaintiffs against the owners, is properly against DeWolf, the mortgager, as one of them, and the remedy over by any of the defendants for what is collected of them beyond their proportion, is against DeWolf, the mortgager in possession when the supplies were furnished, and not against Dimon, the mortgagee out of possession.

Another ground, and the last one urged for a new trial, is in relation to matter happening since the verdict. It is alleged to be the discovery of new and material evidence. That is certainly one legal ground for a new trial, if well supported. But in order to do that, firstly, the party must not have known the existence of such evidence before, nor had the means of easily discovering it. 2 Bin. 582; 2 Fair. [11 Me.] 218; Williams v. Baldwin, 18 Johns. 489. One case exists of a new trial granted for the discovery of such evidence, though it had been actually in the possession of the party's attorney. Broadhead v. Marshall, 2 W. Bl. 955; 2 Root, 454. But if actually known by the party, at any time before the jury retired, or even before a verdict is rendered, no new trial can be allowed on account of it. Ames v. Howard [Case No. 326]; 7 Cow. 269. The matter, considered new and important evidence in this case, it is true, was since developed, though it came from a witness by the name of Dearth, who had been on the stand in some former trials. But he is not shown to have disclosed then what is now regarded as

new. There seems, however, to have been some inattention or neglect in not questioning him more fully on former trials, as he being clerk of DeWolf, was likely to know all the facts connected with the case.

The next requisite is that such new evidence must be material. Tuttle v. Cooper, 5 Pick. 414; Marshall v. Union Ins. Co. [Case No. 9,134]; 5 Serg. & R. 41. As detailed here in the affidavit of Marcy, a son of the plaintiff, which is the only affidavit about it put in the case on the part of the plaintiffs, it would be material. But the counter affidavit of Mr. Blake, on file, denies the truth of the most important points in the newly discovered evidence named by Marcy. And on examination it will be found that Marcy does not swear, of his own knowledge, to any of the new evidence, but merely to what the counsel for the plaintiffs have informed him from their minutes. This is quite too loose. Again, if the statement was in the main correct, it all relates to what Dearth, a witness on the stand for the respondents, is supposed to have disclosed at a subsequent trial about supplies furnished to the ship Corinthian, by Fearing and others. Now, though Dearth there may have sworn to the owners allowing DeWolf to pledge their credit in some cases and not in others, it would not affect, directly, the present case of these plaintiffs, unless they allowed it as to them. And if Dearth testified to a written agreement having once existed as to fitting out the Corinthian, it is not produced, nor its contents given so as to enable the court to judge if it be material. And the probability is from the other facts in the case, that it related to the circumstance with whom of the partners a willingness existed to fit out the vessel at all; because it is conceded that only a part of them agreed to do it, and they gave a bond of indemnity to the other owners; and there was some written stipulation concerning it among them.

Again, it seems to be settled that no uncertainty or doubt must exist as to what the newly discovered testimony really is, so that the court may see what is the effect of it, and whether a new trial on account of it is required in order to be substantial justice. 4 Ham. 5; 5 Halst. [10 N. J. Law] 250; 1 Caines, 24; 1 A. K. Marsh. 188. For this reason the statement of it must be by other affidavits than those of the party, or one interested; and it must be by the new witnesses themselves, if they are procurable. Webber v. Ives, 1 Tyler, 441; Chambers v. Brown, Cooke, 292; [Scott v. Wilson] Id. 315. If it be said that Dearth is a witness for the defendants and may not be willing to give his affidavit, the plaintiffs could at least apply to him for it and for the paper referred to, and ought to do it. Another difficulty here is that Dearth, as the witness for the other side, has in the other trial been attempted to be discredited, and represented as unworthy of full belief; and it is well settled that the newly discovered testimony must not come from a person unworthy of credit. Williams v. Baldwin, 18 Johns. 489; Pomeroy v. Columbian Ins. Co., 2 Caines, 260.

In the next place, the newly discovered evidence must not be merely cumulative evidence. 8 Johns. 84; 15 Johns. 210; 2 Caines, 129; 6 Pick. 114, 116; 10 Pick. 16; Alsop v. Commercial Ins. Co. [Case No. 262.] It must not be, as here, to old points, and of the like kind before adduced at the trial, but of a new description or to new points. Guyott v. Butts, 4 Wend. 579; 3 A. K. Marsh. 104.

Upon the whole, the inclination in my mind, in this as in the other case, is also not to disturb what the jury have settled, unless a very strong and clear ground is made out; and especially where another trial of this case would probably be so doubtful and speculative in its result, as well as in its equities,—looking to the experience which the court has already had in the long litigation about the supplies to the ship Corinthian.

It interests the republic that there should be an end to litigation as soon as may be. It saves enormous expenses and social strifes, and the temptation to a host of perjuries. If a proper case was made out here for a new trial, on the ground of newly discovered evidence, it could be only on the condition that all the costs of the former trials be first paid by the plaintiffs. So far as regards that, the expense and cost already incurred are justly chargeable upon the party making the motion for a new trial, on this ground, as it is he who asks the favor, and it is he who has thus far failed to obtain and offer evidence sufficient to sustain his case. Boswell v. Jones, 1 Wash. [Va.] 322; 3 Rand. [Va.] 52; Weak v. Callaway, 7 Price, 677. A new trial, then, would probably cost more than it is really worth, considering the difficulties and doubts and contradictions which have surrounded this controversy from the start. Sometimes there may be a new trial as to a particular fact,—separately, and not affecting other matter,—where the ruling was wrong as to some of the evidence, or if the newly discovered evidence relates to a single distinct matter. Robbins v. Townsend, 20 Pick. 351; 12 Pick. 287. (See Morris v. State, 1 Black [66 U. S.] 37. The whole trial must be on the whole case.) But nothing of that kind is here feasible, if a case was well made out in relation to either ground.

As this whole case is surrounded, and has been from the start, with difficulties, both as to facts and the law, and as the verdict seems to accord with the apparent justice of the case, and there is no objection in law clearly made out against it, I am unwilling to disturb it. Possibly there may have been an error, and possibly some facts exist which are not in the case now; but as these, if put into it, would not on another trial be likely, materially, to change the aspect of it, let there be entered judgment on the verdict.

MADDEN (UNITED STATES v.). See Case No. 15,705.

MADDEN (WELD v.). See Case No. 17,373.

Case No. 8,933a.

MADDING v. PEYTON.

[Hempst. 192.] [1]

Superior Court, Territory of Arkansas. July, 1832.

WRIT—JUSTICE OF PEACE—PROOF—VARIANCE.

Where the summons of the justice of the peace describes the cause of action as a "note of hand," a "bond" or "writing obligatory" cannot be received in evidence, for it is variant from the summons.

Appeal from circuit court, Hot Springs county.

[This was an action by Absalom Madding against John Peyton for breach of contract.]

Before ESKRIDGE and CROSS, JJ.

OPINION OF THE COURT. This suit was commenced before a justice of the peace for Hot Springs county, upon the following writ: "Territory of Arkansas, County of Hot Springs, Hunter Township, United States of America, to the Constable of Hunter Township, Greeting: Summons John Peyton to appear before me, justice of the peace, on the thirty-first day of the present month, at my dwelling-house in said township, between the hours of ten in the forenoon and three o'clock in the afternoon of the said day, to answer unto Absalom Madding in an action on a note of hand. Given under my hand and seal this 23d day of August, 1831. (Signed) John Williams, J. P." (Seal.) On the 31st of August, the parties appeared, and after hearing the evidence, the justice rendered a judgment against the defendant Peyton, in favor of the plaintiff Madding, for $14.75; from which the defendant prayed an appeal. At the July term of the Hot Springs circuit court, the parties appeared by their attorneys, and neither party requiring a jury, the cause was submitted to the court. On the trial in the circuit court, the plaintiff having offered in evidence, in support of his action, the following writing obligatory, to wit: "Washington, Nov., 1831. On or before the first day of December next, I promise to pay A. Madding fourteen dollars and seventy-five cents, which may be discharged in good merchantable seed cotton, delivered in Barkman's or Collins' gin, for value received. Witness my hand and seal. (Signed) John Peyton." (Seal.) The defendant, by his counsel, moved the court to exclude the said writing obligatory from being given in evidence, which motion the court sustained, and thereupon rendered a judgment for the defendant; to which opinion the plaintiff excepted, and filed his bill of exceptions. The only question for the consideration of this court is, whether the circuit court erred in excluding the writing obligatory from being given in evidence. This will depend upon a fair construction of the statute regulating the collection of "small debts." The first section of the small debt law provides, that the summons shall set forth the true cause of action, whether founded on bond, bill, note, book account, or promise. The summons, in the case before the court, describes the cause of action to be a note. A note is the evidence of debt in writing, not under seal. The instrument of writing excluded from being given in evidence by the circuit court, is a bond, or writing obligatory,—an evidence of debt in writing under seal. The object of requiring the true cause of action to be set forth in the summons is, to apprise the defendant of the charge which he is called upon to answer, in order that he may be prepared to make his defence. The writing offered in evidence, in the circuit court, being in legal acceptation and operation totally different from that described in the summons, and constituting an altogether different ground of action, was very properly excluded from being given in evidence. This court is disposed to sustain, whenever it is possible, proceedings had before a justice of the peace, knowing the great inconvenience which would result to the country from requiring formal correctness in their proceedings. Judgment affirmed.

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

MADDOX (HOLMEAD v.). See Case No. 6,629.

MADDOX (NEVITT v.). See Case No. 10,139.

Case No. 8,934.

MADDOX v. STEWART.

[2 Cranch, C. C. 523.] [1]

Circuit Court, District of Columbia. Dec. Term, 1824.

COURTS—JURISDICTIONAL AMOUNT—CREDIT TO REDUCE—ASSENT PRESUMED—JUSTICE OF PEACE—APPEAL FROM.

1. If a creditor gives a credit upon his account so as to bring it within the jurisdiction of a justice of the peace, and if the debtor does not object to the credit before the justice, his assent to the credit will be presumed.

2. No appeal lies from the judgment of a justice of the peace rendered upon the verdict of a jury.

Appeal from the judgment of a justice of the peace, upon the verdict of a jury.

[This was a suit by W. R. Maddox against Archibald Stewart.]

THE COURT (MORSELL, Circuit Judge, contra) dismissed the appeal, upon the ground that a fact once tried by a jury cannot be reëxamined otherwise than according to the rules of the common law. (See the

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

seventh amendment to the constitution of the United States.) And that a second trial by jury in another court is not according to the rules of the common law.

J. Dunlop, for appellant, contended that it appeared, by the account on which the judgment was rendered, that the appellee had given a credit "by gift, &c. &c." so as to leave a balance of $50, and bring his claim within the jurisdiction of the justice; which he had no right to do.

Mr. Key, contra. That was done before application was made to the justice for the warrant, and the appellant at the trial did not object to it, except that it was for too small a sum. Mr. Key cited the case of Porter v. Rapine [Case No. 11,288], in this court, at June term, 1812, in which it appeared that Rapine had released $6.85 of his claim so as to give jurisdiction to the magistrate, who gave judgment for $20; and this court affirmed the judgment, as it did not appear that the appellant had objected to the credit before the justice.

CRANCH, Chief Judge, mentioned the case of Cazenove v. Darrell [Id. 2,539], in Alexandria, in which the creditor had given a credit in order to bring his claim within the jurisdiction of the justice of the peace. The debtors objected to the credit before the justice; and this court decided that the creditor could not, without the consent of the debtor, release a part of the debt for that purpose.

THE COURT (THRUSTON, Circuit Judge, absent) was of opinion that as the appellant, in the present case, did not object to the credit before the justice, his assent may now be presumed; and that therefore the justice had jurisdiction of the cause.

Case No. 8,935.

MADDOX v. THORNTON.

[2 Cranch, C. C. 260.] [1]

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

CONSIDERATION—IMMORAL—TRAINING RACE-HORSE.

The feeding and training a race-horse is not an immoral consideration, and will support an assumpsit to pay for the same.

Mr. Law, for defendant, contended that the feeding and training the defendant's race-horse, for the worth of which this action was brought, was an immoral consideration, and within the reason of the decision of this court in the case of Holmead v. Maddox [Case No. 6,629], at December term, 1818.

Mr. Jones, contra.

THE COURT (CRANCH, Chief Judge, doubting) said that this case did not come up to that. The horse might be training for a private race; or no race might be run, &c.

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

Case No. 8,936.

MADDUX v. USHER.

[2 Hask. 261.] [1]

Circuit Court, D. Massachusetts. Oct., 1878.

SALE—ORDER—FOR CASH—CONDITION PRECEDENT—FORWARDING GOODS—ATTACHED—TITLE—AVERMENT OF CITIZENSHIP—AMENDMENT.

1. An order, "Please ship me at once 25 bbls. same whiskey I had before," is an order for a cash sale.

2. A reply, "Please find enclosed our invoice for 25 pkgs., shipped you this day as ordered, also our draft for amount of invoice which please accept and return," is not an acceptance of such order, but a proposed sale, upon condition that the draft be first accepted; and the person giving the order, after notice of the condition imposed, can acquire no title to the goods afterwards received, unless the proposed condition is complied with.

3. The fact of forwarding the goods before compliance with the terms of sale by the purchaser is not necessarily a waiver of the conditions of sale.

4. It is a question of fact for the jury to say under all the circumstances, whether the vendor so conducted as to waive conditions of sale, that he may have imposed.

5. A vendor may replevy his goods from a United States marshal who attached them as the property of a supposed purchaser, when he has not complied with the conditions of such sale, and they have not been waived.

6. A defective averment of the citizenship of parties may be amended after verdict.

Replevin, by [William B. Maddux and others] citizens of Ohio against [Roland G. Usher] the United States marshal for the district of Massachusetts, to recover goods that he had attached as the property of a merchant in Boston, who claimed to have purchased the same of the plaintiffs. The plaintiffs alleged the proposed sale by them to have been upon condition precedent that had neither been complied with nor waived, and that they had not parted with their title to the goods. The verdict was for the plaintiffs, whereupon the defendant filed a motion for a new trial for misdirection, and because the verdict was against law and evidence.

Morse, Stone & Greenough, for plaintiffs.

Avery & Hobbs, for defendant.

Before CLIFFORD, Circuit Justice, and FOX, District Judge.

FOX, District Judge. In January, 1875, J. M. Demarest was a wholesale liquor dealer, in Boston; he had purchased from an agent of the plaintiffs, who resided in Cincinnati, a quantity of whiskey, and, on the sixteenth of January, wrote to the plaintiffs, "Please ship me at once twenty-five barrels same whiskey I had before. I have not seen your Mr. Montgomery lately, or would have ordered through him." To this the plaintiffs replied, "Cincinnati, January 21, 1875: Mr. J. M. Demarest: With this you will please find enclosed our invoice, at lowest rate, for twenty-five pack-

[1] [Reported by Thomas Hawes Haskell, Esq., and here reprinted by permission.]

ages shipped to you this day as ordered in your favor of sixteenth; also, find enclosed our draft for amount of invoice, which please accept and return. Thanking you for the order, &c." The whiskey reached Boston some days after the receipt of this letter by Demarest; he never accepted the draft, but did take possession of the whiskey, which, with the exception of one or two barrels, was shortly after attached by defendant, the marshal of this district, on a writ against Demarest, returnable to this court, and the present action of replevin was instituted for its recovery. On the trial, the jury were instructed that, upon the written documents, the sale of the twenty-five barrels of whiskey to Demarest by plaintiffs was upon the condition of his payment therefor by his acceptance of the draft. To this instruction the defendant's counsel excepts.

Demarest's order was for a cash sale, and if it had been accepted as written, and the goods forwarded in compliance therewith, the sale would have been for cash, and he would not have been entitled to any credit; but it is manifest that the plaintiffs did not accept and act upon this offer of Demarest; but, instead thereof, for reasons best known to themselves, they declined to sell for cash, and forwarded him a sixty days' draft enclosed with the same letter with the invoice and other documents, which draft they requested him to accept and return. Demarest's proposal was not accepted, and the goods were not delivered to the railroad in compliance with his offer; but the plaintiffs substituted entirely new and different terms of sale, which, of course, they were fully authorized to do. It is said the language of the letter of the plaintiffs does not, in express terms impose, as a condition of the sale, the return of the draft accepted by Demarest; but considering the brevity and conciseness of the correspondence, we are of opinion its legal signification was to impose upon the sale this condition. After informing Demarest that they had that day shipped the goods, they enclose invoice and draft in the letter, and state therein, "find enclosed our draft for amount, which please accept and return." This surely was not a sale for cash; but on the contrary, it is manifest that, while in other respects they accepted the proposal of Demarest, they, instead of cash, required an acceptance in payment; and when we remember the informal manner in which mercantile correspondence is conducted, we think it a reasonable construction of the language here used, to hold that both parties must have understood that the contract required that the payment for the merchandise should be made by a return of the draft duly accepted. While the plaintiffs might, in precise terms, have informed Demarest that they declined his offer, and would not sell the merchandise to him except on condition of his acceptance of the draft, such formal language is hardly to be expected in business transactions; and their sending him the draft and other documents on the same day they shipped the whiskey may well, in connection with the letter, be considered as equivalent to a direct assertion that the sale would depend upon such condition being performed.

It is said that the merchandise was delivered to the railroad before the plaintiffs wrote their letter to Demarest of January twenty-first, and that such delivery was, in law, a delivery to Demarest, and cannot afterwards be controlled by subsequent acts of the plaintiffs; but in our view, the plaintiffs not having accepted Demarest's proposal for a cash sale, the action of the plaintiffs in shipping the merchandise must be examined entirely independent of Demarest's previous offer, and in no way to be influenced thereby. Conceding that that offer was declined, so far as the plaintiffs' rights are involved, it is as though it had never been made. They might, if they chose, send goods of that description to Demarest on just such conditions as they thought most for their interest; and if Demarest received the goods after he was informed of the conditions upon which the plaintiffs had forwarded them, he must be held to have agreed to those conditions, and could acquire no title without compliance therewith.

The argument of defendant's counsel proceeds upon the theory that plaintiffs, having first accepted Demarest's offer, and placed the goods on the cars to be forwarded to Demarest, afterwards, on the same day, changed their purpose; but the conclusive answer to this is, that there is no evidence that plaintiffs ever accepted Demarest's proposal; on the contrary, it is clear, beyond question, that they never accepted his offer, but substituted terms essentially different, upon which they forwarded the goods to him, taking care to advise him, before the reception of the goods, of these terms, and leaving it to his option whether he would or not, on those terms, complete the purchase. All that took place in Cincinnati on January twenty-first were parts of one transaction, carrying out a proposed sale by the plaintiffs to Demarest; and the court would not be justified in selecting a single act of the parties, and hold them concluded thereby in manifest contravention of the intent of the plaintiffs, as fully communicated to the purchaser.

The language of Lord Westbury in Shepherd v. Harrison, L. R. 5 H. L. 116, is quite applicable to the present case. In that case, a bill of lading for goods and a bill of exchange to be accepted in payment were forwarded to a party, and, as in the present instance, he received the goods under the bill of lading, but refused to accept the bill of exchange. The learned judge there says, on page 130: "I think the truth of the case was this; that the two documents were originally intended to be dependent, the one on the other, and that they were sent together, under the conviction and in the confidence that the bill of exchange would be accepted and returned to the sender

in consideration of the bill of lading. That, however, was not done, and therefore I take it that the bill of lading acquired in that manner gave no right of property to the appellant." Lord Cairns, in the same case, page 133, says: "I, therefore, think that, when one merchant in this country sends to another, under circumstances like the present, a bill of lading and a bill of exchange, it is not at all necessary for him to say in words, we require you to take notice that our object in enclosing these bills of lading and bills of exchange is, that before you use the bills of lading you shall accept the bills of exchange. Merchants know perfectly well what they mean when they express themselves, not in the language of lawyers, but in the language of courteous mercantile communication; and I do not think that any merchant in England, receiving a bill of lading and a bill of exchange under these circumstances, when he came to reflect on the matter, would feel any doubt that he could not retain the one without accepting the other. * * I believe that * * what took place in Liverpool did not vest the property in him (the plaintiff), but the property remained in the shippers."

When the sale is on condition that the purchaser should send his notes in payment, and the condition is not performed, no title vests in the purchaser. Coggill v. Hartford & N. H. R. Co., 3 Gray, 545; Hirschorn v. Canney, 98 Mass. 149.

A distinction is attempted to be drawn between a delivery of goods to a railroad and receiving therefor the common railroad receipt, and a delivery on board of a vessel, to be carried, and a bill of lading taken therefor. If it is admitted that such a distinction exists when the ship is not a common carrier, it is not applicable to the present case, as the delivery to the railroad was conditional and not absolute; the delivery, being only one act in the consummation of the sale on the twenty-first, is not to control the other branches of the contract, by one of which, this condition of payment by the acceptance was imposed on the purchaser.

The question whether there was any waiver of the condition by the delivery to the carrier was submitted to the jury, under the instructions, "that ordinarily, if a party makes a sale upon condition, and delivers the property without any understanding in reference to the continuance of the condition, this would be construed as a waiver of the condition, and it would be a presumption of law, that, if he delivered the article without any understanding between him and the buyer that the condition should continue, he intended to waive the condition. If the delivery is unaccompanied by any act, word, or circumstance, to indicate that it is qualified, or made subject to the condition, the purchaser has a right to understand that the condition is waived. The fact that the goods were actually forwarded or delivered to the purchaser, before a compliance with the terms of sale, is not necessarily a waiver of the conditions of sale. It is enough to enable the sender to retain his title to the goods, if it appears that it was the understanding of the parties, at the time of the delivery, that the condition of payment or security was not waived, though there was no express declaration to that effect at the time. The question of waiver is, therefore, a question of fact for the jury, and may be proved by declarations, acts and circumstances attending the delivery. Did the plaintiffs so deal with the property that they must be held to have waived the payment by acceptance of their draft? And had Demarest the right to understand, from what they did, that they waived this condition, and that the title to the property, by its being forwarded as it was, became Demarest's absolutely, without his acceptance of the draft?"

These instructions were substantially extracts from opinions found in the later Massachusetts decisions, and no objection is made thereto; but it is suggested in argument that upon the documentary evidence it was for the court to determine the question of waiver, as a matter of law. The answer to this suggestion is, that there was other testimony upon this point besides the documents, especially that given by one of the plaintiffs as a witness, which was not in all respects consistent, some portions tending to establish a waiver, whilst in other portions, this was strongly denied.

It is claimed that the plaintiffs have mistaken their remedy; that replevin can not be maintained against the marshal; and reference is made to Freeman v. Howe, 24 How. [65 U. S.] 450, in support of this objection. The cases are essentially different. In Freeman v. Howe, the defendant, as marshal of this district, had in his possession, under legal process, the property which the plaintiff undertook by process issued from the state court to replevin from his possession; and it was decided that the state courts could not take from the marshal property in his custody under the authority of the circuit court; there could not be a conflict of jurisdiction. In the present controversy between citizens of different states, which confers upon the circuit court jurisdiction, the plaintiffs have replevined in this court, the property held by the marshal of the court, under attachment on a writ returnable to, and pending in the same court. Instead of any conflict of different tribunals therefor, the plaintiffs appeal to the same tribunal which has directed the attachment, and invoke its assistance in determining the validity of the attachment and the plaintiffs' title to the property thus seized by the marshal on his precept from this court.

Such had been the practice prior to Freeman v. Howe [supra], as in Harris v. De Wolf, 4 Pet. [29 U. S.] 147, the supreme court of the United States sustained a judgment in replevin against the marshal of the Massa-

chusetts district, recovered in the circuit court, for property attached by him on a writ returnable before the circuit court. The case is in all these points identical with the present. Freeman v. Howe proceeds throughout upon the principle that the courts of the United States, having authorized an attachment, alone are to determine whether the possession acquired by the marshal is valid and shall remain, and declares that other tribunals cannot be allowed to disturb the possession thus acquired, and take from him the property; but it is most clearly affirmed in the same opinion, that it is the duty of the federal courts to afford to the real owners of the property, so attached, complete and appropriate remedies, and to direct a restoration to the true owner of that to which he shall be entitled. The court so authorizing an attachment is not restricted to a single remedy; but the aggrieved party may well avail himself of any remedy known to the law, which will more effectually protect his rights, and by which the federal courts may, according to well-established principles, determine the legal rights of the respective parties.

In Freeman v. Howe, it is said that a bill might be filed on the equity side of the court, to prevent injustice or an inequitable advantage under mesne or final process, it not being an original suit, but auxiliary and dependent, and could be maintained without reference to the citizenship or residence of the parties. In that case, such a remedy could alone be resorted to, as an action at common law could not be maintained in the circuit court, on account of the parties being both citizens of Massachusetts, a difficulty not presented in the present case. A right to redress being thus acknowledged by the supreme court, and Mr. Justice Nelson, having in his opinion pointed out the remedy which the party in that case might avail himself of, we hold that, when the case is different, and one in which the common law has for hundreds of years provided a remedy, a party may well avail himself of it, provided he seeks his remedy before the tribunal having the custody of his property.

In Buck v. Colbath, 3 Wall. [70 U. S.] 334, it was held that an action of trespass might be sustained in a state court against the marshal for an attachment made on a writ returnable to the circuit court, recognizing the authority of the state tribunals to hold the marshal accountable for the value of the property he may have wrongfully attached, provided his possession is not disturbed by process from the state tribunals. In Buck v. Colbath, [supra], Mr. Justice Miller, referring to the suggestion found in Freeman v. Howe that the owner could resort to a bill in equity, on page 345, says: "The proceeding here alluded to is one unusual in any court, and is only to be resorted to in the federal courts in extraordinary cases where it is essential to prevent injustice by an abuse of the process of the court, which cannot otherwise be remedied." The remedy in this tribunal which the common law afforded the plaintiffs, prevents all necessity for any resort to the unusual proceeding suggested by the learned justice. See Matthews v. Densmore, 109 U. S. 216, 3 Sup. Ct. 126.

Replevin has always been maintained in the state courts against the sheriff for property attached by him on writs from state tribunals. Scores of instances can be found in the digests of decisions in every one of the states; and we discern no valid reason why the same practice should not be sanctioned in the federal courts against their officers, if they have wrongfully attached another's property.

It is urged that the citizenship of the parties is not properly averred in the writ. It appears that they are citizens of different states, and in a number of similar instances at the present term, the court has allowed amendments to be made conformable to the truth, so that the citizenship may properly appear on the record, and the proposed amendment, filed June nineteenth, is allowed.

Motion overruled. Judgment on the verdict.

MADEGAN (LARRIVIERE v.). See Case No. 8,096.

MADEIRA, The. See Case No. 501.

MADISON (NELSON v.). See Case No. 10,110.

Case No. 8,937.

MADISON MUT. INS. CO. v. ECKER et al.

[3 Chi. Leg. News, 233; 13 Int. Rev. Rec. 135.]

Circuit Court, D. Minnesota. March, 1871.

INSURANCE COMPANY—STATE REGULATIONS—BOND OF AGENT—PREMIUMS—ACTION FOR.

1. *Held*, where the agent of a foreign insurance company had given a bond that he would faithfully account and pay over to the said company all moneys that should be paid to him belonging to said company, and in all things honestly discharge the duties of an agent of said company, that an action could not be sustained on said bond against the sureties to recover money collected by said agent for premiums, after the company had failed to comply with the state law by obtaining a renewal of their certificate.

2. After the company had failed to comply with the state law, a note given for premiums could not be enforced against the maker unless, perhaps, it was in the hands of a bona fide holder for value.

[This was an action by the Madison Mutual Insurance Company against George A. Ecker and others.]

NELSON, Circuit Justice. The plaintiff, a foreign insurance company, has sued to recover damages for a breach of the bond executed by the defendant, Ecker, at the time of his appointment as agent of the company in this state. The jury returned a special verdict.

The condition of the bond is, "that Ecker shall faithfully account to and pay to the said company all moneys that shall be paid to him, belonging to said company, and shall in all things honestly discharge the duties of an agent of the said company." There is no doubt about the breach of the condition of the bond, and the only defense relied upon by the sureties to defeat a recovery for the larger amount found by the jury is, that the receipt of money premiums and notes by Ecker, and the issuing of policies was in violation of title 6, c. 34, Rev. St. Minn. This statute in terms declares (section 114), "That it shall not be lawful for any agent of any insurance company, incorporated by any other state than the state of Minnesota, directly or indirectly, to take any risks, or transact any business of fire insurance in this state without such company has first obtained a certificate of authority from the state treasurer, and before obtaining such certificate, such fire insurance company shall furnish said treasurer with a statement," etc. Section 121 requires that this statement shall be renewed annually in the month of January of each year, and applies all the restrictions of the previous section upon the transaction of business by the company. Section 125 affixes imprisonment and fine as a penalty for a violation of the act.

The plaintiff had complied with the law previous to January, 1867, but had transacted business through this agent until June following, without obtaining any renewal of the certificate in accordance with the law. The sureties urge that they are not responsible for any delinquencies of Ecker while illegally transacting business. It is not doubted that any transaction of the business of fire insurance after January, 1867, was unlawful, and the participation of the agent in such business was a fraudulent act, but it is urged that there is nothing in the statute declaring that the contracts of insurance are void. The counsel for the plaintiff claims that the policies issued are valid and binding undertakings—the moneys received by the agent belonged to his principal, and a conversion of them to his own use or failure to pay them over, created a breach of the bond which would fix the liability of the parties thereto. Ecker could not excuse his failure by setting up the illegality of his acts in taking applications for insurance, procuring the policies, delivering them to the insured and receiving the premiums. Nor can his sureties avail themselves of this defense, inasmuch as the conversion by Ecker is in no manner connected with the illegal act of transacting the insurance business.

These propositions are urged with great force, but in our opinion are not applicable upon a fair construction of the act regulating foreign insurance companies. It will be observed that this statute required the company to do certain things as a condition precedent of transacting business in the state, and is not merely directory. This condition the state had a right to impose, and the plaintiff was bound to conform to the law in all its provisions. Not having done so, sound public policy would seem to require that the wrong doer should not, as against the sureties of the agent, recover. They undertook to answer for the acts of the agent within the legitimate scope of his authority, and their engagement was not intended to embrace any acts done by him contrary to law.

The contract of insurance being prohibited by the statute, it would be a legal conclusion that any note given for premiums could not be enforced against the maker unless, perhaps, it was in the hands of a bona fide holder for value. See 11 Wis. 394; 3 Gray, 215, 500. Clearly, therefore, in this case the plaintiff could not have been injured by a failure to turn over the premium notes, notwithstanding the rule adopted by the company holding the agent responsible for the face of all premium notes not delivered to them within a specified time. The case of Daniel v. Barney, 22 Ind. 207, in many particulars resembles this case, and the reasoning of the learned judge commends itself to our judgment.

The plaintiff will have a judgment for the amount received by Ecker previous to January, 1867.

Case No. 8,938.

MADISON & P. R. CO. v. WISCONSIN et al.[1]

Circuit Court, W. D. Wisconsin. Oct. 28, 1879.

RAILROAD LAND GRANTS—CONTINUITY OF LINE—SELECTION OF INDEMNITY LANDS—COTERMINOUS PRINCIPLE—ESTOPPEL AND FORFEITURE—OVERLAPPING GRANTS.

[1. By the act of June 3, 1856 (11 Stat. 20), lands (defined in the usual manner by grant and indemnity limits) were granted to the state of Wisconsin to aid in the construction of a railroad "from Madison or Columbus, by way of Portage City to the St. Croix river or lake, between townships 25 and 31, and from thence to the west end of Lake Superior and to Bayfield." Prior to May 5, 1864, the entire line was located, but none of it was constructed except the part between Portage and Tomah, a distance of 61 miles. On the latter date congress passed another act, which, in the first section, granted lands to aid in the construction of a railroad "from a point on the St. Croix river or lake, between townships 25 and 31, to the west end of Lake Superior," and from some point on that line to Bayfield. In the second section a grant was made for a railroad "from Tomah to the St. Croix river or lake, between townships 25 and 31. *Held*, that while the first act was probably intended to create one continuous road from Madison to the west end of Lake Superior and Bayfield, the later act unquestionably operated to break the continuity of this line at the St. Croix river, and create two separate roads; and hence that no deficiencies of lands within the grant limits of one road could be made up by selections from the indemnity limits of the other, unless a vested right thereto had accrued prior to the act of 1864.]

[1] [Not previously reported.]

[2. The act of 1856 provided, in the fourth section, that in disposing of the lands there should be sold in the beginning a quantity not exceeding 120 sections, to be included within a continuous length of 20 miles; and that when 20 continuous miles of road was completed, a like quantity might be sold. The act of 1864, however, provided, in section 7, that when 20 continuous miles of road were completed, patents might issue for the lands earned "on each side of the road, as far as completed, and coterminous with said completed section, not exceeding the amount" prescribed by the act. *Held*, that whatever might be the construction of the act of 1856, it was beyond question that, under the act of 1864, the selections of lieu lands must be made on the coterminous principle, and that a company constructing any given 20 miles of road could not supply deficiencies by selections from the indemnity limits along some other part constructed by a different company.]

[3. By the act of 1856, the "place" or "grant" limits were fixed at 6 miles on each side of the road, and the "indemnity" limits at 15 miles. Under the act of 1864, however, the place limits were 10 miles and the indemnity limits 12 miles, but from the lands thus granted there was to be "deducted" all the lands granted by the act of 1856, and no selections were to be made in lieu of lands granted by that act. The grant was to be "upon the same terms and conditions as are contained" in the act of 1856. *Held*, that the act of 1864 did not recognize and require the enforcement of the provisions of the act of 1856, as to all lands granted thereby, but rather it made a new grant, which included the lands to which no vested right had yet accrued under the previous act, together with enough additional lands to extend the place and indemnity limits to 10 and 20 miles, respectively, and then applied the coterminous principle to the whole.]

[4. A company which accepted from the state a grant of lands for the construction of the road from Tomah to the St. Croix river, upon the same conditions and restrictions as were imposed by the act of 1864, and also accepted from congress the benefit of a subsequent joint resolution extending the time allowed by that act for the completion of the road, as well as certificates from the governor showing the completion of two sections of the road, was, by these repeated recognitions of the act of 1864, estopped from claiming lands except upon the coterminous principle, and hence could assert no right to make up deficiencies by selecting lands beyond its terminal points, and within the limits granted to other companies, which had already commenced the work of construction under the act of 1864.]

[5. A company which accepted from the state a grant for the construction of part of the line upon condition that the same should be completed within a given time, but failed to fulfill the condition, for which reason a forfeiture was declared by the legislature, could not, merely by doing certain grading, have acquired any vested rights in the land such as would prevent the operation of the forfeiture.]

[6. The acceptance by the state of the grant made by the act of congress of 1864, with its condition requiring the lands to be disposed of upon the coterminous principle, operated of itself, and without any formal act of forfeiture, to cut off any claim to lands beyond the terminus of its own road made by a company which, prior to the act of 1864, had violated the conditions upon which the state had granted lands to it.]

[7. Under the acts of congress the grants were of sections of land in place, as they existed on the ground, so that if any of these sections were fractional, the state could not make up the deficiency from lands in the indemnity limits, because, as to the lands in place, the acts operate directly by specific description. But, where there were not lands in place to meet the calls of the grants, whether the deficiency were more or less, it was competent to supply it by sections from the indemnity limits; or, if there were parts of sections of the lands in place excluded from the grant by the terms of the acts, it was competent to supply the deficiency from the indemnity limits by a similar legal subdivision of land.]

[8. It seems that where contemporaneous grants are made to different companies, whose roads approach each other so that the grants overlap, such companies are to be regarded as tenants in common, without regard to which company first constructs its road.]

[This was a bill by the Madison and Portage Railroad Company against the treasurer of the state of Wisconsin, the West Wisconsin Railway Company, the Wisconsin Railroad Farm Mortgage Land Company, the North Wisconsin Railway Company, the Chicago, Portage & Superior Railway Company, and the Wisconsin Central Railway Company. Cross bills were filed by various defendants. The purpose of the litigation was to determine the conflicting claims of the various parties to certain lands granted by congress to the state of Wisconsin to aid in the construction of railroads in that state.]

HARLAN, Circuit Justice. By the first section of the act of congress, approved June 3, 1856, granting public lands to aid in the construction of railroads in the state of Wisconsin, there was granted to that state, "for the purpose of aiding in the construction of a railroad from Madison or Columbus, by way of Portage City, to the St. Croix river or lake, between townships 25 and 31, and from thence to the west end of Lake Superior and to Bayfield, and also from Fond du Lac, on Lake Winnebago, northerly to the state line, every alternate section of land, designated by odd numbers, for six sections in width, on each side of said roads respectively." "But," the act declares, "in case it shall appear that the United States have, when the lines or routes of said roads are definitely fixed, sold any sections or parts thereof granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents, to be appointed by the governor of said state, to select, subject to the approval of the secretary of the interior, from the lands of the United States nearest to the tier of sections above specified, as much land in alternate sections or parts of sections as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of pre-emption has attached as aforesaid, which lands (thus selected in lieu of those sold and to which pre-emption has attached as aforesaid, together with the sections or parts of sections designated by odd numbers as aforesaid and appropriated as aforesaid) shall be held by the state of Wisconsin for the use and purpose aforesaid; provided, that the lands to be so located shall in no case be further than fifteen miles from the line of the roads in each case, and selected for and on account of said roads; pro-

vided, further, that the lands hereby granted shall be exclusively applied in the construction of that road for which it was granted and selected and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever; and provided further, that any and all lands reserved to the United States by any act of congress, for the purpose of aiding in any object of internal improvement, or in any manner for any purpose whatsoever, be, and the same are hereby reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the route of said railroads through said reserved lands, in which case the right of way only shall be granted, subject to the approval of the president of the United States." The second section provides that the sections and parts of sections of land which, by such grant, remained to the United States, within six miles on each side of said roads, should not be sold for less than double the minimum price of the public lands when sold, nor should they become subject to private entry until the same had been offered at public sale at the increased price. By the fourth section it is declared that the lands granted should not be disposed of by the state, except in the following manner: That a quantity of land not exceeding 120 sections, and included within a continuous length of 20 miles of roads, respectively, might be sold; and when the governor of the state should certify to the secretary of the interior that any 20 consecutive miles of either of said roads were completed, "then another like quantity of land" thereby granted might be sold, and so from time to time until the roads are completed. If the roads were not completed within ten years, the act provided that no further sales should be made, and the unsold lands should revert to the United States. The lands, rights and privileges thus granted were, on 8th October, 1856, formally accepted by the state upon the terms, conditions, and restrictions contained in the act of congress, and the state assumed and undertook the trust thereby created.

On 11th October, 1856, the state, by an act on that day approved [Gen. Acts Wis. p. 217], authorized the La Crosse & Milwaukee Railroad Company, a corporation created by the laws of Wisconsin, to construct and operate the roads described in the act of congress from Madison and Columbus, via Portage City, to St. Croix river and lake, and from thence to the west end of Lake Superior and to Bayfield; and for the purpose of aiding such construction the state granted to that company all its interest and estate, present and prospective, in or to the lands granted by the act of June 3, 1856, for the construction of the railroad between the points and along the routes just named, together with all the rights, privileges, and immunities conferred or intended to be conferred by the act of congress. Prior to May 5, 1864, no portion of the entire route from Madison, via Portage City and St. Croix river or lake, to the west end of Lake Superior and to Bayfield, had been completed, except the line between Portage and Tomah, a distance of 61 miles; that part of the line was constructed in the years 1857 and 1858, and ever since April, 1858, has been in use for freight and passenger trains.

On May 5, 1864 [13 Stat. 66], congress passed an act "granting lands to aid in the construction of certain railroads in the state of Wisconsin." Since the rights of parties to this litigation depend chiefly, if not altogether, upon the construction and effect which may be given to that act, it is necessary to refer at some length to its provisions. By the first section it is declared "that there be and is hereby granted to the state of Wisconsin, for the purpose of aiding in the construction of a railroad from a point on the St. Croix river or lake, between townships 25 and 31 to the west end of Lake Superior, and from some point on the line of said road, to be selected by said state, to Bayfield, every alternate section of public land designated by odd numbers, for ten sections in width on each side of said road, deducting any and all lands that may have been granted to the state of Wisconsin for the same purpose by the act of congress of June 3d, 1856, upon the same terms and conditions as are contained in the act granting lands to the state of Wisconsin to aid in the construction of railroads in said state, approved June 3d, 1856." "But," the act provides, "in case it shall appear that the United States have, when the line or route of said road is definitely fixed, sold, reserved, or otherwise disposed of any sections or parts thereof, granted as aforesaid, or that the right of pre-emption or homestead has attached to the same, then it shall be lawful for any agent or agents, to be appointed by said company to select, subject to the approval of the secretary of the interior, from the public lands of the United States nearest to the tier of sections above specified, as much land in alternate sections or parts of sections as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of pre-emption or homestead has attached as aforesaid, which lands (thus selected in lieu of those sold, and to which pre-emption or homestead right has attached as aforesaid, together with sections and parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid) shall be held by said state for the use and purpose aforesaid; provided that the lands to be so located shall in no case be further than 20 miles from the line of the said roads, nor shall such selection or location be made in lieu of lands received under the said grant of June 3d, 1856, but such selection and location may be made for the benefit of said state, and for the purpose aforesaid, to supply any deficiency under the said grant of June 3d, 1856." By the second section of the act, a grant in similar terms, and upon like condi-

tions as to the selection of lands in lieu of sections or parts of sections appearing, when the line or route of the road shall have been definitely fixed, to have been sold, reserved, or otherwise disposed of, was made to the state for the purpose of aiding in the construction of a railroad from Tomah to the St. Croix river or lake, between sections 25 and 31, of "every alternate section of public land designated by odd numbers, for ten sections in width on each side of said roads, deducting any and all lands that may have been granted to the state of Wisconsin, for the same purpose by the act of congress granting lands to said state to aid in the construction of certain railroads, approved June 3, 1856, upon the same terms and conditions as are contained in the said act of June 3, 1856." By the third section of the act, and upon like conditions as to the selection of lieu lands (except that no reference was made to deductions of lands granted by or received under the act of June 3, 1856), there was granted to the state, to aid in the construction of a railroad from Portage City, Berlin, Doty's Island, or Fond du Lac, as the state might determine, to Bayfield, and thence to Superior, on Lake Superior, "every alternate section of public land, designated by odd numbers, for ten sections in width on each side of said road, upon the same terms and conditions as are contained in the act granting lands to said state to aid in the construction of railroads in said state, approved June 3, 1856." Section 4 declares that the sections and parts of sections of land remaining to the United States, within 10 miles on each side of said roads, shall not be sold for less than double the minimum price of the public lands when sold; nor should any of the said reserved lands become subject to private entry until the same shall have been first offered at public sale at the increased price. By section 5 it is provided that the time fixed and limited for the completion of the roads in the act of June 3, 1856, was extended to a period of five years from and after May 5, 1864. Section 6 is similar to the last proviso of section 1 of the act of June 3, 1856. By section 7 it was declared that, whenever there was "completed 20 consecutive miles of any portion of said railroads, supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering places, depots, equipments, furniture, and all other appurtenances of a first-class railroad, patents shall issue conveying the right and title to said lands to the said company entitled thereto, on each side of the road, as far as the same is completed and coterminous with said completed section, not exceeding the amount aforesaid, and patents shall in like manner issue as each 20 miles of said road is completed; provided, however, that no patents shall issue for any of said lands unless there shall be presented to the secretary of the interior a statement, verified on oath or affirmation by the president of said company, and certified by the governor of the state of Wisconsin, that such 20 miles have been completed in the manner required by this act, and setting forth with certainty the points where such 20 miles begin and where the same end; which oath shall be taken before a judge of a court of record of the United States." The eighth section declares that the lands granted by that act shall, when patented as provided in the seventh section, be subject to disposal, for the purposes stated in the act, and for no other, and the railroads should be and remain public highways for the use of the government of the United States, free from all toll or other charge, for the transportation of any property or troops of the United States. The ninth and only remaining section provides that, if the road mentioned in the third section is not completed within 10 years from the passage of the act, as provided therein, no further patents should be issued to the company for such lands, no further sales should be made, and the lands unsold should revert to the United States.

On the 20th March, 1865, the lands granted by the act of May 5, 1864, were accepted by the state, "subject however, to all the conditions of said act of congress," and the state consented "to execute the said trust, created by the aforesaid act of congress, pursuant in all things, to the terms, limitations, and conditions of said act." The secretary of state of Wisconsin was required to transmit a certified copy of the resolution, showing such acceptance, to the secretary of the interior.

Recurring to the provisions of the act of June 3, 1856, it seems to be reasonably clear, that that act contemplated, or at any rate rendered possible, the construction, by one company, of a single continuous railroad from Madison or Columbus, via Portage City and St. Croix river or lake, to the west end of Lake Superior and to Bayfield. But the continuity of such line was destroyed, and in my opinion was intended to be destroyed, by the act of May 5, 1864. Instead of making an additional or increased grant for one entire line, as described in the act of June 3, 1856, from Madison or Columbus to Lake Superior, congress, in one section of the act of 1864, made a distinct grant for a railroad from a point on the St. Croix river or lake, between townships 25 and 31, to the west end of Lake Superior and to Bayfield; in another section, a distinct grant to aid in the construction of another railroad from Tomah to St. Croix river or lake, between townships 25 and 31; and, in a third section, a distinct grant for another and distinct railroad from Portage City, Berlin, Doty's Island or Fond du Lac, to Bayfield, thence to Superior. If congress had intended to give additional lands for the benefit of the same or a single and continuous line from Madison or Columbus, via St. Croix river or lake, to the west end of Lake Superior and to Bayfield, as described in the act of June 3, 1856, that result could have been effected

by an amendment of that act, simply extending, for the benefit of the line therein described, and which had then been formally located, the place limits to 10 miles and the indemnity limits to 20 miles. But, instead of adopting that course, it made a specific grant, in separate sections, for distinct roads between designated terminal points, without requiring the parties or companies constructing those several lines to adopt the line or route which may have been located under or by virtue of the act of June 3, 1856. This course was, perhaps, suggested by the fact, of which we may presume congress had knowledge, that nearly eight years had elapsed after the state's acceptance of the act of June 3, 1856, without anything whatever being done upon the line, west and north of Tomah, beyond the mere location of the route from Tomah, via St. Croix river or lake, to Lake Superior. But, whatever considerations may have influenced congress we are satisfied that the purpose of the act of May 5, 1864, was to break the continuity of the original line from Tomah, via St. Croix river or lake, to the west end of Lake Superior and to Bayfield, and devote to the construction of separate and distinct portions of that line an increased quantity of lands beyond the amount granted by, or which could have been made available under the act of 1856.

An important question arising upon the construction of the acts of 1856 and 1864 is, whether the act of 1864 provides for the disposal of the granted lands upon a principle or by a rule different from that prescribed in the act of 1856, and, further, whether that of 1864 has not practically, and without violating any of the rights of the parties to this cause, superseded the essential portions of the act of 1856. Touching the act of June 3, 1856, some of the counsel insist that the lands, which by that act were allowed to be selected in lieu of lands appearing to have been previously sold or otherwise appropriated by the government, or the lands earned by the construction of each 20 continuous miles, could have been located anywhere along the entire line from Madison, via Portage and St. Croix river or lake, to the west end of Lake Superior and to Bayfield, and that the selection of such lands was not by that act limited to the public lands coterminous with any completed section of 20 miles and within 15 miles of the line of road. Without stopping now to inquire how far that construction of the act of June 3, 1856, is maintained by some of the adjudged cases, or by the action of any department of the government, it is quite certain that the act of May 5, 1864, admits of the disposal of the lands therein granted only upon the coterminous principle. Upon the completion of 20 consecutive miles in the manner required for a first class railroad, and upon the fact of such completion being certified by the governor, and sustained by affidavits, presented to the secretary of the interior, patents could issue for the lands earned in the construction of such twenty continuous miles. But the statute, in language too explicit to admit of doubt, or to require construction, declares that the patents shall convey the right and title to such earned lands to the companies entitled thereto, "on each side of the road, as far as the same is completed, and coterminous with said completed section, not exceeding the amount" prescribed in the act. According to the act of 1864, patents for lands earned in pursuance of its provisions could issue only to the companies constructing the roads described in the act, or to the companies to whom the benefit of the grant might be transferred.

It is, however, contended with much earnestness that the act of 1864, so far from repealing or modifying the act of 1856, recognizes and requires the enforcement of its provisions as to all lands covered by the grant therein contained. But, in my opinion, this position is unauthorized by anything contained in the act of May 5, 1864, and is inconsistent with the evident intention of congress in making distinct grants for the several roads designated in that act. The grant is of "every alternate section of public land designated by odd numbers for ten sections in width on each side of said road, deducting any and all lands that may have been granted to the state of Wisconsin for the same purpose by the act of congress of June 3, 1856, upon the same terms and conditions as are contained in the act granting lands to the state of Wisconsin to aid in the construction of railroads in said state, approved June 3, 1856." It certainly was not the intention of congress, by the act of May 5, 1864, to grant to the state every alternate odd section "for ten sections in width on each side of said road," in addition to the alternate odd sections "for six sections in width on each side" of the roads, granted by the act of June 3, 1856. The purpose of the act of May 5, 1864, was, as to the several roads therein described, to grant the alternate odd sections for 10 sections in width in place of odd alternate sections for six sections in width granted by the act of June 3, 1856; and instead of indemnity limits for 15 miles, as provided in the last named act, to allow selections of lands within 20 miles of the located line. If, within the place limits, as established and rendered certain under the act of 1864, either by the location of a new route or by the partial adoption of the route located under the act of 1856, there should be found lands within the place limits, as established under the act of 1856, the title to which had not been earned or become vested, it was intended that such lands be taken as a part of the place limits under the act of 1864, and not in addition to the alternate sections for 10 sections in width granted by the act of 1864. That is manifestly what was meant by the requirement that the

lands granted by the act of 1856 should be deducted from the alternate odd sections for 10 sections in width granted by the act of 1864. This construction is fortified by the first proviso of section 1 of the act of 1864, which declares that the lands to be located in lieu of lands which had been sold or appropriated by the government, and which, therefore, could not be used to aid in constructing the railroad, should not be made "in lieu of lands received under the said grant of June 3, 1856," but that such location might be made to supply any "deficiency" under the grant of June 3, 1856. That is to say, lands granted by the act of 1856, if found, upon the definite location of the respective roads under the act of 1864, to be within the place limits defined by the latter act, were not to be regarded as having been previously appropriated by congress, so as to entitle the company constructing the road under the act of 1864, to claim other lands in lieu thereof, but they were to be taken as a part of the "ten sections in width" granted by the act of 1864. It was, therefore, to be deducted from the affirmative grant of 10 sections in width, made in 1864. The word "deducting" was not, perhaps, the very best one to express the intention of congress, but that congress intended what I have indicated is reasonably clear.

If we are correct in our construction of the act of May 5, 1864, it follows that the lands coterminous with each completed section of 20 consecutive miles of the respective roads, described in and granted by that act, were exclusively for the benefit of the respective companies who should, under the provisions of that act, construct each completed section of 20 miles, and that no one of the companies constructing a road under that act could, for any deficiency of lands coterminous with its own line, supply such deficiency out of lands coterminous with other lines constructed by other companies under the same act. In other words, congress intended that all the lands granted by and earned under the act of May 5, 1864, by means of constructed road, should be disposed of according to the coterminous principle.

It results, also, from what has been said, that its acceptance of the grant of May 5, 1864, subject to all the conditions prescribed in the act of congress, and its agreement to execute the trust therein created by congress, "pursuant in all things to the terms, limitations, and conditions in said act," binds the state to an administration of the grant upon the coterminous theory, unless rights had previously accrued under and by virtue of the act of June 3, 1856, which congress could not, even with the consent of the state, ignore or violate, or unless, subsequent to the passage and acceptance of the act of 1864, the state, with the consent of congress or in harmony with its legislation, recognized in some binding form the rights growing out of the act of June 3, 1856. Whether any of the parties to this litigation have any such rights, or whether any of them can object to the administration of the grant upon the principles enumerated in the act of May 5, 1864, we now proceed to inquire.

Before considering the exact status at the time of the passage of the act of May 5, 1864, of the several parties to this litigation, it is necessary to state somewhat in detail all that had been accomplished between the date of the passage of the act of June 3, 1856, and prior to the passage of the act of May 5, 1864. We have already referred to the act of October 11, 1856, whereby the state conferred the grant of June 3, 1856, upon the La Crosse & Milwaukee Railroad Company. From the act of October 11, 1856, it appears that the title to the lands granted by the act of June 3, 1856, was not to vest or be subject to disposal except upon the completion of each section of 20 consecutive miles, and that the company was prohibited from making sales exceeding six sections of land for every mile of road completed; that the La Crosse & Milwaukee Railroad Company agreed to complete the entire road from Madison and from Columbus, via Portage City, to the St. Croix river or lake, between townships 25 and 31, and from thence to the west end of Lake Superior and to Bayfield, within 10 years from June 3, 1856, and to complete those portions between Madison and Portage City, and between Columbus and Portage City, simultaneously, as nearly as practicable, and by December 31, 1858; that in case the company should violate the provisions of the act of October 11, 1856, the legislature of Wisconsin might repeal that act, and might revoke the rights and franchises therein conferred, so far as the same had not been performed and fulfilled, and so far as the rights and privileges thereby granted had not become complete and absolute. The La Crosse & Milwaukee Railroad Company promptly accepted the grant, lands, rights, and privileges conferred by the act of October 11, 1856, upon the terms, conditions, and restrictions therein contained. On 31st December, 1856, the company executed to Bronson and others, as trustees, a deed of trust or mortgage, containing the usual provisions, covering all the property which then constituted, or might thereafter constitute or be a part of the road of the grantor from Madison, by way of Portage, to St. Croix river or lake, between townships 25 and 31, and from Portage to La Crosse, to secure bonds amounting to $10,000,000 proposed to be issued for the construction of said roads, including all lands granted or intended to be granted to that company, so far as the same pertained or were applicable to the construction of the road from Madison, by way of Portage, to the St. Croix river or lake, and also all the property which the company might thereafter acquire, as fully and amply

as the same might or could be conveyed if the roads had then been fully constructed and completed, and also the particular lands granted by the acts of June 3, 1856, and October 11, 1856, so far as the same were applicable to the construction of the road from Madison to St. Croix river or lake. Subsequently, on March 6, 1857, the La Crosse & Milwaukee Railroad Company was authorized by an act of the legislature of Wisconsin [Priv. & Loc. Laws Wis. p. 780] to transfer and convey to the St. Croix & Lake Superior Railroad Company all its right, title, and interest in the lands theretofore granted to it by the state which lie north of a point of intersection with St. Croix river or lake, upon the making of which conveyance the grantee should possess all the rights, powers, and privileges in regard to the construction of the road from such point of intersection to the west end of Lake Superior and to Bayfield, and in regard to the application and disposal of such lands, which had been conferred upon the grantor company by said act of October 11, 1856, and the grantor company, from the date of such conveyance, should be exonerated from all liability or duty as to the construction of that portion of the original line north of the St. Croix river or lake. On 10th March, 1857, the La Crosse & Milwaukee Railroad Company executed to the St. Croix & Lake Superior Railroad Company the conveyance authorized by the act to which reference has just been made. It contained, however, this clause: "But it is hereby expressly understood between the parties hereto that the said La Crosse & Milwaukee Railroad Company possesses and does not surrender or release the right of selecting any lands within 15 miles of and more than 6 miles from the route of the said road or roads between the St. Croix river or lake and the west end of Lake Superior, and also between the said route and Bayfield, for the purpose of making up any deficiency which does or may exist in the quantity of lands to which the said La Crosse & Milwaukee Railroad Company is or may be entitled upon that point (part) of its line extending from Madison to the St. Croix river or lake." By the same instrument the St. Croix & Lake Superior Railroad undertake to construct the designated roads, north of St. Croix river or lake, to the west end of Lake Superior and to Bayfield, within 10 years after June 3, 1856.

Following chronologically as far as possible, the history of the events as they transpired and were connected with the proposed lines of road, we find that on 2d August, 1858, there was certified to the governor of Wisconsin the completion, by the La Crosse & Milwaukee Railroad Company, of 20 additional miles westward from Portage City, making 61 continuous miles from that city westwardly to Tomah, in the direction of St. Croix river or lake, so as to admit of the running of regular trains, both freight and passenger. But on 23d July, 1858, the governor refused to certify the same to the secretary of the interior, placing his refusal upon the ground that the conditions upon which the grant was made by the state to the company had not been complied with, in that the company had not built any road from Madison and from Columbus to Portage, simultaneously or at all, while both of such roads—from Madison to Portage, and from Columbus to Portage—were to have been completed by December 31, 1858. After the location of the line from Madison to Portage in June, 1857, and prior to 1861, the La Crosse & Milwaukee Railroad Company partially graded portions thereof, expending from $50,000 to $75,000.

By an act of the legislature of Wisconsin approved April 12, 1861 [Priv. & Loc. Laws Wis. 1861, p. 333], the Sugar River Valley Railroad Company was authorized to build and operate a railroad from Madison and the village of Columbus, on the most direct and feasible routes, to Portage,—both roads to be completed simultaneously, as near as practicable, and to be completed by December 31, 1863. For the purpose of aiding in the construction of such roads, there was granted to that company all the interest and estate, then present and prospective, of the state, in and to so much of the lands granted by the United States to Wisconsin by the act of June 3, 1856, as was or could be made applicable to the construction of that part of the railroad described in said last-named act, lying between Madison and Portage, together with all the rights, privileges, and immunities conferred or intended to be conferred by the act of congress, as to so much of said grant of land. The act provided for the acquisition of title to the land by the company, in the same mode and upon the same conditions substantially as prescribed in the act of October 11, 1856, in relation to the La Crosse & Milwaukee Railroad Company. That act provides also that, in case the Sugar Valley Railroad Company should construct their road, or any part of it, upon or over any route upon or over which any other railroad company was authorized to construct a railroad, or upon or over which it had, prior to that date, actually surveyed or located its line of railroad, then it should be the duty of the Sugar Valley Railroad Company to settle with such railroad company, upon principles of justice and equity, for all the property and rights of property which it should take, injure, or destroy, and pay therefor whatever it should be reasonably worth; that in case the company should fail to expend at least $50,000 in the construction of said road within one year, or should fail to complete the road from Madison to Portage, so as to admit of the running of regular trains upon the same by December 31, 1863, or should otherwise violate the provisions of said act of April 12, 1861, the legis-

lature might repeal the same, and revoke and annul all the rights and franchises therein conferred upon said company, so far as the same had not been performed and fulfilled, and so far as the rights and privileges granted had not become complete, absolute, or vested; that so much of the act of October 11, 1856, and so much of the grant of lands thereby granted to the said La Crosse & Milwaukee Railroad Company as were or could be made applicable to the construction of a railroad from Madison to Portage, and from Columbus to Portage, and all the rights, privileges, and franchises thereby conferred, granted, and conveyed to and upon the La Crosse & Milwaukee Railroad Company, so far as the roads from Madison to Portage, and from Columbus to Portage, and the lands granted to aid in the construction of the same were concerned, were thereby repealed, revoked, annulled, and declared void. In January, 1862, a decree of foreclosure and sale was rendered in the district court of the United States for the district of Wisconsin, of the trust deed executed by the La Crosse & Milwaukee Railroad Company to Bronson and others. The sale under this decree took place April 5, 1863, the purchasers being William Wallace and William H. White. On the 20th January, 1863, the Sugar Valley Railroad Company failed, suspended payment, and practically closed all operations on the line between Madison and Portage, but prior to that date it had expended for grading and in acquiring the right of way about $40,000.

By an act approved 1st April, 1863 [Supp. Loc. & Priv. Laws Wis. 1863, p. 47], the Tomah & Lake St. Croix Railroad Company was incorporated, with authority to build and operate, on such route or from such point as the directors should determine in Tomah, on the track of the Milwaukee & La Crosse Railroad, or any other railroad running out of Tomah (that being the point westward of Portage City to which the 61 miles of road from Portage City, constructed in 1857 and 1858 by the La Crosse & Milwaukee Railroad Company extended), by way of Black River Falls, thence by the most feasible route to such point on Lake St. Croix, between townships 25 and 31, as the directors should determine. For the purpose of aiding in the construction of said railroad there was granted to that company all the interest and estate, then present and prospective, of Wisconsin in and to so much of the lands granted by the United States by the act of June 3, 1856, as was or could be made applicable to the construction of that part of said railroad lying between the village of Tomah and Lake St. Croix, together with the rights, privileges, and immunities conferred or intended to be conferred by said act of June 3, 1856, as to so much of said grant, the title to the lands thus granted to vest in the same mode and upon the same conditions, substantially, as those prescribed in reference to the La Crosse & Milwaukee Railroad Company by the act of October 11, 1856. The act further provided that so much of the act of October 11, 1856, and so much of the grant thereby of lands to the La Crosse & Milwaukee Railroad Company as was or could be made applicable to the construction of a railroad from Tomah to Lake St. Croix, and all the rights, privileges, and franchises thereby conferred, granted, and conveyed to the said La Crosse & Milwaukee Railroad Company, so far as the road from Tomah to St. Croix, and the lands therein granted to aid in the construction of the same, were concerned, were thereby repealed, revoked, annulled, and declared void. On the 5th May, 1863, Wallace and White received a deed from the marshal, and upon the same day organized a corporation under the name of Milwaukee & St. Paul Railway Company, to which was conveyed, by the decretal purchasers, among other things, the lands granted or intended to be granted to the La Crosse & Milwaukee Railroad Company by virtue of the acts of June 3, 1856, and October 11, 1856, so far as lands pertained or were applicable to the construction of the roads from Madison, by way of Portage, to the St. Croix river or lake. By an act approved March 31, 1864 [Gen. Laws Wis. 1864, p. 349], the St. Croix & Lake Superior Railroad Company was authorized and empowered to preserve and protect the timber growing or being upon any of the lands theretofore granted by congress to the state of Wisconsin by the act of June 3, 1856, and "which are situated within fifteen miles of the located line of such company's railroad."

We have now stated, so far as we have been able to collect them from the immense mass of papers before us, the important facts in connection with the lines of railroad between Madison, via Portage and St. Croix river, to the west end of Lake Superior and to Bayfield, which transpired between the passage of the act of June 3, 1856, and the acceptance by the state of the act of 5th May, 1864. At the date last named, as we have shown, no part of the line between Madison and Portage had been constructed. Nothing had been done, except to locate and partially grade the lines between those points. The company charged with the duty of completing the road from Madison to Portage by December 31, 1863, had, prior to May 5, 1864, failed and suspended operations, and was in suspension at the last-named date. Between Tomah and St. Croix lake, and between St. Croix lake and the west end of Lake Superior and Bayfield, nothing whatever had been done in the way of construction prior to May 5, 1864. The respective companies seeking or claiming the benefit of, or operating under, the grant of June 3, 1856, had done substantially nothing between Tomah and Lake Superior beyond locating their lines on the designated routes.

Returning to the inquiry whether the acceptance by the state of the provisions of the

act of May 5, 1864, was inconsistent with any rights which then belonged to the predecessors in interest of the parties to this cause, let us first examine the case as to

The West Wisconsin Railroad Company,

Formerly the Tomah & Lake St. Croix Railway Company. It seems to be clear that that company, at least, is not in any position to object to the administration of the congressional grant upon the coterminous principle. It would seem to be estopped, upon every principle of equity, from asserting any claim to supply its deficiency of land, if any such exists, out of lands beyond its line and along the road constructed and to be constructed by other companies north of its line and between St. Croix river or lake and Lake Superior. The state, by an act approved March 29, 1865, conferred upon that company the benefit of the increased grant, and, among other things, all and singular the rights, privileges, and interests conferred and bestowed upon the state by the act of May 5, 1864, including the privilege given by that act as to the extension of time for building the road from Tomah to St. Croix river or lake between townships 25 and 31. The company accepted the grant upon the same conditions and restrictions as were imposed by congress upon the state in the act of 1864. Besides, it accepted from congress, by joint resolution approved July 13, 1868, a further extension of three years for the completion of its road beyond the time limited by the act of 1864. It accepted and caused to be filed with the secretary of the interior a certificate from the governor of the state, dated September 10, 1870, showing that the first 80 miles constructed by it had been built and completed in the manner required by the act of May 5, 1864. It accepted and caused to be filed a similar certificate as to another section of 20 continuous miles. After these repeated recognitions of the act of May 5, 1864, after accepting the benefits, the extension of time, and all the privileges given by that act and by the act of 1868, it should not be heard to claim lands beyond its terminal points and within the limits granted to other companies who have entered upon the work of construction under the authority and upon the faith of the act of May 5, 1864. If, as claimed, the North Wisconsin Railroad Company, which is engaged in constructing the road from St. Croix lake or river to Bayfield, has received grants of land in violation of the coterminous principle prescribed in the act of May 5, 1864, that is a matter between the state or the United States and that company, of which the West Wisconsin Railroad Company may not complain. And so if the West Wisconsin Railroad Company has, as urged, received lands along or opposite to its line which it had no lawful right to receive under the act of 1864, that is not a matter to be corrected in this litigation, or of which other companies can complain under the present issues, provided such other companies were not themselves entitled to the lands thus alleged to have been illegally appropriated and received by the West Wisconsin Railroad Company. As to whether it has, in fact, received patents for lands to which it was not entitled, the court expresses no opinion. Its decision upon the claim of the West Wisconsin Railway Company is restricted to the single point that it cannot supply its alleged deficiency out of the lands north of St. Croix river or lake, and beyond its own terminal points, whether such lands are claimed by the North Wisconsin Railway Company, the Chicago, Portage & Superior Railway Company, or the Wisconsin Central Railway Company.

Madison & Portage Railway Company.

Our next inquiry relates to the claim of the Madison & Portage Railway Company to supply its alleged deficiency from lands north of St. Croix river or lake. We have already seen that the rights, privileges, and franchises conferred in 1856 upon the La Crosse & Milwaukee Railroad Company, so far as the roads from Madison to Portage, and from Columbus to Portage, and the lands granted to aid in the construction of the same, were concerned, were, in the year 1861, revoked, annulled, and declared void by the state. The right of the state to make such revocation cannot well be disputed in view of the reservations in the act of October 11, 1856, and the failure of the La Crosse & Milwaukee Railroad Company to complete such roads by the time stipulated in that act, viz. December 31, 1858. What the La Crosse & Milwaukee Railroad Company may have previously done upon the line between Madison and Portage, in the way merely of grading, did not create any rights in its favor against the state or against the United States, certainly no rights that were complete or absolute, or which prevented the state, in 1861, from recalling its grant to that company. We have also seen that, in the statute of 1861, declaring such revocation, the right to construct the road from Madison to Portage was conferred upon the Sugar Valley Railroad Company, together with the lands, privileges, and immunities, as to that part of the original line, which had been previously conferred upon and granted to the La Crosse & Milwaukee Railroad Company. But the Sugar Valley Railroad Company (the predecessor of the Madison & Portage Railroad Company) did not comply with the terms of the said act of 1861. It did not, as it expressly agreed to do, expend upon its road, within one year from the passage of the act, the sum of $50,000; nor did it, by December 31, 1863, complete the road from Madison to Portage so as to admit of the running of regular trains upon the same, or at all. On the contrary, as early as January 26, 1863, it failed, suspend-

ed payment, and practically closed all operations on its road. It had not resumed operations when the act of May 5, 1864, was passed, or when its provisions were accepted by the state. It had not, at either date, acquired any right which was "complete, absolute, or vested." It was in a position where the state, by virtue of the reservations of power contained in the act of 1861, could revoke all the authority conferred upon it, including the right to earn lands as compensation or bounty for constructed road. Its violation of the act of 1861, in the particulars named, authorized the state, at the time of its acceptance of the act of May 5th, 1864, to repeal the act of 1861, and revoke the grant thereby made. The state did not, so far as I can find in the record, formally exercise such right of repeal and of revocation, but it did, on 20th March, 1865, as it might lawfully have done, that which was practically equivalent to a revocation of the rights granted in the act of 1861; that is to say, it agreed with the United States to execute the trust, created by the act of 1864, pursuant, in all things, to the terms, limitations, and conditions of that act—an agreement which, we have seen, required the disposal, according to the coterminous principle, of all the lands granted by the act of 1864 among the several companies constructing, under the sanction of its authority, each continuous 20 miles. That agreement embraced all the lands beyond or northwest of Tomah, and as far north as Lake Superior, and was inconsistent with any right in the Sugar Valley Railroad Company thereafter to earn and appropriate lands beyond its own line and within the limits, terminal and lateral, prescribed by the act of May 5, 1864. If it was competent for the state, on March 20, 1865, as it unquestionably was, to revoke the grant of 1861 to the Sugar Valley Railroad Company, it was equally competent, without a formal revocation of such grant, to stipulate with the United States that it would dispose of the lands granted and received under the act of 1864 according to the terms therein prescribed. If we are correct in this view, it results that no action of the state, subsequent to March 20, 1865, continuing in force the grant of 1861 to the Sugar Valley Railroad Company, or substituting the Madison & Portage Railroad Company to the enjoyment of the rights originally conferred upon the Sugar Valley Railroad Company, could affect its obligation to the United States to respect and execute the provisions of the act of May 5, 1864. It is enough for the disposition of the claim of the Madison & Portage Company that the Sugar Valley Railroad Company had no substantial right, on March 20, 1865, which prevented the state from agreeing to execute the trust created by the act of May 5, 1864, pursuant, in all things, to its provisions, including the provision which declared the coterminous principle. The effect of the act of May 5, 1864, and of its acceptance by the state, so far as the Sugar Valley Railroad Company or its successor was concerned, was to protect or withdraw the lands described in that act from any claim of that company on account of deficiency lands to which they might become entitled by actual construction of road, at a subsequent date, under the grant of June 3, 1856.

Wisconsin Railroad Farm Mortgage Land Company.

We will now consider the case of the Wisconsin Railroad Farm Mortgage Land Company, which claims to be the successor of the La Crosse & Milwaukee Railroad Company as to all rights accruing upon the construction of the 61 miles of road between Portage and Tomah in the years 1857 and 1858. It will be remembered that the La Crosse & Milwaukee Railroad Company, on the 10th March, 1857, under authority conferred by the state, transferred to the St. Croix & Lake Superior Railroad Company the right to construct the original line north of St. Croix lake or river, and such benefits and privileges as were connected with the grant contained in the act of June 3, 1856. The indenture between the parties contained, as has been seen, an acknowledgment that the La Crosse & Milwaukee Railroad Company then possessed and did not surrender or release the right to select lands within 15 miles of, and more than six miles from, the route of the roads north of St. Croix river or lake to supply any deficiency which then existed or might thereafter exist in the quantity of lands to which the La Crosse & Milwaukee Railroad Company was or might be entitled upon that part of its line extending from Madison to the St. Croix river or lake. It does not appear that the state previously assented to or contemplated such an arrangement between the parties. But, waiving any consideration of its validity because of the absence of such assent, it is clear that the state, after its acceptance of the act of 1864, and before the date of its grants to the North Wisconsin Railroad Company, the Chicago & Northern Pacific Air Line Railway Company, and Wisconsin Central Railway Company, conferred upon the Wisconsin Railroad Farm Mortgage Land Company the benefit of the reservation contained in the contract and indenture of March 10, 1857. The purchasers at the decretal sale of the rights and interests conveyed by the mortgage to Bronson and others, by apt and sufficient words, conveyed and transferred to the Milwaukee & St. Paul Railroad Company before the passage of the act of May 5, 1864. Although that company necessarily took subject to the right of appeal and revocation reserved to the state in the charter of the La Crosse & Milwaukee Railroad Company, and was, therefore, for the reasons already stated, in no position to object to the state's accepting and agreeing to execute the provisions of the act of May 5,

1864,—the state not having previously assented to the contract and reservation contained in the indenture of March 10, 1857,—we find that, as early as the year 1868, the state agreed that the farm mortgagors might have the benefit of any claim to the lands donated by congress which the Milwaukee & St. Paul Railroad Company had acquired, as the successor of the La Crosse & Milwaukee Railroad Company, on account of the construction of the road from Portage to Tomah. If, without the consent of congress, no such claim was maintainable under the act of June 3, 1856, nevertheless in 1868 congress authorized the legislature to dispose of the lands granted, and which might have accrued and been certified to the state, under the act of June 3, 1856, to aid in the construction of the road from Madison or Columbus, via Portage, to St. Croix river or lake, for the benefit of the Wisconsin Railroad Farm Mortgage Land Company. We find also that the legislature of Wisconsin, by an act approved March 23, 1872, declared the Wisconsin Railroad Farm Mortgage Land Company to be the legal successor (as to the rights acquired and conferred in and to a portion of the lands granted by congress to the state of Wisconsin by an act approved June 3, 1856) of the La Crosse & Milwaukee Railroad Company, as fixed and reserved in and by the contract entered into by and between the La Crosse & Milwaukee Railroad Company and the St. Croix & Lake Superior Railroad Company, executed March 10, 1857, and duly filed in the office of the secretary of state of Wisconsin. The act directed the governor to carry out the provisions of that contract, and conveyed to the Wisconsin Railroad Farm Mortgage Land Company, out of the lands granted by the act of June 3, 1856, such quantity of lands as had been or thereafter might be made applicable thereto, as should make, together with the lands theretofore conveyed to that company, the exact number of 6 sections for each mile of the railroad constructed by the La Crosse & Milwaukee Railroad Company from Portage to Tomah, a distance of 61 miles. At the same time, or on the day previous, the acts conferring the grants of June 3, 1856, and May 5, 1864, upon the St. Croix & Lake Superior Railroad Company were repealed, but with the proviso that nothing therein should be construed to impair the rights of the Wisconsin Railroad Farm Mortgage Land Company to the grant of June 3, 1856. Congress and the state seem to have concurred in desiring to provide full compensation in lands to the Farm Mortgage Company for the 61 miles of road constructed and in use long prior to 1864. Such was the unfulfilled engagement of the state to that company when, in 1874, to the North Wisconsin Railway Company and the Chicago & Northern Pacific Air Line Railway Company was granted the right, title and interest which the state then had or might thereafter acquire in the lands granted by the acts of June 3, 1856, and May 5, 1864, to aid in the construction of the roads north of St. Croix river or lake. The two companies, it is clear, took their grants with the knowledge that the state had, by a previous act, directed the governor to execute the contract of March 10, 1857, which expressly recognized the right of the La Crosse & Milwaukee Railroad Company to supply any deficiency south of St. Croix river or lake out of lands north of that river or lake. It seems to me, therefore, that, recognizing the right of the state to accept the grant of May 5, 1864, without doing violence to the then existing rights of any of these companies, or of their predecessors, it yet became bound by its subsequent ratification of the contract of March 10, 1857, before the date of the grants to the North Wisconsin Railroad Company and the Chicago & Northern Pacific Air Line Railway Company, to grant to the Wisconsin Railroad Farm Mortgage Land Company, out of the lands north of St. Croix river or lake, a quantity sufficient to satisfy its claim for the construction by its recognized predecessor of the 61 miles of road between Portage and Tomah. The claim of the Wisconsin Railroad Farm Mortgage Land Company related to road constructed south of Tomah, and neither that company nor its predecessor was required to accept the provisions of the act of 1864. That part of the line described in the original act was not embraced by or referred to in that act, for the reason, doubtless, that it had in fact been constructed before its passage. It was, therefore, left under the operation of the act of June 3, 1856. And even if that act did not require deficiency lands to be selected upon the coterminous principle, it was competent for the state, in view of the action of congress, after accepting the act of 1864, and before conferring the grant therein contained upon the North Wisconsin and Chicago & Northern Pacific Air Line Railway Company, to allow the Farm Mortgage Land Company to select the deficiency lands earned by its predecessor for constructed road out of such of the lands north of St. Croix lake or river as were embraced in the indemnity limits prescribed by the act of June 3, 1856. This it did by an express approval in 1872 of the contract of May 10, 1857, and by requiring the governor to carry it into effect. I am of opinion that the right thus recognized by the state should be enforced; but in giving effect to the claim of the Wisconsin Railroad Farm Mortgage Land Company it is not necessary, I think, to disturb the location of lands already made by the North Wisconsin Railroad Company. Upon this particular point, however, no final decision is now made. The Farm Mortgage Company was not entitled to any specific sections of land, and its claim can doubtless be satisfied without disregarding the selection or location of lands by the North Wisconsin Railroad Company for road constructed. But in this respect

the rights of those two companies can be more satisfactorily determined after a report by the master, to be hereafter made; and, until the coming in of that report, the court also reserves for determination the right of the several parties other than the West Wisconsin Railroad Company and the Madison & Portage Railroad Company in the fund spoken of in argument as the trespass fund.

Some question has been made as to the precise extent of the grant under the two acts of congress. We understand that it covers 6 sections in width on each side of the line in the one case, and 10 sections in the other, of lands in place as they existed on the ground, so that if any of these sections were fractional, or from any cause were not full sections, the state could not make up the deficiency from lands in the indemnity limits, because as to the lands in place the act operates directly by specific description, but, when there was not land in place to meet the call of the grants, whether the deficiency was more or less, it was competent to supply it by sections from the indemnity limits; or if, as might happen, there were parts of sections of the lands in place excluded from the grants by the terms of the acts, it was competent to supply the deficiency from the indemnity limits by a similar legal subdivision of the land. It would seem to be impracticable to administer the trust on any other basis. In supplying deficiencies it must be by sections, whether full or fractional, and by legal subdivisions. Deficiencies in place limits, caused by sales or preemptions previous to the location of routes, whether before or after the passage of the acts, may be supplied from the indemnity limits.

Although the Wisconsin Central Railroad Company has filed no cross bill, and has only presented its claims by answer, it may not be improper for us to express an opinion upon the effect of the grant by the act of 1864, when there is a conflict or overlapping of lands granted to the different railroads as they approach Lake Superior, large quantities of land being thus granted by the act to different roads. These grants are made by the same law operating on the lands granted at the same time. The Wisconsin Central Railroad has completed its road to Ashland, on Lake Superior, a point not named in the act, but up to the present time no road has been finished to Bayfield or to the west end of Lake Superior, and, without foreclosing the parties upon this question, we should be inclined to think that the different companies, as to all lands overlapping in the respective grants, must be considered tenants in common, without regard to priority of construction.

I am not sure that I have touched upon every point in this complicated cause which is essential to the determination of the rights of parties, nor am I quite sure that the recital of facts contained in this opinion is in all respects full and accurate. It would have been gratifying to me to have had more time than has transpired since the conclusion of the oral argument for the examination of the record and the consideration of the many difficult questions suggested by counsel. But the interests of parties seem to require an early disposition of the cause, and I have not felt at liberty to postpone an announcement of my conclusions to such a time as would give me all the opportunity for careful deliberation which the large interests involved seemed to demand. I have been the more willing to pursue this course since counsel concurred in stating that the cause, however decided in this court, would be taken to the supreme court of the United States for final determination. Upon the filing of this opinion in court, counsel will prepare an order dismissing the bill of complainant and the cross bill of the West Wisconsin Railroad Company, and referring the cause to the special master with such directions as are consistent with this opinion, and as will facilitate the final determination of all the remaining issues.

[An appeal was taken in this case to the supreme court of the United States, but was dismissed by stipulation of counsel on April 8, 1864.]

MADRE, The VERONICA. See Case No. 16,923.

MAD RIVER R. CO. (SIMPSON v.). See Case No. 12,885.

Case No. 8,939.

MAENHAUT et al. v. NEW ORLEANS et al.

[2 Woods, 108.] [1]

Circuit Court, D. Louisiana. Nov. Term, 1875.

CONSTITUTIONAL LAW — LEGISLATIVE ACT — CONTRACT — BONDS — TAXES — MONEY COLLECTED — TRUST FUND.

1. An act of the legislature, which provided for the issue of bonds by a municipal corporation, and prescribed the manner in which the tax to pay the interest thereon should be levied, and enacted safeguards to secure its levy and collection, on the faith of which legislation the bonds were sold, constitutes a contract with the bondholder, the substantial performance of which he is entitled to exact.

[Cited in Maenhaut v. New Orleans, Case No. 8,940.]

2. Money collected to pay the interest on said bonds, levied, collected and set apart, according to the provisions of said act, is a trust fund for that purpose, and the municipal corporation may be enjoined from using it for any other purpose without the consent of the bondholders.

[Followed in Ranger v. New Orleans, Case No. 11,564. Cited in Meriwether v. Garrett, 102 U. S. 530; Garrett v. City of Memphis, 5 Fed. 869; Chaffraix v. Board of Liquidation, 11 Fed. 641; Fazende v. City of Houston, 34 Fed. 97.]

3. The act of the legislature of Louisiana of Feb. 23, 1852, establishing the charter of the city of New Orleans, which declares that the

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

rate per cent. of the tax (to pay interest on the consolidated debt) in each municipality shall be in proportion to the indebtedness of each, is not in conflict with article 127 of the constitution of 1845, which declares that "taxation shall be equal and uniform throughout the state."

[Followed in Ranger v. New Orleans, Case No. 11,564.]

In equity. This cause was heard upon the motion of complainants [Rosalie Maenhaut and others] for a preliminary injunction, and for the appointment of a receiver. It was submitted upon the bill, supplemental bill, answer, affidavits, and arguments of counsel.

John A. Campbell and E. Bermudez, for motion.

B. F. Jonas, City Atty., T. J. Semmes, W. W. Howe, John Finney, and E. W. Huntington, contra.

WOODS, Circuit Judge. The facts as they appear from the pleadings and affidavits are substantially as follows: Previous to the 23d of February, 1852, the city of New Orleans was composed of one general municipal organization, which comprised municipalities, each of which had a government of its own, and each of which, as well as the general municipal body, had contracted debts for which they were respectively liable. At the date named, an act of the general assembly of Louisiana was approved, which established a municipal corporation to be called the city of New Orleans, to be composed of the several municipalities, and to be governed by a mayor and common council. [Acts La. 1852, p. 53.] The act declared that the estate and title of the several municipalities in lands, bridges, ferries, streets, roads, wharves, markets, stalls, landing places, buildings and other property, should be vested in the city of New Orleans. Section 37 of this act, provided that the debt of the general sinking fund, commonly called the old city debt, and the debts of the three municipalities should be assumed and paid by the city of New Orleans, and the city was declared liable therefor. Five officers of the city, including the mayor, were constituted commissioners of the consolidated debt of New Orleans, and they were authorized to issue the bonds of the city, having not more than forty years to run, with interest payable semiannually. The commissioners were authorized to exchange these bonds for any bonds, obligations or debts of the old corporation, or any of the municipalities, or to sell the same, and with the proceeds pay off said debts. It was provided that the bonds thus issued should form a stock to be called the consolidated debt of New Orleans. It was further provided as follows: "The common council shall annually, in the month of January, pass an ordinance to raise the sum of $600,000, by a special tax on real estate and slaves, to be called the consolidated loan tax, and the rate per cent. of said tax in each municipality shall be in proportion to the debt of each. All ordinances, resolutions or other acts passed by said council after the first day of January in each year, shall be null and void, unless the ordinance imposing the consolidation loan tax shall have been previously passed. At the end of each and every year, any surplus of the consolidated loan tax remaining in the treasury, after the payment of all the interest, shall be applied to the purchase, from the lowest bidder, of such bonds issued under this act as have the shortest period to run." The section further provides: "Nor shall any loan be contracted unless the same be authorized by a vote of a majority of the qualified voters of said city, and no ordinance creating a debt or loan shall be valid unless for some single object or work distinctly specified therein, and unless such ordinance shall provide ways and means for the punctual payment of running interest during the whole time for which said debt or loan shall be contracted." By an act passed on the same day as the act just mentioned, the amount to be levied in January of each year to pay the principal and interest on said bonds was increased to $650,000.

Under authority of these acts, and upon the faith thereof, about ten millions of bonds were issued, which were negotiated above par, and sold in the money markets of Europe and the United States. It further appears that, beginning with the year 1869, the city of New Orleans had issued several series of bonds in violation of the restrictions imposed by the act of 1852. At the extra session of 1870, an act was passed changing the form of the city government, and repealing the act of 1852, retaining in force, however, some of its clauses and sections. In 1874 Act No. 53 was passed, which postponed the levy and collection of any tax for the sinking fund for the purchase of the bonds of the city, until December, 1876. There are now outstanding about $4,142,000 of the consolidated bonds. It appears further, by the averments of the supplemental bill, that on the 14th of July, 1875, the city of New Orleans adopted an ordinance, No. 3190, whereby it was provided that the commissioners of the consolidated debt were authorized to pay, with a delay not exceeding ten days, fifty per cent. of the certain past due interest coupons, and that such pro rata payments be continued out of all interest collections up to January, 1876, provided that the holders of such coupons shall indicate their acceptance of this arrangement by their respective signatures at the time of payment. The said coupons were to be stamped thus: "Half paid." The following are the coupons referred to: Consolidated 1852, due July, 1875. Railroad, up to July, 1875. Pontchartrain Railroad, due July, 1875, etc. The paper to be signed by the bondholders under this ordinance is as follows: "We, the undersigned, holders of city bonds, hereby acquiesce in and approve Ordinance No. 3190 of the city council, providing for the pay-

ment of fifty per cent. of the interest collected and to be collected up to the 1st of January, 1876, the balance to be used for the general relief of the city government, reserving our right to be hereafter paid by the city the balance due on said coupons." The supplemental bill charges that the city council, since the passage of the ordinance aforesaid, has allowed no bondholder to participate in the payments of interest who did not consent to the ordinance, and that it has excluded a number, among whom were complainants, because they would not do so. The complainants are the holders of seven of the consolidated bonds of the city. There has been deposited by the city in the Louisiana National Bank, to the credit of the consolidated loan, during the six months ending July 30, 1875, the sum of $174,409.90, and there is now on deposit in the bank to the credit of that fund, a sum nearly, if not quite, sufficient to pay the interest due on the consolidated bonds. There are many other averments and admissions of the pleadings and matters of fact set forth in the affidavits, which for the purposes of the present motion it is unnecessary to notice. Although the prayer of the bill of complaint is very broad, the purpose of the present motion is very narrow. It is that an injunction may issue against the city and against the Louisiana National Bank, to restrain them from paying out the said funds collected for the interest on the consolidated bonds, for any other purpose than that for which said fund was collected, or in any other manner than in accordance with the laws and ordinances previously existing, and that should there be any further default, the complainants may be allowed to renew their motion for the appointment of a receiver.

Counsel for defendant, not being advised within what narrow limits the relief sought by this motion was confined, have argued many questions which it is not now necessary to pass upon or notice. The only question is, Shall the injunction go as moved for? There can be no serious question that so much of the twenty-ninth section of the act of 1852, as provides for the manner in which the tax to pay the consolidated bonds is to be levied, and the safeguards for the levy and collection of the tax, constitutes a contract with the bondholder, the substantial performance of which he is entitled to exact. 1 Dill. Mun. Corp. § 41; Woodruff v. Trapnall, 10 How. [51 U. S.] 190; Curran v. Arkansas, 15 How. [56 U. S.] 304; Van Hoffman v. City of Quincy, 4 Wall. [71 U. S.] 535; Furman v. Nichol, 8 Wall. [75 U. S.] 44; People v. Woods, 7 Cal. 579; People v. Bond, 10 Cal. 563; Brooklyn Park Co. v. Armstrong, 45 N. Y. 234. For the purposes of this motion, it is immaterial whether the contract is a contract with the state of Louisiana or with the city of New Orleans. In the case of Van Hoffman v. City of Quincy, supra, it was held, however, by the supreme court of the United States, that under like circumstances, both the state and the corporation were bound. It is also unnecessary to consider whether or not some of the relief prayed for by the bill must be sought by mandamus after judgment, and not by bill in equity.

The only question which the court is now called on to decide, is this: The city of New Orleans having collected and set apart, as required by the act of 1852, a fund to pay the interest on the consolidated bonds, can the city be enjoined from appropriating the fund to any other purpose, without the consent of the bondholders? In my judgment, there is no doubt that the city can be thus enjoined. The money specially collected to pay this interest is deposited in bank to the credit of the fund for that purpose. This money, being the fruits of a contract between the bondholders and the state and city, and having been specially collected under authority of law to pay this interest, and deposited in bank to the credit of a fund set apart for such payment, it is held by the city in a fiduciary capacity, and the trust is imposed upon the city to apply the funds to the object for which they were collected. See authorities cited below. This is a trust which equity can enforce.

Dillon, in his learned work on Municipal Corporations, says, in section 729: "In respect of property held by municipal corporations in trust or clothed with public duties, equity has always asserted its jurisdiction to see that the trusts were performed and the public duties discharged. The jurisdiction of chancery over such municipal corporations is forcibly asserted by the house of lords in an interesting and important case, in which the corporation of Dublin, under act of parliament was the trustee of funds raised from water rates to supply the city with water, and where the bill charging the corporation with breaches of trust and mismanagement was filed by the attorney general on behalf of the inhabitants of Dublin paying water rates." This was the case of Attorney General v. Mayor, etc., of Dublin, 1 Bligh (N. S.) 312. In the case of People v. Ingersoll, 58 N. Y. 35, it was held that if the public corporation, having power to act in a corporate capacity, has by its officers so acted under the laws as to become bound by its obligations, the debt has become a corporate and county charge, and the moneys, the fruits and proceeds of the obligation are trust funds, subject to the control of the governing body of the corporation under the general laws of the state. So it was held in the case of Attorney General v. Corporation of Lichfield, 11 Beav. 120, that the borough fund created under the municipal corporation act is a trust fund, and the court of chancery has authority and jurisdiction to compel the parties who receive and apply the fund to account for the sums they receive and the application of them, and, that

the court has jurisdiction if it be expedient and the case require it, to restrain the application of money collected by rates to costs, debts and expenses incurred prior to making the rates. The case of Trevillian v. Mayor, etc., of Exeter, 5 De Gex, M. & G. 828, was this: A corporation raised money under an act of parliament on mortgages of the tolls and additional works of a canal, and acting on what the court of appeal (differing from the court below) decided to be an erroneous construction of the act, applied part of the money so raised in paying off old mortgages affecting other property of the corporation. On the tolls and additional works being an insufficient security, held that the new mortgagees were entitled to follow their money so far as it had been erroneously applied, and to stand in place of the old paid off mortgagees as against the other property of the corporation. So in Attorney General v. Mayor, etc., of Dublin, supra, it was held that where there is any fund created for the purpose of being applied to some public purpose, which fund is vested in a corporation, the court of chancery has, by its original inherent jurisdiction, a right to see to the due application of the fund. The court of chancery will always lay hold of any breach of trust in relation to the administration of property, let the party guilty of it be either in a public or private capacity. Charitable Corporation v. Sutton, 2 Atk. 406. See, also, Attorney General v. Eastlake, 21 Eng. Law & Eq. 43; Sturge v. Eastern Union Ry. Co., 7 De Gex, M. & G. 158.

On these and many other authorities that might be cited, I feel justified in holding that the tax collected and deposited under the act of 1852, to pay the interest on the consolidated bonds, is a trust fund in the hands of the city authorities to be applied to that purpose and no other, and that, if there is any danger that the fund will be diverted to other purposes, the complainants are entitled to their injunction to restrain such diversion. On consideration of the pleadings and affidavits in this case, I cannot shut my eyes to the fact that there is danger of the application of this fund to purposes other than that for which the law authorized it to be collected. It seems, however, that some of the holders of the consolidated bonds have consented to receive half the interest on their bonds, and to allow the city to use the other half for other purposes. It is their right to make this agreement, and the court will not interfere with it. The city ought to be restrained only from diverting so much of the fund as may be necessary to pay the interest on the bonds, the holders of which do not consent to the terms of Ordinance No. 3190, administration series. A preliminary injunction must issue accordingly. It will be also ordered that should there be any further default, the complainants may renew their motion for a receiver.

In the argument upon the motion for injunction, it was claimed by counsel for the city that the act of 1852 was in violation of the constitution of 1845, which was in force when that act was passed, and which declared (article 127), "that taxation shall be equal and uniform throughout the state." The provision of this act of 1852, which is deemed to contravene this constitutional requirement, is this: "The rate per cent. of said tax (tax to pay interest on consolidated debt) in each municipality shall be in proportion to the indebtedness of each." I cannot see any conflict between the law and the constitution. As at present advised, I do not think the objection to the law well founded.

[This cause was subsequently heard at the same term, for final decree. The preliminary injunction was made perpetual, but the other relief asked for in the bill was denied. Case No. 8,940.]

Case No. 8,940.

MAENHAUT v. NEW ORLEANS.

[3 Woods, 1.] [1]

Circuit Court, D. Louisiana. Nov. Term, 1876.

CONSTITUTIONAL LAW—LEGISLATIVE ACT—BONDS—CONTRACT—REMEDY—PRIORITY OF PAYMENT.

1. The act of the legislature of Louisiana, approved Feb. 23, 1852 [Acts La. 1852, p. 53], by authority of which the consolidated bonds of the city of New Orleans were issued, and which declared that a special tax should be annually levied on real estate and slaves, to raise the sum of $650,000 to be applied to the payment of the principal and interest of said bonds, is a contract with the bondholders, and remains unaffected by any subsequent legislation which seeks to impair or repeal its provisions.

2. The remedy of the bondholders for the enforcement of the contract contained in said act is at law.

3. Under the provisions of said act the holders of consolidated bonds are not entitled to priority of payment over other bondholders out of all taxes raised on real estate.

4. The bare fact that the consolidated bonds were older than bonds subsequently issued gives their holders no advantage over the holders of the bonds of later date.

[This was a bill in equity by Rosalie Maenhaut against the city of New Orleans for a preliminary injunction, and for the appointment of a receiver. The injunction was granted, restraining the city from diverting to other purposes the tax levied and collected for the purpose of paying interest on city bonds. Case No. 8,939. The case is now heard for final decree.]

John A. Campbell and E. Bermudez, for complainants.

B. F. Jonas, City Atty., and H. C. Miller, for defendant.

WOODS, Circuit Judge. The complainants are holders of bonds issued by the city of New

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

Orleans by authority of the 37th section of the act of the legislature, approved Feb. 23, 1852. The bonds issued represent what is designated as the consolidated debt of New Orleans. The act declares that "the common council shall annually in the month of January pass an ordinance to raise the sum of six hundred thousand dollars" (this sum was increased by an act approved the same day to the sum of $650,000), "by a special tax on real estate and slaves, to be called the consolidated loan tax. * * * At the end of each and every year any surplus of the consolidated loan tax remaining in the treasury after the payment of all the interest and the expenses of the management of the debt, shall be applied to the purchase from the lowest bidder of such bonds issued under this act as have the shortest time to run." The act further provided that all ordinances, resolutions or other acts passed by the city council after the first day of January in each year should be null and void, unless the ordinance imposing the consolidation loan tax should have been previously passed. The act further provided that, after its passage, no obligation or evidence of debt of any description whatever except those thus authorized should be issued by the city of New Orleans, or under its authority, nor should any loan be contracted unless the same should be authorized by a vote of a majority of the qualified voters of said city. About $10,000,000 in bonds were issued under authority of the act, of which there are still outstanding over $4,142,000, and the complainants hold a part of this issue of bonds. The bill charged that there had been collected by the city authorities and deposited to the credit of the consolidated loan, the sum of $174,000, and asked for an injunction restraining the city from diverting this fund to any other purpose than the payment of the interest on the consolidated loan. It appears, from the report of the master, that for a long period after the passage of the act of 1852 collections of taxes were made and applied with regularity under the provisions of the 37th section of the act; that subsequently, for a number of years, there was no attempt to levy and collect the tax required by said section; that large sums collected under the act were misapplied and used by the city for other purposes than those prescribed by the act; that in 1872 the legislature passed an act to postpone the levy and collection of the tax for the sinking fund to pay the principal of the consolidated bonds, but provided for the payment of the interest; and finally, that in 1876 the legislature passed an act authorizing what was called the premium bond plan for paying the city debt, and repealing all laws for the levy and collection of the tax authorized and required by the act of 1852

On a former hearing an injunction was allowed, as prayed in the bill, forbidding the city from diverting to any other object the taxes collected by virtue of the act of 1852 for the payment of the interest on the consolidated loan, and the fund so collected has been applied as required by law and the rights of the complainants. On this, the final hearing, it is moved that the court decree that complainants are entitled (1) to a specific performance of their contract with the city contained in section 37 of the act of 1852; (2) to the levy, collection and exclusive application to the payment of the principal and interest of their bonds, of the sum of $650,000, to be levied upon the real estate of the city; (3) to a priority of payment out of the taxes raised by the city upon its real estate, to the extent of $650,000; and (4) to an injunction restraining the city from applying any of its revenues raised or hereafter to be raised by levy on real estate, to the payment of any other debt or demand, until complainants' claims as bondholders have been fully provided for and satisfied.

So far as the first two of these demands of the complainant is concerned, I am of opinion that the act of 1852 above mentioned contains a contract valid and binding on the city, and that the bondholders are entitled to exact the substantial performance of the contract. I have so held upon the former hearing of his case: Maenhaut v. New Orleans [Case No. 8,939]. The 37th section of the act of 1852, constituting as it does a contract between the city and the bondholders, stands unaffected by any subsequent legislation that seeks to impair or repeal its provisions. But the remedy of the complainants to enforce their contract is clearly not in equity, but at law, by the recovery of a judgment on their coupons and bonds, and by the writ of mandamus commanding the levy and collection of the tax required by law. The relief at law is plain, adequate and complete, and equity can not be resorted to. Heine v. Levee Commissioners, 19 Wall. [86 U. S.] 655.

The claim that the complainants are entitled to priority of payment out of all taxes raised on real estate, and to an injunction forbidding the application of taxes so raised to any purpose whatever until their claims are satisfied, cannot be sustained. The contract between the city and the bondholders contained in section 37 of the act of 1852 does not give the bondholders any priority of payment over other bondholders out of the taxes on the real estate of the city. The contract entitles these bondholders to have levied on the real estate of the city and paid them annually the sum of $650,000, and it entitles them to nothing more. The city may levy on real estate other sums to pay its current expenses or to pay its other debts. These bondholders derive no advantage from the fact that their bonds may be older than those held by other persons. If the city should levy and collect annually $650,000, to apply to the principal and interest of the issue of bonds held by complainants, and should so apply it, the contract of the city would be fully performed. The complainants would have no right to say that the city could not levy other taxes on its real estate

or pay such taxes in any order it chose. The questions presented by this part of the prayer for relief were discussed in the case of Ranger v. New Orleans [Case No. 11,564], and a result reached adverse to granting the relief prayed. The injunction allowed pendente lite will be made perpetual. All other relief prayed for must be refused.

MAFFET (CAMBIOSO v.). See Case No. 2,330.

MAGAURAN (COWAN v.). See Case No. 3,292.

McGAVICK (PICKETT v.). See Case No. 11,126.

MAGDALENE, The. See Case No. 2,056.

Case No. 8,941.

In re MAGEE.

[1 Wkly. Notes Cas. 21.]

District Court, E. D. Pennsylvania. Oct. 7, 1874.

BANKRUPTCY—PRACTICE—APPLICATION TO ANNUL ADJUDICATION.

Application [by George R. Magee] to annul adjudication, all known creditors having assented thereto in writing, and no warrant having issued.

THE COURT ordered the vacation of the order of adjudication, upon proof of assent of all known creditors, and publication of the notice of the application for annulment.

Case No. 8,942.

MAGEE v. CALLAN et al.

[4 Cranch, C. C. 251.] [1]

Circuit Court, District of Columbia. Nov. Term, 1832.

BAIL—CIVIL ACTION—JOINT AND SEPARATE—BAIL FOR ONE—AFFIDAVIT.

1. Upon attachment of the goods and effects of both and each of two joint debtors, bail must be given for both, to release the joint and separate effects.

2. Bail will not be received for one only to discharge his separate goods.

3. The court will not, upon affidavit, decide whether the effects attached are the joint or several property of the defendants.

This was an action at law by Peter Magee against James Callan and Andrew Clements.] Attachment on warrant, under the Maryland act of 1795, c. 56, of the joint and separate effects of the defendants, for a joint debt; laid in the hands of the Chesapeake & Ohio Canal Company as garnishees.

Mr. Marbury, for Clements, one of the defendants, offered bail and an appearance for him, to discharge his separate effects.

C. Cox demanded bail for both defendants; for bail for one would discharge the joint as well as separate property attached.

THE COURT (MORSELL, Circuit Judge, contrà, or at least doubting,) refused to permit one of the defendants to appear and give bail, unless bail and appearance be entered for both. The joint effects are attached to compel the appearance of both; and ought not to be given up without the appearance of both; and the defendants cannot be permitted to appear without good bail.

On the next day, Mr. Marbury offered an ex parte affidavit of Mr. J. P. Ingle, the clerk of the canal company, that the company had no joint effects of the defendants in their hands, but had the separate effects of each; and moved again to appear and give bail for Clements alone, so as to discharge his separate effects, and contended that he had a right, in this manner, to show that no joint effects were attached; and that, in an attachment against a partner for his separate debt, his share or interest in the joint effects may be attached. Campbell v. Morris, 3 Har. & McH. 553, and Wallace v. Patterson, 2 Har. & McH. 463.

THE COURT, however (MORSELL, Circuit Judge, absent), said that the affidavit of Mr. Ingle could not be received as sufficient evidence to the court, in this stage of the cause, that the effects in the hands of the canal company are not joint effects. The plaintiff had a right to have that question tried, either upon interrogatories, or by a jury, upon the issue of nulla bona; and this court could not, in this manner, deprive him of that right.

Bail was then given for both, and the attachment dissolved.

Case No. 8,943.

MAGEE v. DENTON et al.

[5 Blatchf. 130.] [1]

Circuit Court, N. D. New York. Jan. 7, 1863.

TAXATION—INCOME—DIVIDENDS—ILLEGAL ASSESSMENT—REMEDY.

1. Under the internal revenue act of July 1st, 1862 (12 Stat. 432), when a dividend has been declared by an incorporated company, and become payable, its amount is to be regarded as forming part of the taxable income of the stockholders of the company, even though they do not call for and receive the dividend.

2. If an assessment of income tax under that act is not made in legal form, the remedy of the person aggrieved is at law, and not in equity.

3. If such assessment is made in legal form, the party aggrieved must pursue the remedy provided by section 93 of the act, before he can resort to a court of equity for relief.

This was an application for a provisional injunction, to restrain the defendant [Seymour F.] Denton, as a collector of internal revenue, from collecting $1,500 of the income tax assessed against the plaintiff [John Magee] un-

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

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

der the internal revenue act of July 1st, 1862 (12 Stat. 433). The bill showed, that the plaintiff made, in due form, a particular statement of his income for the year 1862, and verified the same by his oath; that the statement was then delivered to the proper assistant assessor, who increased the taxable income shown by that statement, by the addition to it of $30,000, on the assumed ground that the plaintiff's share of the profits of a mining company in which he was the principal stockholder, amounted to that sum, and had not been included in the statement; that the plaintiff objected to this increase, and offered to show, by his oath, that he had received no profits or dividends from the company, and that it was an incorporated company, and had expended all its profits for the year in the improvement of its property, by opening a mine, &c.; that the assistant assessor persisted in maintaining the propriety of such increase, and the assessor, on the question being presented to him, also refused to strike the increase from the assessment; that the assessor consented to submit the matter to the commissioner of internal revenue, and the case was presented to him, in an argument, by the counsel for the plaintiff, the question before both the assessor and the commissioner having been understood to be, whether a stockholder of an incorporated company, which had made profits during the year 1862, and had expended such profits in repairs or improvements, or in the purchase of stock or other property, instead of making dividends to its stockholders, could be taxed for his share of such profits, as part of his income for that year; and that the commissioner decided the question in the affirmative, and the assessor refused to strike the increase made by the assistant assessor from the assessment, but returned the original assessment to the collector without modification. The bill was filed against the collector, the assessor, and the assistant assessor.

HALL, District Judge. In the view I take of this case, the motion for an injunction must be denied, without reaching the question of the original liability of the plaintiff to be assessed for such profits of the company as had not been embraced in any dividend declared by it. If the plaintiff's counsel is correct in the position that the profits of an incorporated company, itself an artificial person, are not, in the contemplation of the act of congress, a portion of the gains, profits, or income of the stockholders, until they are distributed as dividends, or embraced in a dividend declared by the managers of the corporation, I think it quite clear that, when a dividend has been declared and has become payable, the mere omission of the stockholder to obtain or receive the dividend subject to his call, would not excuse him from embracing the amount of such dividend in his statement of his taxable income for the year. The bill does not show that no dividend had been declared; and that fact should have been directly and explicitly stated, in order to entitle the plaintiff to an injunction. The bill, in regard to this point, only states that the plaintiff, during the year 1862, never received anything from said incorporated company by way of dividends on his shares, or otherwise. This statement is not necessarily untrue, even if the dividends actually declared on the plaintiff's stock during that year amounted to the sum of $30,000.

Another objection is, that the plaintiff had a perfect remedy under the statute, and failed to avail himself of that remedy, and that no reason for such failure, of a character to give a court of equity jurisdiction to relieve him, appears on the face of the bill. The wrongful act, if any, of which the plaintiff complains, is the addition of $30,000 made to his income statement by the assistant assessor. If this has not been made in such form and mode as to give the legal right to levy and collect the tax therefor, that objection must be urged in a court of law and not in a court of equity. If made in legal form, the act of congress gives the right of appealing to the assessor, and provides, in substance (section 93), that if the list or return of any party shall have been increased by the assistant assessor, he or she may be permitted to declare, under oath or affirmation, in the form and manner to be prescribed by the commissioner of internal revenue, the amount of his or her annual income liable to be assessed under the act, and that the same so declared shall be the sum upon which duties are to be assessed and collected. In the view that the plaintiff's counsel takes of this case, the plaintiff could have made the oath thus required, or rather which the law thus permitted him to make, and, if the assessor had refused to strike the wrongful increase from the assessment, the plaintiff could have had his remedy. As the assessor had no discretion, and would have been bound, on the presentation of such an oath, to strike the addition from the assessment, it is probable that the plaintiff might have had a remedy at law by mandamus, if the assessor had refused to perform the duty; and it is certain that, if he would have had no remedy at law, he would have had one in equity. The right to make this oath, and thus to become entitled to have the assessment corrected, must be fatal to the plaintiff's prayer for relief in this suit, unless his neglect to make such oath be excused by some allegation of fraud, accident, or mistake, giving jurisdiction to a court of equity. It is like the case of a defendant in a suit at law, who has neglected to appear and establish a legal defence in that suit, when he had an opportunity to do so, and has then resorted to a court of equity to set aside the judgment.

It was suggested, on the argument, that the making of the oath prescribed by the 93d section would not have changed the aspect of the case, because the making of it would

have been but the reiteration of the oath already taken and furnished to the assistant assessor, and because, on the ground assumed by the assessor and by the commissioner of internal revenue, the assessor would still have refused to strike the increase made by the assistant assessor from the assessment against the plaintiff. It is true, that the plaintiff's oath, verifying the statement first delivered by him to the assistant assessor, contained nearly, if not precisely, the oath prescribed by the 93d section; but the oath then made and delivered was, it is said, not required by the statute, and, if so, perjury could not have been assigned upon it, even if it had been wilfully false; but, whether that be so or not, as the act of congress requires this oath after the increase has been made by the assistant assessor, and after the attention of the party has been called to such increase, and he has had an opportunity to inquire upon what grounds such increase was made, it is clear that the oath previously taken cannot be made available for the purposes for which the oath prescribed in section 93 is to be made.

The grounds above stated are fatal to the application for an injunction; for an injunction ought not to be granted, in a case of this kind, unless the plaintiff's right is quite clear, and the granting of the injunction is necessary to protect and secure that right.

MAGEE (McNEIL v.). See Case No. 8,915.

Case No. 8,944.

MAGEE et al. v. The MOSS.

[Gilp. 219.] [1]

District Court, E. D. Pennsylvania. Nov. 12, 1831; Dec. 31, 1831.

SEAMEN'S WAGES — FORFEITURE — DESERTION — SHIPPING ARTICLES — CERTAINTY OF VOYAGE — ENTRY IN LOG BOOK — MASTER'S CRUELTY — IMPRISONMENT IN FOREIGN PORT.

1. The shipping articles must declare explicitly the ports at which the voyage is to commence and terminate.

[Cited in The Brutus, Case No. 2,060.]

2. Where shipping articles declare the voyage to be "from Philadelphia to South America, or any other port or ports, backwards and forwards, when and where required, and back to Philadelphia," it is no violation of the contract with the seamen, for the master to proceed from South America to Europe, and affords no justification to them for leaving the vessel.

[Disapproved in Snow v. Wope, Case No. 13,149.]

3. To subject a seaman to the forfeiture of his wages for desertion, according to the provisions of the act of 20th July, 1790, [1 Stat. 131], the prescribed entry in the log book is indispensable.

[Cited in Spencer v. Eustis, 21 Me. 521.]

4. Where the departure of the seamen from a vessel, before the termination of the voyage, is involuntary on their part, or with reasonable cause, or with the apparent assent of the master, they do not forfeit their wages.

[Followed in Jansen v. The Theodor Heinrich, Case No. 7,215. Quoted in The Lilian M. Vigus, Id. 8,346.]

[See The Balize, Case No. 809.]

5. To justify seamen for leaving a vessel, before the termination of the voyage, on account of the cruelty of the master, it must be apparent that they could not remain without extreme danger to their personal safety.

6. Where a seaman is imprisoned by the authorities of a foreign country for a violation of its laws, the costs and charges may be deducted from his wages; but not so when he is imprisoned at the instance of the master of the vessel.

[Cited in The David Pratt, Case No. 3,597.]

7. The imprisonment of a seaman in a foreign gaol, at the instance of the master of a vessel, is only to be justified by extreme necessity.

[Cited in Jordan v. Williams, Case No. 7,528.]

[Quoted in Buddington v. Smith, 13 Conn. 336.]

The libellants [John Magee, Alexander Ware, John Dunderfield, and William Pitt] were seamen on board the ship Moss. They shipped at Philadelphia, as appeared by the articles, on the 2d January, 1830, on board the ship Moss, at the wages of fifteen dollars a month, "on a voyage from Philadelphia to South America, or any other port or ports, backwards and forwards, when and where required, and back to Philadelphia, unless sooner discharged." The vessel sailed on the 3d January, for Buenos Ayres, where they arrived about the 5th March. All the persons on board were put on an allowance of three quarts of water each per day, from the 22d February until they made the land. They sailed from Buenos Ayres, on the 27th June, for Havanna, where they arrived on the 3d September. All the persons on board were put on an allowance of one pound of bread each per day, from the 8th July until they reached the Havanna, but there was plenty of potatoes, vegetables and meat given them. The vessel remained at Havanna until the 30th December, 1830, when she proceeded to Marseilles, thence to Pernambuco, and thence back to Philadelphia, where she arrived on the 10th October, 1831. On the 19th December, 1830, the libellants left the vessel at the Havanna, having first made known their intention so to do to the American consul, without having received the wages then due to them, and without any assistance from the captain to enable them to return to the United States. The libellants declare that during the time they remained on board the vessel, they were not allowed a sufficient quantity of provisions, and were treated with extreme cruelty; during the time they were at the Havanna, Ware and Dunderfield, two of the libellants, were confined in gaol, at the instance of the captain; and they finally left the vessel, because they discovered that the captain was about to

[1] [Reported by John R. Gilpin, Esq.]

carry them from the Havanna to an European port, contrary to the contract as contained in the shipping articles, and also because of the ill treatment they had experienced.

The respondent, Edmund Fennell, who was the master of the vessel, denies in his answer that the libellants were obliged to leave her in consequence of ill treatment or abuse, or because the provisions were insufficient or bad. He alleges that when the two seamen, Ware and Dunderfield, were confined in prison at his instance, it was done with the assent of the American consul, on account of their drunkenness and improper conduct, and on one occasion, when he found that Ware had been put in gaol by the Havanna police, he obtained his discharge and paid the costs, together with the expense of medical attendance which he afterwards required. He further alleges that Magee, Ware and Dunderfield deserted from the vessel; that their desertion was regularly entered in the log book; and that other seamen were hired in their places at higher wages. The account annexed to the libel claims full wages from the time of shipment until the libellants left the vessel; additional wages for the time they were on short allowance; and their expenses from the day they left the vessel till they reached Philadelphia. The respondent, besides alleging an entire forfeiture on the ground of desertion, claims allowance for various sums advanced, for the excess of additional wages paid to seamen shipped in their places after they left the vessel, and for the expenses of their several imprisonments at the Havanna. The libellants were severally examined for each other, to support the allegations of the libel. On the other side, for the respondent, the supercargo of the vessel from Havanna, and the first mate of the ship, who also joined her at Havanna, and other witnesses were produced; their testimony contradicted, or greatly weakened the evidence of the libellants, especially on the subject of the provisions. There was rice on board, which was occasionally served out, also potatoes, and generally the stores of the ship were good, indeed of a superior quality. The accounts also of the severity of the captain were softened and modified.

C. Ingersoll, for libellants.

There has been such a deviation from the voyage contracted for as discharges the seamen from the contract. The words "other port or ports, backwards and forwards," intend only ports in South America. The voyage was "to South America, or, (not 'and,') any other ports." Having gone to Buenos Ayres was a full performance of the articles. "Backwards and forwards," means between South America and Philadelphia. "Any other port or ports," is as general as "elsewhere;" they mean the same thing. By the first section of the act of congress of 20th July, 1790, the articles must declare the voyage and terms of shipment. This was to prevent uncertain and indefinite contracts, or terms of service; to guard and protect seamen against their own heedlessness in signing articles. Can seamen, under the general description of port or ports, be kept indefinitely, and carried to any part of the world? There is no limitation here even of time. Nor is a voyage to Marseilles either subordinate to, or consistent with, the voyage described in the articles. 1 Story, Laws, 102 [1 Stat. 131]; Anonymous [Case No. 449]; Brown v. Jones [Id. 2,017]; The Brutus [Id. 2,060]; Wood v. The Nimrod [Id. 17,959].

Was there a consent or acquiescence on the part of Captain Fennell that these men might leave the vessel? When a forfeiture of wages is insisted on, a clear case must be made out against the seamen. The seventh section of the act of congress of 20th July, 1790, invests the master with certain powers. He is bound to use these and all the means afforded by the law to recover and retain the seamen, before he can resort to forfeiture. The answer of the captain to the mate, when asked if he was about to discharge the seamen, shows either that he was conscious they had a right to go on account of the change of the voyage, or that he was willing to part with them. They did not consider themselves as deserters; neither did the captain so consider them. Will the court then so consider them? They applied to a lawyer for counsel; they appealed to the court of the place where they were, being willing to meet the captain, to have their right discussed and decided; they were sent by the court to the master of the port, and by him to the consul, who gave them a letter to take on board the ship. The captain adopted no measures to bring them back to the ship; he never even asked them to return, although he frequently saw them. They went about at large, making no attempt at flight or concealment. All this was acquiescence in their departure; they might well so consider it. If this was not acquiescence, still there can be no forfeiture unless the captain had done all in his power to compel their return; that is a part of his duty. These men remained constantly within the sight and recall of the captain, without an effort, or even request on his part for their return. Seamen may leave the ship if a voyage is changed. Abb. Shipp. 147, 464; Ordinances of France, bk. 2, tit. 3, art. 4; Thorne v. White [Case No. 13,989]; Crammer v. The Fair American [Id. 3,347]; Hindman v. Shaw [Id. 6,514]; Moran v. Baudin [Id. 9,785].

J. S. Smith, for respondent.

Had these seamen a right to leave the ship at Havanna; had not the captain a right to insist on their going to Marseilles?

The forfeiture of wages does not rest on the act of congress only, but on the prin-

ciples of the commercial and general maritime law. The act of congress provides penalties for two acts of a seaman. 1. Not rendering himself on board. 2. Absence without leave for more or less than forty-eight hours. If a seaman dies immediately after the vessel sails, his representatives may recover for the whole voyage, on the ground of its entirety. In the case of Sims v. Jackson [Case No. 12,890], it is said, "he would have forfeited the whole, if he had left the vessel." This was not under the provision of the act of congress, but by the maritime law.

The act of congress applies to all the libellants except Pitt; as to the rest its directions were strictly complied with. The excuses set up for leaving the ship are now all abandoned, except two. 1. That the ship was going to Europe, which was not authorised by the articles. 2. That the captain acquiesced in their departure.

I. As to the construction of the articles; are they such as the act of congress requires? The contract must declare the voyage, not describe it. It must be declared, that the seamen may know where they have a right to be discharged, and when. The terminus a quo and ad quem must be stated, but not the intermediate ports. This voyage was from Philadelphia to South America, and back to Philadelphia, omitting the intermediate ports. The words or "any other port or ports" must mean ports not in South America, which was already mentioned. Between South America and the other ports they are to go backwards and forwards, where and when required. The voyage ends on their return "back to Philadelphia," the port of final discharge. The voyage performed was in exact conformity with the articles. The ship went from Philadelphia to Buenos Ayres, in South America, thence to Havanna, a port not in South America, and thence to Marseilles, another port not in South America, thence back to South America, and thence to Philadelphia. 3 Kent, Comm. 178; Abb. Shipp. 463, 468.

II. As to the acquiescence of the captain, it rests only on the fact that he saw them on shore and did not order them on board; this too rests only on the evidence of the men themselves. It does not, besides, apply at all to Pitt. The consul certainly ordered them on board; they refused to go. Suppose the captain did acquiesce; that he used no force to bring them back; was he under any obligation to do so? The deserting seaman must come himself and offer to make amends, and to go on board. The captain is not then bound to receive him if he has hired another in his place. It does not appear whether the captain saw these men on shore before or after he had hired others. Ware was put into prison by the police. Abb. Shipp. 136; 3 Hopk. Works, 206; Whitton v. The Commerce [Case No. 17,604].

C. Ingersoll, in reply.

You cannot strike out "or," and put in "and," which is necessary for the respondent's construction of the article. The men were bound to go to South America, "or" any other ports, not "and" any other ports. All after South America is illegal and void for uncertainty. As to the necessity of an entry in the log book, the act of congress fixes the time of absence which shall be deemed to be a desertion and incur a forfeiture. The maritime law has no such limitation. The act also directs the particular mode of proof of such absence; it must be by the entry in the log book.

HOPKINSON, District Judge. The libellants have presented three claims for the decision of the court. 1. For having been put on short allowance. 2. For wages up to the time they left the ship. 3. For additional pay to bring them back to the United States. The respondent rebuts these claims; the first by the denial of the charge; the second and third by charging the libellants with a desertion from the ship and their duty, by which they have forfeited their wages, and of course every claim to an extra allowance. The fact being admitted that they did leave the vessel at Havanna, it is incumbent on them to show a good cause for doing so, or some legal justification to avoid the penalty which otherwise the law will impose upon them. As to Pitt, besides the justification he relies on, in common with the other libellants, he has a further defence against the penalty of forfeiture, in the omission to note his absence in the log book. This has been repeatedly decided to be necessary; and it must be considered to be settled, when a forfeiture of wages is insisted upon, under the provisions of our act of congress. The same law which gives the forfeiture for the absence of seamen, prescribes an evidence by which that absence shall be proved; and the owner who claims the penalty, must conform himself to the proof required of him, by the same authority which gives the penalty.

The general defence which the libellants have to avoid this penalty, is in the allegation, that the ship was going from Havanna to Marseilles, in Europe; that this was a voyage not within the contract; and that they were not bound to go with her. That the breach of the contract was on the part of the captain in taking the ship to a place not within the terms of the articles. The validity of this defence depends upon the construction of the articles, and the obligation entered into by the libellants when they executed them. The voyage described in the articles is "from Philadelphia to South America, or any other port or ports, backwards and forwards, when and where required, and back to Philadelphia, unless sooner discharged." This is certainly a very awkward description of a voyage. South America is spoken of as a port to which they are to go,

"or" to any other port or ports, without any designation of them, whether in Europe or America; but they are to go backwards and forwards, where and when required. It will not do to tie down these contracts, made sometimes in a counting house, and sometimes in the cabin of a ship, to the strict rules of composition. We must endeavour to come at the true meaning of the parties, and to give the contract a reasonable construction; to take care to put upon general words a just and reasonable limitation; but not lightly to destroy and avoid the whole contract because the generality or breadth of the expressions may be in a degree uncertain, or might be used to impose an oppressive service. The court will take care that this shall not be done, and will avoid the whole if they cannot so limit it. In the present case I can see nothing unreasonable or oppressive in the construction the captain has put upon these articles. He took the ship to Buenos Ayres; he then went to Havanna, and from thence to Marseilles; he came again to a port in South America, and then terminated the voyage by returning to Philadelphia. This voyage or these voyages were strictly within the terms of the contract, and, in my opinion, no unjust or oppressive use has been made of the awkward manner in which the contract is expressed.

In the case of Wood v. The Nimrod [Case No. 17,959], I adopted this principle, and I consider it to be in full accordance with the opinion of Judge Winchester, adopted by Judge Story, in the case of Brown v. Jones [Id. 2,017]. In the case in which the opinion of Judge Winchester is given, Anonymous [Id. 449], the articles specified a voyage from Baltimore "to Curracoa and elsewhere," and the respondent contended he had a right to go to St. Domingo without going to Curracoa. There he claimed to go in direct violation of a clear specification or designation of a port named in the contract, and he made the claim under the general words "and elsewhere." It is also on the face of that contract, that although the voyage commenced at Baltimore, it had no ascertained or declared termination, either as to time or place. We have the "a quo" but not the "ad quem." In such a case, where, besides all this, the respondent had rested his defence on his own deception and breach of faith, the learned judge says "the term 'voyage' is a technical phrase, and always imports a definite commencement and end." In our case, this description of a voyage is fully answered; the uncertainty, such as it is, is about the intermediate ports to which the vessel might go. But even in such a case as that which the judge had before him, he would not absolutely reject the terms "and elsewhere," or destroy the whole contract for their uncertainty. He would give them a reasonable meaning and construction consistent with the contract. "They must be construed" he says, "as subordinate to the voyage specified, and can only authorise the pursuing such a course as may be necessary to accomplish the principal voyage." The judge explicitly says, that he would not be understood "to give any opinion that it is essential to the validity of seamen's articles, that there should be an insertion of the name of every port, to which a vessel may proceed, in the course of trade; but there must be some equivalent specification, such as to a port or ports, island or islands in the West Indies." In the present case, the person who shipped these men, swears that the articles were read to them, and they perfectly understood them, and that he has frequently shipped men to go to "port or ports" without mentioning what part of the world they were in.

The libellants have set up another justification for leaving the ship, to wit, the cruelty and barbarity of the captain to them. Some strong evidence has been produced by the seamen in support of this part of the defence. On the other hand there is evidence which softens, but does not remove this charge against the captain. The ill treatment of sailors, by the officers under whose command they are placed, has so frequently been a subject of complaint, that courts have taken pains to explain the law so as to secure full protection and justice to the seamen on the one side, and to discourage unreasonable complaints on the other. Masters and mates of vessels are often coarse and rough men, with very little control over their tempers, and fond of using their power to its utmost. Seamen are also as often insolent, obstinate, and negligent of their duty, and require a strict hand of discipline. Both have the property of others entrusted to them, and it is the object of the law to give as much security as possible to all these interests. The seamen must submit to a reasonable discipline, and to such privations and punishments as are necessary to enforce a faithful performance of their duties, but they must, nevertheless, be treated as men, with the feelings of men, always entitled to the rights of humanity and the protection of the law. To justify the men in leaving their ship in a foreign port, or abandoning their duty at the hazard of loss or ruin to their owners, they must make out a very strong case indeed. Before they resort to this extreme remedy, the necessity for it ought to be extreme, or so pressing that a moderate and reasonable man could not resist it. They should bear much and trust for satisfaction and redress from the law, when they return home, and not, for every excess of punishment, become their own judges and avengers at the heavy expense of the innocent owners, who pay them for their service, and have trusted to their fidelity. The cases on which the courts have justified the seamen, on a plea of cruelty by the captain, in leaving the service and terminating their contract, have been where it was apparent that they could not remain with him without danger and

damage to their personal safety, such as to make a dissolution of the contract necessary. No man can be bound to serve another at the peril of his life.

In the case of Rice v. The Polly and Kitty [Case No. 11,754], there was not only a most wanton and excessive cruelty or beating of the men, but the most dangerous threats of personal injury if they continued on board. They were obliged to leave the ship at Lisbon, in the midst of the voyage and return in another vessel. The question was, whether they had forfeited their wages. The judge said: "When mariners enter into articles for a voyage, they do not thereby put themselves out of the protection of the laws, or subject their limbs or lives to the capricious passions of a master or his mate." There is no doubt much power given by the law to the master, but the law also watches the use he makes of it, and corrects any abuse of it. In that case the libellants had been cruelly beaten and abused; it was necessary to have a surgeon to cure one of them of his wounds and bruises. The captain and the mate were combined, and supporting each other in their barbarity to the men. The master once declared that "he would make them glad to jump overboard before they got to America." The whole crew left the vessel, but did not secrete themselves on shore; they demanded their wages and clothes and applied for process against the captain and mate, who promised to pay them their wages, and recorded the process. The judge did not, it is true, rely on the promise in giving his judgment, but said: "The libellants have not voluntarily deserted, but have been forced from a service in which neither the rights of humanity nor personal safety could be depended upon or even expected."

To forfeit wages there must be a voluntary departure, without reasonable cause. Abb. Shipp. 464. In the case of Limland v. Stephens, 3 Esp. 269, which was one of seamen's wages, Lord Kenyon says: "There are reciprocal duties between masters and servants. Desertion is a forfeiture of wages; but if the captain conducts himself in such a way as puts the sailor into that situation that he cannot, without damage to his personal safety, continue in his service, human nature speaks the language—a servant is justified in providing for that safety. After the plaintiff had been with the consul, he communicated to the defendant the wish of the consul to see him. The captain said, he would go when it suited him. Being pressed by the plaintiff to go, he beat him very severely, and threw a log of wood which hurt his foot. The plaintiff left the ship, and defendant was heard to say, that if he returned he would chain him to the mast, and bring him to Sweden." In reply to an observation made by the counsel of the defendant, Lord Kenyon said: "Is a man bound to serve at the peril of his life? Desertion is an answer to the seaman's claim for wages; but that must be a voluntary act of the seaman's, and not caused by any act of the captain. In this case, the act of the captain has made the dissolution of the contract necessary, and, in my opinion, justifiable on the part of the sailor." This case was decided in 1801. The case of The Polly and Kitty [supra], in which the same principles were adopted, was decided in 1789, by Judge Hopkinson, then judge of the admiralty in this district.

I have quoted these cases so much at large, to show that the cruelty must be extreme and dangerous to justify a sailor in leaving his ship and throwing up his contract. In both the cases cited, there was not only barbarous abuse of the persons of the sailors, but threats of future ill usage of a dangerous violence, which there was good reason to believe would be fully executed. The case of the present libellants has no such features; the captain was a harsh, severe man, but by no means of so brutal a character as those we have alluded to. I do not think his conduct justified the libellants in leaving the ship, or made a dissolution of their contract necessary.

The libellants having failed to justify their leaving the ship, either on account of the alleged change of the voyage described in the articles, or the ill treatment of them by the captain, they have incurred a forfeiture of their wages, unless their remaining ground of defence shall avail them, to wit, the consent or acquiescence of the captain in their departure. The forfeiture of wages earned by a hard and perilous service is a severe penalty, and should be exacted only on a clear legal cause. So it has been considered by the courts, and those who claim this penalty have always been required to show themselves to be clearly entitled to it by the performance, on their part, of all the requisitions of the law. The master of the vessel must throw the fault on the offending seamen; he must deal with them fairly, and honestly, and in good faith. He should neither endeavor to drive them from their duty, nor deceive and entrap these rash and ignorant men into a course of conduct, which he sees may draw upon them the loss of their wages, while they have no such suspicion. If they are really and truly acting under a mistaken opinion of their rights, and not from a dishonest or rebellious disposition, they shall be undeceived, their error should be explained, or at least they should not be drawn or permitted, by an insidious silence or an inattention to their proceedings, to involve themselves in the crime of desertion with its ruinous consequences. A practice of this sort upon sailors, may well be considered as a fraud, and the contriver ought not to gain by it. How were the facts of this case? The libellants left the ship under a belief that they had a right to do so; that the intention to take them to Europe was a breach of the contract, and discharged

them from it. They also thought that the treatment they had received from the captain dissolved their contract. They were mistaken in both points; it was a mistake of the law of their case, and not a mutinous resolution to disregard their contract, and the law which bound them to it. Their conduct shows that they had a sincere confidence in their opinion, and were willing to bring it to a fair test. They make no flight, they seek no concealment, they walk openly about the city, they go to the wharf, they meet the captain without apprehension, they demand their wages of him, they apply to the courts of the country for redress, and in every thing they conduct themselves like men confident in their right. What was the conduct of the captain? He passed them again and again; he took none of the measures the law put in his power to bring them back to the ship and their duty; he did not even order them to go on board. In his conversation with the mate he expressed himself doubtfully as to his intention of taking these men with him, and finally sailed away leaving them to shift for themselves.

In the case of Dixon v. The Cyrus [Case No. 3,930], circumstances by no means as decided as these, were considered as strong evidence of consent on the part of the master to the departure of the seamen. The question of good faith is one hardly capable of direct, explicit testimony. It is an impression, an opinion derived from the whole conduct of the party. The conduct of Captain Fennell in his severe treatment of these men while they were under his authority, and his extraordinary abstinence from every attempt, even the most mild, to bring them back after they had left him, present him to my mind as a man of a violent and severe temper, and wanting in frankness and fair dealing. It seems to me that he was dissatisfied with these men, for they had certainly misbehaved themselves, and was quite willing they should leave the ship; but while he endeavoured to compel them to do so by his severity, and would lull them into security by his entire inattention to their absence, he was indulging himself in the anticipation that he would deprive them each of eleven months' wages. He was not open even to his mate. In a case in which the conduct of the captain was so calculated to deceive and mislead the men, and to induce them to believe he had no desire for them to return to the ship, but acquiesced in their opinion that he had no claim upon them to go with him to Europe; where, too, it is at least doubtful whether he did not design to mislead them for the very purpose of forfeiting their wages on a charge of desertion, I will not deprive them of their reward for services faithfully rendered for the space of eleven months. The owners of this ship have, in these services, received full value for the money demanded of them, and I see no just cause for withholding it.

There is a subordinate question in this case which must also be disposed of. The respondent claims a credit for certain prison fees paid at Havanna for the libellants, or some of them. It appears that, except in the case of Ware, the men were imprisoned by, or at the instance of the captain; but Ware was put in gaol, by the police officers of the city, for some misconduct or offence against the laws of the country. For the money paid by the captain to obtain his liberation from imprisonment he is justly chargeable, and the respondent must be credited with the amount. But no such credit will be allowed against the men imprisoned by the captain for his grievances or complaint. I have declared that I will not countenance the practice of thrusting our seamen into foreign gaols by the captain, through the influence he may have with our consuls or the officers in a foreign port. It is always a most severe punishment, and in some climates dangerous to health and life. The punishments which the law authorises the master to inflict on board of his vessel, by personal correction, by confinement and other privations, are generally sufficient for all the purposes of discipline. It should be only in a case of some pressing necessity, of some danger to the vessel, or her master or crew, that the men should be imprisoned on shore.

Decree: It is ordered and decreed, that the libellants shall recover and have from the respondent, the wages severally due to them, from the time they respectively shipped and entered on board of the said ship Moss, until the time when they respectively left the said ship, and ceased to perform any service or duty on board of her, deducting therefrom all payments made to the said libellants respectively, and all credits to which the respondent is entitled for advances of money or goods; and also deducting from the wages severally due to the libellants, the amount paid by the respondent beyond the amount stipulated to be paid to the libellants, to the hands employed in their places for the remainder of the voyage after the libellants had left the ship. And it is further ordered and decreed. that there be deducted from the wages due to Alexander Ware. the money paid by the respondent to obtain his release from the prison at Havanna, in which he had been confined by the authority of that city for offences against its laws and police; but no deduction shall be made from any of the libellants for or on account of any prison fees, or other costs and charges, induced by or in consequence of their imprisonment by the captain of the ship, or the American consul at his instance. And it is further ordered and decreed, that the several accounts of the libellants be adjusted and paid on these principles, and in case of any disagreement between the parties, be reported and referred to the court for final adjudication.

The several claims of the libellants for short allowance are dismissed, and also their claim of two months' pay to keep them at Havanna and bring them home to Philadelphia.

On the 31st December, 1831, the parties having reported their adjustment of the accounts of the several libellants to the court for a final adjudication, it was ordered and decreed that there be paid by the respondent to the libellants severally, the following sums, to wit, to Alexander Ware one hundred and nineteen dollars and nine cents; to John Dunderfield one hundred and forty-three dollars and thirty-two cents; to John Magee one hundred and forty-nine dollars and two cents; and to William Pitt eighty-four dollars and ninety-seven cents.

Case No. 8,945.

MAGEE v. UNION PAC. R. CO.

[2 Sawy. 447.] [1]

Circuit Court, D. Nevada. Aug. 4, 1873.

REMOVAL OF CAUSES—PETITION—UNDER LAW OF UNITED STATES—MOTION TO REMAND —WHEN MADE.

1. A suit removed from a state court into the circuit court, upon a petition stating that the defendant has a defense arising under a law of the United States, will be remanded when it appears by the defendant's answer that no such defense is claimed or made.

2. The fact that the corporation is one organized under a law of the United States is not, of itself, enough to give the circuit court jurisdiction.

3. Motion to remand may be made before trial whenever there are no disputed facts, and it clearly appears from the record, as well as the admissions of counsel, that the corporation has no defense arising under a law of the United States.

This action was brought in the state court [by John Magee] to recover damages for personal injuries alleged to have been received by plaintiff's wife, while traveling on defendant's railroad, in the territory of Utah, and was removed to this court by defendant, the petition for removal stating generally, that the defendant had a defense to the action arising under a law of the United States. The defendant is a corporation organized under a law of the United States. The cause having been entered here the defendant filed its answer, alleging that the injuries, if any, were received by plaintiff's wife in Utah; that that territory has competent courts to try the action; that its principal place of business was and is in Boston, Massachusetts, and that, therefore, this court has no jurisdiction. Beyond this the answer contains only apt words to deny negligence and unskillfulness, and to aver the exercise of due care. The act of congress, under which the cause was removed, provides that "any corporation * * other than a banking corporation organized under a law of the United States, and against which an action at law * * may be commenced * * for any alleged liability of such corporation, may have such suit removed * * to the proper circuit court of the United States upon filing a petition therefor, * * * stating that they have a defense arising under or by virtue of the constitution of the United States, or any treaty or law of the United States, and offering good and sufficient surety," etc. 15 Stat. 227. In this state of the law and the record, the plaintiff moved to remand the cause to the state court, upon the ground that it sufficiently appears that the defendant has no defense arising under a law of the United States, it having pleaded none. To this the defendant replied that, being created by and organized under a law of the United States, every defense it may have is one arising under the law which creates it and gives it all its powers.

Mesick & Wood, for plaintiff.

E. Wakeley and Williams & Bixler, for defendant.

Before SAWYER, Circuit Judge, and HILLYER, District Judge.

HILLYER, District Judge. In Mayor v. Cooper, 6 Wall. [73 U. S.] 247, it was said by the supreme court, that "two things are necessary to create jurisdiction, whether original or appellate. The constitution must have given to the court the capacity to take it, and an act of congress must have supplied it." The defendant being a United States corporation, the constitution has given this court the capacity to take jurisdiction of actions to which it is a party. Osborne v. United States Bank, 9 Wheat. [22 U. S.] 738. But it rests with congress to supply it and prescribe the conditions of its exercise. To entitle the defendant to remove a suit, congress has said, in the law now in question, that it shall not only be a corporation organized under a law of the United States, but shall state in its petition that it has a defense arising under or by virtue of a law of the United States. Unless it has such a defense, this case is not properly here. It was said in Cohens v. Virginia, 6 Wheat. [19 U. S.] 264, that a case in law or equity may truly be said to arise under the constitution, or a law of the United States, when its correct decision depends on the construction of either. Following this language, it may be truly said that a defense arises under a law of the United States, when a correct decision upon the merits of the defense depends upon the construction of that law. But it appears in this case, by the admission of counsel, as well as by the record that the defense involves the construction of no law of the United States. A correct decision upon its merits depends entirely upon common law principles, wholly independent of any statute law.

The jurisdiction of this court depends upon the character of the defense, as well as upon the character of the party, and as the defend-

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

ant has no defense arising under or by virtue of a law of the United States, there is a failure of jurisdiction, and the cause must be remanded to the state court. It was suggested that there was a doubt as to this being the proper stage in the case to determine this question upon motion. There are no disputed facts, and it clearly appears from the admissions of counsel and the record—the answer filed—that this corporation has no defense, as we construe the law, arising under a law of the United States. As the question can never be presented more satisfactorily than now, it would only cause unnecessary delay to postpone the decision of the matter until the trial.

The motion is granted, and an order will be entered, remanding the cause to the court whence it was removed.

MAGEE, The SALLY. See Cases Nos. 12,259–12,261.

Case No. 8,946.

The MAGENTA.

[2 Abb. U. S. 495.] [1]

Circuit Court, D. Louisiana. April Term, 1870.

COLLISION—CUSTOM ON RIVER—LOCATION OF LOOKOUT—BOTH IN FAULT—DAMAGES.

1. The custom of steamboats navigating the Mississippi river, in respect to directing their course when meeting each other,—explained.

2. Neglect on the part of a pilot of a river steamboat to lay her course, when approaching another boat, in conformity to the well settled custom of boats plying upon that river; or the failure to keep a proper lookout,—e. g., when (especially at night) the man on the lookout is stationed in the pilot-house behind the steamer's chimneys, instead of on the hurricane deck, in front of them,—is a fault in navigation which exposes the steamboat to liability for a collision occurring in consequence.

3. Where both of the colliding vessels are in fault for the collision, the aggregate damages sustained by the two should be shared equally between them.

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

E. C. Billings and A. De B. Hughes, for libelant.

R. H. Marr, for claimant.

WOODS, Circuit Judge. About nine o'clock of the night of November 11, 1865, the steamers Brazil and Magenta collided near Bonnet Carre Point, on the Mississippi river, about thirty-eight or thirty-nine miles above the city of New Orleans. The result of the collision was the sinking and loss of the steamer Brazil and cargo. This suit is brought by the owner of the Brazil against the steamer Magenta to recover for the damage sustained.

There is much conflict of testimony in the case; but the following facts are not disputed, or are clearly established by the evidence. The Magenta was ascending and the Brazil descending the river. The Magenta being the ascending boat gave the first signal, to wit, two whistles, indicating her purpose to pass to her own left or port side. This was responded to by the Brazil with two whistles, indicating that she understood the signal of the Magenta, that she assented to it, and her own purpose to pass to her own left or port side. So that, had the signals been observed, each boat in passing the other would have presented to her her starboard side. It is also in proof and undisputed, that the custom or common law of the river is, for ascending boats to run the points, and for the descending to run the bends. In other words, the ascending boat takes her course from the point on one side of the river to the nearest point on the other side, thus enabling her to avoid the obstacle of the current to some extent, and sail in the eddy water near the banks and under the point; the descending boat follows the main channel current, or what is known in the law as the "line" of the stream, following the bends, and thus uses the force of the current as well as her steam power to propel her on her course. It is also established that when the steamers first came in sight of each other the Brazil was in the middle of the river rounding Bonnet Carre Point, which is on right bank of the river, and the Magenta was passing Thirty-Five Mile Point, a mile and a half or two miles below, on the left or east bank. It also appears that the bow of the Brazil collided with the starboard side of the Magenta forward of the wheel; that her bow for a distance of four or five feet on the larboard side and fifteen or twenty feet on her starboard side was knocked off; and that she sunk on the bar on the right bank of the river from one hundred and fifty to two hundred and fifty feet yards from shore.

As to what part of the river the collision occurred at, there is a conflict of testimony between the libelants and claimants. The libelants say it was about the middle of the river, and the claimants that it was near the right bank, and as close to the bar in the right bank as it was safe for the Magenta to run. The weight of the direct evidence upon this point is about equally balanced, but when the probabilities af the two versions, that of the libelants and that of the claimants, are considered, we think the libelants have the advantage. The pilot of the Brazil is not shown to be non compos mentis, and it seems no person, unless insane, piloting a steamer of two hundred tons burden, after assenting to a signal to pass to the larboard, would port his helm and direct his course to the starboard across the river and run into a steamer of one thousand two hundred or one thousand three hundred tons burden. I am forced to the conclusion, therefore, that the collision took

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

place near the middle of the river, and that the Brazil did not change her course.

And here is where her fault lies. Her pilot knew or ought to have known the custom of the river, that ascending boats ran the points. The signal of the Magenta indicating that she intended to keep to the left was notice to the Brazil that the Magenta proposed to cross from Thirty-Five Mile Point, and run up the bank along and under Bonnet Carre Point, and it was his duty, instead of stopping his boat, to put his helm a-starboard and direct his course close in on the left bank of the river. If, when the signals were exchanged, he had done this, a collision would have been impossible.

It is very clear from the testimony, that both the captain and the pilot of the Brazil were inexperienced and unfit to have charge of a boat. With skill and prudence on the part of these officers, I have no doubt that a collision might have been avoided.

But it is just as clear that there was fault on the part of the Magenta. When signals were exchanged between the two boats, the officers of the Magenta must have known, or should have known, that a collision was possible; they intended to cross the river and run up under Bonnet Carre Point; they knew that the Brazil was coming down the current of the river, running the bends according to the custom of descending boats, and it was their duty to have a lookout stationed in such a position, on the boat, as to keep the Brazil in view, and give warning of impending danger. According to the testimony of claimants themselves, this was not done.

Carter, the pilot of the Magenta, testifies: "A few moments after exchanging signals, the lights of the descending boat were hidden from witness by the chimneys of the Magenta; this time was probably half a minute, not more than a minute. When I next saw the lights, I discovered that the Brazil, the descending boat, was running directly across the river, square across our bow."

Captain Leathers, of the Magenta, testifies that he and both the pilots were in the pilot-house at the time of the collision. If the chimneys of the Magenta hid the lights of the Brazil from the pilot, Carter, they hid them also from the other pilot and the captain. The proper and usual place for the lookout was on the hurricane deck, in front of the chimneys. No testimony is offered on the part of the claimants to show that a man on the lookout was stationed there, and it is fair to presume that there was none or we should have the fact in the testimony. The pilot-house, behind the chimneys, is not the place for the man on watch, when passing other steamers in the night. If a proper lookout had been maintained on the Magenta, the impending danger of a collision might have been seen, and by good seamanship avoided.

I find, therefore, that both steamers were at fault; that by the exercise of proper watchfulness and skill on the part of either, the collision might have been avoided. In such a case, according to the rules laid down by the supreme court in The Catherine v. Dickinson, 17 How. [58 U. S.] 170, the loss must be divided.

The damage to the Magenta was, according to Captain Leathers, from three to five hundred dollars; and he is the only witness that speaks to the point. I put the damages, therefore, at three hundred dollars.

The testimony as to the damage occasioned by the loss of the Brazil is very conflicting; but after a careful review of the testimony, I am satisfied the court below fixed the damage very near the correct amount, namely, twelve thousand dollars. From one-half this amount, to wit, six thousand dollars, should be deducted the one-half of the estimated damage suffered by the Magenta, namely, one hundred and fifty dollars, leaving the sum of five thousand eight hundred and fifty dollars as the amount of the decree in favor of libelant against the Magenta. Let a decree be entered accordingly, each party to pay his own costs. Decree accordingly.

Case No. 8,947.

The MAGGIE JONES.

[1 Flip. 635;[1] 5 Cent. Law J. 263.]

District Court, E. D. Michigan. March 12, 1877.

PRACTICE IN ADMIRALTY—AMENDMENT—COLLATERAL SECURITY—STAY—DISCHARGE OF SURETY.

1. If a libel is amended by adding a co-libellant, this does not discharge the surety on the stipulation.

[Cited in U. S. v. Mosely, 8 Fed. 691.]

2. After commencement of suit and seizure and bonding of the vessel libellants took notes and mortgages of the owners, payable at different times within six months, as collateral security: *held*, that this did not operate to arrest or stay the suit, nor was the surety discharged.

[Cited in The Theodore Perry, Case No. 13,879.

Libel for towage by the tug E. M. Peck, which boat libellants owned. John P. Clark, the respondent, was surety upon the stipulation to answer judgment. The original libel was filed in one name only and the stipulation of surety was given to answer this libel, and "to abide the result of said cause." After seizure of the schooner libellants received from the owner of the schooner promissory notes covering the claim as, also, other claims against her, the payment of which was secured by a mortgage upon the schooner. The notes and mortgage were given as collateral security only for the claims and not in payment or extinguishment, it being understood that the lien upon the schooner should re-

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

main in full force. The draft which was the basis of the libel was not surrendered. Respondent knew nothing of this last transaction. The first note was paid, the others were not. In May, 1875, the schooner was seized under the mortgage but was released with the knowledge of, and without objection from, respondent. At the same time a bill of sale of the schooner was made to respondent to secure him, amongst other things, against this liability on the stipulation, and the schooner went into his possession. The stipulation of respondent covered other claims besides this; he had paid all decrees against him in all cases against the schooner except this one; had been subrogated to the rights of these libellants, and had an execution issued under which the schooner was seized. The bill of sale was given to effect her release, as well as upon that under the mortgage. The seizure under the execution was prior to the seizure under the mortgage. The vessel in twenty days thereafter was libelled in Buffalo and sold, and respondent lost all security he might have had under his bill of sale.

E. E. Kane, for libellant.
H. C. Wisner, for respondent.

BROWN, District Judge. After the stipulation in this case was filed, the libel was amended by adding the name of Bradley as co-libellant, he having been part owner of the tug at the time the services were performed. It is insisted that this discharged the surety upon the stipulation. This position is untenable. I regard it as settled by the case of Newell v. Norton, 3 Wall. [70 U. S.] 257, that the undertaking of the surety is practically co-extensive with the liability of the vessel in that particular action, and subject to any amendment which the court has power to make. This power is, however, so far limited that the name of one sole libellant can not be changed for that of another, however the cause of action might remain unchanged, as where a mistake had been made in the name of the owner of a tug. The Detroit [Case No. 3,832]. Still more clearly would the amendment be beyond the power of the court, where a new cause of action was introduced. It was upon this ground that it was held by the supreme court of this state, in Evers v. Sager, 28 Mich. 47, that the sureties upon the appeal were discharged. Regarding this, the court observe (page 52): "If the court had possessed the power to order or allow such an amendment, irrespective of the stipulations of the parties, the sureties would have been bound by its action, because their obligations must be understood as contemplating a possible exercise of such power." See, also, The Harmony [Case No. 6,081]. The addition of a new party, or indeed any other amendment which the court has power to make in the original action, has usually been held not to affect the undertaking of a surety. King v. Holland, 4 Term R. 457; Merrick v. Greely, 10 Mo. 106; Miller v. Clark, 8 Pick. 412; Ball v. Claflin, 5 Pick. 306; Seeley v. Brown, 14 Pick. 177. In the case of Fullerton v. Campbell, 25 Pa. St. 345, where additional plaintiffs were added after an appeal by defendant from an award of arbitrators, and a scire facias was sued out on the recognizance, reciting a suit in the names of the plaintiff, including those added after the appeal, it was held fatal to a recovery. This was an action of trespass vi et armis at common law, and it may be well said that the surety, while responding for the trespass of one, might not have been willing to answer for that of three. The particular character of the trespass does not appear in the report, and hence it is impossible to say whether the cause of action was in fact changed by the amendment; if it were a mere correction of a mistake (as in the present case the failure to name all the owners of the tug), the case is in conflict with a great weight of authority; if it were practically the introduction of a new cause of action, it is inconsistent with none of the cases above cited. In the light of these opinions, I do not regard it as controlling the determination of the question of the case under consideration.

Were the question an original one, I should feel strongly inclined to hold that the taking of the notes and mortgage of the owner of the vessel, even as collateral security, operated to extend the time for payment of the claim; but I find the rule to be too well settled the other way to be now disturbed. There is a distinction taken in the books, between the cases where the notes are received as conditional payment and those where they are taken as collateral security. In the former, the note clearly operates as an extension of time for the payment of the original debt; in the latter, it is regarded as strictly collateral, as much so as if the security were taken upon the property of a third party, and for an entirely different consideration. The leading case upon this point is that of U. S. v. Hodge, 5 How. [46 U. S.] 282, which was an action brought against the sureties on a bond given to secure the faithful performance of the duties of paymaster. The paymaster, being in arrears, executed a mortgage to the United States, of real and personal estate, to secure the payment of such sum, not exceeding $65,000, as should be found due him on settlement, the payment to be made after the expiration of six months from the giving of the mortgage. The court held that though the mortgage could not be enforced until after six months from its date, yet its acceptance by the government had no effect upon the liability of the sureties upon the bond, inasmuch as it was a collateral security; that, there being no provision in the mortgage that it should suspend the legal remedy on the bond, it could not be successfully contended that it could have this effect;

that, to discharge a surety, the giving of time must act upon the instrument indorsed by him, and that no suspension of remedy upon the bond can be implied from the time limited in the collateral security for the payment of the sum found due.

All the earlier authorities upon this point are reviewed and criticised in the case of Austin v. Curtis, 31 Vt. 64, in which, in a very elaborate opinion, the court held, overruling two prior cases in the same state, that no agreement to delay the collection of an overdue debt is implied from a receipt by the creditor from the principal debtor of a note or other obligation not yet due, merely as collateral therefor. Pring v. Clarkson, 1 Barn. & C. 14; Twopenny v. Young, 3 Barn. & C. 208; Elwood v. Deifendorf, 5 Barb. 405; Day v. Leal, 14 Johns. 404; Emes v. Widdowson, 4 Car. & P. 151.

While, without explanation, I should be strongly inclined to hold, in view of the ordinary course of business upon the lakes, that the taking of a note for a claim of this kind was conditional payment, I am precluded from that conclusion here by the express terms of the stipulation. As the taking of these notes then did not suspend the prosecution of the original suit, and as the mere failure to press the suit with expedition can not be pleaded by the surety in discharge of his obligation, it results that this defense can not be sustained. Irrespective of this, it is at least doubtful whether the taking of a bill of sale after the vessel had been seized upon this mortgage, to secure him for signing the stipulation, would not be such a ratification of the extension as to continue the liability of the surety. A decree will be entered for the libellants for the amount of their claim and interest.

Case No. 8,948.

MAGIC RUFFLE CO. v. DOUGLAS et al.

[2 Fish. Pat. Cas. 330; Merw. Pat. Inv. 91.] [1]

Circuit Court, S. D. New York. Feb., 1863.

PATENTS — THEORY OF GRANT — INFRINGEMENT — BURDEN OF PROOF — ORNAMENT — MACHINE FOR MAKING — INVENTION REQUIRED — RUFFLE PATENT.

1. The public who, through the law, secure to the inventor the exclusive property in his invention for a limited period, receive in return either new, more valuable, or cheaper productions during the lifetime of the patent, and, from its expiration, the free enjoyment of any benefits which may flow from it, forever thereafter.

2. The plaintiff's "ruffle patent" is for a new article of manufacture, and the burden of proof is on the defendants to show, to the satisfaction of the jury, that this article was made before the patentee made it. It is not enough that they raise a doubt in the minds of the jury on that point: they must satisfy them of the fact.

3. The word "ruffle," as used in this patent, means "plaited linen, lace, or muslin, used as an ornament, as for the neck, breast, or wrist," or, as a wider sense, "fine cloth ruffled," that is, ornamentally ruffled.

4. The superior beauty of an ornament, and the rapid sale of the article, are important tests of its utility.

5. If the patentee has so described his new article that it can be made without invention, and has then, bona fide, attempted to describe the best machine for making it, and has failed to describe a practical device, such failure does not avoid the patent unless it be the result of fraudulent intent.

6. A subject-matter to be patentable must require invention, but it is not necessarily the result of long and painful study, or embodied alone in complex mechanism. A single flash of thought may reveal to the mind of the inventor the new idea, and a frail and simple contrivance may embody it.

7. The jury requested to find a special verdict.

This was an action in the case [by the Magic Ruffle Company against Alexander Douglas and Samuel S. Sherwood], tried before Judge Shipman and a jury to recover damages for the infringement of three letters patent. The first, for an "improvement in the manufacture of ruffles," was granted to George B. Arnold, May 8, 1860 [No. 28,244], and assigned to plaintiffs. The claim of this patent was as follows: "The ruffle described, as a new article of manufacture, the gathered cloth A, being secured to the binding B by the single series of stitchers C, which perform the double duty of confining the gathers and of securing the gathered cloth to the binding, substantially as set forth." The second patent, for an "improvement in sewing machines," was granted to George B. Arnold, May 8, 1860 [No. 28,139]. The claim of this patent was as follows: "First. A gathering and feeding mechanism in two distinct parts, so constructed and operated that the gatherer takes hold and moves the cloth up to the needle, leaving it immediately after the stitch is formed, or at the point where it is formed, and the feeder, properly so called, takes hold of and feeds the cloth after the seam is made. Second. I claim the combination of the part E J with the part B G, or their equivalents, operating together substantially as described, and for the purpose specified. Third. I claim regulating the fullness of the gathers by varying the relative throw of the feeding devices substantially as described." The third patent, for an "improvement in sewing machines," was granted to George B. Arnold and Alfred Arnold, September 25, 1860 [No. 30,112], and assigned to plaintiffs. The claim of this patent was as follows: "First. In a sewing machine, the employment of the separator C, or its equivalent for the purpose of separating two pieces of cloth E and F, and thereby protecting F from the action of the gathering mechanism, substantially as set forth. Second. Gathering cloth and stitching or fastening the gathers on a sewing machine by the combined action of the single feeding device A, presser foot B, and separator C, or their equivalents, substantially in the manner described. Third.

[1] [Reported by Samuel S. Fisher, Esq., and here reprinted by permission. Merw. Pat. Inv. 91, contains only a condensed report.]

Regulating the length of the stitches in the production, of a gathered fabric, by changing the position of the separator C or of C, and the pressure foot B, relatively to the extremity of the path traversed by the feeder A, substantially as set forth."

Glover & Darling and E. W. Stoughton, for plaintiffs.

George Gifford, for defendants.

SHIPMAN, District Judge (charging jury). This suit is brought by the plaintiffs to recover damages for an alleged infringement of certain letters patent, issued in conformity with the act of congress [5 Stat. 117], and purporting to secure to the original patentees the exclusive use of the inventions therein described. The suit embraces three distinct patents, which are easily distinguished by the several names of "Separator," "Double Feed," and "Ruffle" patents. The first named two are for machines, or improvements on machines. The last is for a new article of manufacture, or for an improvement in an article of manufacture. Although the patents were issued to the Messrs. Arnold in the first instance, they subsequently passed into the hands of the present plaintiffs by valid assignments, and whatever rights were originally granted to the patentees now belong to these plaintiffs; and they are entitled to the same redress as the patentees would have been had they still continued to own the patents, and brought the suit themselves.

As I have already stated, the three patents are all embraced in the suit; no doubt, out of abundant caution on the part of the plaintiffs, in order to meet any evidence of infringement of each and all that might be developed on the trial. It appears, however, from the evidence, and is conceded by the plaintiffs, that but two of the patents have been infringed, viz: the separator patent and the ruffle patent. That these two have been infringed by the defendants, there can be no reasonable doubt on the evidence. In other words, there can be no reasonable doubt, on the evidence before you, that the defendants have used a machine, or mechanical contrivance, substantially like that described in the separator patent, the exclusive use to which purports to be granted to George B. and Alfred Arnold, which grant, by assignment, belongs to the plaintiffs in this suit. It is equally clear that they have extensively manufactured ruffles substantially like those described in the ruffle patent, the exclusive right to manufacture which purports to have been granted to George B. Arnold, and which grant belongs, by assignment, to these plaintiffs. You will therefore not be perplexed with what is often a difficult question in patent cases, viz: whether there has been an infringement or not. The great question, then, for the court and jury is, whether or not these patents are valid grants of right? This is the great question, stated as a whole, but a proper examination of the case requires that we should address our attention to several distinct and separate inquiries. I will now point out these several inquiries, and dispose of such of them as properly belong to the court to decide, and submit to the jury such as belong to them to decide.

We will first look at the ruffle patent. The object of every patent is to secure to the patentee, his heirs and assigns, the exclusive property in the invention set forth in the specification, free from all control or invasion by others. The patent is granted upon inquiry, according to the forms of law, and assumes the patentee to be the original and first inventor, and therefore gives him the exclusive property in his invention, for the benign and just object of rewarding him for his creative labors and ingenuity, and stimulating the inventive genius of others. The exclusive property in his invention is secured to him only for a limited period, subject, on certain conditions, to a limited renewal. After that, his invention becomes the property of the public. The public who thus, through the law, secure to the inventor the exclusive property in his invention for a limited period, receive in return either new, more valuable, or cheaper productions during the lifetime of the patent, and from its expiration the free enjoyment of any benefits which may flow from it forever thereafter.

Now let us examine this ruffle patent, and see what it purports to grant. This is a question of law, to dispose of which belongs to the court, and not to the jury. This patent is simple, and I can not better describe the invention than to adopt the language of the claim, and say, that it purports to grant the exclusive right to manufacture and sell "the ruffle therein described, as a new article of manufacture, the gathered cloth A (the ruffled strip) being secured to the binding B (the band), by the single series of stitches C, which perform the double duty of securing the gathered cloth to the binding substantially as therein set forth." The distinguishing features of this article, by which it is materially different from all other ruffles known before, are the single series of stitches, and the unvarying regularity of the plaits, or gathers—thus dispensing with the gathering thread, avoiding the injurious process of whipping or scratching the fabric with a sharp needle, and the perforations in the ruffled piece which the needle and thread make in gathering, before sewing on the band, and by pulling out the thread after it was sewed on, or in case the thread was left in, by dispensing with its presence. I repeat, the ruffle patented differs from those that existed before, by the uniformity of the plaits, and by the absence of all whipping or scratching with the needle, with all perforations, except those made by the permanent stitches, and by the absence of an appendage in the shape of a useless thread, in the ruffle after it was finished. The regularity of the plaits, it is obvious, improved the beauty of the fin-

ished article, and the employment of only one series of stitches, one stitch of the series being struck through each plait at the instant of its formation, dispensed with the effect of the whipping process, with the perforations made by the needle in running the old gathering thread, and effectually dismissed the thread from the finished article, wherever it was formerly left in. It is the exclusive right to manufacture this article that this patent purports to grant to Mr. Arnold.

The patent is prima facie evidence that he was the original and first inventor of this article. The defendants deny this, and allege that the same article was made before the plaintiffs or the patentee made it. The burden of proof is on the defendants to show to your satisfaction that this article was made before the patentee made it. It is not enough that they raise a doubt in your minds on that point: they must satisfy you of the fact. The evidence which they offer relates to three kinds of ruffles, viz: old ones made by hand, those made by Chittenden at New Haven, and the bustle tops on Union skirts made by the defendants.

As to the old style of ruffles made by hand, it is difficult to discover from the evidence how they could have been made, except by the slowest process, without the gathering thread, and the perforations of the needle consequent upon its use, or how any approach to uniformity of plaits could have been obtained without whipping or scratching the ruffled piece. You have heard all the evidence on this point, and it is for you to determine whether satisfactory evidence has been submitted to you, that hand-made ruffles were like those which I have stated to you this patent describes.

As to the ruffles alleged to have been made by Chittenden on his machine, and by him given to his wife. Precisely what the character of those ruffles was, if they were made before this "magic ruffle," may be somewhat difficult for you to determine. No specimen of them has been shown to you. How—that is, in what precise form—they were made, does not appear. Whatever was done, appears to have been the result of a casual experiment on a machine; and it is for you to say, whether the evidence satisfies you that an article substantially like that described in this patent, was then produced. As I have already stated, the burden of proof is on the defendants, and it is not enough that they raise a doubt in your minds; they must prove the fact to your satisfaction.

As to the tops of the Union skirts made by the defendants. It is alleged that they are ruffles—substantially like the article described in the plaintiff's patent. Mr. Renwick, a very intelligent gentleman, and an expert in mechanics, has stated that he should call them ruffles. That they are ruffles in a certain sense, there can be no doubt, as one part of them is ruffled or gathered cloth on one side, leaving the other side free; so is a lady's skirt ruffled, in a certain sense; or even an umbrella or parasol, when it is closed—for it is ruffled cloth gathered at one end or side, and the other left free when the instrument is closed, except as the whalebones keep it extended in one direction.

This term "ruffle," like many others, is often used in a latitudinarian, and often in a purely metaphorical sense. It is applied some times to the disarrangement of flexible surfaces, as to the wrinkling of a once smooth garment, or piece of cloth, sometimes to the agitation or disturbance of the temper. Lord Bacon once said, on a memorable occasion: "They would ruffle the jurors."

But there is a restricted sense in which the term "ruffle" is used, and it is clear that it was used in this patent substantially in that restricted sense. The best definition of the word in this sense which I can find, is that given by an eminent lexicographer: "Plaited linen, lace, or muslin, used as an ornament, as for the neck, breast, or wrist;" and he adds, as a wider sense, "fine cloth ruffled"—that is, ornamentally ruffled. And the author gives a literary example of this meaning of the term, by quoting from Goldsmith the couplet—

"Such dainties to them, their health it might hurt,
It's like sending them ruffles when wanting a shirt."

Now, gentlemen, in view of this definition, which I understand to be the sense in which the term is used in the patent, and illustrated by the article produced in court by the plaintiff, it is for you, in the exercise of plain good sense, to say whether those skirt bustles of the defendants are fairly embraced within it—whether those bustles, though in a certain sense "ruffled," are the articles secured by this patent, and thus antedate this invention. I think you can have no difficulty on this point.

If you find this "magic ruffle" in the old hand-made ruffles, or in the ruffle Chittenden made, or in this skirt bustle, then, of course, the patent is good for nothing. But if you do not find in these, or in either of them, this "magic ruffle," which the patentee claims he first made, and which, upon the evidence, he undoubtedly first introduced into the general market, and to the notice of the trade, then the plaintiffs are entitled to a verdict—provided that it is useful. Of its utility, in the legal sense, you can have no doubt. The superior beauty, and rapid sale of the article, is shown on all sides. The beauty of an ornament is one great test of its utility.

A point of law has been raised as to the validity of this ruffle patent, which I will briefly notice, but it need not trouble the jury. It is claimed that the patent (or specification) must point out a way in which they could be made; and furthermore, that it was the duty of the patentee to point out the best mode known to him, or his patent is

void in its present form. It is conceded that he could cure this defect by a reissue. Now, the rule of law on this subject is this: the inventor is bound so to describe his invention that the article can be made by one skilled in the art, and it is his duty to describe the best mode which he knows. He has carefully described the article; so he claims that one moderately skilled in the use of the needle, and especially one skilled in the art of making ruffles, can not fail to know precisely what is done, and with sufficient care and time could not fail to make the article. I think I could make one myself; and I am sure Mr. Brennan (one of the jurors) who is skilled in the use of the needle, could—give him time. The thing—the "magic ruffle"—is minutely described in all its parts, and the only thing it would seem left for the maker to do, is to fold or plait the cloth evenly, hold it in its place, and stitch it to the band. I grant that this work could not be done rapidly, without the use of some mechanism, but that it could be done with care, operative skill, and time, without invention, there can, I think, be no doubt. Now, the patentee did not intend that it should be done without the use of his improved mechanism, and, as was his duty, he described what he regarded as the best mode, viz: by the use of his double-feed machine or mechanism. It is claimed by the defendants that he has failed in the description of his machine as a practical device. Now, for the purpose of deciding this question, I assume that he has thus failed. What effect does this failure have on his patent? Does it make it void? I answer no, unless he has done it fraudulently, and there is no evidence of fraudulent intent. His attempt to describe his double-feed machine must be deemed, in the absence of any proof to the contrary, to have been made in good faith; otherwise, we must suppose that he intended to make his double-feed patent void by his own act. He having, therefore, so described his ruffle that it can be made without invention, and bona fide attempted to describe the best mode, and failed, does not avoid his patent. Therefore the jury need not trouble themselves with this question. To restate the question for the jury, then, touching this patent for the ruffle, they will inquire: was this magic ruffle a new article of manufacture, or an improved article of manufacture (it is immaterial which we call it), and was the patentee the first to produce it? If it is a new article, and he was the first to produce it, and it was useful, then the plaintiffs are entitled to a verdict irrespective of any question touching the machines, and to such damages as they have actually sustained by the manufacture of the article by the defendants. If you are agreed on this point, of the novelty, usefulness, and first invention by Arnold, of this "magic ruffle," I repeat the plaintiffs are entitled to a verdict, whatever your opinion may be with regard to the priority of the invention of the separator improvements to the sewing machines. If, however, you should find that the patentee was not the first inventor of this "magic ruffle," then it will be necessary for you to find that he was the first inventor of the separator arrangement before you can give the plaintiffs a verdict; and I think you had better pass upon this question, if you can agree upon it, even if you agree for the plaintiffs on the ruffle patent: and if you bring in your verdict for the plaintiffs, I will inquire of you, how you find on this question of the prior invention of the separator? But whether you can agree or not, on this point, still the plaintiffs will be entitled to a verdict at your hands, provided you find on the ruffle patent in their favor.

I need not describe the invention, as set forth in the separator patent. It has been shown to you, operated in your presence, and fully explained; whosesoever it was, it was a simple but happy conception, which, when reduced to practice, produced surprising results, both in the quality of the article manufactured and the rapidity with which it was turned out. A subject-matter to be patentable must require invention, but is not necessarily the result of long and painful study, or embodied alone in complex mechanism. A single flash of thought may reveal to the mind of the inventor the new idea, and a frail and simple contrivance may embody it. Some inventions are the result of long and weary years of study and labor, pursued in the face of abortive experiments and baffled attempts, and finally reached after the severest struggles, while others are the fruit of a single happy thought. All that can be said on the score of invention against this separator device is, that it belongs to the latter class. But that it was an invention within the meaning of the law, there can be no doubt. The only question is: whose invention was it? Was it Douglas'? or was it Chittenden's? or was it the Arnolds'?

The patent is prima facie evidence that it was the Arnolds' invention, and their joint invention, as the patent is issued to them jointly, inasmuch as there has been no proof inconsistent with the idea that it was their joint product. The burden of proof is on the defendants to show you satisfactorily that it was the invention of some other person. Now I intend to allude only briefly, and in general terms, to the evidence on these points. The defendants claim that they have shown by direct evidence that Douglas first invented and used the separator. You remember the witnesses and the comments of counsel.

The plaintiffs claim that they have proved by direct evidence facts entirely inconsistent with any such conclusion; and they insist especially, that the fact that there was concealment of the defendants' names as the makers, that they screened themselves behind Oakley, and that Douglas took out a patent for his binding gauge, after, he alleges,

he had invented the separator, and had used it in connection with the gauge, with an immense saving of labor, and omitted all mention of it in his patent, and all attempts to patent it separately, are utterly inconsistent with the idea that it was his invention. On the bearing and force of all the evidence upon this point, you must decide.

Did Chittenden first invent and use the separator? Chittenden's device is not claimed to have been invented before the summer of 1859. Arnold and Mrs. Price state explicitly that the separator was applied to her machine by Arnold in the summer of 1858, before they went to Coleman for the purpose of having a model made, in order to apply for a patent, which was in August, 1858. It is for the jury to say whether they state the truth. They state in detail the character of the device and its surprising effects. Now, if they state truly, and the jury find that the conception of this invention was complete, and its success demonstrated at that time, as stated by them, they can have no difficulty in fixing the date of Arnold's invention prior to that of Chittenden's, assuming this to have been made in the summer of 1859, which he and Mr. Winchester fixed as the date of his. The reason why a delay was made in taking out the patents they allege was the erroneous information obtained from Coleman.

It is for you to determine upon the whole evidence on this point whether the defendants have shown you satisfactorily that either Douglas or Chittenden antedated this invention. If they have not satisfied you, then the plaintiffs are entitled to a verdict on this patent. But if you are satisfied that the Arnolds were not the first inventors of the separator, and you are satisfied that George B. Arnold was the first inventor of the magic ruffle, the plaintiffs will still be entitled to a verdict.

The only remaining question is that of damages. The rule and amount of damages in this case must be the same whether you find for the plaintiffs on one or both of the patents (separator and ruffle patents), and that is, the damage actually sustained by the plaintiffs. It is generally somewhat difficult to ascertain precisely how much the owner of a patent has been damaged by the infringement of another, and I shall endeavor to simplify the inquiry in this case at some risk of doing injustice to the plaintiffs. The jury will have as a basis to start upon, the quantity sold by the defendants according to their own admission, 1,244 boxes; and they will inquire whether or not they are satisfied that the plaintiffs were prevented from selling that number of boxes by those sales of the defendants. If they were, then the plaintiffs have a right to recover the amount of profits of which they were deprived by the defendants' sales. They insist they were thus deprived of selling these 1,244 boxes, and that the profits which they thus lost were equivalent to $\$2^{15}/_{100}$ per box. The jury must decide. If they lost, in round numbers, $2 per box in 1,244 boxes, this would give them the right to recover $2,488. But the plaintiffs claim that from the whole evidence the jury ought to find that the defendants made larger sales, and thus damaged the plaintiffs in a still larger amount. The jury are to determine this; but they should proceed with caution in this part of the case, and give no more damages than they think the proof warrants them in concluding that the plaintiffs have actually sustained.

This is an important case to the parties, but requires for its proper disposition only unbending impartiality and straightforward good sense. Every person may be compelled, at some time in his life, to struggle in a court of justice for his rights, and no higher felicity attends human action than that which flows from the upright and just discharge of the duty of triers.

Mr. Gifford: I deem it my duty to call the attention of the court to two points. One is a point in which I think the court has overlooked the evidence. Mr. Chittenden made ruffling upon the machine in the presence of the jury. That was intended as a specimen of the ruffle he made upon the same kind of machine in the summer of 1859.

The other point respects the construction of the ruffle patent. I ask your honor to charge the jury that the claim of the ruffle patent is not limited to regularity of plaits in the ruffle produced, but includes ruffles with irregular as well as regular plaits. And further, I will ask your honor to charge that the gathering thread in the old ruffle was only a means of making the article, and when made and taken out formed no part of the manufactured article.

THE COURT: I called it a "useless thread."

Gentlemen (to the jury): The counsel for the defendants has called my attention to that portion of my remarks in which I stated that it might be difficult from the evidence to determine how the ruffle was made by Mr. Chittenden; and he has called my attention to the fact, that Mr. Chittenden has experimented upon the machine here. That you are to take into consideration, as it appears in the evidence, to show what the character of the ruffling was. I call your attention, therefore, to that fact in connection with the remarks I have already made.

[For other cases involving this patent, see Magic Ruffle Co. v. Elm City Co., Cases Nos. 8,949 and 8,950.]

Case No. 8,949.

MAGIC RUFFLE CO. v. ELM CITY CO.

[13 Blatchf. 151; 2 Ban. & A. 152; 8 O. G. 773.] [1]

Circuit Court, D. Connecticut. Oct. 20, 1875.

PATENTS — LICENSE — AGREEMENT — VIOLATION — VALIDITY OF PATENT—DISCOVERY—ESTOPPEL.

1. Letters patent granted to George B. Arnold, May 8th, 1860, for an "improvement in ruffles," and three other patents, were owned by the plaintiffs, a corporation of New York. They had recovered a verdict in a suit for an infringement of the Arnold patent. The defendants, a corporation of Connecticut, had been infringing that patent. On the 21st of February, 1863, an agreement of license was made between the two corporations, whereby the plaintiffs agreed to license the defendants, under the four patents, to manufacture and sell under such license, exclusively, the ruffle then manufactured and sold by the defendants, and known as "the double ruffle," and to use the patented machines in the manufacture only of the said double ruffle, and whereby, in consideration of said license, the defendants expressly recognized the validity of each of said patents, and agreed to receive licenses as aforesaid under each of them, and expressly agreed that they would manufacture and sell only the said double ruffle, and that the said double ruffle should not be divided by them, and whereby they agreed to submit, at all times, their manufactory to inspection, so that the plaintiffs should be advised of the kind of ruffles which were being manufactured, and to pay counsel in the suit above named, and to retain and pay counsel thereafter in suits relating to and in support of said patents, and to pay one-half of the other expenses of sustaining said patents, and whereby each party agreed to assist the other in suits which might be instituted by either for the purpose of maintaining its rights under either of said patents. The bill in this suit alleged, that, after the agreement of license was made, the defendants continued to make and sell the double ruffle of the kind referred to in the agreement, and also made and sold, in violation of the agreement and of the Arnold patent, quantities of single ruffles, each of which contained the invention described and claimed in said patent, and prayed for a disclosure by the defendants of their profits and of the number of yards of single ruffle containing said improvement which they had made and sold, and for the payment of such profits and of the damages sustained by the plaintiffs. The answer, besides denying the infringement, denied the novelty of the invention covered by the Arnold patent, and alleged that the defendants had, ever since the agreement was executed, been engaged, to the knowledge of the plaintiffs, in the sale of ruffles which were not claimed by them, until about the time of the commencement of this suit, to violate said patent, and that this suit was brought on a stale claim, and one unfounded in equity: *Held*, that the defendants were estopped, by their covenants in the agreement, from denying the validity of the patent.

[Distinguished in National Manuf'g Co. v. Meyers, 7 Fed. 357.]

2. The contract was not merely an agreement for a license, but was an executed license.

3. The plaintiffs could sue for either an infringement of the patent or a breach of the agreement, and the bill in this case could be regarded as a bill in either aspect.

[Cited in McKay v. Smith, 29 Fed. 296; American Box Mach. Co. v. Crosman, 57 Fed. 1025.]

4. As a bill founded on the agreement, although no royalties were payable, and although the patent had expired, the bill is not open to the objection that there is a complete and adequate remedy at law, because an account and a discovery are necessary to ascertain the facts from which the damages to the plaintiffs can be computed, and this bill is a bill for an account and a discovery.

[Distinguished in Washburn & Moen Manuf'g Co. v. Cincinnati Barbed Wire Fence Co., 42 Fed. 677.]

5. The contract having become executed, and the defendants having enjoyed its benefits, they cannot, in the absence of fraud on the part of the plaintiffs, deny the truth of their admission of the validity of the patent.

6. The invention in the Arnold patent consists in confining the tucks and gathers in place and securing them to a binding or ungathered piece of cloth, by one and the same series of stitches, or, in other words, causing one series of stitches to perform the double duty of confining the plaits and attaching them to the binding or other material. The claim, namely, the ruffle "as a new article of manufacture, the gathered cloth A (the ruffled strip) being secured to the binding B (the band) by the single series of stitches C, which perform the double duty of confining the gathers and of securing the gathered cloth to the binding, substantially as herein set forth," is infringed by the defendants' ruffle, which is a plaited strip combined with a band, a single row of stitches performing the office of securing the gathers and uniting the gathered cloth to the band, although it has, in addition, a second row of stitches in the band, not securing the band to the gathered cloth, and although it is a finished article, having a band with an even and finished edge, and is designed to be worn as a neck ruffle.

7. The defendants' ruffle is not a double ruffle, and so within the license, because, if it is divided between the two rows of stitches, one part will be a ruffle, and the other will be a useless strip of stitched cloth, not a ruffle, in any proper sense of the word.

8. The defence, that the agreement in regard to the manufacture of ruffles other than the double ruffle was subsequently abandoned by the plaintiffs, is not sustained.

9. Nor is the defence sustained, that the claim has become stale, by reason of the laches of the plaintiffs in vindicating their rights, and in acquiescing in the assertion of adverse rights by the defendants.

In equity.

Clarence A. Seward and William D. Shipman, for plaintiffs.

Charles R. Ingersoll and Edwin W. Stoughton, for defendants.

SHIPMAN, District Judge. The parties in this case are corporations. The complainants were created under the laws of the state of New York, and the defendants were incorporated under the laws of the state of Connecticut, and are established at New Haven, in this district. The bill alleges, that the complainants are and have been since September 18th, 1860, the owners of letters patent number 28,244, granted to George B. Arnold, on May 8th, 1860, for a new and useful "improvement in ruffles," and were also, in the month of February, 1863, the owners of three other patents, theretofore issued to George B. Arnold and Alfred Arnold, for other improvements in machinery for mak-

[1] [Reported by Hon. Samuel Blatchford, District Judge; reprinted in 2 Ban. & A. 152; and here republished by permission.]

ing ruffles, and in ruffles, which improvements were generally known as the "double feed," "separator," and "ruffle without a band;" that prior to the month of February, 1863, upon a suit of the complainants against Douglas and Sherwood, in the circuit court of the United States for the Southern district of New York, a verdict was rendered by which patent number 28 244 was sustained; that the defendants had at that time been engaged in manufacturing and selling ruffles containing the improvement described in said letters patent; and that, in order to avoid further litigation, and for peace sake, and for the purpose of harmonizing the business conducted by the two corporations, an agreement, dated February 21st, 1863, was entered into, and was thereafter an executed agreement of license, and no legal proceedings against the defendants were commenced. The material portions of this agreement are as follows: "The Magic Ruffle Company hereby agree to license the said Elm City Company under the four several patents granted to George B. Arnold, and George B. and Alfred Arnold, to wit, the double feed. the separator and its combinations, the ruffle with a band, and the ruffle without a band, to manufacture and sell under said license, exclusively, the ruffle now manufactured and sold by the said Elm City Company, at their manufactory in New Haven, Connecticut, and known as the double ruffle, and to use the machines patented to the said George B. Arnold, and George B. and Alfred Arnold, in the manufacture only of the said double ruffle. In consideration of the said license, the said Elm City Company do hereby expressly recognize the validity of each of said patents, and hereby agree to receive licenses as aforesaid under each of them, and hereby expressly agree that they will manufacture and sell only the said double ruffle, and that the said double ruffle shall not be divided by the said party of the second part." The Elm City Company also agreed to submit, at all times, their manufactory to inspection, so that the Magic Ruffle Company should be advised of the kind of ruffles which were being manufactured, and to pay counsel in the suit of Douglas and Sherwood, and to retain and pay counsel thereafter in suits relating to and in support of said patents, and to pay one-half of the other expenses of sustaining said patents. It was mutually agreed, that each party was to assist the other in suits which might be instituted by either party for the purpose of maintaining its rights under either of said patents. The bill also alleges, that, thereafter, the defendants continued to manufacture and sell the double ruffle of the kind referred to in the agreement. and that, after February 21st, 1863, they made and sold, in violation of said agreement and of said letters patent, many thousand yards of single ruffles, each of which contained the invention described and claimed in the said letters patent, and prays that the defendants may be required to make a disclosure of all their gains and profits, and of the precise number of yards of single ruffle containing the said improvement, which they have made and sold, and to account for and pay over such gains and profits as have arisen to them, and also all damages which the complainants have sustained by reason of the premises.

The answer denies that the defendants have made and sold any ruffles in violation of letters patent No. 28,244, alleges that the ruffles which they have made were made by the aid of machinery which was invented by and patented unto Crosby and Kellogg, and that, at and prior to said agreement, they were manufacturing, by the use of said machinery, as they lawfully might, double ruffles of a peculiar kind, which were afterwards divided so as to form single ruffles of a form and arrangement some of which somewhat resembled the ruffles manufactured by the complainants, and, to avoid any possible controversy with said complainants, the said defendants agreed not so to manufacture single ruffles thereafter, but that said agreement was intended only to prevent the manufacture of that particular kind of single ruffle; and that the defendants have not, since the date of said agreement, made or sold a gathered ruffle having a single series of stitches, which is the only kind of ruffle claimed in patent No. 28,244. The answer denies the novelty of the alleged improvement described in said patent, and alleges that the defendants have, ever since the execution of said agreement, been engaged, to the knowledge of the complainants, in the sale of ruffles which were not claimed by them, until about the time of the commencement of this suit, to be in violation of said patent, and that this action is brought upon a stale claim, and one which is unfounded in equity.

(1.) The first question in this case is—are the defendants estopped, by their covenants in the agreement, from denying the validity of the complainants' patent? The defendants contend, that the suit is against them simply as infringers, for a violation of the complainants' patent rights, and that the covenant which is claimed to be an estoppel, being contained in an instrument collateral to the patent, cannot operate as an estoppel in a suit which is not founded upon the agreement but upon the patent, and that no bill in equity can be sustained upon the agreement, inasmuch as for a breach of that contract the complainants have a full and adequate remedy at law.

The contract is not merely an agreement for a license, but is an executed license. Such was the intention of the parties, as it is to be collected from the whole of the instrument. Buell v. Cook, 4 Conn. 242. By the agreement, the defendants were licensed to manufacture and sell the double ruffle only. If they manufactured and sold any other ruffle

which was protected by either of the patents, they became, as to such ruffle so improperly manufactured, infringers, and the complainants could resort to an action at law or in equity, to obtain redress for this violation of their exclusive patent rights. If the licensee "uses the patented invention beyond the limits of the license or grant, or in a way not authorized by the license or grant, then there has been a violation of a right secured to the patentee under a law of the United States giving to him the exclusive right to use the thing patented, although such licensee performs, according to their terms, all the covenants entered into by him." Goodyear v. Union India Rubber Co. [Case No. 5,586]; Wood v. Wells [Id. 17,967]. And, if the licensees have also expressly covenanted, in their agreement of license, that they will do or will not do a particular act, or will not use the invention for a particular purpose, a violation of such covenant is also a breach of contract, not arising under the laws of the United States, but for which remedy may be sought in the circuit courts of the United States, provided the citizenship of the parties gives jurisdiction to such court. Goodyear v. Union India Rubber Co., cited supra; Goodyear v. Congress Rubber Co. [Id. 5,565]; Wilson v. Sanford, 10 How. [51 U. S.] 99. In this case, it was competent for the complainants to take either one of the two remedies for the alleged injury, which have been mentioned. They could bring a bill alleging an injury to their exclusive rights under the laws of the United States, or, as the residence of the parties gave this court jurisdiction, could bring a proper suit, setting up the breach of the contract as the gravamen of their action. The averments of their bill are sufficient to justify a court in holding, if necessary, that it is a bill for an injury to their patent rights, but, it is manifest, from an examination of the stating part of the bill, that the pleader intended to make the alleged breach of the agreement the foundation of the action, and that he is seeking to recover damages for an injury to the complainants arising out of the violation of the contract.

But the defendants insist that a bill in equity, based upon the contract, cannot be sustained, because, for a breach of the contract, there is a complete and adequate remedy at law. There is, undoubtedly, a remedy at law for the alleged injury. The only question is, whether it is complete and adequate. If the complainants were seeking to recover royalties which the defendants had agreed to pay, inasmuch as the account is particularly within the knowledge of the defendants, or, if the patent was still in existence, and the preventive remedy by injunction against future injuries could be administered, there would be no question that a bill in equity would be a proper remedy. Eureka Co. v. Bailey Co., 11 Wall. [78 U. S.] 488; Goodyear v. Congress Rubber Co. [supra]; Rich v. Hotchkiss, 16 Conn. 409. In this case, the defendants had not agreed to pay royalties, and an injunction cannot be granted, inasmuch as the patent has expired. It is alleged that the defendants have violated the contract of license by manufacturing and selling a ruffle which they were not authorized to make, and which they had agreed not to make. By this violation the complainants say that they have been injured, and the redress which they ultimately seek is the payment of damages. Although the suit is upon the contract, the damage to the complainants, if any, is the damage which they have sustained from the injury to their patent rights. The ascertainment of the facts from which such damages can be estimated, is, in cases of injury to property in letters patent, peculiarly within the province of a court of equity, because, the facts from which damages are to be computed can only be ascertained by an account and a discovery of the number and amount of articles which have been sold by the defendants—facts which are exclusively within their knowledge. They alone have the evidence which can enable the complainants to recover, either at law or in equity. It is true, that damages are not ordinarily assessed by a court of equity (Livingston v. Woodworth, 15 How. [56 U. S.] 546); and, prior to the act of 1870 [16 Stat. 198], authorizing the circuit court, as a court of equity, to decree the payment of damages in patent cases, damages were not recoverable in equity suits. A bill in equity proceeded, prior to that act, upon the theory that the infringer was equitably bound, as a trustee, to pay to the patentee the profits which had been made by an unlawful use of the invention. Cowing v. Rumsey [Case No. 3,296]. But, this bill is a bill for an account and a discovery. It avers that the complainants do not know, and cannot set forth, the number of yards of ruffle which have been made in violation of the patent and of the agreement, and prays for a disclosure of the quantity which has been made and sold. Whether, having obtained jurisdiction of the case, the court will proceed to grant further and complete relief, and to exercise a power which courts of equity have, in certain cases, heretofore exercised (Russell v. Clark's Ex'rs, 7 Cranch [11 U. S.] 69; Pratt v. Law, 9 Cranch [13 U. S.] 456; Insurance Co. v. Colt, 20 Wall. [87 U. S.] 560), and what relief will be granted, are questions which can be determined more properly after the report of the master shall have been received.

It is well settled, that, where the suit is upon a license, or upon a contract, which license or contract contains covenants on the part of the defendants, by which they admit the validity of the plaintiffs' patent, and agree to maintain it by suits or legal proceedings, and there has been an enjoyment of the license by the defendants, they are estopped from denying the truth of their admissions, unless it shall be averred, by cross-bill, or answer, that such agreement was obtained by fraud, surprise or imposition. Eureka Co. v. Bailey

Co., 11 Wall. [78 U. S.] 488; Crossley v. Dixon, 10 H. L. Cas. 293. It is evident, from an inspection of this agreement, and from the answer, that there had been litigation in regard to the validity of the patents, between the plaintiffs and Douglas and Sherwood, and that the parties to the agreement entered into it in order to avoid similar litigation between themselves, and to prevent future violation of the patents by others. "The agreement was manifestly intended to adjust conflicting rights," and it cannot be permitted, in the absence of fraud on the part of the plaintiffs, that the defendants should deny the truth of their careful and deliberate admissions, especially since the contract has become executed, and they have enjoyed its benefits.

(2.) Is the ruffle which has been manufactured and sold by the defendants, and which is styled the "Princess ruffle," an infringement of patent No. 28,244? The specification of the patent states, that the nature of the invention "consists in confining the tucks or gathers in place, and securing them to a binding or ungathered piece of cloth, by one and the same series of stitches; or, in other words, causing one series of stitches to perform the double duty of confining the plaits and attaching them to the binding or other material." The claim is for the ruffle "as a new article of manufacture, the gathered cloth A (the ruffled strip), being secured to the binding B (the band), by the single series of stitches C, which perform the double duty of confining the gathers and of securing the gathered cloth to the binding, substantially as herein set forth." The article is a plaited or gathered piece of cloth, the gathers of which are confined in their place by a row of stitches, which, also, at the same time, secures the gathered cloth to a band, and this band is an unhemmed strip of cloth, which is to be attached by the purchaser to whatever garment the ruffle is to ornament. "The distinguishing features of this article, by which it is materially different from all ruffles known before," have been declared to be, in the case of Magic Ruffle Co. v. Douglas [Case No. 8,948], "the single series of stitches, and the unvarying regularity of the plaits or gathers, thus dispensing with the gathering thread, avoiding the injurious process of whipping or scratching the fabric with a sharp needle, and the perforations in the ruffled piece which the needle and thread make in gathering." The defendants' ruffle is a plaited strip, combined with a band, a single row of stitches performing the office of securing the gathers, and uniting the gathered cloth to the band, but it has, in addition, a second row of stitches in the band, not securing the band to the gathered cloth. The ruffle can be cut in two, between the two rows of stiches. One part would be a ruffle, and the other a strip of stitched cloth. The Magic ruffle of the plaintiffs is an unfinished article, to be attached by the band to ladies' or children's undergarments. The Princess ruffle is a finished article, having a band with an even and finished edge, and is designed to be worn as a neck ruffle. Still, the distinguishing characteristic of the Magic ruffle is found in the Princess ruffle, which contains the row of stitches performing the double office of confining the gathers and attaching the ruffled cloth to the band; and, although the Princess ruffle has a second series of stitches, and is a completed article, different in appearance, and used for a different purpose, from the Magic ruffle, yet, in its patentable characteristics, it contains the single feature which had been previously patented by the plaintiffs' grantor. It has other and additional features which render it a different article from the Magic ruffle in the eye of the trade and of the purchaser, but these additional features do not vary the one peculiarity in which it resembles the Magic ruffle. If that peculiarity is a patentable one, it follows that the defendants' ruffle is an infringement of the plaintiffs' patent.

An attempt was made to claim that the Princess ruffle was a double ruffle, and so within the license to the defendants, but it is obvious that, if the Princess ruffle is divided, the narrow strip which remains after the ruffle proper has been cut off, is a useless strip of stitched cloth, and is not, in any proper sense of the word, a ruffle.

The answer further alleges, that, after the execution of the agreement, the defendants discovered the existence of letters patent to Isaac M. Singer, dated on or about March 18th, 1856, and that the complainants, believing that this invention substantially contained that described in patent 28,244, desired to join with the defendant in purchasing the same; that it was purchased by both parties about April 2d, 1863, and, since that time, the complainants have made no attempt to enforce their patent, but have regarded the same as substantially inoperative and worthless; and that, by reason of said Singer patent, the patent numbered 28,244 is void. Whether the Singer patent does or does not anticipate the patent of the complainants is not material, inasmuch as the validity of the latter patent is not here in issue. This part of the answer is material only upon the question of the laches of the complainants in the vindication of their alleged rights. The only evidence in regard to the reasons for the purchase of Mr. Singer's patent, or the opinions of the complainants in regard to the effect of the Singer invention upon the validity of their own patent, is contained in the testimony of the defendants' treasurer, who says, that "the defendants discovered the existence of the Singer patent, and, thinking that, if left in the hands of other parties, it might possibly be used for purposes of litigation and annoyance, causing expense and trouble, they thought best to secure it, and the Magic Ruffle Company, regarding it in anticipation of their patent, wished to unite with us in securing it, and, as that would save one-half

of the expense, and, as we thought, answer our purpose, we consented to do so, and it was bought jointly by them and the defendants." This does not maintain the position of the defendants, that the agreement in regard to the manufacture of ruffles other than the double ruffle was substantially abandoned in consequence of the purchase of the Singer patent. This purchase seems to have had no material influence upon the relations of the parties, or upon this agreement.

The most important point of the defendants is, that they have been manufacturing the Princess ruffle ever since the date of the agreement, with the knowledge and acquiescence of the complainants, and were not notified that such manufacture and sale were regarded by the complainants as a violation of the agreement, or of the patent, until after it had expired, and about the time of the commencement of this suit, and that this claim, if it ever had any validity, had become stale, and should not be favored by courts of equity, by reason of the laches of the complainants in the vindication of their rights, and their acquiescence in the assertion of adverse rights. If I was satisfied, from the evidence, that the defendants had manufactured and sold the Princess ruffle since 1862, in such quantities that the attention of the plaintiffs must have been early called to the infringement, or that they actually knew of the violation of the agreement ever since the year 1862, I should be of opinion that their delay in making known their claims was such as to prevent them from now receiving the aid of a court of equity to the extent of its powers. The testimony of the treasurer of the defendant corporation upon this part of the case is guarded, as will be seen by the following quotation: "Question. Subsequent to the date of that agreement, and up to the time of the commencement of this suit, have the defendants manufactured and sold ruffles like exhibit Barney, No. 3? Answer. Yes; more or less. Question. Has the same been sold in New York. If so, name a few of the houses to whom it has been sold? Answer. Yes; Calhoun & Robbins, J. B. Spelman & Son, L. H. Mandelbaum & Co., and a number of others, whom I could not positively swear to know by name. Question. It has been in the market to a considerable extent, has it not, and under what name? Answer. It has, under the name of Princess." The testimony in the case, as it now stands, does not show that the Princess ruffle has been in the market to any large extent, and that the complainants must necessarily have known that the defendants were manufacturing and selling this ruffle, and thus show that the complainants were negligent in the enforcement of their rights, or were wilfully permitting the defendants to continue the manufacture, under the supposition that their conduct was not open to criticism.

As I have said, I am not now called upon to decide as to the measure of damages. The only decree which can now be made is, to order an accounting and a disclosure, and a reference to a master to ascertain the number of yards of Princess ruffle which have been manufactured and sold, and the amount of such sales during each year, and to ascertain the profits which have accrued to the defendants from such manufacture, for the purpose of ascertaining the amount of the complainants' damages. Other questions in regard to damages will be determined upon the hearing after the accounting shall have taken place.

Let a decree be entered for a reference and an account.

[For the hearing on exceptions to the master's report and for a final decree, see Case No. 8,950.

[For another case involving this patent. see Magic Ruffle Co. v. Douglas, Case No. 8,948.]

Case No. 8,950.

MAGIC RUFFLE CO. v. ELM CITY CO.

[14 Blatchf. 109; 2 Ban. & A. 506; 11 O. G. 501.] [1]

Circuit Court, D. Connecticut. Jan. 27, 1877.

PRACTICE IN EQUITY — ACTION AT LAW — INADEQUACY — BILL FOR DISCOVERY — ACCOUNT — DAMAGES — PATENTS — INFRINGEMENT.

1. Where a bill is brought for a discovery and for other equitable relief within the appropriate jurisdiction of a court of equity, and the ultimate object of the plaintiff is to obtain damages, the court, having granted a discovery, will proceed and give the proper relief in damages, and not compel the plaintiff to undergo the delays and expenses of a suit at law.

2. Where a bill is brought for a discovery, in a case which is not the proper subject of an action or bill for an account, the fact that the plaintiff is entitled to a discovery does not necessarily entitle him also to an account.

3. But if the relief to be ultimately rendered is the payment of damages, and a discovery is needed, and the ascertainment of damages is complicated and intricate, and the action at law cannot be adequately tried without great difficulty, then, although the case is not one of trusteeship or agency, a court of equity will assume jurisdiction of the whole case and proceed to a final decree on the merits.

4. The rule of damages for the infringement of a patent considered.

5. If a master's report, made under an interlocutory decree, discloses facts properly heard by him, which, in the opinion of the court, should be further investigated, it is competent for the court to direct such an investigation.

In equity.

Clarence A. Seward, for plaintiffs.

Charles R. Ingersoll and Edward W. Stoughton, for defendants.

SHIPMAN, District Judge. The bill of complaint herein alleged, in substance, that the plaintiffs were the owners of letters patent granted to George B. Arnold, on May

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 2 Ban. & A. 506; and here republished by permission.]

8th, 1860, for a new and useful "improvement in ruffles," and that an executed agreement of license, dated February 21st, 1863, was entered into between the plaintiffs and defendants, by which the former licensed the latter to manufacture and sell the ruffle then manufactured by them, and known as the double ruffle, and the latter agreed to manufacture only said ruffle, and admitted the validity of said patent. The bill also alleged, that, after the date of said agreement, the defendants, in violation thereof and of said letters patent, made and sold many thousand yards of single ruffles, each of which contained the invention described and claimed in said letters patent, and prayed for a disclosure of all their gains and profits, and of the number of yards so made and sold, and that they account for and pay over such gains and profits, and also all damages which the plaintiffs had sustained by reason of the premises. The patent had expired before the bill was brought. The court was of opinion, that, while the averments of the bill were sufficient to justify a court in holding, if necessary, that it was a bill for an injury to patent rights, yet it was manifest that the pleader intended to make the alleged breach of agreement the foundation of the action, and that he sought to recover damages for an injury to the plaintiffs arising out of the violation of the contract. In reply to the objection that a bill in equity, based upon the contract, could not be sustained, because for a breach of contract there was a complete and adequate remedy at law, the court held that it properly had jurisdiction of the case, inasmuch as the proper averments of the bill made it a bill for a discovery, and that the ascertainment of the facts from which damages are to be estimated, in case of injury to property in letters patent, is peculiarly within the province of a court of equity, and whether, having jurisdiction, it would proceed to grant further and more complete relief, and what relief would be granted, were questions which could be determined after the master's report had been made. The court also found, that the agreement had been broken, and that the defendants had made and sold ruffles in violation of said agreement, and which ruffles contained the improvement described and claimed in said letters patent. An interlocutory decree was passed, in which it was adjudged that the plaintiffs were entitled to a discovery from the defendants of facts from which damages for the violation of said contract could be computed and ascertained, and that an account be taken by a master to ascertain and report the number of yards of ruffles made and sold by the defendants during each year between February 21st, 1863, and May 8th, 1874, which contained the improvement claimed in said letters patent, and to ascertain the gains and profits which had been made by the defendants during the period aforesaid, from said manufacture and sale. The opinion of the court, detailing the pleadings and the facts in the case, at length, is to be found in [Case No. 8,949].

The master's report states, that, after a number of hearings and adjournments, the parties "agreed upon the number of yards of ruffling manufactured and sold by the defendants, and that the gains and profits on the whole of the goods so manufactured and sold, amounted to the sum of thirty thousand dollars, the agreement being made upon the basis of the facts proved in the examination of the business transacted in the years 1863 and 1864." The whole number of yards is 2,363,080, and the number of yards of each article, and the profits upon each, are stated in an exhibit attached to the report. The plaintiffs now ask for a final decree for the amount which has been reported by the master. The defendants insist, that, inasmuch as the court has held that the violation of the agreement was the foundation of the action, and jurisdiction was obtained merely for purposes of discovery, and as the relief which is desired is simply the payment of damages for a breach of contract, the court has not jurisdiction to grant further relief. They claim that the jurisdiction which has been exercised in ordering a discovery is exhausted, and cannot empower the court to retain the case for the relief prayed for.

When a bill is brought for a discovery and for other equitable relief within the appropriate jurisdiction of a court of equity, and the ultimate object of the plaintiff is to obtain damages, in such case the court, having granted a discovery, will proceed and give the proper relief in damages, and not compel the plaintiff to undergo the delays and expenses of a suit at law. "The jurisdiction having once rightfully attached, it shall be made effectual for the purposes of complete relief." 1 Story, Eq. Jur. (8th Ed.) § 64k. This rule is expressed in 1 Fonbl. Eq. (book 1, c. 1, § 3), as follows: "The court having acquired cognizance of the suit for purposes of discovery, will entertain it for the purpose of relief, in most cases of fraud, account, accident and mistake," all of which are subjects of equitable jurisdiction. In some cases, courts have laid down the principle more broadly, and have apparently held, that, when jurisdiction once attaches for discovery in any case, the court will entertain a bill for relief, although no equitable relief is or could be sought, and where the only relief that can be granted is in damages. The cases of Parker v. Dee, 2 Ch. Cas. 200; Ryle v. Haggie, 1 Jac. & W. 234; Armstrong v. Gilchrist, 2 Johns. Cas. 424; King v. Baldwin, 17 Johns. 384,—assert this doctrine, and the language of Chief Justice Marshall, in Russell v. Clark, 7 Cranch [11 U. S.] 69, if interpreted literally, and not in connection with the facts of the case, justifies the assertion. Other courts have disclaimed this extensive jurisdiction, and have held that, where a party comes into equity for discovery mere-

ly, and this is the only ground upon which a court of equity obtains jurisdiction, and no other equitable relief is or can be sought, the case will not be retained for purposes of assessing damages, but the parties will be remitted to an action at law. In Middletown Bank v. Russ, 3 Conn. 135, Chief Justice Hosmer says: "This brings me to consider whether a court of chancery, having taken jurisdiction for enforcing a discovery, will universally assume cognizance of the cause, settle every question which may arise, and grant ultimate relief. I have no hesitation in giving a negative to this question." The cases of Hipp v. Babin, 19 How. [60 U. S.] 271, and Insurance Co. v. Bailey, 13 Wall. [80 U. S.] 616, are illustrations of the indisposition of courts of equity to entertain jurisdiction of suits which are merely for the enforcement of a legal demand. It may be regarded as generally true, that a court of equity ought not to sustain a bill which, although it may contain matter which can give the court jurisdiction, is merely for the assessment of damages for a breach of contract (Hatch v. Cobb, 4 Johns. Ch. 559; Kempshall v. Stone, 5 Johns. Ch. 193; Milkman v. Ordway, 106 Mass. 232); and that, where a bill is brought for discovery, in a case which is not the proper subject of an action or bill for an account, the fact that the plaintiff is entitled to a discovery does not necessarily entitle him also to an account (Foley v. Hill, 2 H. L. Cas. 28; Frietas v. Dos Santos, 1 Younge & J. 574). There is, however, a class of cases in which the relief to be ultimately rendered is the payment of damages alone, and where the party seeking such relief needs the aid of a court of equity for discovery, in a case which is not of trusteeship or agency, but where the ascertainment of damages is complicated and intricate, and the action at law cannot be adequately tried without great difficulty, resulting from the nature of the accounts or from other circumstances. In such cases, a court of equity assumes jurisdiction of the whole case, and proceeds to a final decree upon the merits. In Foley v. Hill, cited supra, a case in which a debt against a banker for a deposit in his bank was sought to be recovered, the lord chancellor says: "It is not because you are entitled to a discovery, that therefore you are entitled to an account. That is entirely a fallacy, that would, if carried to the extent to which it would be carried, according to the argument at the bar, make it appear that every case is matter of equitable jurisdiction, and that, where a plaintiff is entitled to a demand, he may come to a court of equity for discovery. But the rule is, that, where a case is so complicated, or where, from other circumstances, the remedy at law will not give adequate relief, there the court of equity assumes jurisdiction." To the same effect are Corporation of Carlisle v. Wilson, 13 Ves. 276, and O'Connor v. Spaight, 1 Schoales & L. 305, and the principle is fully recognized in Fowle v. Lawrason, 5 Pet. [30 U. S.] 495.

In my opinion, this case comes fully within the rule which has been considered. A discovery was certainly necessary, for the facts which are embodied in the master's report required an expenditure of much time, labor and painstaking by the defendants' treasurer before they could be stated, and it would have been impracticable to obtain them in the ordinary method of trial by jury. These facts having been thus obtained, the court is now asked to leave the parties to the remedy at law, where the main question must be, in fact, the ascertainment of damages for an injury to the patent rights of the plaintiffs, oftentimes one of the most complex and difficult questions of patent law, one which demands careful study, reflection and experience upon the part of the master, and which can often be very inadequately solved in a jury trial. The careful and accurate computation of damages in this case is a matter which will require time and labor, for, as will be seen hereafter, I do not think that all the elements from which damages are to be computed have been ascertained by the agreement of the parties.

There is another reason which induces me not to remit the parties now to an action at law. It is disclosed in the testimony taken before the master, that, since the commencement of this suit, the defendants have gone into insolvency, and their estate is now being administered upon in the probate court, under the insolvent system of this state. This creates no bar to an action at law against the defendants, but, as their estate is entirely in the custody of a court for the benefit of their creditors, and a dividend can only be expected, it is for the advantage of all the parties and the creditors, that the dividend should not be diminished by protracted and expensive litigation and a multiplicity of suits.

It is next claimed by the plaintiffs, that the report of the master discloses all the facts from which damages can be ascertained, and that, it having been agreed that the profits of the defendants upon the ruffles manufactured and sold by them were the sum of $30,000, such sum is the measure and rule of damages. I do not understand that, in all cases and invariably, the amount of profits upon the manufactured article is the rule of damages for an infringement. Cowing v. Rumsey [Case No. 3,296]; Bell v. Daniels [Id. 1,247]. In this case, as was stated in the former opinion, "the Magic ruffle of the plaintiffs is an unfinished article, to be attached by the band to ladies' or children's undergarments. The Princess ruffle is a finished article, having a band with an even and finished edge, and is designed to be worn as a neck ruffle. Still, the distinguishing character of the Magic ruffle is found in the Princess ruffle." The

defendants' ruffles contain the patented improvement which is embodied in the Magic ruffle, but the ruffles of the two parties are different in the eye of the trade and of the purchaser. The endeavor of the court should be to ascertain the damages which resulted to the plaintiffs from the unauthorized use of their improvement, how much the plaintiffs have lost in consequence of the violation of this contract by the manufacture and sale of the twenty-two kinds of ruffles which are mentioned in the report; and the fact that, upon the entire ruffles of the character which the defendants manufactured, they made a profit, is not sufficient to enable a court to determine that the plaintiffs suffered that amount of damages from the use of their patented improvement. Mowry v. Whitney, 14 Wall. [81 U. S.] 620; Littlefield v. Perry, 21 Wall. [88 U. S.] 205.

There should, therefore, be a reference to a master, to ascertain the amount of damages which the plaintiffs have suffered in each year, from the year 1863 to 1874, from the breach of the contract by the use of the patented improvement in the manufacture of the ruffles which it has already been found were manufactured and sold by the defendants during said years.

The defendants made the point, upon the former hearing, that they had been manufacturing the Princess ruffle ever since the date of the agreement, with the knowledge and acquiescence of the plaintiffs, and were not notified that such manufacture and sale were regarded by the plaintiffs as a violation of the agreement or of the patent, until after it had expired, and about the time of the commencement of this suit; and that this claim had become stale, and should not be favored by courts of equity, by reason of the laches of the complainants in the vindication of their rights, and their acquiescence in the assertion of adverse rights. It was said in the opinion, that, "if I was satisfied, from the evidence, that the defendants had manufactured and sold the Princess ruffle since 1862, in such quantities that the attention of the plaintiffs must have been early called to the infringement, or that they actually knew of the violation of the agreement ever since the year 1862, I should be of opinion, that their delay in making known their claim was such as to prevent them from now receiving the aid of a court of equity to the extent of its powers." "This doctrine is found in the very nature and character of the jurisdiction exercised by courts of equity on this and other analogous subjects." Wyeth v. Stone [Case No. 18,107]. There was at that time no adequate evidence of laches on the part of the plaintiffs. It now appears, from the report of the master, that 2,359,074 yards of infringing ruffles were sold by the defendants from 1863 to 1874, in which amount is included 1,055,246 yards of the Princess ruffle, the one which was the principal subject of discussion upon the former hearing. The defendants renew their claim, from these facts, that there must have been laches on the part of the plaintiffs, who properly say that they have had no opportunity to introduce any testimony upon their part, because they did not know that the question of laches was to be made an issue before the master. Enough is brought to the attention of the court, from the evidence properly received by the master, to show that the evidence in regard to laches was not exhausted in the proofs which were taken before the interlocutory decree. The order which has been heretofore passed being only interlocutory, if the master's report discloses facts, properly heard by him upon the order of reference, which, in the opinion of the court should be further investigated, it is competent for the court to direct such an investigation. Interlocutory orders and decrees are subject to revision until a final decree is made. Perkins v. Fourniquet, 6 How. [47 U. S.] 206. The decree should also provide that the master should take proofs as to whether the plaintiffs have had knowledge of the manufacture and sale of said ruffles which have been manufactured and sold by the defendants in violation of said agreement, and during what period of time the plaintiffs have had such knowledge, and whether the defendants have manufactured and sold said ruffles since 1862, in such quantities that it must have come to the attention and knowledge of the plaintiffs, or that they actually knew of such manufacture during said period.

The second exception to the master's report, in regard to the admission of patents subsequent to the plaintiffs' patent, is sustained. The master's report is confirmed, with said exception.

Let a decree be passed in conformity with this opinion.

[For another case involving this patent see Magic Ruffle Co. v. Douglas, Case No. 8,948.]

Case No. 8,951.

In re MAGIE.

[2 Ben. 369; 1 N. B. R. 522 (Quarto, 138); 1 Am. Law T. Rep. Bankr. 122.] [1]

District Court, S. D. New York. April 28, 1868.

BANKRUPTCY—JURISDICTION—PLACE OF RESIDENCE—DOING BUSINESS.

Where a bankrupt filed a petition in bankruptcy in this district, not averring any place of residence, and, on his examination, it appeared that he resided with his father, in New Jersey, and had done so since he came from Chicago, four years previous, that he had been engaged in looking after a private matter, with a

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission. 1 Am. Law T. Rep. Bankr. 122, gives only a partial report.]

view to returning to Chicago, and that, for about six months back, he had been keeping books for a firm in New York City, and thereupon, the register declined to make an adjudication of bankruptcy, as having no jurisdiction of the case: *Held*, that the register's decision was correct.

[Distinguished in Re Baily, Case No. 753. Cited in Fogarty v. Gerrity, Id. 4,895.]

In this case, a petition in bankruptcy was filed by the bankrupt on March 3d, 1868, which was referred to a register. It stated that he had been "a general agent and clerk for twelve months next immediately preceding the filing of the petition, at New York City." The register examined the petitioner on oath, and he deposed that he resided with his father, in New Jersey, and had done so since he came from Chicago, Illinois, about four years before, where he had been in business; that he had been engaged in looking after a personal matter since he came from Chicago, with the intent of returning there; and that, since about the middle of October, 1867, he had been engaged in keeping books with a firm in New York City, but had not been engaged with any other persons in New York City, nor had any business connection save as thus stated, nor been engaged in business otherwise for himself. The register thereupon declined to make an adjudication of bankruptcy, on the ground that this court had no jurisdiction of the case, inasmuch as the petition was not "addressed to the judge of the judicial district in which such debtor has resided, or carried on business for the six months next immediately preceding the time of filing such petition." On request of the bankrupt, the question was certified to the court.

[2] [Register JAMES F. DWIGHT, certified that in the course of the proceedings in said cause before him, the following question arose pertinent to the said proceedings. Facts: On the 3d day of March, 1868, William H. Magie filed his petition for adjudication in bankruptcy, &c., with schedules A and B attached, in the clerk's office of this district, and the matter was duly referred to me as register to take such proceedings as are required by the act. It appearing by the petition, duplicate copy of which was (with the schedules) filed with me on the 3d of April, that the petitioner respectfully represents that he has been a general agent and clerk for twelve months next immediately preceding the filing of this petition, at New York City, within this judicial district. I examined the petitioner under oath, on the 9th of April, touching the matter of his residence or business to the end of deciding if this court has jurisdiction of his case. The petitioner deposed that he resided with his father at Elizabeth, New Jersey, and has done so since he came from Chicago, Illinois, about four years ago. That he was formerly in business for himself at Chicago; that he had been engaged in looking after a personal matter since he came from Chicago, with the intent of returning there. That he has been engaged as a bookkeeper for a firm in William street, New York City, since January 1, 1868. That previous to January 1, 1868, and since about the middle of October, he had been engaged in keeping books with a firm in Wall street, New York City. That he had not been engaged with any other persons in New York City, nor had any business connections save as thus stated, nor been engaged in business otherwise for himself. That he was unmarried. The petition did not aver place of residence. There are only three creditors.

[Upon this state of facts I declined to make adjudication in bankruptcy of the petitioner, on the ground that the district court for the Southern district of New York had no jurisdiction of the case, inasmuch as the petition was not "addressed to the judge of the judicial district in which such debtor has resided or carried on business for the six months next immediately preceding the time of filing his petition," &c. To which decision and refusal the bankrupt excepts, and through his attorney prays that the question may be certified to the judge, as to whether, upon these facts, this court has jurisdiction of the petition, and whether adjudication shall be had. Which is granted, and this certificate forwarded to the judge for his decision and opinion on the point raised.

[BY THE REGISTER. In my opinion the law intended to confer jurisdiction in these courts only, where the petitioner would be known publicly as a resident and citizen; or where he had such business relations with the public generally as would equally cause him to be known. And it could scarcely be said that a person whose business was only that of a book-keeper or clerk in a place where his name did not appear in public, "carried on business" in a way that would give any publicity to his occupation or person. The object of this provision as to jurisdiction would seem to be to prevent imposition upon creditors and fraudulent discharges; and there is no hardship worked to petitioners, for, if having no regular business by which they are known, they may apply in the district where they reside.

[Which facts and opinion are submitted for the opinion of the judge.] [2]

BLATCHFORD, District Judge. I think the register was correct in his decision. The principles laid down by this court, in Re Kinsman [Case No. 7,832], in reference to a kindred provision in the bankruptcy act of 1841 [5 Stat. 440], make it improper for this court to assume jurisdiction in this case.

[2] [From 1 N. B. R. 522 (Quarto, 138).]

[2] [From 1 N. B. R. 522 (Quarto, 138).]

Case No. 8,952.

MAGILL v. BROWN.

[Brightly, N. P. 346; 14 Haz. Reg. Pa. 305.]

Circuit Court, E. D Pennsylvania. April Term, 1833.

CORPORATIONS—STATUTES OF MORTMAIN — PENNSYLVANIA LAW—CHARITABLE USES — POWER TO TAKE — SOCIETIES OF FRIENDS — CHARTER BY PRESCRIPTION — CONSTITUTIONAL LAW — RIGHTS OF CITIZENS—ENJOYMENT OF PROPERTY—CHARITABLE USES — COMMON LAW — ADOPTION IN PENNSYLVANIA — JURISDICTION OF CHANCERY—WHAT ARE — CONSTRUCTION OF DEVISE OR BEQUEST.

[1. The English statutes of mortmain and superstitious uses were never adopted by the colony or state of Pennsylvania, but its policy was always favorable to corporations and religious bodies.]

[2. Under the constitution and laws of Pennsylvania, persons associated for religious, literary, or charitable purposes have power to take property by devise or bequest for pious or charitable uses, whether or not such bodies are actually incorporated, and without a license from the state.]

[Cited in Burr v. Smith, 7 Vt. 259.]

[3. The societies of Friends, though never formally incorporated, are capable, under the constitution and laws of Pennsylvania, of taking property by devise or bequest for the purposes of their organization.]

[4. The yearly meeting of Friends in Philadelphia is a body politic or corporate by prescription, and its rights of taking and enjoying property cannot be impaired by inquiry into the separate capacity of its component members.]

[5. One of the privileges secured in every state to the citizens of the several states by article 4, § 2 of the constitution of the United States, is that of exemption from the law of alienage and the consequent right of enjoying property in the several states; and accordingly a devise or bequest cannot be defeated on the ground that the beneficiary is a citizen or a corporation of another state than the testator.]

[6. Though the English statute of charitable uses (43 Eliz. c. 4) was not adopted by the colony or state of Pennsylvania, the principles of the common law relative to such uses, which were restored in England by that statute, were adopted, as well as the principles of equity in the administration of such trusts.]

[7. The whole course of the common law of England, except as modified, for special purposes of policy, by the statutes of mortmain and superstitious uses, was favorable to charities and the jurisdiction of chancery over charitable uses and gifts therefor has been exercised from the beginning of the existence of the court, and does not depend on the statute of 43 Eliz.]

[Cited in Burr v. Smith, 7 Vt. 259.]

[8. The following are good charitable uses: (a) An annual subscription to the stock of a religious society, which is applied to the printing and dissemination of books and writings approved by such society. (b) A gift to a religious society for the relief of the poor members thereof. (c) A gift to the treasurer of a society, organized for the civilization and improvement of certain Indian tribes, for the benefit of such Indians. (d) A gift to a religious society for the relief of the poor thereof, and toward enlarging and improving its meetinghouse. (e) A gift to a town for a fire engine and hose.]

[9. A devise or bequest to a society, with whose constitution and purposes the testator is familiar, for the purposes of such society, such purposes being proper objects of charitable uses, is a good devise or bequest for such charitable uses.]

The subject of bequests for pious and charitable uses was very fully considered by the circuit court of the United States for the Eastern district of Pennsylvania, at the April term, 1833, in the case of Magill v. Brown, which involved the construction of the will of Sarah Zane, deceased. The following sections of the will are those reviewed in the opinion of the court:

"9. I give to the yearly meeting of Friends held in Philadelphia, of which I am a member, eight acres of meadow land, situate on Greenwich Point road, being part of thirty acres belonging to my dear father, with the flats thereunto belonging, to be kept by the yearly meeting aforesaid for the purpose of a fund, the income of which, after keeping it in good order, to be paid as an annual subscription into the yearly meeting's stock.

"10. I give most affectionately to the five monthly meetings of Women Friends held in Philadelphia, viz., Philadelphia monthly meeting, monthly meeting for the northern district, monthly meeting for the southern district, monthly meeting for the western district, and Green street monthly meeting—to each of the above said monthly meetings two hundred dollars, making in the whole one thousand dollars, to purchase ground rents; the income whereof I request to be received annually in the monthly meeting's collections towards the relief of the poor members belonging thereto.

"11. Whereas, about the year seventeen hundred and fifty-nine, Captain Newcastle, an Indian chief or messenger, ordered thirty pounds, Pennsylvania currency, to be paid to my dear father, for the use of his two cousins, a boy and a girl. The boy soon after died. The girl, named Betty, received a part of the above thirty pounds at different times, by Thomas King, an Indian chief; but as no information could be obtained of said Betty for forty years; and the residue of the thirty pounds is now in my possession, I am desirous that the full sum of thirty pounds principal, with the interest from the year seventeen hundred and fifty-nine until the time it is paid, which I desire to be into faithful hands; therefore I will and direct my executor to pay to the treasurer of the committee of the yearly meeting of Friends held in Philadelphia, appointed to relieve the Indians, for the benefit of said Indians, according to their best judgment in justice and equity.

"12. I give to my executors a legacy or sum of three hundred dollars, to be paid by them to the treasurer of the committee of the yearly meeting of friends held in Philadelphia, appointed to relieve the Indians, to the benefit of said Indians."

"17. I give to my executors the sum of one thousand dollars, to pay to the treasurer of

the committee appointed by the yearly meeting of Friends held in Baltimore, for the transactions of the relief and benefit of the Indians, that the said yearly meeting, with the yearly meeting of Friends held at Mount Pleasant, in the state of Ohio, hath under their care, towards civilization, having the tribe of Tuscaroras first in view, if it be found within two years.

"18. I give affectionately to Friends composing the Baltimore yearly meeting five hundred dollars, to be realized in that city, so that the interest or income thereof be annually paid into their collection toward their yearly meeting, stock, if one exists; if not, I will, if it be the mind of Friends belonging thereto, the encouragement to establish one.

"19. I give affectionately to Friends composing the yearly meeting held at Mount Pleasant, state of Ohio, five hundred dollars, to be realized so that the interest or income thereof be annually paid into their collection towards their yearly meeting stock, if one exists; if not, I will, if it is the mind, and agreeable to the Friends belonging thereto, the encouragement to establish one.

"20. I give to the select members belonging to the monthly meeting of Women Friends held at Hopewell, Frederick county, Virginia, five hundred dollars, to be realized in the town of Winchester, in the same county, the interest or income issuing therefrom to be annually paid into the treasury of the above said monthly meeting's stock, towards the relief of the poor belonging thereto.

"21. I give to my dear friends composing Centre preparative meeting, belonging to Hopewell monthly meeting, the sum of five hundred dollars towards enlarging Friends' monthly meeting-house in Winchester, if that meeting think it expedient, and to assist building a stone wall, so as to enclose the whole lot whereon the said meeting-house is erected.

"22. I give to the citizens of Winchester above said one thousand dollars to purchase a fire-engine and hose to be kept in best repair, with my affection and gratitude.

"31. Whereas, the heir of the late Elizabeth Roberts, daughter of Joseph Galloway, formerly of Philadelphia, hath deposited a bond of one hundred pounds, Pennsylvania currency, in the hands of Wm. Rawle and Joseph Jenks, agents for the estate of Elizabeth Roberts' daughter, now in Great Britain, I believing the above said bond to be given by my brother Isaac Zane, of Virginia, a number of years since—the bond for many years out of reach; the interest hath not, that it appears, been paid: I will and direct my executors to pay the said one hundred pounds principal, and the legal interest thereon from the day of its date till paid in full.

"Lastly. I do nominate and appoint my respected friends Samuel Coates and ——, of Philadelphia, and Jacob Rinker, of Virginia, executors of this, my last will and testament; giving them, my above-named executors, full power to sell by private sale my house in Chestnut street, to meet the payments herein directed; and if that be insufficient, to sell Marlbro' estate, in Virginia, belonging to my late brother, Isaac Zane: hereby revoking all former and other wills by me heretofore made, and declaring this to be my last will and testament. In witness whereof, I hereunto set my hand and affix my seal, in Philadelphia, this twenty-fourth day of the third month, in the year of our Lord one thousand eight hundred and nineteen."

The following elaborate and learned opinion was delivered by

BALDWIN, Circuit Justice. This case arises on the will of Sarah Zane, a member of the Society of Friends, who in the body thereof describes herself as of the city of Philadelphia. She died in Virginia, but, as it has not been questioned, we shall assume this to have been the place of her domicil at the time of her death. The law of the state must therefore govern her disposition of her personal property, as well as of her real estate situated here. 1 Bin. 336, 344; 3 Rawle, 318; 3 Pen. & W. 187, 188.

The questions which have been made in the argument, and those which necessarily arise in the case, are of the most interesting kind; involving the capacity of the Quaker societies of this and other states to take real or personal estate by devise, without a charter of incorporation; their right to enjoy it for their own use, as a body united for the purposes of religion, charity, and education; and what now are, by the law of the land, pious and charitable uses, for which valid donations can be made by deed or will. In referring to the history of the settlement of this state, the principles of its first settlers, the character of its founder, his systems and institutions, it would seem not a little surprising that such questions could have remained open till this time. If there are any subjects on which the law could be supposed to be settled, it would be the rights of religious societies and charitable establishments. If there was any part of the law of England which could be congenial to the spirit and policy of the colony, and likely to be adopted by a society of men who sought an asylum from persecution for religious opinion, it would be that which would afford the best protection in the enjoyment of their rights, privileges, immunities and estates as a religious society. If there were any laws which they would be disposed to leave behind them, they would be those which grew out of feudal tenures, a spirit of persecution, or an established religion. The last laws which they would introduce would be those which created a forfeiture of all land conveyed to a society incorporated for the purposes of charity and religious worship, according to their own

consciences, without regard to the mode of celebrating divine service as prescribed by law, or which prevent a donation for such uses from taking effect without a special license by charter or act of assembly. Such would be the natural conclusion from the known and practical principles of civil and religious liberty which have distinguished the policy and jurisprudence of this state through all time as founded on a system of "free and unlimited Catholicism" in matters of religion, of expanded benevolence in matters of charity, and equality of rights in the enjoyment of property.

These leading features are so strongly impressed on the written laws, and enter so deeply into the customs and common law of the state, as to make it impossible to mistake the character and tendency of the system in the details of its legislation, by colonial authority, or the adoption of the statutes or common law of England. It is not conceivable that the Quaker settlers of this province should have introduced those laws of the mother country, which would incapacitate them as individuals or a religious society from taking, holding or enjoying property as a matter of right without a charter; or expose to a forfeiture to the proprietor or mesne landlord lands conveyed to them for the purposes of sepulture, religious worship, or charity; and above all that William Penn should have adopted the statutes of Henry VIII., declaring the celebration of divine service according to the rites of the Catholic church to be superstitious, and conveyances for its use illegal and void; and the statutes of mortmain, which make the enjoyment of property by a religious body dependent on the pleasure and permission of the lord of the fee; while at the same time he excludes the statute of 43 Eliz. and the mild and beneficent principles of the common law which that statute has been held to have restored.

The history of the Society of Quakers presents no instance of an incorporation. Did they adopt any rule of law, making one necessary to give them a legal capacity to purchase property? They have enjoyed it from the earliest time without a license in mortmain. Is it liable to be now seized by the state as forfeited by the purchaser? They have their own modes of worship and system of charities. Are donations for their support to be regulated by the prohibitory statutes of a foreign country, or confined to the uses specified in its laws? 2 Ves. Sr. 475. They have kindred societies in other states—do the laws of these invalidate a bequest of money to them for purposes of piety and charity? These are questions which have been made by the counsel in their objections to the devise of the lot of ground to the yearly meeting of Philadelphia, and the pecuniary bequests to the several meetings of Friends in this place and in Maryland, Virginia, and Ohio. The objections to the validity of the dispositions of this will are not founded on any statutory law of Pennsylvania, but on the English statutes of mortmain, superstitious uses, and wills, alleged to be in force in this state by usage, though not adopted by any act of assembly. The principles of the common law have also been relied on as supporting the objection to the capacity of the parties to take, for the want of an incorporation as well as of an act of assembly, containing enabling provisions, analagous to the 43 Eliz., validating dispositions for religious, literary and charitable purposes, and giving jurisdiction to the courts to carry them into effect, as they can do in England.

The field of investigation is from its nature a broad one, and from the confined course which has been taken in discussing the law of charities in the various cases which have arisen is, in a great measure, a new one. Though there are several statutes on the subject in England, prior to the 43 Eliz., no treatise or opinion contains a condensed or comparative view of the system of charities, which has grown out of them, so as to enable us by any authority of precedent or adjudication to ascertain the definite source of the various principles which have from time to time become embodied into the general course of the law of England. Nor have the courts of the United States or of this state brought into contrast or comparison either the policy of the government of England and this country in relation to the religious establishments and rights of conscience, the general course of legislation pursued in either, or the principles of the common law independent of the statutes alluded to.

Proceeding on the assumption that the 43 Eliz. was the only foundation on which charities could be supported, in opposition to prior statutes, and that statute not being considered in force here unless re-enacted, the courts in this country have laid down principles which, resting solely on such assumption, cannot be considered as authoritative in their conclusions, if on a more thorough examination the premises on which they depend should appear to be erroneous. We trust that a review of the course of their adjudication on charities will show that it has not become so settled as to be sanctioned by the maxim of "communis error facit jus," or that in endeavoring to extract the rules which must govern the law of charities from the constitution of the Union and this state, its statutes and usages, and the statutes and common law of England, we violate the respect due to the decisions of courts of high authority.

It is at all times proper to discriminate between the question directly presented for the deliberate consideration of a court, on which they exercise their judgment, by a solemn adjudication, and those observations which are made by way of illustration, or mere declarations of what the law is on any particular subject. The one is binding as authority, the

other to be respected only as a mere opinion or argument, which must have its influence, but cannot be enforced on our judgment. If the supreme judicial tribunal of the state or the Union have judicially considered the statutes of mortmain to be in force, this court is bound to take the law as settled; but if they have merely declared them to be so, without making such opinion the basis of their judgment, or have in doing so omitted to refer to the supreme law of the land which bears on the question, this court may and ought to do what a higher one would do, notwithstanding any preconceived or expressed opinion—compare the constitution with the statutes, and be governed by the result.

The 3d section of the 3d article of the constitution of the United States prohibits a "forfeiture for treason except during the life of the person attainted." The constitution of Pennsylvania extends the prohibition to all forfeitures by attainder, or felos de se, or death by casualties. It is at least worth the inquiry whether a forfeiture in fee is incurred by an alienation in mortmain, against which no prohibition is to be found in any law of the state; in a word, whether a penal law of England has an effect which the whole power of the federal and state government is incompetent to give to a conviction for the highest crimes known to their laws. 9 Serg. & R. 343. This inquiry necessarily leads to an investigation of the common law, so as to find out whether these statutes are in affirmance or derogatory of its principles which have been made the common law of the state, so far as adopted or applicable to its policy. If they are of the latter character, then how have they become in force in Pennsylvania, and what is the evidence of their adoption by legislation or usage? As these statutes impose a forfeiture of the whole estate conveyed, the proposition that they are in force here ought to be considered as an affirmative one to be made out by those who assent, that an act lawful by the common law is prohibited by a statute. The penal laws of England have been presumed not to be in force here. The burden of proof has always been held to be on those who allege a forfeiture, by an act punishable only by statute; and it ought to be clear and conclusive, especially on subjects which affect the rights to the transmission and enjoyment of property. If there was any one subject on which the founder, the legislature, and the people of the colony, from its first settlement, were governed by a settled, unyielding course of policy, it was to facilitate the transmission of estates, to secure their enjoyment, and disincumber them of all restraints attendant on feudal tenures, the forms of conveyance, the ceremonies of investiture, and most emphatically to protect them from the operation of all laws growing out of an established religion, which at all interfered with the rights of conscience or the perfect freedom of religious worship. Lyle v. Richards, 9 Serg. & R. 326, 334, 359.

The charter of privileges of 1701, the colonial laws, both the constitutions of 1776 and 1790, and the laws of the state, are in the same spirit which induced the people, in their first acts of assuming independence and establishing government by their own authority, to prescribe the following oath to the members of the convention who formed their first constitution: "That I will oppose any measure that shall or may in the least interfere with or obstruct the religious principle or practice of any of the good people of this province, as heretofore enjoyed." Conv. Pa. 39. The constitution was in the spirit of this oath, and declared the rights of religious societies and corporate bodies held according to the usage of the colony to be inviolable. We have, therefore, a plain rule of decision by the supreme law of the state, if the nature and extent of such usage can be judicially ascertained. The enjoyment of real estate in perpetuity by any body incorporated by a written charter, or one presumed by law from evidence of long possession and exercise of corporate franchises, is mortmain per se. If on a review of the legislation and custom of the colony before, and of the state after the Revolution, it shall appear, that their rights have been the subject of the most continued favor, and their protection is provided for in the most explicit manner, it must be deemed conclusive evidence of the general policy of the state at least, if it does not establish the utter incompatibility of any incapacity in any body of men not only to take, but to enjoy, an estate to their own use, with the whole scope and tenor both of its written and common law.

The strong constitutional position which has been assumed by the senior counsel of the respondent in this case has induced us to examine it with a degree of attention equally called for by the magnitude of the questions involved, and by the conclusions which we have felt ourselves bound to adopt; in some respects at variance with the views of the judges of the supreme court of the United States as to the necessity of an actual incorporation to give the capacity to take; and of those of this state, to enable a corporation to enjoy an estate. We think, however, that it will be found to accord with all the great leading principles and rules which have been too firmly established by themselves to be now shaken, and that their minds would have come to the same conclusion as ours have done if the same materials for investigation had been presented to them. In reviewing the judicial history of this state, it is believed that there will be found no decision that an incorporation is necessary to give to any association of individuals the capacity of taking and enjoying an estate in perpetuity, either by the assumed name of the society, or by trustees for their use. If such a rule exists, it is only by the common

law as adopted here. Neither is there any adjudged case turning on the statutes of mortmain, by which any estate has ever been vested in the commonwealth by a forfeiture incurred in consequence of an alienation to a corporate body without license, charter or law; or any evidence that such license was ever granted by the proprietary or governor, or any public grant made with a clause of non obstante statuto, in any patent, charter, or act of assembly, under the colonial or state government; nor does the word "mortmain" appear on the statute book for one hundred and fifty years from the date of the charter to Penn. This unbroken silence would have been taken as conclusive evidence that the British statutes were deemed wholly inapplicable to the fixed policy of the colony and state, its usage and fundamental laws, if the contrary opinion had not been expressed by the judges of the supreme court of the state, and adopted by the legislature at the present session. Hence arises the importance, as well as delicacy, of the questions involved in this cause. To consider them open after the declared opinion of both departments of the government, may seem to indicate a want of respect to their authority, but when we feel convinced that there is a law of higher obligation which must guide our judgment, we are bound to follow it.

The view which we feel constrained to take of the constitutions of 1701, 1776, and 1790, all of which remain in force so far as respects the rights of property, conscience, and religious worship, is this: that all bodies united for religious, charitable or literary purposes, though without a written charter or law, are to be considered as corporations by prescription or the usage and common law of the state, with all the attributes and incidents of such corporations by the principles of the common law, and entitled to all rights which are conformable to the customs of the province. From this view it results that if the statutes of mortmain apply to bodies whose charters are in existence they apply equally to those whose charters are presumed from prescription. A brief summary of these provisions will show that they embrace all corporations of either kind. The 9 Hen. III. c. 36, declared gifts made to any religious house to be void, and that the land given should enure to the lord of the fee. The 7 Edw. I. prohibited all alienations in mortmain under a like forfeiture. These statutes were evaded by fictitious recoveries, till the 13 Edw. I. took away their effect. A new mode of evasion was then invented by conveyances in trust for uses in mortmain, so that the profits went to religious persons. The 15 Rich. II. extended the former statutes to such uses, and to all guilds, fraternities, towns, and cities which have perpetual community, and all others which have offices perpetual, though not people of religion. Keb. St. 5, 33, 46, 181; 1 Ruffh. St. 9, 32. 100, 401, 402. The 23 Hen. VIII. c. 10, prohibited conveyances to any bodies not incorporated, for the use of churches, &c., to have obits perpetual or the continual service of a priest forever, and declared them void, but there was an express saving of the right of devising in mortmain by the custom of cities and towns corporate. Keb. St. 403, 404; 2 Ruffh. St. 171, 172. The statute of wills of 34 & 35 Hen. VIII. contained an express exception of devices to corporations. Keb. St. 562; Ruffh. St. 333, 334.

Such is the substance of the English statutes, which have been considered as the clogs upon dispositions to pious and charitable uses, which have been removed by the 43 Eliz. in England. If the question of their application to the state of things in this colony was a new one, we should deem it apparent that they were never practically extended to it. "It is the true principle of colonization that the emigrants from the mother country carry with them such laws as are useful in their new situation, and none other." 3 Bin. 596. That the law of charities as it rests on the 43 Eliz. is not only useful, but peculiarly adapted to the policy of the state, is unquestioned. It is therefore difficult to account for the prevalence of the opinion that it is not in force, or that any statutes repugnant to its provisions, should have been considered as practically adopted. Yet such is undoubtedly the apparent tendency of judicial opinion for the last twenty-five years.

In 1808, the judges of the supreme court made a report to the legislature pursuant to a resolution calling on them to state what English statutes were in force, in which they declare "conveyances to superstitious uses absolutely void by these statutes, and conveyances to corporations, unless sanctioned by charter or act of assembly, to be so far void that they have no capacity to hold the estates for their own benefit, but subject to the right of the commonwealth, who may appropriate them at their own pleasure; in other words, that such conveyances have no validity for the purpose of enabling the corporation to hold in mortmain." They consider them as standing on the same footing as conveyances to aliens. 3 Bin. 626; Leazure v. Hillegas, 7 Serg. & R. 319, 322. In M'Girr v. Aaron they declared a devise to an officiating priest and his successors, not being a corporation sole, was against the policy of the law, and void, as tending to a perpetuity. 1 Pen. & W. 51. In the case of Methodist Church v. Remington, 1 Watts, 218, they say: "The statutes of mortmain, too, which deprive corporations of the capacity to hold," &c., and consider the legislature as evincing "an evident jealousy of clerical monopoly," though they refer to no act in which it had been expressed. They also decided, that a conveyance for a religious society composed of members a majority of whom resided out of the state was not good under the law of 1730; and that the trust not being sanctioned by any legislative recognition, they would not lend their aid

to carry it into effect. In Witman v. Lex they seem to take for granted that at common law an incorporation was necessary to give a capacity to take and hold in perpetuity (17 Serg. & R. 91), though it was dispensed with by the custom of the province. We should have felt bound by these opinions, if the court had taken a view of the constitution and legislation of the state on the subjects to which they relate, and given them a deliberate construction; but as they have not been called upon to declare the meaning of any but the act of 1730, or of the provisions of any of the constitutions, it cannot be expected that the law can be considered as settled until their provisions had been brought under judicial notice. In the case of Baptist Association v. Hart's Ex'rs, 4 Wheat. [17 U. S.] 28, the supreme court of the United States have decided that a bequest of personal property to the plaintiffs as trustees was not valid for want of an incorporation, at the time of the devise; and the decision was approved in the case of Inglis v. Trustees of Sailor's Snug Harbor, 3 Pet. [28 U. S.] 114. This case was ruled according to the law of Virginia, in which state the 43 Eliz. had been repealed. We may therefore consider it as a case settling a question of a local rather than of a general nature. It has not, at any rate, such an application to the law of Pennsylvania as to control this case, if it should appear to be embraced in the provisions of any act of assembly or constitution of the state, or to rest on its known and recognized usage.

So far as these opinions of both courts rest on general principles affecting this case, they are also open to all rules which have been laid down in other cases by the same authority, to which it is thought best to refer before entering on a review of the general course of the law of England or of this state. The last case which has arisen in the supreme court of the state is Methodist Church v. Remington [supra]. In giving their opinion, the chief justice uses this strong language: "The decision in Witman v. Lex is full to the point that a trust in favor of an incorporated religious or charitable society is an available one." As the statute 15 Rich. II. expressly applied to conveyances in trust, or for the use of religious persons, in mortmain, we may consider this statute as not in force in this state; so that the objections growing out of the statutes of mortmain will be confined to those of Hen. III. and Edw. I. In relation to superstitious uses, the court observe: "The present is not a superstitious use, and indeed it is not easy to see how there can be such a thing here, at least in the acceptation of the word by the British courts, who seem to have extended it to all uses which are not subordinate to the interest and will of the established church;" so that an inquiry into this subject is not closed. In M'Girr v. Aaron there were no trustees, and, though the court held the devise to an officiating priest void because he was not a corporation, yet they declared it good in case of the congregation, though not incorporated (1 Pen. & W. 51, 52), on the principle that "a gift to a charitable use shall not fail for want of a trustee, but vest as soon as the charity has acquired a capacity to take." As the bequest in the case of the Baptist Association failed only for the want of a trustee capable at the time of the devise, though there was an incorporation afterwards, we cannot consider it as authority in this state, where a different principle is established. The bequest would have been good according to M'Girr v. Aaron.

In examining the decisions of the supreme court of the United States which precede and follow the Baptist Case, it appears that they have established a different principle as to devises of real estate for charitable uses, or for the use of religious societies which are not incorporated; so as to leave that case applicable only to a bequest of money or personal property, even in Virginia. In Terrett v. Taylor, 9 Cranch [13 U. S.] 43, 53, land in or near Alexandria was conveyed to two persons, the church-wardens of the parish for the time being, and their successors in office for the use and benefit of the church in said parish. The deed was held to operate by way of estoppel to confirm to the church and its privies the perpetual and beneficial estate in the land, though it was not incorporated, and church-wardens were not capable of holding an inheritance in land by succession. [Mason v. Muncaster] 9 Wheat. [22 U. S.] 455, 464. The court remark: "And in our judgment it would make no difference whether the Episcopal Church were a voluntary society or clothed with corporate powers, for in equity, as to objects which the laws cannot but recognise as useful and meritorious, the same reason would exist for relief in the one case as the other. Laws enacted for religious purposes evidently presuppose the existence of the Episcopal Church, with its general rights and authorities growing out of the common law." The church was capable of receiving endowments of land, and that the minister of the parish was during the incumbency seized of the freehold of its inheritable property as emphatically persona ecclesiae, and capable as a sole corporation of transmitting the inheritance to his successors. [Terrett v. Taylor] 9 Cranch [13 U. S.] 45, 46, 329; [Mason v. Muncaster] 9 Wheat. [22 U. S.] 455, 464. In Town of Paulet v. Clark, 9 Cranch [13 U. S.] 329, they say: "The property was in fact and in law generally purchased by the parishioners, or acquired by the benefactions of pious donors. The title thereto was indefeasibly vested in the churches, or rather in their legal agents—[Terrett v. Taylor] Id. 49—or representatives entitled to take the donation—[Town of Paulet v. Clark] 9 Cranch [13 U. S.] 329." "The true legal notion of a parish church is a consecrated place, having attached to it the right of burial, and the administration of the sacra-

ments. Every such church, of common right, ought to have manse and glebe as a suitable endowment; and when there is a church actually in existence, a grant to it is in effect a grant to the parson and his successors, as an endowment to be held jure ecclesiae." [Town of Paulet v. Clark] 9 Cranch [13 U. S.] 329; [Mason v. Muncaster] 9 Wheat. [22 U. S.] 464. The parson has a qualified fee, but the land becomes the perpetual inheritance of the church. [Terrett v. Taylor] 9 Cranch [13 U. S.] 47, 53; [Town of Paulet v. Clark] Id. 329; Co. Litt. 341 a. b.; 2 Mass. 500.

In Beatty v. Kurtz, 2 Pet. [27 U. S.] 580, 583, 585, the court decided that the laying out and marking a lot in the plan of a town "for the Lutheran Church" was a good and valid disposition—though it was not then organized, and was never incorporated as a religious society, but was a voluntary association, acting in its general arrangement by committees and trustees chosen from time to time; or any church actually in existence, or any grantee capable of taking. It was supported as a dedication of the lot to public and pious uses, and the enjoyment decreed to the committee of the society. The court take a ground which applies with great force to the law and constitution of Pennsylvania, as will appear hereafter. "The bill of rights of Maryland gives validity to any sale, gift, lease or devise of any quantity of land, not exceeding two acres, for a church, meeting, or other house of worship, and for a burying ground, which shall be used, improved and enjoyed only for such purposes. To this extent it recognizes the doctrines of the statute of Elizabeth for charitable uses, under which, it is well known, that such uses would be upheld, although there was no specific trustee or grantee." In the Case of the Town of Paulet they laid down the principle that they considered appropriations or dedications of property to particular or religious uses as an exception to the general rule, requiring a particular grantee, and, like the dedication of a highway to the public. [Town of Paulet v. Clark] 9 Cranch [13 U. S.] 331; s. p. [Beatty v. Kurtz] 2 Pet. [27 U. S.] 583. In M'Connell v. Lexington, 12 Wheat. [25 U. S.] 582, they considered that the immemorial use of a spring by the people of the town, as public property, was evidence of its original dedication, and decisive against a private claim to its exclusive use. In Cincinnati v. White, 6 Pet. [31 U. S.] 436, 437, the principle of these cases was affirmed to its fullest extent, and the court add—what is very important in the consideration of this case—that "the case of Beatty v. Kurtz [supra] did not turn on the bill of rights of Maryland or the statute of Elizabeth, but rested on more general principles of law." [Cincinnati v. White, supra.]

To trace these principles to their source in the early statutes and common law of England is therefore in perfect accordance with the decisions of the tribunal to whose revision our opinion is subject. It is the more necessary in this case, as the general course of the law of England as to the transmission and enjoyment of property formed the law of the colony at its first settlement, and continued in force till repealed or altered by colonial authority. In ascertaining what these general principles are, it is our duty to adopt the rules of construction which have been established by the supreme court in relation to charities under the 43 Eliz., and to apply them to the laws and constitution of this state, and the other English statutes which are analogous in their provisions and subject-matter to that statute, in doing which we shall start upon premises which must lead to correct results.

The legislation of Pennsylvania will be first considered according to the rules of expounding statutes laid down in Baptist Association v. Hart [4 Wheat. (17 U. S.) 1], and those which are the principles of the common law. It is not to be denied that if any gifts are enumerated in this statute which were not previously valid, or for which no previous remedy existed, the statute makes them valid, and furnishes a remedy. That there were such gifts, and that the statute has given them validity, has been repeatedly determined. The books are full of cases where conveyances to charitable uses which were void by the statutes of mortmain, or were in other respects so defective that on general principles nothing passed, have been sustained under this statute. If this statute restores to its original capacity a conveyance rendered void by an act of the legislature, it will, of course, operate with equal effect on any legal objection to the gift which originates in any other manner, and which a statute can remove. The authorities to this point are numerous. [Baptist Ass'n v. Hart] 4 Wheat. [17 U. S.] 31; 1 Sugd. Powers, 267; 4 Vin. Abr. 479, 483; Gilb. Ch. 45; 1 P. Wms. 248; [Inglis v. Trustees of Sailor's Snug Harbor] 3 Pet. [28 U. S.] 141; 4 Ch. R. 40.

"Statutes providing remedy for the maintenance of religion, the advancement of learning, and the relief of the poor, shall be extended according to equity, right and reason in their favor, and never against them," or be so construed as to permit the mischief to remain and suppress the remedy. The duty of judges is to advance the remedy and suppress the mischief—to advance the public and suppress the private object. 11 Coke, 70–73b; Hob. 97, 157; 5 Coke, 14b. Statutes authorizing gifts in mortmain, and all laws in favor of public institutions, shall be favorably and benignly construed. 11 Coke, 76a; Hob. 122; Co. Litt. 99a; [Town of Paulet v. Clark] 9 Cranch [13 U. S.] 331; [Inglis v. Sailor's Snug Harbor] 3 Pet. [28 U. S.] 140, 480; 1 Lev. 66; Dyer, 225. So of charters of the king for pious and charitable works. 10 Coke, 28a. And in all acts for the confirmation of grants by persons having power over the land the deed shall be established though it wants some circumstance necessary to

give it effect, according to its tenor and purport. 11 Coke, 78a. The statutes of superstition were intended to advance and continue good and charitable uses, and affect none which are not derived out of superstitious uses, or to be distributed by superstitious persons. Moore, 129, pl. 277; 4 Coke, 105, 11, 13, 14; where the same deed contains a disposition partly superstitious, and pious and charitable in other parts, the latter are good, if not dependent on and capable of being separated from the former. 4 Coke, 104–116, and cases cited; Anders. 95-100; Cro. Eliz. 449; Wing. Max. 497; Co. Litt. 342a. Though hospitals are named in the statutes, they apply only to such as are religious or ecclesiastical, or the funds are to be devoted to purposes of superstition as specially defined and plainly prohibited. It shall not be made superstitious by construction or intendment—it must be plain, and not imaginary, and no general words shall take away good and charitable gifts allowed by parliament, which are favored in the law. Co. Litt. 342a; Hob. 120–124; Moore, 865, pl. 1194; 11 Coke, 70b 71a; Wing. Max. 497. An affirmative statute does not take away a right existing by common law or custom, as the statute of wills, which did not affect the previous right to devise. Co. Litt. 111b, 115a; 3 Coke, 35a.

A custom saved and preserved by a statute is good against a statute. Thus lands can be held in mortmain in London without license, because there is such a custom (Cro. Eliz. 455); and the customs of London are saved by acts of parliament and Magna Charta (2 Co. Inst. 201; 4 Co. Inst. 250, 253; 5 Day, Com. Dig. 20; Cro. Eliz. 248, 455; W. Jones, 251, 387). A statute authorizing an act to be done repeals a law prohibiting it; otherwise it would be a dead letter, in opposition to an established maxim that such construction shall be made of all acts, "ut res magis valeat, quam pereat," and reverse another unquestioned one, "leges posteriores priores contraria abrogant." [Greene v. Neal] 6 Pet. [31 U. S.] 299. A grant by the king or an act of parliament is an authority to hold the thing granted, and operates as a license dispensing with the performance of any other act required by any law against which the king may grant a license or dispensation; though none is given in terms, it per se creates an incorporation, confers suggestion, and grants a rent; so if done by a private person under the authority of an act of parliament, as the erection of an hospital. 10 Coke, 30, 25a; Plowd. 502. A clause of non obstante statuto is not necessary to save a forfeiture by the statutes of mortmain. It is inferred from the act of the king or the legislature in order to give it effect. 8 Coke, 56. Its only use is to show the king is not deceived. 4 Coke, 36a. Hence it has always been held that the statutes did not apply to grants made by the king. 15 Vin. Abr. 479, a, 2. "He shall not be intended to be misconusant, and when he licenses expressly to alien to an abbot, &c., which is in mortmain, he need not make any non obstante of the statute of mortmain, for it is apparent to be granted in mortmain, the license of the king or mediate lords operates to two intents, as a dispensation from the statute of quia emptores, and of mortmain, because their deeds shall be taken most strongly against them, and the king shall not be presumed to make a void grant." Co. Litt. 98b, 99a; Plowd. 502; 8 Coke, 56.

Where land is held immediately of the king, he may grant a license to alien in mortmain; if held mediately, it might be made by the mesne lord, or with his consent. 34 Edw. I. c. 3; Keb. St. 71; Ruffh. St. 155. Since the 7 & 8 Wm. III., he can do it without their consent. 2 Day's Com. Dig. 298. As tenures in chivalry had been abolished by the statute 12 Car. II., the forfeiture accruing by alienation in mortmain accrued only to the king, who may renounce by his license a right conferred on the crown. Co. Litt. 98, 99; Vaughan, 332. The effect of a license in mortmain is not to give a capacity to a corporation to take or hold in mortmain. Conveyances in mortmain were good at common law. Co. Litt. 98, 99; Vaughan, 356. A grant in frank-almoigne placed the lands in the hands of bodies which never died. The estate became dead as to the king or mesne lords, of whom they were holden, yielding neither escheats, wardships, reliefs, or other benefits. Such grants were always good by deeds of private persons before the statutes, or by title of prescription, and are now good by the grant of the king. Litt. §§ 141, 142; Co. Litt. 98, 99; Co. Litt. 2b; Terms of the Law, 294; Plowd. 293; 6 Coke, 17a. Notwithstanding the statutes, the estate vests by the conveyance. 7 Serg. & R. 320. They are founded on the capacity of the grantee to take, so that wherever they apply the conveyance would enable a corporation to hold at common law for its own use; for if the estate did not vest, it would remain in the hands of the grantor or his heirs, as in the case of a conveyance to superstitious uses, which are merely void without incurring any forfeiture by the statutes of Hen. VIII. and Edw. VI. The license therefore is only an exemption from the penalty of the statutes. Co. Litt. 52b. It restores an interest. 1 Freem. 117. It is an authority coupled with an interest, enabling the grantees to acquire and enjoy an inheritance to their own use, without incurring the forfeiture, and by a renunciation of the rights given by the statutes, leaves the estate in their hands as if they had never been passed (2 Day's Com. Dig. 297, b, 3; Fitzh. Nat. Brev. 222, 495, 500; 4 Co. Inst. 135; Co. Litt. 99a; Vaughan, 333, 356); and operates in favor of a society or body not incorporated by a charter (Vaughan, 351, 352; 7 Coke, 35b), which is conclusive to show its previous capacity to

take. All that can be required, then, to give the same capacity to hold as to take, and make the right to enjoy as perfect as to take an estate, is any act of the party to whom the forfeiture accrues, which is in terms, or by its legal operation, a renunciation of a right conferred by law, which binds him and protects the estate from the assertion of his claim under the statutes; according to the established principle that subsequent laws abrogate prior ones, inconsistent with them, without any repealing clause, and will produce the same effect as a license in mortmain. It is admitted that the king is bound by all acts of parliament in which he is named, so that he can exercise no power by statute, prerogative, or tenure, in derogation of any right protected or authority conferred by the statute; but, generally speaking, he is not bound unless its provisions extend to him, subject to these exceptions. All statutes which provide profitable remedy for the maintenance of religion, the advancement of good literature, and the relief of the poor (11 Coke, 71b; 5 Coke, 14a, 14b), which suppress wrong and provide a remedy for a right (2 Co. Inst. 142, 69, 359, 681), or tend to perform the will of a donor or founder (11 Coke, 72a; 5 Coke, 14, 15; Plowd. 246; 3 Atk. 147), bind the king, though not named. His claims to lands by escheat, forfeiture or wardship are subject to all rights existing before they came to his hands. The law gives him a better remedy, but no better right, than the subject from whom the land came to his hands (2 Co. Inst. 573; 2 Ves. Sr. 296, 297; Hardr. 69, 469); and the appropriate courts were authorized by the statute—33 Hen. VIII. c. 39; Keb. St. 555; 2 Ruffh. St. 324—to decide on the rights of a subject, in a controversy between him and the king, according to equity and good conscience, as between subject and subject (7 Coke, 19b; Hardr. 27, 176, 230, 502; 4 Co. Inst. 190).

These are the principles which have given to the 43 Eliz. its powerful effect; though it contains no repealing clause, license or non obstante statuto, yet, by universal consent, it has been held to repeal the statutes of mortmain, the exceptions of corporations in the statute of wills, and to restore the common law in all cases embraced in its provisions, or which can be brought within them by the most liberal and benign construction. 1 P. Wms. 248; Finch, Prec. 16; Gilb. Eq. 137; 2 Eq. Cas. Abr. 191; [Inglis v. Trustees of Sailor's Snug Harbor] 3 Pet. [28 U. S.] 141. These principles are admirably condensed by the supreme court in [Baptist Association v. Hart] 4 Wheat. [17 U. S.] 31, and are those by which we must consider the legislation of Pennsylvania on the same subjects. We must hold its law to bind the state, and to dispense with the forfeiture accruing to it by an alienation in mortmain, if a similar law in England would bind the king. The prerogative of a republican state cannot be deemed, in a court of justice, more sacred than the jewels of a crown; or the rights of its citizens, individually or collectively, to the enjoyment of property, to be placed on a less permanent foundation than those of the subjects of a monarchy. Nor can corporations be subject to disabilities here from which they are exempted by the general course of the law of England, between the spirit and policy of which, and that of Pennsylvania, there will be found a most marked difference in this respect.

In England there has always been a jealousy of their rights to hold property; here they will be found to have been favored and protected by express provisions in the constitution and laws, while there is an entire absence of any restriction on their capacity to take or enjoy estates. There the effect of statutes has been to remove disabilities interposed by former statutes, which abrogated common law rights; here laws have been passed in affirmance of its principles, and they have been embodied in a supreme law. There courts have gone to the extent of their power, to rescue charities from the intolerant spirit of the times; here their duty is to further the benevolent policy of the people and legislature as evidenced in all their acts. From the first settlement of the province, we find that the uniform tenor of its laws has been to encourage all alienations of property, and to confirm its disposition, in every mode known to the law. The act of 1705 confirmed all sales of land made under the laws of the province, and declared that no deed, grant or assurance should be held defective on account of any want of form, of livery of seisin, attornment, misnomer or misrecital, but shall be good and effectual. 1 Dall. Laws, 51, 53; 1 Smith Laws, 31. This law has always been in force. The act of 1711 confirmed all grants from the proprietor to any person or persons, bodies politic or corporate, to hold the same for such estates and uses as they had been sold or disposed of, notwithstanding any defects therein, and shall be expounded most beneficially for the grantees, according to the words, tenor and true meaning thereof. 1 Dall. Laws, Append. 39, 40. This law was repealed in council in 1713, but its principles have ever been respected. The law of 1705 declared that all wills whereby any lands were devised should be good and available in law for granting, conveying, and assuring the lands devised and chattels bequeathed. 1 Dall. Laws, 53; 1 Smith, Laws, 33; 1 Dall. Laws, Append. 26, 36. The law of 1742 gives a remedy for the recovery "of any legacy or bequest of any sum of money" to any person or persons. Miller, Laws, 156; 1 Dall. Laws, 449, 631. Neither of these laws contain any exception of corporations. The rights of conscience were declared inviolable by the charter of privileges of 1701, granted by William Penn to the people of the colony. No person who lived quietly un-

der the government and acknowledged one God, should be in any case molested, or prejudiced in his estate, because of his conscientious persuasion (1 Dall. Laws, Append. 8, 10); and liberty of conscience was secured by a law approved in council (1 Dall. Laws, 43, 44). In 1712 an act was passed empowering all religious societies of Protestants within the province to purchase and hold lands for burying grounds, houses of worship, schools and hospitals; and, by trustees or otherwise, as they shall think fit to receive and take grants and conveyances for the same, for any estate whatever for the uses aforesaid. All sales, gifts or grants to such societies, or any persons in trust for them, were ratified and confirmed according to their tenor and meaning, and of the parties concerned. Gifts to the poor of these societies, or for their use, shall be employed only for the charitable uses for which they were given, according to what may be collected to be the true meaning of the donors or grantors, notwithstanding any failure in these gifts, grants or bequests. Bradf. Laws, 160. This law was repealed in council, twice enacted, and as often repealed. In 1710 the judges of the county court were made a court of equity, authorized to proceed according to the rules and practice of the high court of chancery of Great Britain, and an appeal was given to the supreme court, with power to decree as may be agreeable to equity and justice. Bradf. Laws, 103, 120. Though this law was repealed in 1713, and courts of chancery discontinued in 1736, the rules and principles of equity have always formed part of the common law of the state.

The sixth article of the charter to Penn provided, that the laws for regulating and governing property within the province, as well as for the descent and enjoyment of lands and goods and chattels, should be and continue the same as they should be for the time being, by the general course of the law of England, till the same should be altered. 1 Dall. Laws, Append. 3. The preamble to the act of 1718 recites that it is a settled point, that as the common law is the birthright of English subjects, so it ought to be the rule in British colonies. But acts of parliament have been adjudged not to extend to these plantations, unless they are particularly named in such acts (1 Dall. Laws, 129, 133); or, as has often been declared by the supreme court of the state, unless they are convenient, adapted to the circumstances of the colony, or have been in force by adoption, usage or long-continued practice, in courts of justice. [Morris v. Vanderen] 1 Dall. [1 U. S.] 67; [Respublica v. Mesca] Id. 74; 3 Bin. 596, 597; 1 Dall. Laws, 722. After repeated attempts to pass a law in favor of religious societies which would accord with the spirit of the colony, one was finally approved in council. The act of 1730–31 confirmed all sales, gifts and grants of land to any persons in trust for the use of any protestant religious society, for sites of churches, houses of religious worship, schools, almshouses and burying-grounds, made before the law. It also contained a provision which made it lawful in future, for any such society within the province to purchase, take, receive by gift, grant or otherwise, for the above specified uses and purposes, and for any estate whatsoever, and to hold the same for the said uses in fee, provided, that they should not take land for their maintenance or support, or for any other uses than those specified. 1 Dall. Laws, 270–273.

The constitution of 1776 declared, in the first section of the bill of rights, "That all men have an equal right to acquire, possess and protect property;" and in the eighth, "That every member of society hath a right to be protected in the enjoyment of life, liberty and property." 2. "That all men have a natural and unalienable right to worship God according to the dictates of their own conscience and understanding." 3. "Nor can any man, who acknowledges the being of a God, be justly deprived or abridged of his civil rights as a citizen, on account of his religious sentiments, or peculiar mode of religious worship, and that no authority is or ought to be vested in any power whatever, that shall in any case interfere with, or in any manner control the rights of conscience in the free exercise of religious worship." In the frame of government (section 45): "And all religious societies or bodies of men, heretofore united or incorporated for the advancement of religion or learning, or for other pious and charitable purposes, shall be encouraged and protected in the enjoyment of the privileges, immunities and estates which they were accustomed to enjoy, or could of right have enjoyed under the laws or former constitution of the state." Section 46. "The declaration of rights is hereby declared to be a part of the constitution of this commonwealth, and ought never to be violated on any pretence whatever." 1 Dall. Laws, Append. 55, 60; Conv. Pa. 55, 64.

The first law passed, on the change of government, declared the province laws in force till altered or repealed; also the common law, and such parts of the statute laws of England as had been before in force,—"And so much of any law or act of assembly as declares, orders, directs or commands any matter or thing repugnant to, or inconsistent with, the constitution, is hereby declared not to be revived, but shall be null and void, and of no force or effect." 1 Dall. Laws, 722. The constitution of 1790, in article 7, § 1, provides, "That the legislature shall, as soon as may be, provide by law for the establishment of schools throughout the state, in such manner that the poor may be taught gratis." Section 2. "The arts and sciences shall be promoted in one or more seminaries of learning." The 44th section of the old constitution contained similar provisions, though not so full. Section 3. "The rights, privileges,

immunities and estates of religious societies and bodies corporate, shall remain as if the constitution of the state had not been altered or amended." The first three sections of the bill of rights are, in substance, the same as in the old one. The third concludes—"and that no preference shall ever be given by law to any religious establishment or modes of worship." Section 26. "To guard against the transgression of the high powers which we have delegated, we declare that every thing in this article is excepted out of the several powers of government, and shall for ever remain inviolate." In the first clause of the schedule it is ordained, "That all laws of this commonwealth in force at the time of making the said alterations and amendments in the said constitution, and not inconsistent therewith, and all rights, actions, prosecutions, claims and contracts, as well of individuals as of bodies politic, shall continue as if the said alterations and amendments had not been made." 3 Dall. Laws, 32, 36. These provisions, and the law which immediately followed the adoption of the constitution, are a direct negative on the existence of any spirit of policy adverse to corporations.

In 1791, the act was passed "to confer on certain associations of the citizens of this commonwealth, the powers and immunities of corporations, or bodies politic in law." The preamble recites the reasons to be the saving time to the legislature in enacting laws to incorporate private associations, and the convenience of individuals desirous of incorporation—and the law provides: "That when any number of persons, citizens of the state, are associated, or mean to associate for any literary, charitable or religious purpose, they are empowered to obtain a charter of incorporation, subject only to the following conditions: To state in writing the objects, articles and conditions of their associations, and if the attorney general and the supreme court shall certify their opinion that they are lawful, the governor shall order it to be enrolled; and the persons associated become an incorporated body in law and in fact; to have continuance by their corporate name and title. They are authorized to execute the usual corporate powers, and to make by-laws and ordinances, provided they are not repugnant to the constitution and laws of the United States, of this state, or to the instrument on which the corporation was established. The corporations and their successors shall be able and capable in law, according to the terms and conditions of the instrument on which they are established, to take and hold lands, money, goods and chattels given them, according to the articles and by-laws, or the will of the donor, provided the clear income does not exceed five hundred pounds yearly." "And, whereas, bequests and legacies may be made to public institutions of which they may not derive the benefit intended, from a want of information," it is directed, that "when a will is brought to the register's office, to be recorded, which shall contain a bequest or legacy to a public incorporate body, he shall give them notice within six months, of the nature and amount of the legacy, and the name of the executor." 3 Dall. Laws, 40, 43. The law of 1818 enacts that where any lands are holden in trust for any religious society, or for any number of persons for the purpose of public worship or schools, or to be used as a burying-ground, or for charitable purposes; or where any estate of a personal nature, is or may be vested in any person or persons, to be applied by them to any religious, literary or charitable use or uses, and the trustee or trustees neglect or abuse such trust or trusts, the supreme court, or court of common pleas, on complaint made, may call on the trustees to answer; and if, on hearing, the court is satisfied that the trust has been neglected or abused, may and shall remove the trustees, and appoint others in their place, who shall be vested with the rights and powers of the former trustees, and give such security as is required. Section 2. The court shall have the power and jurisdiction of compelling the trustees to account before the court or auditors. Purd. Dig. 167; 7 Smith, Laws, 43, 44. This law was followed by the act of 1825, "To prevent the failure of trusts." The supreme court is authorized to grant relief in equity in all cases of trusts, so far as regards the appointment of trustees, either in consequence of the death, infancy, lunacy or other inability, or where a trustee renounces or refuses to act, or one or more dies, or becomes non compos, and a joint action is requisite, and to compel a conveyance of the legal estate, when the trust has expired. On the application of any person interested in the execution of the trust, the court may appoint a trustee, having regard to the objects of the trust as fully as a court of equity can do, and the rights of the former trustee shall vest in him; on the application of trustees, the court may remove them and appoint others. The act of 1828 confers the same powers on the courts of common pleas, district and circuit courts. Purd. Dig. 858–860.

From this summary of the legislation of Pennsylvania, it appears to have partaken of the spirit of its successive constitutions, and to have been constantly progressive, in the completion and perfection of the system of its founder, each succeeding law being more liberal in its principles, and more expanded in its provisions. The principles of the charter of Penn continued in force and protected all religious societies in the enjoyment of their rights of worship and property, in their houses of devotion, after the repeal of the act of 1712 by the council, and the passage of the act of 1730, as before. In 1733–34, Governor Gordon informed the council that a house had been erected in Walnut street for the exercise of the Roman Catholic religion, in which mass was openly

celebrated, contrary to the laws of England, particularly to the statute of 12 Wm. III., which extended to the colonies. The council were of a different opinion, and declared that the Catholics were protected by the charter of privileges and the law concerning liberty of conscience; but they referred the subject to the governor, that he might consult his superiors at home. No other proceedings however took place. Gord. 216. This opinion of the council accords with the declaration of William Penn to the members of the assembly, in 1701, "That he had justly given privileges the precedency of property as the bulwark to secure the other." 2 Clarkson's Life of Penn, 203. It was a rule of property, and the basis of the usage and common law of the state. The opinion of the council was the practical exposition of the charter, as understood and acknowledged, of which there cannot be a stronger case than the one that occurred. The 11 & 12 Wm. III. c. 4, prohibited the celebration of mass in any of the dominions of England, under a penalty of perpetual imprisonment. 4 Ruffh. St. 41. If this statute included the colonies, it was repealed by the charter; if it did not, there was no law professing or attempting to interfere with it as a fundamental law of the colony.

The list of laws rejected by the king in council shows the constant struggle between the policy of the colony and mother country (Hall & Sellers' L. 21, 57, 67, 99, 125, 193, 199, 276; Miller's L. 16, 74, 158), which ended only with the Revolution. The usage continued, in despite of the efforts of the king and council to prevent it from having the sanction of the law, and the provisions of the constitution were as broad as the usage. Its phraseology is adapted to the inconveniences which existed, and its provisions afford a remedy commensurate with the mischief arising from the want of a legal sanction to rights indispensable to the enjoyment of practical liberty of conscience, as a bulwark to property. In the Case of Cedar Springs Congregation, the trust did not depend on the enabling provisions of the statute, but on the custom of the province, as stated in Witman v. Lex [supra]; Methodist Church v. Remington, 6 Bin. 59 [1 Watts, 218]. The evidence of this custom appears in all the acts for granting charters, and in the law of 1791, in relation to the lots held by the Quaker societies in Front street, and at the corner of Fourth and Arch streets. 3 Dall. Laws, 46, 47. The proceeding before the council in 1734 is unequivocal evidence of the claim of right by the Catholic societies, according to the usage under the charter of 1701; so that we have from the most authentic sources full evidence of the existence of a custom and usage, expressly saved and preserved by the constitution of 1776, which operates not only prospectively, but refers by express terms to the former constitution of 1701, so as to make the usage of the same force from that time, as it would have had, if the state had been then independent of the mother country, as she was in 1776. Being saved by the supreme law, the custom had the same force as the law itself, and stood on the same basis as customs saved by Magna Charta, according to the rules of law before laid down.

The constitution of 1776, then puts the rights which could be enjoyed by the previous custom of the province, on the same footing as if they had been defined in detail in the 45th section, and the present constitution makes them perpetual. If any additional sanction could be given to them by human authority, it will be found in the first amendment to the constitution of the United States. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This extends to the judicial as well as legislative departments of the government, and annuls all jurisdiction over the subject matter, past or future. [Marbury v. Madison] 1 Cranch [5 U. S.] 174–179; [Bingham v. Cabot] 3 Dall. [3 U. S.] 382. If the rights of a religious or literary society are derived from a contract or grant, no state law can impair their obligation, and the supreme court have placed them under the same constitutional protection as those of individuals. [Terrett v. Taylor] 9 Cranch [13 U. S.] 45; [Mason v. Muncaster] 9 Wheat. [22 U. S.] 454; [Society v. Town of New Haven] 8 Wheat. [21 U. S.] 480; [Dartmouth College v. Woodward] 4 Wheat. [17 U. S.] 624. To deny to bodies united without a charter any rights of property which could be enjoyed by a corporate body, would be in direct opposition to both the constitutions of the state and union, and the custom of the province. "Incorporations were almost unknown; yet to all sorts of pious and charitable associations, in every part of the province, valuable bequests were made by those who were ignorant of the niceties of expression necessary to accomplish the object at common law. Nothing was more frequent than bequests to unincorporated congregations, without the intervention of trustees; and even when there was a corporation, it frequently happened that the corporate designation was mistaken, or the trust vaguely defined. Notwithstanding which, the testator's bounty was uniformly applied to the object." Surely a usage of such early origin and extensive application, may claim the sanction of a law, resting, as it does on the basis of all our laws of domestic origin, the legislation of common consent. 17 Serg. & R. 91, 92. The same principle is adopted in all governments. A usage or custom is presumed to have had its origin in a law once in existence, and lost in the lapse of time, the evidence whereof being by prescription, that supplies the place of the written law, which is taken to have been as broad as the usage. The law presumed from a custom, has the same force as one appearing on the rolls of parliament—

the only difference is in the mode of proof; and the rule that a custom shall not prevail against an act of parliament unless it is saved and preserved by a statute. 3 Dow, Parl. Cas. 112; Austruther 614; 1 Dow, Parl. Cas. 322. The supreme law of England and the states of this Union which have no written constitutions of government, is proved only by legislative usage, which is the evidence of their constitution and supreme law. [Calder v. Bull] 3 Dall. [3 U. S.] 400; [Wilkinson v. Leland] 2 Pet. [27 U. S.] 656, 657; [U. S. v. Arredondo] 6 Pet. [31 U. S.] 714, 715. On whatever subject a known and recognized usage exists, it forms the law of the case, and controls all affirmative statutes, and the rules of the common law—as a general or local law, according to its nature. [U. S. v. Arredondo] Id. 715, and cases cited. The reason is obvious—it is founded on a law presumed from the prescription. This presumption is not that such a law ever, in fact, existed, but "it is adopted as a general principle, to take the place of individual or specific belief." 12 Ves. 265, 266; 10 Johns. 380; [Prevost v. Gratz] 6 Wheat. [19 U. S.] 504. Though the party claiming by prescription produces his title, and it is worth nothing, the court will direct the jury to presume another grant subsequently. All shall be presumed to be done, which shall make the ancient appropriation good, and the right shall be presumed from the prescription, if it could have had a legal beginning. 12 Coke, 5; Cowp. 109, 110. The same rule applies to the franchises of a corporation (4 Mod. 55; 1 Saund. 345; 1 Rolle, Abr. 512), "for whatever may commence by grant, is good by prescription." Where possession has been long held under a claim of right, to the exclusive enjoyment of the lands of the crown, a patent, charter, or grant of the king will be presumed. 1 Dow, P. C. 322. The same rule is applied in this country,—14 Mass. 534,—though the possession was taken and held under a defective title,—[Society v. Town of Pawlet] 4 Pet. [29 U. S.] 506, 507; [Jackson v. Huntington] 5 Pet. [30 U. S.] 439, 440. The principle has been applied in Pennsylvania to a religious society, which has been long in possession of a piece of ground, on which they had erected a church, used it for public worship, and occupied an adjoining piece for a burial-ground, and another piece for the free passage of the congregation, and the accommodation of horses and carriages, according to what the supreme court declared the common usage. This possession was held to be sufficient to enable the society "to recover in ejectment, and sufficient for a presumption, that the commonwealth had granted the land to the predecessors of the plaintiffs, or made a promise of a grant which would establish a right of pre-emption." Mather v. Ministers of Trinity Church, 3 Serg. & R. 510, 511.

Either presumption is sufficient for all the purposes of this case. The only difference between a grant and a pre-emption is the payment of the purchase money, which must precede the formal consummation by patent; but when paid, the right to a patent, and the enjoyment of the estate against the commonwealth is complete. We may now assume these principles to be settled, that usage and customs have the force of laws—that those which are saved and preserved by the constitution of this state are its supreme law—and that rights declared in the constitution, or which have been, or could be enjoyed according to customs or usage, saved and preserved, neither depend on legislative discretion, nor can be impaired, much less forfeited, by legislative power. It follows, that no charter can be requisite to give a capacity already existing by usage, or asserted in the bill of rights or constitution, or a dispensation from a forfeiture, which no law was competent to enforce or prescribe. Hence, the course of the legislature has been, in granting special acts of incorporation to religious, literary and charitable societies, strictly in the spirit of the constitution, to superadd to their constitutional rights, the privileges, franchises and immunities of corporations, to confer the powers of corporate bodies, "to further their objects and charitable designs," to put all religious societies on the same footing, as to the encouragement and protection afforded by the constitution (Bradf. Laws, 11, 23, 52, 89; Laws 1790, p. 285) by imparting to them such powers as would enable them to manage their corporate concerns, and enjoy their corporate property by their own by-laws and officers, and to assert their rights in their corporate capacity; not to give the capacity to take property, nor to release it from the forfeiture of mortmain. Charters were given to Catholic societies, "to enable them to manage the temporalities of the church, as fully as any other religious society could do." Laws 1789, pp. 456, 532; [Terrett v. Taylor] 9 Cranch [13 U. S.] 49; [Town of Pawlet v. Clark] Id. 326, 327. A lottery was granted for the benefit of the Hebrew congregation, in order to save their property from sale by execution. The preamble contained this recital—"And whereas, it is just and proper that all religious societies should be protected, so far as is consistent with the principles of the constitution." Laws 1790, p. 310; 2 Dall. Laws, 817.

In most of the laws granting charters, there is a recital to this effect, "that it is just and right, agreeably to the true spirit of the constitution, that the prayer be granted;" or, "that this house is disposed to exercise their powers for the encouragement of all pious and charitable uses." Bradf. Laws, 37, 223, 407; Laws 1789, pp. 189, 198, 225, 285. They are retrospective to the property held by the society, before the incorporation, in some cases by deeds in trust for their use; in others, to the society by their name of association only, of which there are more than thirty instances in Bradford's Laws, which fully establish the fact of the universal usage throughout the state, for all religious societies to enjoy estates

without actual incorporation. What expresses the sense of the legislature most unequivocally is, the law of 1789, which, after reciting the 45th section of the constitution, declared so much of the law of 1779, relating to the college and charitable school of Philadelphia, as was repugnant to the charter from the proprietor, to be void, on the ground "that the charter gave them rights which were entitled to encouragement and protection in the free enjoyment and exercise thereof, in conformity to the will of the donor, in the same manner as it could have of right occupied and enjoyed the same under the former laws and constitution," and that the law was "repugnant to justice, a violation of the constitution, and dangerous in its precedent to all incorporated bodies, and the rights and franchises thereof." 2 Dall. Laws, 650, 651. When such is the fact of the constitution, it certainly could not be the law of the state, that bodies united or incorporated, needed any other protection for their rights, privileges or estates. They could be submitted to no other test than usage; and though the legislature could not be coerced to grant an incorporation, they could not infringe any right which could be enjoyed under the constitution. They might refuse them the franchises necessary to transmit property by mere succession, and to govern the society by corporate officers and by-laws; but as all the individual members were capable in law of acquiring it, no power could take it from them.

The inhabitants of a town may take in succession by a grant to their singular heirs, a private person may build and endow a house for a school, an hospital, a church, or abiding houses for the poor, without incorporation: but he could not, by his own grant, give it corporate franchise of succession. 10 Coke, 26, 27; 2 Co. Inst. 202; [Town of Pawlet v. Clark] 9 Cranch [13 U. S.] 329. The rule of the common law is recognized and well illustrated in the preamble to the 39 Eliz. c. 5, for the erection of hospitals, &c., by private persons,—the reason for which is declared to be, "understanding and finding that such good law has not taken such good effect as was intended, by reason that no person can erect or incorporate any hospital," &c., "but her majesty, or by her highness' special license, by letters patent in that behalf to be obtained." The act then authorized the creation of incorporations by the deed of the founder enrolled in chancery, without any act of the crown, with full corporate powers and franchises and to make any by-laws not repugnant to the laws of the kingdom. Keb. St. 921; 2 Ruffh. 687, 688. This statute was evidently the pattern for the act of 1791, as appears by the title, the preamble, and the enacting clauses. Neither contain any restrictions on any unincorporated societies or bodies; their provisions are remedial, in order to facilitate the enjoyment of charitable donations, and the furtherance of charitable objects, by corporate franchises; to enable an individual to do what he could not do without a law;—to give a private deed the effect of a public grant, in order to complete the pious and charitable work by the charter of the donor or founder, without a special application to the crown or assembly. 10 Coke, 25–34; [Terrett v. Taylor] 9 Cranch [13 U. S.] 49. Both laws are founded on an existing right to make the donation; and if the right of property had not been understood to have been fixed and settled, the legislature would never have interfered to secure its enjoyment in perpetuity by succession, as a continuing corporate franchise with no other limitation to the power of making by-laws, than the laws of the land, the will of the donor or founder, and the articles of association; placing the incorporation on the authority of parliament, in England, and in this state making it a contract or legislative grant, the obligation of which cannot be impaired by the state.

All the analogous legislation of England is bottomed on the right of private persons, singly or associated, to take and hold estates of inheritance by apt words of grant to themselves and their heirs, which is a common law right of all subjects who are under no legal incapacity. In this respect the law of both countries is the same; the only difference between them consists in two particulars:—1. In England, those persons who have devoted themselves to religion, withdrawn from the world, and entered into holy orders, are not deemed in law to have any civil existence until they have acquired the capacity of natural persons by the removal of the disabilities arising from their profession and the restoration of their original right. In this state, there is no such disability. The bill of rights declares it to be the natural and inherent right of all men to acquire, possess and enjoy property, and the constitution protects all members of society in their persons and estates. No common law disability, therefore, can obstruct the vesting of a constitutional right, and as no law can take it away, no charter is necessary to confer it, or to restore what has not been relinquished or lost. 2. In England, there are statutory disabilities on corporations, whereby they are less favored than individuals or bodies not incorporated; but, in this state, they are subject to no restraints, and in the constitution are placed on the same footing of protection as private persons or bodies united without a charter—there is of course no necessity of any law to repeal a statutory disability, or of a license by any subordinate authority, to perfect a right conferred by a supreme law. If an act of parliament had contained the same provisions as the constitution of this state, and the statute of 34 & 35 Hen. VIII. had contained no exception for corporations, there could have been no doubt that any religious society could have taken an estate in fee without a charter, and enjoyed it in mortmain without a license. There can

be no clearer evidence of the common law right, than the enactment of statutes to take it away, nor is any rule better established, than that an exception of a particular case is an admission that the case would have been embraced in the law or constitution, if no exception had been made. [Gibbons v. Ogden] 9 Wheat. [22 U. S.] 207; [Brown v. State of Maryland] 12 Wheat. [25 U. S.] 436–438.

The application of this rule to the jurisprudence of this state will furnish a solution of all the difficulties which have attended the investigation of the law of charities, and lead to results which cannot be erroneous. The reason of the law is the law itself, and we have only to look to the reasons which call for an incorporation in England for the want of an act of parliament removing the disabilities of religious persons, and to bear in mind that the effect of the constitution must necessarily be that here ecclesiastics or persons in holy orders have a capacity to purchase, which is denied to them by the policy of the common law. Hence arises the necessity of an incorporation by charter or prescription, to give them the capacity of natural persons, by removing the disability arising from their being professed men of religion, as monks, friars and canons, who are deemed dead persons in law; but when one of them becomes a bishop, an abbot, &c., he is the head or sovereign of the house, having a secular capacity to purchase and hold land, through whom the monks or the convent become as natural persons, and remain so while there is a sovereign or head. A grant to an abbot and his monks, or to the abbot and convent, is good, and vests the title in perpetuity. If the grant is made while there is a vacancy in the head or sovereignty, the fee remains in abeyance, but vests whenever the vacancy is filled. Perk. §§ 3, 51, 55; Litt. §§ 443, 655; Co. Litt. 263, 346b; [Terrett v. Taylor] 9 Cranch [13 U. S.] 47; [Town of Pawlet v. Clark], Id. 329; [Beatty v. Kurtz], 2 Pet. 27 U. S.] 580. The reason why a grant to monks or to a convent, who have never had a head or sovereign by charter or prescription, is bad, is "that when a man taketh lands or tenements by purchase he ought to be of ability to take the same when it falleth to him by purchase." Perk. § 505. Monks have not this capacity, because they are all dead persons in law; but the abbot, who is the sovereign, &c., and this by reason of the sovereignty, for otherwise he should be but as one of the other monks of the convent. Co. Litt. § 655; Id. 345b. And the grant cannot take effect, though a corporation was made afterwards. 2 Coke 51b; Hob. 33; 8 Vin. Abr. 56, H; Perk. §§ 3, 4; Co. Litt. 2a, 3a. The reason of this rule shows that it is confined to grants to persons who have no personal capacity or civil existence. It cannot apply to natural persons, who have a common law right, guarantied in this state, and declared inviolable, as to whom a charter could have no effect except to confer some corporate franchise which was not of right by law. There is no rule of the English law which requires a charter to enable a society or body of capable persons to take and hold property in fee by proper and apt words of inheritance. Any opinion to the contrary must be founded on the misapplication of the foregoing rule, as is evident from the cases referred to by the counsel in the argument of the case [Baptist Association v. Hart] 4 Wheat. [17 U. S.] 1; and in not discriminating between the right of holding an estate of inheritance with and without proper words to convey it, and between the effects of a deed which transmits from ancestor to heir, or a charter which passes it from predecessor to successor. A grant to the commonalty, parishioners, inhabitants or good men of a place (Co. Litt. 3a), the commoners of a waste (Shep. Touch. 236, 237), the people of the county of O., or to associates, being a settlement of Friends at S., does not enable them to hold an inheritable estate without a charter (Perk. § 510), if they could take any estate or privilege it would be only for the lives of the then existing inhabitants (2 Johns. Cas. 323; 9 Johns. 75), as in case of a grant to a single person, omitting "and his heirs." They are capable of taking the fee by proper words of grant to themselves and their heirs, or to another in trust for their use (8 Johns. 388; Shep. Touch. 337), but some person or body politic must be named who can take by force of the grant, as a mayor and commonalty (Perk. § 64), or the church-wardens of such a church (Perk. § 55), in ancient time (Co. Litt. 3a), and now by custom (Cro. Eliz. 145, 179). The parishioners, inhabitants or good men of Dale are capable to purchase goods by such name. Co. Litt. 3a. The only reason why they cannot purchase in fee by that name is that they are not a permanent (Hob. 86), continuing body having succession. Any estate conveyed to them in fee must descend to their singular heirs, unless they have no charter or prescription, the franchise of a body politic, which is the only thing required to enable them to hold in perpetuity by succession.

These considerations lead to the object and effect of an incorporation in England, first, to give to ecclesiastical persons the same civil capacity to purchase as other natural persons have by right; and, secondly, to confer the franchise of succession. In this state, the first object is effected by the constitution, and the incorporation is necessary only for the second. The only difficulty then is to distinguish between the natural rights of all the members of the society which constitutes the state a body politic, and those which are conferred by charter or law on a body of men who are the members of a society united for particular purposes. The common law requires no charter to enable a body of men in any place to purchase chattels or receive do-

nations of money, a chattel interest, or an estate for the lives of the grantees, in land, by their name, as a body, without other words. If one is necessary, it can be only to give them some privilege, immunity or exemption from the rigor of the common law, so as to make them as a natural person capable of enjoying an estate in fee without words of inheritance. A corporation is a permanent thing, that may have succession, an assembly of many into one body (Terms of Law, 123), an artificial body constituted of several members, united by its franchises and liberties, which form its ligaments and are its frame and essence (Lil. Pr. Reg. 459), which never dies, and exists only in its political capacity (1 Bl. Comm. 468–470), which unites and knits them together as a natural person (Id. 272); or a person who is made by policy and fiction of law a body politic, with the capacity of succession in perpetuity, but which exists in both a natural and political capacity (Wood. Inst. 109; 1 Bl. Comm. 468–470). The corporation aggregate, which never dies, and can take only in one capacity, holds in perpetuity by a grant to itself without words of succession; but a corporation sole, existing in both capacities, takes only for life, unless the word "successors" is added, so as to denote the intention to convey to him in his politic capacity of succession. Co. Litt. 8, 9, 94a, 96b, 250; Perk. § 240; Plowd. 496; Wood. Inst. Eng. Law, 111; Terms of Law, 124; Cro. Jac. 532. Succession is a corporate franchise, by which property passes from predecessor to successor, as it does from ancestor to heir, by inheritance. Terms of Law, 123; 4 Coke, 65a. Succession is not a word of inheritance. A grant to a private person and his successors carries only a life estate. Succession must be granted by a charter from the crown, or a law making the grantees a corporation, so that their rights devolve on their successors by virtue of the franchise. The object and effect of the incorporation is to create the artificial person with the same capacity as the natural person. Whenever it exists as a perpetual body, in the exercise of this franchise, its uninterrupted enjoyment is evidence of a charter presumed to be lost, and it is a corporation in fact and in law. Perk. § 34; Co. Litt. 132b; 2 Day's Com. Dig. 300; 1 Saund. 345; 1 Mod. 55. The word "successors" is not in all cases indispensable to vest an interest by a grant or an obligation in the successor of a sole corporation; as where a grant is made to an abbot and his convent, to hold in frank-almoigne the tenure imports succession, and as the celebration of divine service and free alms are continuing objects, the estate is in perpetuity, as in case of a gift in frank-marriage. Litt. § 133; Co. Litt. 93b, 94a; s. p. [Inglis v. Trustees of Sailors' Snug Harbor] 3 Pet. [28 U. S.] 146, 147. So where, by a local custom, the right passes to the successor, though not named, as the chamberlains of London (Terms of Law, 124; 1 Lil. Pr. Reg. 383, 384; 4 Coke, 65a; Cro. Eliz. 464, 682; Hob. 247; 5 Day's Com. Dig. 17); so, of church-wardens who are a corporation by prescription throughout the kingdom, with capacity to take and hold money and chattels for the church, but not lands, yet they may hold lands by special custom in succession as a corporation (March, 67, pl. 104; Cro. Eliz. 145, 179; Cro. Jac. 532; Cro. Car. 455; [Terrett v. Taylor] 9 Cranch [13 U. S.] 45, 53; [Town of Pawlet v. Clark] Id. 328; 17 Serg. & R. 92). Neither are any particular words necessary to create the corporation; a public grant of corporate privileges is, per se, an incorporation to give the capacity of enjoyment according to the grant; as to the inhabitants of a town, to have guildam mercatoriam, which unites them by the franchise, and makes them as a natural person for the purpose. 10 Coke, 30a; 1 Rolle, Abr. 513; 1 Bl. Comm. 474. And as the only thing for which a charter is necessary is, to grant the franchise of succession, its actual enjoyment and exercise is, per se, evidence that it was by lawful and competent authority. 1 Bac. Abr. 500; 10 Coke, 28a; 1 Bl. Comm. 475–479; 1 Lil. Pr. Reg. 459. London itself is only a corporation by prescription. 5 Day's Com. Dig. 17, H. If then the religious, literary and charitable societies which have existed in this state had no other foundation for their rights of property, than the principles of the common law and long usage, they could not be disturbed for want of an actual incorporation by charter or law; and when we add to these rights, those expressly secured to them by the constitutions of the state and Union, we cannot doubt that they are as inviolable as a charter could make them. To decide that any one was necessary to enable a religious society to enjoy the sites and buildings for worship, for charity, for education and sepulture, and funds for the maintenance and support of poor, would be a declaration that the rights of conscience and worship could be made dependent on the discretion of the legislature. And, if a charter could be withheld from any society, united for religious purposes, so as to impair their rights of property, then a preference could be given to modes of worship; there would be a virtual prohibition of the free exercise of religion, and the sect favored by the legislature would be, in substance, a religious establishment.

Connecting with the whole course of the legislation of Pennsylvania, the well known fact which appears in the record in this cause, that the societies of Quakers have never been incorporated, it is not credible, that their right to hold their places of worship and charity, and to enjoy donations of land and money, is a mere shadow, without a charter in fact. In our opinion, they have had from 1701, and yet have, a charter more firm than any patent or law can create, the great charter of Penn, which was the basis of the usage and custom of the prov-

ince, and by its incorporation into the supreme law of the state, is the rule and standard of right by which our judgment must be guided. The law of 1777 repeals all laws inconsistent with its provisions, whether those of the mother country or the colony; and declares that laws not inconsistent with it shall remain in force, as well as such statutes and common law in England as have been heretofore adopted. The laws of 1705 in relation to deeds and wills, which have no exception of corporations, the law of 1730–31, which actually amortises the sites of houses of worship and burial grounds, then in possession of religious societies, devoted or erected for the purposes of religion or charity, were also a direct license to all Protestant religious societies to take and hold in mortmain by future grants and gifts. The law of usage which, being saved by the constitution, became a supreme law, gave the same right to all societies united or incorporated for these purposes, whether Protestant or not. As the custom of the province was in accordance with the rejected laws of 1710, in relation to the powers and duties of courts of equity, to the law of 1711, for the confirmation of public grants, and of 1712, in relation to religious societies, and the various acts concerning liberty of conscience and the privileges of freemen, and as this custom is the law of the state, according to which lands have been held in mortmain from its first settlement, we are bound to give it the same effect as is given to the custom of London by all the rules and principles of law in relation to the construction of statutes. We must apply those which have been adopted on the 43 Eliz., as laid down by the supreme court, to the constitution and laws of the state, and construe them most favorably and benignly, for the promotion of all objects connected with the maintenance of religion, the advancement of learning, the relief of the poor, and public utility; so that the rights, privileges, immunities and estates thus guarantied, shall be enjoyed unimpaired here, at least as far as they are in England, by this statute. No one can compare its provisions with the legislation of the state, and hesitate, for a moment, in saying that they fall far short of the protection given by our own laws to donations for pious and charitable uses. If the 43 Eliz. has by universal consent been considered as pro tanto a repeal of the statutes of mortmain, of superstitious uses, and restraints on corporations by the statutes of wills, they cannot be in force in this state, unless we reverse the whole course of the law, in the exposition of statutes, by construing them liberally in favour of forfeitures, and strictly against charities, so as to abrogate common law rights by equity, and defeat the remedy provided by statutes for their protection.

It must be remembered, that these are mere statutes of policy in contravention of the common law. The old statutes of mortmain were passed to prevent the king and mesne lords from being deprived of their seignioral and feudal rights accruing by prerogative and tenure. The statutes of Hen. VIII. and Edw. VI. were aimed avowedly against the rights of the Catholic religion. Its suppression being their great object, donations for its support were declared "to be superstitious uses, mala in se, and destructive to our constitution and government under the Protestant religion; therefore the law prohibits them, but it is not so with charities, which have always been favored." The true foundation of the statute of mortmain of 9 Geo. II. was, that enough of lands had got into the hands of corporations that were indissoluble; and even now charities may be established in the lifetime of a person, but shall not be done in his last moments. 3 Atk. 148, by Lord Hardwicke. The history of the times gives another reason for this statute: It was passed in the session of 1735–36, during a period of high excitement against the Catholics, and when the church was deemed to be in such danger that a bill for the relief of the Quakers from severe disabilities was thrown out in the house of lords after passing the commons. 5 Hume, 617, 618; 3 Rapin, 225, 226. It is not congenial to the policy of this state to incorporate such principles into its system, nor would it be creditable to the character of its legislation to expound it unfavorably to those rights and institutions which were favored, protected and spared by the laws of a king who spared little besides. If any statutes were suited to the policy of the state, they are the 43 Eliz. and the 7 & 8 Wm. III. c. 37, an act for the encouragement of charitable gifts and dispositions, which in favor of learning, charity and other good and public uses, authorized the king to grant licenses to any person or persons, bodies politic or corporate, their heirs and successors, to purchase and alien land, in mortmain, in perpetuity or otherwise, without being subject to forfeiture. 3 Ruffh. 636. It may well be presumed, that the emigrants from England brought with them these principles for adoption, and engrafted them into their system of religious toleration and charities; but that they ever adopted any law which created a forfeiture for an alienation of property to any religious, literary or charitable society or corporation or prohibited donations for the uses of worship, according to the ritual of the Catholic church, is utterly inconsistent with the established usage, and every law of the state or colony from the earliest to the present time.

The law must be settled beyond all doubt before we can feel justified in deciding that the rights of religious societies and of charitable and literary institutions, in Pennsylvania, are less firmly established than they were in the mother country. As to the statutes of superstitious uses, it suffices to say that where there can be no religious estab-

lishment, no restraint on the free exercise of religion, and no preference of modes of worship, the celebration of divine service according to the rites of any church or society worshiping the Supreme Being, cannot be deemed unlawful or superstitious; nor can an actual incorporation or express license be necessary to give to any society or body of men the capacity of enjoying any right in accordance with a custom or usage, incorporated into the constitution, in order to save a forfeiture, by an alienation in mortmain, where none is in a like case imposed by the law of England. The Revolution devolved on the state all the transcendent power of parliament, and the prerogative of the crown,—[Trustees of Dartmouth College v. Woodward] 4 Wheat. [17 U. S.] 651,—and gave their acts the same force and effect; consequently, a grant, charter or law made by its authority is, by the principles of the common law, equally binding on the state, as a patent or act of parliament is on the king. The state can take no estate by forfeiture when the alienation is expressly authorized by its laws, and the enjoyment of the estate secured to the grantee by constitutional provisions, which except the subject matter from all the powers of government.

It would be a remarkable feature in the legislation of the state, if, while its successive constitutions have made the rights of bodies united or incorporated its especial favorites, and its laws give the right of self-incorporation to all religious, literary and charitable associations, and so far depart from the jealous policy of the state against chancery jurisdiction as to provide special remedies for the execution of trusts in their favor, both as to real and personal property, they should be still considered as reprobates, outlawed by the statutes of mortmain, and their estates forfeited by the very act of a conveyance to a corporation directly, or to trustees for their use. If any, the least respect is paid to the constitutions, they must be considered as placing corporations on the same footing at least, if not a better, than in England; yet if the judicial dicta which we find in the cases are the law of the state, the statutes of mortmain are in full force, while those which have softened their rigour have not been adopted, and the supreme law of the state is a very nullity, incompetent to protect charities, even to the extent of the 43 Eliz. or the 7 & 8 Wm. III. There is no escape from this conclusion, if we take these dicta as the settled law of the state. If the statutes of mortmain are a part of the jurisprudence of the state, they have been so from its first settlement; and as they have been in no way modified or altered, they must be taken to have been adopted to their full extent, so as to cover the mischief they were intended to remedy, by creating the forfeiture, and giving the state the right to seize the lands aliened, or the mesne landlord to enter, as the land may have been held under the one or the other. 7 Serg. & R. 320. As the tenures of Pennsylvania are free and common socage, there were no seigniorial rights accruing by tenure, which could be defeated by an alienation in mortmain, except in case of a person seised of lands, dying intestate, and without known kindred, when the land escheated to the immediate landlord of whom it was holden, or to the proprietary, if he held immediately from him; according to the colonial law of 1705 (1 Dall. Laws, Append. 45, § 12), which remained in force till 1787, when the escheat was declared to be to the state (2 Dall. Laws, 553). The mesne landlord, then, was till that time, entitled to the benefit of the forfeiture, and the license of the king or proprietary was no dispensation without the consent of the party to whom it accrued; the king could renounce his own right, but not the right of a subject; before the statute of Wm. III. it could be done only by the power of parliament. Vaughan, 333-343, 356; Co. Litt. 99a. By the law of England, the license of the king and mesne lords is not alone sufficient; there must be a writ of ad quod damnum, to ascertain what damage it would be to any other person, to alien in mortmain. Fitzh. Nat. Brev. tit. "Writ of Ad Quod Damnum" (222), 493, etc. It follows, that a patent, license or charter from the proprietary, under the colonial government, or from the president of the council, before 1787, would not have saved the forfeiture to the immediate landlord, without his consent, and the writ of ad quod damnum; for if the statutes were in force, either by adoption or as "the general course of the law of England," or the common law, they remained in force till they were altered or repealed, as declared in the acts of 1718 and 1777, as fully as if they had been re-enacted; and a license can have no greater effect here than it had in England before the statute of 7 & 8 Wm. III. which was passed in 1695, thirteen years after the charter to Penn. "With respect to English statutes enacted since the settlement of Pennsylvania, it has been assumed as a principle, that they do not extend here, unless they have been recognised by our acts of assembly, or adopted by long-continued practice in courts of justice." 3 Bin. 597. As there is not a spark of evidence of such recognition or adoption, we have no legislative or judicial authority for saying that it is now in force; consequently, no license would save the forfeiture before 1787.

The supreme court has declared it to be a point conceded, that the 43 Eliz. has not been extended to this country. "But we consider the principles which chancery has adopted in the application of its principles to particular cases, as obtaining here, not indeed by the force of the statute, but as part of our common law, and where the object is defined, and we are not restrained by the inadequacy of the instrument which we are

compelled to employ, nearly if not altogether, we give relief to that extent that chancery does in England." 17 Serg. & R. 91. Assuming this position of the court to be correct, the inevitable conclusion is, that we have not adopted the great operative principles, by which it has been held in courts of law, as well as in equity, to be a repeal of the statutes of mortmain, de donis conditionalibus, and of the restriction on corporations by the statute of wills. 3 Atk. 150. This is the effect produced, which has given to that statute its importance: those statutes interposed barriers to the vesting and enjoyment of property for pious and charitable uses, which the 43 Eliz. removed, so that they became opened for the exercise of the equity powers of courts of chancery as completely as if no previous disability by statute had ever existed; and this is the reason why it has ever been considered in England as the Magna Charta of charities, that, being an enabling statute, it repealed all disabling ones. If we assume that this leading feature. this vital spirit of the statute, has not been adopted here, we should be bound to consider the prohibitory statutes which it repealed, as in force here in all their rigor; if we follow the report of the judges made in 1808, as explained and adopted by the declaration which they made in subsequent cases, in connection with the opinion in Witman v. Lex, above quoted, we must declare the law of mortmain to apply to all donations of land to corporations, for pious and charitable uses, without the benefits of the statutes of Eliz., or Wm. III., to mitigate their severity or save the forfeiture. Strange as this result may be, it is unavoidable, if the protection which these statutes throw around charities in England does not exist here, or has been taken away by the statute, common law or usage of the state. They operate equally on all societies, whether incorporated by prescription, by special act of assembly, or the charter of the proprietary; so that the enjoyment of their estates depends on legislative discretion, in granting a dispensation of the forfeiture, accruing by an alienation to bodies, and for purposes not only valid, but favored, encouraged and protected in England, without license, under the 43 Eliz., or by the license of the king under the 7 & 8 Wm. III. This latter statute was passed shortly after the first settlement of this colony; its words show the policy of the times to be favorable to all charitable institutions, and connected with the political history of England, its passage is a striking illustration of the disposition of parliament to make them its peculiar favorites.

One of the great principles of the Revolution of 1688, was a denial to the king of the power of dispensing with, or suspending of laws, or the execution thereof. It was the first item of abdication of the crown by James II. as set forth by the lords and commons in convention, that he had exercised it without consent of parliament; and a declaration that it was illegal, was the first and second items of the bill of rights (3 Ruffh. St. 440, 441), which was made a fundamental law of the kingdom. There could therefore be no stronger indication of the spirit of the times in favor of charities, than by authorizing the king to dispense with the statute of mortmain in their favor, making it an exception to a great rule and principle of government; and we deem it incredible that a less liberal spirit could have entered into the legislation of the colony: yet, if the statutes of mortmain have been adopted, there can be no power to dispense with their forfeiture, but by the legislature. The principle of the Revolution of 1688 has been carried into all the American constitutions: no governor can exempt a corporation from the forfeiture of mortmain by his license or charter, with a clause of non obstante statuto; and no act of assembly before or since the Revolution has exempted charities from the effects of mortmain. There are, therefore, but two alternatives for us to adopt; the first, that the statutes of mortmain have been in force from the first settlement of the province, that the statutes which, in England, have mitigated their rigor, and made them in some measure conformable to our usage and condition, the laws and constitution, have not been adopted, and that there has never been any power to dispense with the forfeiture, unless in the party to whom it accrued. Or, that they never were introduced by our ancestors, as any part of their code. In the choice of these alternatives, we cannot hesitate—we cannot look at one item of legislation upon the subject, whether of supreme or subordinate authority, or into the ancient customs and unbroken usage of the state, without at once perceiving the total repugnance between the whole policy of the state, and the existence of British statutes, which would compel us to declare that every house of worship erected in the colony from the time of William Penn, stands upon ground forfeited by a conveyance to a religious society or corporation. It was due to the weight of judicial authority which bore on these questions, to examine them through the details of the law of England, as well as of the state, before we would venture to dissent from it; it was due especially to the high legislative authority which has declared what in its view was the policy and law of the state, as to the disabilities of corporations. The thirty-fourth section of the judiciary act [1 Stat. 92] makes it our duty to make state laws the rule of our decision, unless they are repugnant to the constitution, laws or treaties of the United States. The preamble to the act of 6th April last, contains a plain declaration, that "no incorporation, though lawfully incorporated or constituted, can, in any case, purchase lands within this state, either in its corporate name, or names of any person or persons whomsoever, for its use, directly or

indirectly, without incurring the forfeiture of said lands to this commonwealth, unless said purchase be sanctioned and authorized by an act of the legislature thereof; but every such corporation, its feoffee or feoffees, hold and retain the same, subject to be divested or dispossessed at any time by the commonwealth, according to due course of law." P. L. 467, 468. On the other hand, we have the supreme law of the state in two constitutions, declaring—one, that the declaration of rights is hereby declared to be a part of the constitution of the commonwealth, and ought never to be violated on any pretext whatever; the other, that every thing contained in the bill of rights is excepted from the general powers of government, and shall forever remain inviolate: among these rights are enumerated those of "all religious societies, or bodies of men heretofore united or incorporated for the advancement of religion and learning, or for other pious and charitable purposes, which shall be encouraged and protected in the enjoyment of the privileges, immunities and estates," &c., in the constitution of 1776; and "the rights, privileges, immunities and estates of religious societies and corporate bodies," are, by that of 1790, declared to remain as if the constitution had not been altered, and the first article of the schedule expressly saves the rights of incorporations.

We have felt it our duty to consider the law of the state to be as thus declared and we have been unable to bring our minds to any other conclusion than that any English statute which impairs the right of any corporation to enjoy an estate for its own use, is entirely inconsistent with the usage and constitution of the state, and could never have been in force by adoption, without deranging the whole system of policy, built up by a uniform course of the common law, and legislation of the state for a century and a half. If, however, we have not succeeded to that extent, we apprehend there can be little doubt that these propositions may be considered as established: 1. That, construing the legislation of the state by the rules which have been applied to the 43 Eliz., the statutes which would prevent the effectuation of any objects declared lawful, and by any disposition made valid and confirmed by law, must be considered as repealed so far as they embrace these objects and dispositions. 2. That conveyances and devises of land for religious, charitable, literary and public purposes, must be taken to be, within the meaning of the act of the 6th April, 1833, a purchase "sanctioned and authorized by an act of the legislature." 3. The constitution is an act of the supreme legislature of the state, which authorizes all societies or bodies of men, united or incorporated, to hold and enjoy to themselves, and in their own names and right; and the acts of 1730, 1818 and 1825, are legislative sanctions of their right to hold and enjoy lands, money and chattels for all these purposes.

We should have rested satisfied with results so satisfactory to our minds as these, if they had not been in some respects at variance with the understanding of the supreme court of the state, as to the law of mortmain, and the decision of the court in Baptist Association v. Hart [4 Wheat. (17 U. S.) 31]. Opposed to such authority, it would have been our duty to have surrendered our own judgment, unless we had found it supported by the constitutions of the state, and the United States. Bound to decide on the laws of a state, as the courts of a state do, we must look to that which is supreme, as the only rule of our decision, where its language is plain; in its application to this case, it cannot be mistaken, nor can we overlook the first amendment to the constitution of the United States, which, in our opinion, wholly prohibits the action of the legislative or judicial power of the Union on the subject matter of a religious establishment, or any restraint on the free exercise of religion. We know of nothing which would so directly tend to infringe this prohibition as a law to declare that no religious society should be capable of enjoying land for the purposes of sepulture, worship or charity, without a license from the state; if the legislature can seize it as forfeited, they may impose the most effectual restraint on religious worship, by taking from the society the ground whereon, and the building in which they celebrate it; and no preference of modes of worship can be so repugnant to the rights of conscience and equality of religious right, as to license one society to do what they prohibit to another. With such rules for our guide, we could follow no other.

The objection to the devise of the eight acre lot is thus narrowed to the want of residence of some of the members of the yearly meeting in the state. This is founded on the act of 1730, which is confined to religious societies within the province. In the case of Methodist Church v. Remington, 1 Watts, 218, the supreme court say, "If the trust before them is to be sustained only by the enabling provisions of the law of 1730, it must fall: on the other hand, it is fair to say, that, though it derives no support from the statute, it is not necessarily prohibited by it; for it is an undoubted rule of construction, that an affirmative statute such as this, does not take away the common law, and there was certainly no absolute prohibition of such a trust by the common law, or any previous statute." The objection is therefore not sustained by this decision, still less by the opinion in the case of Baptist Association v. Hart, 4 Wheat. [17 U. S.] 27–29, where the court declared that a devise in Virginia to a charity in Pennsylvania would have been good if the plaintiffs had been capable of taking; and it is in direct opposition to the common law in relation to bequests of personal property for charitable purposes, to be expended in Ireland (1 Brown, Ch. 274); Scotland (1 Brown,

Ch. 571; Amb. 236; 14 Ves. 537; 16 Ves. 337); or for the support of a bishop in America (1 Brown, Ch. 444), all of which have been held to be good. 3 Pet. [28 U. S.] 500–502, Append. The yearly meeting of Philadelphia is a Protestant religious society, which has existed from the settlement of the colony, with known and recognized capacity of taking and enjoying property, according to the law and usage of the province and state, as well as the principles of the common law. They must be considered as a body politic or corporate by prescription, possessing and enjoying the franchise of succession, with the same rights of property as a natural person does by inheritance. We cannot impair the rights of the body united by their franchises, by inquiring into the separate capacity of its component members. They might be in part persons who could not hold for their separate use; but that would not change the character of the society, nor affect their constitutional rights as a body united for the purposes of religion and charity, located within the state; and, as such, they would come within the equity, if not the words, of the law of 1730. Be that as it may, they cannot be excluded from the protection of the constitution and usage, in the absence of any law requiring the residence of all its members within the state, or any rule of the common law, which imposes any disability upon the citizens of one state holding property in any other state, as its own citizens may do. The objection to the bequests of money to the Quaker societies in Maryland, Virginia, Ohio, and to the citizens of Winchester, assumes a different shape. Their alleged incapacity arises from their being composed wholly of the residents of other states, which must be tested by the law of the domicil of the testatrix. There is none which denies to the citizens of other states any rights of property which can be enjoyed by the citizens of this state under its constitution and laws, which declare them inherent in all persons. The laws for the enforcing the execution of trusts extend to all "personal property vested in any person or persons, to be applied by them to any religious, literary or charitable use or uses," and the cestui que trust, or other person interested in the execution of the trust may apply to the courts of the state to compel the trustees to account, or to prevent the failure of the trust.

The constitution of the United States declares, that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states;" this instrument was adopted by the same power which established the constitutions of the several states, and is a part of the supreme law of each, as fully as if it was incorporated in its body. We must take it therefore as a grant by the people of the state in convention, to the citizens of all the other states of the Union, of the privileges and immunities of the citizens of this state; no law of the state has given it any construction which in any way restricts its operation, and it is not the duty of any federal court to so expound the constitution as to weaken the bond existing between the states which have established a "general government of the Union," a federal government of these states, by restraining the grants of rights or powers within limits narrower than the tenor and purport of the words used, according to their common acceptation. "It cannot be presumed that any clause in the constitution is intended to be without effect, and therefore such a construction is inadmissible, unless the words require it." [Marbury v. Madison] 1 Cranch [5 U. S.] 174–176. This clause is copied from the fourth article of the old confederation, and is one of the most important in the whole instrument; it becomes senseless if it is not applied to the rights of property. The political rights of the citizens depend on the laws of the respective states (article 1, § 2, cl. 1, Const. U. S.), rights accruing by contract cannot be impaired in their obligation by state laws (article 1, § 10), and personal rights are protected by the 2d and 3d clauses of section 9, art. 1, of the constitution, and the 9th amendment; leaving no subject on which this clause can operate except property. The words "privileges and immunities" relate to the rights of persons, place or property; a privilege is a peculiar right, a private law, conceded to particular persons or places (7 Day, Com. Dig. 113, tit. "Privilege," A), whereby a particular man, or a particular corporation, is exempted from the rigor of the common law (Cow. Inst. tit. "Privileges"), as converting aliens into denizens, whereby some very considerable privileges of natural born subjects are conferred upon them, or erecting corporations, whereby a number of private persons are united and knit together, and enjoy many liberties, powers and immunities in their political capacity, which they were utterly incapable of in their natural (1 Bl. Comm. 272). Among the privileges of the citizens of every state, is that of exemption from the law of alienage, though not born in the state; and every body of private persons united or incorporated have the franchise and immunity of enjoying estates in succession in this state; these are exemptions from the rigor of the common law, which the citizens of other states may enjoy in this, as fully as the citizens of this state can. We can therefore make no distinction between these bequests and those to societies located in the state; the disability of alienage cannot be applied to the citizens, societies or corporations of other states, and they may enjoy property as it can be enjoyed of right by those which are within the state.

The next questions that arise on this will, are the uses for which the various dispositions are made. As the supreme court have declared it a settled point, that the 43 Eliz.

is not in force, we must endeavor to ascertain from other sources, what uses are pious and charitable, as distinguished from those which are deemed superstitious or otherwise invalid. The general course of the law of England, as to the transmission of property, was declared, in the charter to Penn, to be the rule in the colonies, till altered or repealed, and the common law was recognized by the acts of 1718 and 1777 as in force, as well as such statutes as had been adopted. It is also a conceded principle, "that the colonists take with them such laws of the mother country as are useful and suited to their condition." 1 Jour. Cong. 27. It will be necessary, therefore, to trace the law of charities through the English statutes which preceded the 43 Eliz. as well as the common law, so as to determine what was its general course, how far it has been adopted in the written law of this state, or has been the basis of its usage independently of the enabling or enacting provisions of the 43 Eliz. and 7 & 8 Wm. III., assuming them not in force as adopted statutes. The following statutes on the subject come strictly within the description of the supreme court of the United States, in [Baptist Association v. Hart] 4 Wheat. [17 U. S.] 31; they embrace cases within the statutes of mortmain, and gifts to corporations, and are analogous to the 43 Eliz. in all their features; so that there can be no reason for not giving them the same effect and construction as have been given to that statute.

The following are uses declared to be pious and charitable, by a series of statutes commencing in 1285, and affirmative of the common law: The statute 13 Edw. I. c. 41, enumerates the maintenance of a chantry, lights in a church, divine service and alms. Keb. St. 49; 1 Ruffh. St. 106; Fitzh. Nat. Brev. 465; 2 Co. Inst. 467. The statute 17 Edw. II., divine service, the defence of Christians and the church, liberal alms-giving, relief of the poor, hospitalities, and all other offices and services before due, by whatever name they are called. Keb. St. 36, 37. The statute 15 Rich. II. c. 6, the poor parishioners of the churches, the endowment of a vicar to do divine service, inform the people and keep hospitalities. Keb. St. 181; 1 Ruffh. St. 402; S. P. 4 Hen. IV. c. 12; Keb. St. 198. The statute 2 Hen. V. c. 1, the sustenance of impotent men and women, lazars, men out of their wits, and poor women with child; the nourishing, relieving and refreshing other poor people. Keb. St. 212; 1 Ruffh. St. 486. The statute 23 Hen. VII. c. 10, obits, masses and lights, to be kept not more than twenty years; the discharge of tolls and customs in a city in case of the poor, and the cleansing of the streets. Keb. St. 403, 404; 1 Ruffh. St. 171, 172. The statute 37 Hen. VIII. c. 4, § 5, alms to the poor, and other good, virtuous and charitable deeds. Keb. St. 608. The statute 1 Edw. VI. c. 14, erecting grammar schools to the education of youth in virtue and godliness; the augmentation of the universities; better provisions for the poor and needy; the support of a schoolmaster, preacher, priest, vicar; the maintenance of pier walls and banks; and the relief of poor men being students or otherwise. Keb. St. 636-644; 2 Ruffh. St. 397, etc. The repairing of bridges and highways, and setting poor people to work. 2 & 3 Edw. VI. c. 5; Keb. St. 651; 2 Ruffh. St. 412; 18 Eliz. c. 20; Keb. St. 903, 904; 2 Ruffh. St. 623. The relief of the poor of every parish. 5 & 6 Edw. VI. c. 2; Keb. St. 676; 2 Ruffh. St. 639. The resuscitation of alms, prayer and example of good life in the realm. Keb. St. 730; 2 Ruffh. St. 481. The relief of prisoners. 14 Eliz. c. 5; Keb. St. 847; 2 Ruffh. St. 606. The repair of churches. 13 Eliz. c. 10; Keb. St. 839; 2 Ruffh. St. 595. The maintenance and relief of the poor in houses of correction, impotent and maimed soldiers (29 Eliz. c. 6, § 7; Keb. St. 894; 2 Ruffh. St. 656; 35 Eliz. c. 1; Keb. St. 907; 2 Ruffh. St. 672), and hurt and maimed soldiers and mariners (Keb. St. 911; 2 Ruffh. St. 676). The maintenance of houses of correction, abiding houses, and stocks and stores therefor. 35 Eliz. c. 7; Keb. St. 913; 2 Ruffh. St. 678. The founding and erecting hospitals and houses of correction, for the relief and sustenance of poor, maimed, needy or impotent people. 13 Eliz. c. 5; Keb. St. 921; 2 Ruffh. St. 687; 2 Co. Inst. 120. Donations to hospitals, colleges and other places, founded, ordained, for the relief of poor, aged and impotent people, and maimed soldiers. 39 Eliz. c. 6. Schools of learning; orphans, or such other good, lawful and charitable intents and purposes; reparation of high-ways and sea banks; the maintenance of free schools and poor scholars; orphans and fatherless children; and such like good and lawful charities. 4 Co. Inst. 166, 167. To which may be added the cases not enumerated or recognised by the words of the statutes, but which are within their equity, by adjudged cases. The erection of chapels of ease, as members of parochial churches (Hob. 123, 124); or cathedral churches (Swinb. 66). Gifts for the advancement of religion, learning, piety and public utility. 11 Coke, 70b, 73b; 10 Coke, 26; 8 Coke, 130b. Poor men decayed by misfortune or the visitation of God. Moore, 129. Persons imprisoned for conscience sake. Duke, Char. Uses (by Bridgman), 131. A bell for a church; pulpit cushion and cloth, and building a session-house. Poph. 139. To maintain scholars who should use holy orders. Toth. 61, 62. The marriage of poor maidens. 1 Coke, 26. Making a stock for poor laborers in husbandry, and poor apprentices. 1 Coke, 26a; Keb. St. 1040; Ruffh. St. 74; preamble to 7 Jac. I. c. 3. Such things as concur in decency and order with the intent of the founder. Duke, Char. Uses (by Brigman), 155. The 43 Eliz. c. 4, enumerates twenty-one cases as classed by Lord Coke, in 2 Co. Inst. 711, which were all comprehended in preceding statutes or the cases above referred to, either in express or general terms.

This review exhibits a striking coincidence between the general course of the laws of England and Pennsylvania, in the designation by both of what are deemed and recognised to be the uses and purposes of piety and charity, protected and encouraged during the most intolerant times. The same coincidence will appear in tracing to their origin in the British statutes, and decisions of their courts, the rules and principles upon which donations for such uses have been construed and governed, as well as the remedies provided for their enforcement. The statute 17 Edw. II (De Terris Templarium), established and ordained as law forever, that lands which had been given and enjoyed for pious and charitable uses, should not escheat to the king or mesne lords of whom they were holden, on the extinction of the order of Templars, by whom they were holden for such uses. That they should be given to other men of holy religion, to the end that they may be charitably disposed of to godly uses. "So always that the godly and worthy will of the givers be observed, performed and always religiously executed." Keb. St. 86, 87; 8 Coke, 131b; 10 Coke, 34b; Co. Inst. 431, 432; 3 Coke, 3b; 7 Coke, 13a. The 37 Hen. VIII. c. 4, and 1 Edw. VI. c. 14, directed and empowered the king to dispose to the good, virtuous and godly uses specified in those acts, such parts of the suppressed lands, or their rents and profits, as had before been given to such purposes and misapplied. Also to dispose, change and alter donations given for superstition, to pious and godly uses, or to direct it to be done by the commissioners. The commissioners were directed to inquire what property had been given by deed or will to poor persons intended to have continuance forever out of the chantry lands, and to make such assignment thereof, that the money should be paid to them according to the conveyance or will of the donor, and that all charges on those lands for charitable or pious uses, should be paid by the king's receiver. Sections 12, 13. The commissioners were directed to execute their commission favorably and beneficially towards such uses and purposes, and their acts so made were declared as valid as if done by an express act of parliament. Keb. St. 636–644. The proviso in the fifth section of 39 Eliz. c. 5, prohibited the diversion of the funds of any hospital to any other purposes than those appointed, and declared that such construction should be put upon the act as should be most favorable to the maintenance of the poor, and repressing all evasions of the act. 2 Co. Inst. 721, 722. The commissioners were directed to make such orders and decrees as the said good and charitable uses may be fully observed in most full, ample and liberal sort, which not being contrary to the orders, decrees and statutes of the donors or founders, shall stand good according to their tenor and purport. 39 Eliz. c. 6; 4 Co. Inst. 167. The laws for confirming patents and grants from the crown, declared them to be good and available according to their tenor and effect, their words and purport, and to be expounded most beneficially for the patentee, without license, confirmation or toleration; any misnomer, misrecital or misdescription of the premises, or a corporation, or any lack of attornment, livery of seisin, or misnaming any person or body politic, to the contrary notwithstanding. 18 Eliz. c. 2; 43 Eliz. c. 1; Keb. St. 852, 935; 2 Ruffh. St. 612, 702.

These statutes were evidently the models from which the colonial acts of 1705, for confirming deeds, wills, and sales under acts of assembly, and the law of 1711, confirming patents, were drawn: the rejected law of 1712, in relation to religious societies, contains a most admirable summary of the effect of the general course of the statutes of England, as they had been construed by courts of equity; and the powers conferred on the colonial courts by the acts of 1700 and 1710, show the intention of the legislature, that they should be exercised to the same extent and in the same manner as they were by the high court of chancery in England. It is, indeed, impossible to compare the laws of the two countries on the subject of charities, without being struck with the strong analogy between them; the substance of the statute and common law of England was adopted in the early colonial laws, entered into the custom of the province, and will be found condensed in a few words in the 45th section of the constitution of 1776, with this marked difference, that what the 43 Eliz. has done by implication and the construction given by courts, the constitution has done by a direct affirmative declaration of rights. What was left imperfect was finished by the law of 1777, by expressly restoring the common law, repealing all laws inconsistent with the rights declared in the constitution, and declaring all colonial laws then in force and consistent with it to remain in force; this was going farther than the words of the 43 Eliz., which contained no repealing clause. The law of 1791, giving the powers of self-incorporation to all religious, literary and charitable societies, was an improvement upon the pattern of 39 Eliz. c. 5; and the laws for the execution of trusts was an adoption of the whole course of chancery, in administering trusts for the use of charities; so that we may safely conclude that the English system of charities, as it was at the settlement of the colony, has become naturalized here, not only as to the principles of equity applied to the 43 Eliz., but the substance and effect of the enabling provisions of all the statutes, including those of Elizabeth, by which the common law as to charities was restored in England, and brought here by the colonists unincumbered with restrictions.

The course of the law of England providing remedies for the enforcement and sup-

pressing the abuses of charities, are next to be considered. The statute 13 Edw. I. c. 41, gave the following remedies where the lands were aliened: If the king is the founder, he shall seize and hold the lands, and the purchaser shall lose his money; if a private person is the founder, he or his heir shall have his writ to recover the same land in demesne; if the lands are not aliened, but the alms withdrawn for two years, he shall have an action by writ of cessavit. Keb. St. 49; 1 Ruffh. St. 106; Keb. St. 30, 31; 1 Ruffh. St. 66; Co. Litt. § 136, pp. 95, 96. By the 2 Hen. V. c. 1, hospitals were placed under the correction and reformation of the ordinary, by the ecclesiastical law. Keb. St. 212; 1 Ruffh. St. 486. When the king was founder, the chancellor was visitor. Co. Litt. 95b, 95a. By the 37 Hen. VIII. all lands held by hospitals, chapels, &c., which came within the purview of the laws for the suppressions of the church lands, were placed under the supervision of the court of augmentations, who decided exclusively all cases concerning them, as well as charities charged upon them, where the king was concerned or could be prejudiced; but all controversies between subjects were to be decided by the courts of common law. Keb. St. 608, 609; 2 Ruffh. St. 371. All copyheld lands, and all lands held by the license, assent, grant or confirmation of the king, were excepted from the operation of the law. By the 39 Eliz. c. 4, the chancellor was directed to appoint commissioners, to examine into the donations made for certain charitable uses, and correct their misemployment. Keb. St. 920; 2 Ruffh. St. 687. The 39 Eliz. c. 6, directed commissioners to be appointed, to inquire of land and goods given to any charitable uses, which had been misemployed, and to reform and correct their abuses. The party deeming himself aggrieved, may complain to the chancellor, who shall judge thereon according to equity. 4 Co. Inst. 167. This act was repealed by the 43 Eliz. c. 9, but the proceedings under it were confirmed (Keb. St. 648), the adoption of the 43 Eliz. c. 4, as a substitute for it, having made it inoperative. These statutes formed the law of charities in England before the 43 Eliz., and made a system which has received but little improvement, either by that or any subsequent statutes; the rules of their construction adopted by all the courts of England, have ever been of the most liberal tendency, to establish charities and correct the abuse or diversion of the funds devoted to their support.

The course of the common law on charitable and pious donations is in accordance with the spirit of the statutes before recited, and the rules established for their construction. It is an admitted principle, that the personal property of decedents was disposable to pious uses, for the good of the soul of the deceased; the children and kindred had claims upon the trustees, but came in under the title of charity; the distribution was made by the ordinary at his discretion, to charitable uses in particular, or for the good of the soul of the deceased, according to the circumstances of the estate. 2 Bl. Comm. 494; 2 Forrest, 190; 4 Co. Inst. 336; 7 Day's Com. Dig. 612, note 13; Moore, p. 822, pl. 1111; 7 Ves. 69. The executor held the surplus to account to pious uses. Carey, 28, 29. A feme covert executrix, may give the goods of the testator for the good of his soul. Perk. § 7, cites 13 Edw. III. Any person who has power and capacity to make a grant or devise, may do it for pious and charitable uses. 7 Day's Com. Dig. 612; Duke, Char. Uses (by Bridgman) 132. A testator by will, directed lands which were devisable by custom, to be sold by his executor, and the money to be distributed for the good of his soul; the executor held the land for two years without a sale, which the court held to be a breach of the intention of the testator, and they construed the will so as to make a condition, as such appeared to be the intention, the heir entered for the breach and recovered. 38 Ass. pl. 3; Lib. Ass. 221; Plowd. 345, 523. The king gives land to the good men of D. which was no corporation before, rendering a certain rent, and the residue to repair a bridge, the king released the rent, which being the cause of their corporation, would seem to have determined it, yet for the preservation of the charitable use, they should continue a corporation for that purpose only. Duke, Char. Uses (by Bridgman) 134, cites 40 Ass. 26. A gift to a parish for a charitable use by deed, is void, but a devise by good will is good, and the church-wardens and overseers shall take in succession. Id. Land was devised in the church of St. Andrew in Holborn, which was not capable of taking and holding in mortmain, but the court on an ex gravi querela brought by the parson to execute the devise (Fitzh. Nat. Brev. 441, L), awarded it to him, considering it to be the intent of the will, that the parson should have it, and not the church, and construed the words so as to preserve the intent; and not to destroy it; decided 21 Rich. II.; Perk. § 509; Plowd. 523; acc., 17 Serg & R. 92; [Terrett v. Taylor] 9 Cranch [13 U. S.] 43; [Town of Pawlet v. Clark] Id. 328; 1 Atk. 437; [Inglis v. Trustees of Sailors' Snug Harbor] 3 Pet. [28 U. S.] 119, 146, 147.

A declaration by will, that a feoffee shall stand seized to the use of C., is a good devise of the land by intention, it being that C. should have the land. Dyer, 323, pl. 29; 1 Leon. 313; 15 Eliz. A gift of chattels to parishioners who are no corporation is good, and the church-wardens shall take in succession, for the gift is to the use of the church. 37 Hen. VI. p. 30; 9 Cranch [13 U. S.] 328; 17 Serg. & R. 92; S. P., 1 Penn. Rep. 49, 51. Courts will labor to support the act of the party, by the art or act of the law. Hob. 123–125; S. P. [Inglis v. Trustees

of Sailors' Snug Harbor] 3 Pet. [28 U. S.] 119. In 4 & 5 Phil. & M., a devise was made of lands to Trinity College and their successors for ever, for founding grammar schools for poor scholars, and held good by the equity of 1 & 2 Phil. & M. c. 8, which suspended the statutes of mortmain for twenty years. Dyer, 255b, pl. 7; 1 Coke, 25, 26, decided in 8 & 9 Eliz. C. B. Lands devised to employ the profits to find a priest to celebrate mass for the good of the soul of the testator, and other souls, as long as the laws of the land would suffer it; and if the laws prohibited it, then to the use of all the poorest people in six parishes, with power to the devisees to dispose of the profits at their pleasure to any of these purposes—the devise was held good, and not to be within any of the statutes. And. 43; Cro. Car. 108; 2 Ch. Cas. 18a, decided 3 Eliz. So of a devise to sustain poor men decayed by misfortune or under the visitation of God (Moore, 129, pl. 277, decided 24 & 25 Eliz.); or to relieve such as were imprisoned for conscience sake (Duke, Char. Uses, by Bridgman, 131, adj. 41 Eliz.) A devise to an idiot for a charitable use, though inoperative in his life time, takes effect when the land comes to the hands of his heir. Duke, Char. Uses (by Bridgman) 134. A gift to find a chaplain ad divina celebranda is not for a superstitious use, and, though not within the 43 Eliz., is good. Carey, 39; Duke, Char. Uses (by Bridgman) 154, adj. 18 Jac. I. acc. So for finding a bell for a church, a pulpit cushion and cloth—for the support of the poor, or building a session house—these are good acts of piety, charity and justice. Poph. 139. So where land was devised to divers persons and their heirs, in trust and confidence in them, out of the profits to erect a free school and to pay so much to the master yearly, and so much to the usher, and £20 per annum to five poor men. Martidale v. Martin, Cro. Eliz. 288, adj. 34 & 35 Eliz. K. B. The same will contained another devise in trust—that a preacher shall be found forever to preach the word of God in the church of St. Mary, in Thetford, four times a year, at ten shillings a sermon. Both clauses of the will were adjudged good, by the barons of the exchequer and the judges of the K. B. who, after "often argument, agreed, that the 23 Hen. VIII. c. 10, was to be taken to extend only to superstitious uses, by the words of it, in the very body of the act, and at the beginning, as by the time it was made—for at this time they began to have respect to the ruin of the authority of the pope and the dissolution of the abbeys, chauntries and the like." Gibbons v. Maltyard, Poph. 6–8, adj. 34 & 35 Eliz. So of a devise for a free school, and the support of a master thereof, and certain alms-men and alms-women forever; the devise was held to be valid, though it did not take effect, owing to the breach of the condition on which it was made to depend. Porter's Case, 1 Coke, 22–25, 34 & 35 Eliz. in exchequer. In the case of Mayor, etc., of Reading v. Lane, a devise was made to the poor people maintained in the hospital of St. Leonard's, in Reading; the objection to the devise was, that the poor not being incorporated, were not capable of holding lands, but it was decreed, that as the plaintiffs were a corporation capable of holding lands in mortmain and governed the hospital, the land should be assured to them for the use declared in the will. Toth. 7; 42 Eliz. lib. A, fol. 706; Toth. 32; Duke, Char. Uses (by Bridgman) 134b, 361.

Charities have always been favored in the law, by excepting them, when fastened on lands, from ordinary rules; where they are charged with services for the advancement of religion or justice, works of devotion, piety or charity, although the lord purchases parcel, yet the entire services remain. 6 Coke, 2a, 36 Eliz., in the court of wards. As, to make a bridge or beacon, repair a highway (6 Coke, 1b, 2a), to marry poor virgins, to find a preacher in a church, or the ornaments of a church (6 Coke, 2a), or to bind a poor boy an apprentice, or to feed a poor man. Co. Litt. 149a. The law was considered so well settled that Lord Coke, in 34 & 35 Eliz., states, unqualifiedly, that any man at this day may give lands in trust for any charitable use, to any person or persons and their heirs. 1 Coke, 26b; Sheph. Abr. 1066. They are prohibited by no statute, and none were ever intended to overthrow works of charity, but to prohibit their abuse. Co. Litt. 342a. The statutes of superstition did not extend to corporations, which were not both religious and ecclesiastical. 2 Coke, 48, 49. Gifts to lay hospitals remained valid; bishops, deans and chapters, parsons, vicars, abbots, churchwardens, &c., could hold lands notwithstanding the statutes of mortmain, as they were not dead persons in law, but had a capacity to grant or to hold land, to sue and be sued. 1 Bl. Comm. 472–475; 2 Bl. Comm. 109. Though they were religious persons, they were also secular, in which capacity, they were considered as natural persons, or bodies politic, and could purchase and hold lands (Co. Litt. 94a, b; Perk. §§ 31, 35, 55, 51), before the statutes of mortmain, and can now hold them in all cases where other corporations can. The capacity existed at common law and was not taken away by the statutes of mortmain, where the uses and purposes were declared good by the statutes providing a remedy, or correcting abuses, which in the language of the supreme court, removed all obstructions and disabilities which in any way prevented the donation from taking effect, and restored them to their common law capacity. [Baptist Association v. Hart] 4 Wheat. [17 U. S.] 31. Charities were thus left free for the exercise of the jurisdiction of the respective courts, who in all cases gave effect to the disposition of a testator, whenever his intention was ex-

pressed, or could be collected from the will, notwithstanding any defect in form, or the want of naming or designating an object to take; they would give it locality, and application to those persons or bodies who were capable, if they could by any reasonable intendment be brought within the devise. As, in the Church of Holborn Case, they shifted the devise from the church to the parson, because the church could not hold in mortmain, but as the endowment of a vicar or parson was good by 15 Rich. II., and divine service by 13 Edw. I. and by 17 Edw. II. it was awarded to him, and he held an inheritance in right of the church as a capable person, the church in effect holding for his use; so, in the Reading Case, they shifted the devise from the poor of the hospital, to the corporation which governed it.

The law looks to the substance of the gift, and, in favor of religion, vests it in the party capable of taking it,—[Town of Pawlet v. Clark] 9 Cranch [13 U. S.] 329,—but without the right to alien it. Wing. Max. 341, pl. 26. This consists in the enjoyment of the thing given according to the intent of the donor. Courts of common law and equity, were astute in devising means of giving it application and effect; whenever the instrument would pass the legal estate, either to the trustee or cestui que trust or use, they supported the charity; the mode of establishment, or the distribution, was a circumstance in which they would relieve, according to their respective powers, against any defects in the disposition by will or deed. Their action on charities was not, by any authority assumed from the necessity of the case, but the positive directions of the statutes, to execute and religiously observe the will of the donor, in the most ample and liberal sort, notwithstanding any defects or failures therein; the same rules were prescribed to the special tribunals and courts under whose governance charities were placed, and were applied as liberally in favor of a subject against the king, as between private persons. A donation to a charity, therefore, could only fail for want of a capable object, where there was neither a devisee to use, nor in trust, nor a cestui que use, capable of holding; they took effect whenever a trust was created and vested in any body or person who was named, described or could be brought within the scope of the will, and was capable of holding either as cestui que trust or trustee. The cases in which these principles were established, were decided before the 43 Eliz., on prior statutes, or the rules of the common law; they have been approved and acted on by the supreme court of this state, in 17 Serg. & R. 91; 1 Penn. 51; and by the supreme court of the United States, in [Terrett v. Taylor] 9 Cranch [13 U. S.] 43, 53; [Town of Pawlet v. Clark] Id. 328; [Mason v. Muncaster] 9 Wheat. [22 U. S.] 455–464; [Beatty v. Kurtz] 2 Pet. [27 U. S.] 582; [Inglis v. Trustees of Sailors' Snug Harbor] 3 Pet. [28 U. S.] 119; [City of Cincinnati v. White] 6 Pet. [31 U. S.] 437; and the practical rules of construing the statutes of charities, as laid down in [Trustees of Philadelphia Baptist Ass'n v. Hart] 4 Wheat. [17 U. S.] 31, are those which are to be found in cases not affected by the 43 Eliz., as well as those within it.

The remedies for evasions of the statutes and the abuse or misemployment of charitable donations, were administered with the same liberality by courts of law before as after that statute; the equitable powers conferred on the courts which were to decide on claims for charitable uses out of the king's lands or revenues, evinces the favorable disposition of the king and parliament in their favor. The benign principles of the common law were never displayed in brighter colors than in the course of the courts in the expositions of the statutes of Hen. VIII. and Edw. VI. for the suppression of superstitious uses and religious houses; if any want of liberality has appeared in later times to have entered into the jurisprudence of England on charities, it has risen from overlooking the provisions, or disregarding the principles, of their ancient statutes, which contain all that is valuable in the system, or adapted to the institutions of this country. The statutes of mortmain, of superstitious uses, and the restraints on corporations, are exceptions from the general course of the law of England; legal excrescences which were forced into it by the policy of the times, during the existence of tenures in chivalry, the persecution of the Catholic church, and latterly, since the statute 9 Geo. II., by a spirit of hostility to charitable donations by will, all of which are utterly repugnant to the spirit which pervades the common, the statute and the constitutional law of this state. There is no case reported as adjudged by courts of common law against a gift to charity, where words of inheritance were used in a devise to private persons in trust, or for a use, or to any body or society, which had a head known to the law, as being capable of holding for any other use, by statute, charter or usage, local custom or prescription. Perk. § 510, refers to a case decided in 26 Edw. III., of a devise of a remainder to the brotherhood of Whiteacres in London, to find a chaplain to pray for the soul of the testator; the brotherhood was not incorporated or enabled to purchase, and the remainder was held void. Perkins thus introduces this case: "But the commonalty of a company which is not incorporated by the king's charter to purchase, &c., cannot take by devise." He states the case and concludes: "And know, that the chief and supreme officers of the fraternity, corporation or guild are taken in law for the best men," &c. These remarks lead to the ground of the decision. The devise was of a remainder,

which could not vest without words of inheritance to private persons, or to a corporation by succession; in this case there being neither, the devise failed on the ground that the commonalty or brotherhood, having no politic capacity by means of a head or chief officer, could not hold an estate by succession, and no words of inheritance being used, the remainder in fee continued in the heirs of the devisor, according to the rules before laid down from Sheph. Touch. 235–237, etc. There was no franchise in the commonalty, from which a corporation could be presumed, as in the case from Duke, Char. Uses (by Bridgman) 134, decided in 40 Edw. III.; the statute of Rich. II., authorizing the endowment of a vicar or priest, had not been passed, and by the words of the devise, there was no ground to infer the intention to be that any church or parish should take or hold it, by a parson, overseer or church-warden; so that there was no circumstance on which the court could lay hold to take the estate from the heir at law and give effect to the devisees as in the cases referred to in [Town of Pawlet v. Clark] 9 Cranch [13 U. S.] 328, &c. A learned judge considers this to have been a case which could have been aided by the royal prerogative exercised by the court of chancery. [Inglis v. Trustees of Sailors' Snug Harbor] 3 Pet. [28 U. S.] 142. But it appears to have been one where the king had no interest or claim by statute, prerogative or tenure; the devise not taking effect, the estate remained in the heir of the devisor. The charity was not extinct as in cases under the statute of Templars; it never existed, because there was no devisee in whom the remainder could vest; the king therefore could not make a new appointment by his sign manual (7 Coke, 36a), nor could a court of chancery disturb the course of the common law, on any ground of equity; such a devise would not be aided in equity under the 43 Eliz., unless the brotherhood could be considered as a corporation by prescription, by some franchise or right to unite them. This case therefore cannot be considered as at all in opposition to those which have been referred to.

So far as the common law could be settled by the repeated solemn adjudications of the courts of Westminster Hall, we thus find it established from the time of Edw. III., without any clashing decision. It only remained to add the sanction of parliament to these principles of the law of charity by a declaratory act to make them irrevocable. That was done in the Case of the Thetford School Devise, which had been held valid in the two preceding cases, in 34 & 35 Eliz., Cro. Eliz. 288, and Poph. 6–8. This devise was made in 9 Eliz., when the annual value of the land was £35 per annum; it afterwards rose to £100; a private bill was exhibited in parliament (7 Jac. I.) for the erection of the school, &c., according to the will, on which two questions were moved: 1. Whether the preacher, school-master, usher and poor should have only the said certain sums appointed to them by the founder, or that the revenue and profit of the land should be employed to the increase of their stipend, &c. 2. If any surplusage remained, how it should be employed. The case was referred to the judges, and it was resolved, that the whole profits and revenue should be employed to the increase of the stipends, and if any surplusage remained it should be expended for the maintenance of a greater number of poor, and nothing should be directed to the use of the devisees, executors or heirs, or any private use, it appearing to be the intention of the testator to employ the whole in works of piety, charity, the maintenance and increase thereof; and the bill was passed accordingly. This was in accordance with the rule established in the statute de templarium, quoted by Lord Coke at the end of the case; so always that the godly and worthy will of the donors, &c. (8 Coke, 130b, 131b), which was not a new rule introduced into the law by the act passed for the Thetford school, but as declared by all the judges in the case of Sutton's Hospital, in 10 Jac. I., was declaratory and explanatory of the common law. 10 Coke, 30b, 34a. The right to take and hold the land devised for charitable uses with their increased revenues and profits being thus definitely settled by both the legislative and judicial power of the kingdom, it has never been questioned since the Case of the Thetford School, on which the statute 43 Eliz. had no bearing, and is not even referred to in the report of the proceedings in parliament, or the opinions of the judges, on the law of the case, as previously settled in Cro. Eliz. 288; Poph. 6–8.

The spirit of equity which pervaded the law of charities having been extended so as to bring within its protection not only the specific bequests of a testator, but the entire fund on which they were charged, it was not necessary for courts of equity to usurp any of the powers of a court of law, in order to effectuate a charitable donation, or to establish any rules or principles different from those on which the common law courts had acted with the sanction of parliament. Chancery had its appropriate jurisdiction over cases of fraud, accident and breach of trust, arising out of dispositions of property to purposes unconnected with charity; if the party had a right known to the law, but had no legal remedy, he could resort to the extraordinary powers of the court of chancery for relief, according to its usage and settled principles, which applied to charities as well as other subject matters of its cognizance. To have refused the same relief in the one case as the other, would have placed charities under the ban of the law of equity, though they were the favorites of the statute and common law: if there was anything in the nature of charities, which would call for or

justify the withholding equitable relief for matters not cognizable at law, without special authority by statute, it would have appeared in the course of the law for more than three hundred years before the 43 Eliz. Its history exhibits no feature of the kind; on the contrary, it exhibits the most convincing evidence, that it was peculiarly the duty of courts of equity to obey the injunctions of the statutes, to execute the intention of the donors and founders of charities, and not to suffer their donations to fail of effect or to be abused when their intention could be ascertained. The proceedings of courts of equity are very imperfectly reported prior to the Restoration; some few cases are interspersed among the common law reports, but they are mostly referred to in the short notes of Carey and Tothill, which do not give the reasons of the court for their decisions; we are therefore left to infer the principles which governed them from their acts, thus briefly noted, and the elementary writers in or near the time, who have given the results in general terms. Enough, however, can be collected to show, satisfactorily, that the general course of equity before the 43 Eliz., in all cases of charities, was according to rules and principles as well settled and defined as on any other subjects, and was the basis on which the law now stands on the construction of that statute.

The jurisdiction of chancery over trusts was never questioned by the most strenuous advocates of the common law. 2 Bacon, Abr. 22; Harg. Law Tracts, 431; Treat. Eq. 523; 2 Day's Com. Dig. 764. It was coeval with their existence, and its exercise was indispensable in cases where the feoffor, having parted with his whole estate, had no control over it at law; but being made in trust and on confidence, the powers of a court of equity were necessary to deal with the corrupt conscience of the feoffee who refused to execute the trust. The cases of its exercise from the time of Hen. VI. are numerous. 4 Co. Inst. 84; Gilb. Ch. 19, 259; Bohun, C. C. 6; 1 Hu, Ab. 400; Lil. Pr. Reg. 57, 58; 1 Rolle, Abr. 374; Mitf. Pl. 120, 121. The equity and use of the land being to go according to conscience, the subpoena for relief herein in this court is given accordingly. Sheph. Abr. 201, pl. 13, 199. Chancery would not only compel the performance of the trusts specified, but compel the feoffee to do any other acts for the benefit of the feoffor or cestui que use in a deed or obligation. Brown, Conscience, 5, 9, 27, fol. 162-3. Carey, 13, 20, cites cases from the time of Hen. VI. and Edw. IV. It also remedied grievances arising from acts done which were prohibited by statute, but for which there was no remedy by the common law, as waste in certain cases. Car. 26; Moore, p. 554, pl. 748; Fonbl. Eq. 32.

All cases of covin and fraud were cognizable in equity, from the earliest times. Toth. 62; Car. 20, 25, 26; 4 Vin. Abr. 487; Brown, Conscience, 8; Moore, 620, pl. 846. The performance of verbal promises in temporal matters. Brown, Conscience, 14, fol. 163; Fonbl. Eq. 45. The specific performance of contracts made by competent parties, on good consideration, were also decreed against the party, his heir, and those claiming under him with notice. Toth. 3, 4, 62, 69, 70, 92, 123, 106; Cro. Car. 110; Fonbl. Eq. 5; 2 Day's Com. Dig. 772. "Equity will aid the perfecting of things well meant and on good consideration," and "will reform in conscience that which is badly done," by supplying defects. Car. 23, cites 9 Hen. VIII.; Max. Eq. 57; 10 Hen. VII. 201, pl. 13. It will prevent a contract from failing for want of a circumstance or ceremony (Carey 24, 25), as livery of seisin, attornment, surrender of a copyhold, enrolment of a deed, a misrecital (Toth. 62; 12 Eliz. 79; 38 Eliz.), or a misnomer of a corporation (Toth. 131, 32 Eliz.; Car. 24, 44; Bohun, C. C. 7; Max. Eq. 57; Toth. 27, 33 Eliz.; Sheph. Abr. 194, 195; Hob. 124; Cro. Eliz. 106). Though an estate cannot be created by covenant by law, it shall be made good in chancery. Toth. 84, 40 Eliz. So of a lease made to commence during the existence of a former one which would make it void at law. Toth. 127, 25 Eliz.; S. P., 128, 40 Eliz. So where an exception was intended to be made, but it was omitted by mistake, chancery supplied it. Toth. 131, 37 Eliz. So where a devise was void at law, by misrecital of a grant and by reason of an attornment (Toth. 79, 38 Eliz.), or a copyhold surrendered at a court held out of the manor where the land lay (25 Eliz., Toth. 45), or a conveyance sought to be avoided for want of livery (Toth. 42, 41 Eliz.), chancery will relieve, though the defect would be fatal at law. Where courts of equity act upon instruments to take effect in the lifetime of the party who makes an agreement for a valuable consideration, they will make it as effectual for the purposes intended as the party had power to do. Sugd. Pow. 361. And in dispositions by will, they will help against all defects which the testator had power to remedy. 1 Mad. Ch. 47, 49. The principle on which they act is, that where the parties interested intended to contract a perfect obligation, though by mistake or accident, they omit the set forms of words, so that there is no legal remedy, yet they are bound in natural justice to stand to their agreement, and "where there is substance, the law will apply the words to the intent, though they sound differently" (Tr. 14; 1 Fonbl. Eq. 147; Plowd. 140, 141), the imperfect execution of the contract not affecting the equity raised by the agreement (1 Fonbl. Eq. 37, 40, 41). Equity, therefore, will supply any defects of circumstances in conveyances (1 Fonbl. Eq. 38), where there is an intent to make a better assurance (Carey, 44).

It has never been pretended that the course of equity on these subjects was regulated or

in any way affected by the 43 Eliz.; it was founded on principles which were the origin and foundation of its jurisdiction, and became gradually developed according to the exigency of the times. There is no reason which would prevent their application to charities in all cases between subjects, before the 43 Eliz. in the same manner as after; nor is there to be found in any decision or authority, other than the late dicta denying it: so far as any traces of its jurisdiction over charities are to be found in the books, it seems to have been under the three heads of fraud, trust and accident, and exercised without any doubt of the power in all cases where either circumstance existed. In Toth. 58, a case is reported as having been decided in 36 & 37 Hen. VIII. in which the court of chancery decreed lands to the mayor and burgesses of Gloucester, to whom they had been devised for the use of a school and other purposes. When a donor appointed lands or goods to be sold to maintain a charitable use, and did not appoint by whom the sale should be made, it was decreed to be made by persons named by the commissioners, and the money employed to maintain a charitable use according to the donor's intent. Toth. 30; Duke, Char. Uses (by Bridgman) 360, 41 Eliz. In Francis Moore's reading on the 43 Eliz., various cases are referred to which show clearly that charities stood upon the same footing in equity before the statute as they have done since. If a man devise that the executors of his wife shall pay money to be lent to young tradesmen, it is void, because he cannot charge the executors of his wife; but assets belonging to the husband were decreed to be liable to the charitable use. Duke, Char. Uses (by Bridgman) 136, 40 Eliz. Land sold in confidence to perform a charitable use, which the bargainer declared by his will, the bargain was never enrolled, yet the lord chancellor decreed the heirs should sell the land, to be disposed according to the use. This decree was made 24 Eliz., before the statute of charitable uses, and "was made upon ordinary judicial equity in chancery, and therefore it seems the commissioners upon this statute may decree as much in the like case." If a reversion be granted to a charitable use, the particular tenant shall be bound to attorn by the decree of the commissioners, and it was said there are precedents in chancery where the lord chancellor had decreed and compelled the tenant to attorn. Sir Thomas Bromly decreed and compelled the terre tenant to give seisin of a rent seck to the intent the party may bring an assize. Duke, Char. Uses (by Bridgman) 163.

From these cases, and the remarks of Sir Francis Moore, it seems that the course of the commissioners and the chancellor, under the statute, was taken from the previous rules of judicial equity, which were settled long before its adoption. It was penned by him by order of the house of commons (Duke, Char. Uses, by Bridgman, 122), which gives great weight to any opinion expressed by him, and to cases which he adopts as law. He says, no use shall be taken by equity to be a charitable use, within the meaning of the statute, if it be not within the meaning and words of the statute; but the words may be construed by equity, as the repairs of churches extend to all convenient ornaments, and conveniens for the administration of divine service. A gift of lands "to maintain a chaplain or minister to celebrate divine service, is neither within the letter nor meaning of this statute, for it was of purpose omitted in the penning of the act, lest the gifts intended to be employed upon purposes grounded upon charity might, in change of times, contrary to the minds of givers, be confiscated into the king's treasury; for religion being variable, according to the pleasure of succeeding princes, that which at one time is held for orthodox, may, at another, be accounted superstitious, and then such lands are confiscated, as appears by the statute of charities" (1 Edw. VI. c. 14). The effect of this omission is not to make the devise void, but to except such cases from the jurisdiction conferred on the commissioners by the statute. It is the same as a proviso which declares that nothing in the act shall be construed to extend to colleges, &c., which is only to exempt them from being reformed by commission. Hob. 136. So a gift for the maintenance of a chaplain or priest for divine service will be a charitable use, and in the direction of chancery, though not within the power of the commissioners. 7 Day's Com. Dig. N. 10, p. 609, and cases cited. As the statute gives to the chancellor no judicial power, except by appeal from the decree of the commissioners, it follows, that wherever he exercises any jurisdiction over cases not within the statute, or excepted from the power of the commissioners, it is independent of the statute; yet the uniform course of equity in such cases has been to give relief by the same rules and principles as if the case had been included in its enumeration. The lord keeper and the judge decreed that money given to maintain a preaching minister was a charitable use, notwithstanding it is not warranted by the statute, and that the same shall be paid by the executor to such maintenance. Pember v. Inhabitants of Kingston, Toth. 34; 15 Car. I.; Duke, Char. Uses (by Bridgman), 381; Pensterd v. Pavier, Toth. 34. Where an endowment was made for a vicar, but was void at law, by reason of some defects arising from the ignorance of the donor, it was decreed good in chancery. "For in cases of charitable uses, the charity is not to be set aside for want of every circumstance appointed by the donor,—if it should, a great many charities would fail." Joyce v. Osborne, Nel. Ch. 40, 41; 15 Car. I. So, where by will a certain sum was charged upon land for a weekly sermon and lecture, it was objected, that the devise was void, "because the case was not in the statute," because "no person was named,"—"part of the

land was held per autre vie, and not devisable,"—and, "as the sermons had been discontinued, therefore the annuity ought to cease;" but the chancellor held them to be good. 2 Ch. Cas. 18, 19; S. P. 32. This principle has been followed up by various cases, in which devises to chaplains, ministers, preachers, vicars, &c., have been held good (1 Vin. Abr. 249; 2 Vern. 105; 3 P. Wms. 344; Swinb. 71) and chancery has decreed the execution of trusts in their favor, without any other authority than that on which they, through all time, acted on matters within their appropriate jurisdiction. 2 Fonbl. Eq. 210. It was strongly illustrated in a case decided immediately after the statute. In 11 Hen. VI. land was given with intent to find a chaplain to celebrate divine service, until the feoffor should procure a foundation, but was not so employed. The commissioners, under 39 Eliz., decreed the lands to the use,—the chancellor reversed their decree, because the use was not inquirable by them under the statute, but by his chancery authority he did decree the land according to the original use. Duke, Char. Uses (by Bridgman) 154; Carey, 39; 3 Jac. I. A decree was made for the heir at law, against certain feoffees who had lands conveyed to them to maintain scholars who should use holy orders. Crofts v. Evetts, Toth. 61, 62, 3 Jac. I.,—though this case is not within the statute.

The general principle adopted in chancery, that the performance of a charitable use is equally if not more favored than the payment of debts (Duke, Char. Uses, by Bridgman, 138, from Moore's Reading on the Statute, referred to as laid down in 42 Eliz.,) shows the reason of these decisions to be founded in general rules, to carry the intention of the party into effect, for all lawful objects, especially favored ones, as is forcibly expressed in a note in Tothill, of a case decided in 38 & 39 Eliz. "The law of God speaks for him, equity and good conscience speak for him, and the law of the land speaketh not against him." Toth. 126. This is the basis of equity jurisdiction; and as there is no subject to which the rule would apply with more force than to charities, so it will be found, that it has been the uniform course of equity to support charitable donations in all cases where they are not prohibited by law;—the inquiry has been, not what uses were authorized, but only what forbidden. Courts of original jurisdiction have taken cognizance of cases excluded from the power of special tribunals, without any statutory authority, and have not considered charities to be excluded from the protection of the law of equity, because they were not made subject to the power of the commissioners under the 43 Eliz. It contains no provision which enlarges the jurisdiction of the chancellor, as a court of equity, or as acting in place of the king by his prerogative or personal jurisdiction; in the appointment of commissioners, he acts as a special officer, selected to perform the duty imposed by the statute; in sustaining appeals from the commissioners, he acts by the rules of equity and good conscience, and these are the only functions which he is to perform under the statute. Keb. St. 943, 944; 2 Ruffh. St. 708, 709. It is wholly silent as to a proceeding by original bill, between private parties, or by information of the attorney general, where the king is in any way concerned, or where the chancellor can act only by the sign manual of the king. It enumerates only twenty-one charitable uses, as classed by Lord Coke, in 2 Inst. 710, and prescribes only one rule to the commissioners in making their decrees: "So as the lands and money may be duly and faithfully employed to and for such of the charitable uses and intents before rehearsed respectively, for which they were given, limited, assigned or appointed, by the donors and founders thereof;"—"which decrees not being contrary to the orders, statutes or decrees of the donors or founders, shall, by the authority of the present parliament, stand firm and good, according to the tenor and purport thereof, and shall be executed accordingly, until the same shall be undone or altered by the lord chancellor," &c. 2 Co. Inst. 710. This is the substance of the recital and remedial part of this statute; and if the law of charity could be traced to no other source, the system must have remained not only very defective, but would have been extremely illiberal and contracted, if it had rested on the enacting or remedial provisions it contains, or its operation and effect had been confined to the enumerated cases. By recurring to the statutes heretofore noticed, and the decisions of courts of law and equity, before this statute, it will be found, that they comprehend forty-six specifications of pious and charitable uses, which were recognized as within the protection of the law, in which were embraced all that were enumerated in the 43 Eliz. The statutes of Hen. VIII. and Edw. VI., for the suppression of superstition, protected more cases of charity, and prescribed more liberal rules for their establishment and maintenance, than 43 Eliz. The rules they prescribed to the commissioners, and the courts under which they were placed, are more definite and explicit in favor of charities, even where their establishment would prejudice the rights of the king, than this statute directs in cases between individuals.[1]

The same remark applies to the statutes of 39 Eliz., and if a detailed comparison was

[1] The following summary list of uses declared by statute and adjudged cases to be valid, as pious and charitable, for which property could be held prior to the 43 Eliz. will fully sustain this position: (1) Gifts for the exercise and celebration of divine service, to find a chaplain, a taper to burn before an image, prayers for souls, the defence of the church, obits, or service of a priest. St. 13 Edw. I.; 17 Edw. II.; 2 Hen. V.; 23 Hen. VIII.; 15 Rich. II. (2) Free alms, lib-

made, exhibiting the system of charities by the general course of the law of England, as it stood before the 43 Eliz., and as it would appear from that statute taken alone, no jurist would hesitate in preferring the former as the most perfect and liberal. The contrast would be striking indeed, if we expunge from the latter all which it adopts from former statutes and the common law; or if we take from the rules and principles which have governed its construction, as they are stated in the books to have been founded on its provisions, those which appear to have been finally settled and established previously;—this statute and the great system which has been supposed to have been built upon it, would lose its importance in the view of the profession. That branch of the personal or prerogative jurisdiction of the chancellor, which is exercised on the information of the attorney-general, by appointing a charitable donation to new objects, on the extinction of those to which it was originally devoted, will be found to be derived from the fundamental law of charities, established by the statutes of Templars (17 Edw. II.).

The altering and disposing to good and pious uses, donations originally made for purposes of superstition, is a provision of the 1 Edw. VI. The appointment of general and vague charities to definite objects results from the general direction of the statutes, prior to the 43 Eliz., to make such appointments, "so that the will of the giver shall in all things always be faithfully observed and religiously executed" (17 Edw. II.); and that the decrees "shall be most beneficial in favor of the charities specified" (1 Edw. VI.); so that the said charitable uses may be observed in the most liberal and ample sort (39 Eliz.). General charities are embraced in the 37 Hen. VIII. as "good, virtuous and charitable deeds;" and in 1 & 2 Phil. & M., "the resuscitation of alms, prayer and example of good life;" and in 39 Eliz. c. 6, "other good, lawful and charitable purposes and intents;"—they were also under the superintendence of the king, as parens patriae. So that in all these cases, the 43 Eliz. has no direct or indirect effect in giving any jurisdiction to the chancellor. The appropriation of the increased profits and revenues of land charged with a specific sum to charities, to the same objects as those specified; and the

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eral alms-giving and relief of the poor. 13 Edw. I.; 17 Edw. II.; 37 Hen. VIII.; 1 Edw. VI.; these were gifts in frankalmoigne, and were good at common law. Co. Litt. § 133; pp. 93b, 94a, &c.; 6 Coke, 17; Carey, 39; Duke, Char. Uses (by Bridgman) 154; Poph. 6; 8 Coke, 130; And. 43; Hob. 124; Plowd. 523; Perk. § 7. (3) Hospitalities. 17 Edw. II.; 15 Rich. II. (4) All other offices and services before time due, by whatever name. 17 Edw. II. (5) The employment of a vicar to inform the people, &c. 15 Rich. II. (6) Lazars in hospitals. 2 Hen. V. (7) Men out of their wits. 2 Hen. V. (8) Poor women with child, nourishing, relieving and refreshing other poor people. 2 Hen. V.; 1 Coke, 26a. (9) The discharge of tolls and tollages to be levied to relieve the poor. 23 Hen. VIII.; 1 Coke, 26a. (10) The cleansing of streets. 23 Hen. VIII. (11) Good, virtuous and charitable deeds. 37 Hen. VIII. (12) Erecting grammar schools, and the maintenance of schoolmasters (1 Edw. VI.; Dyer, 225; 1 Coke, 25) and ushers (Poph. 8; 8 Coke, 130b). (13) The further augmentation of the universities. 1 Edw. VI. (14) The support of preachers, priests and vicars (1 Edw. VI.) and parsons (Plowd. 523; 1 Coke, 26). (15) The maintenance of pier walls and sea banks. 1 Edw. VI. (16) The relief of poor men, being students or otherwise. 1 Edw. VI. (17) Repairing bridges and walls. 2 & 3 Edw. VI.; 1 Coke, 26a. (18) Setting poor people at work. 5 & 6 Edw. VI.; 1 Coke, 26a. (19) The resuscitation of alms, prayer, and example of good life. 1 & 2 Phil. & M. (20) The relief of prisoners. 14 Eliz.; Duke, Char. Uses (by Bridgman) 131. (21) The repair of churches. 13 Eliz.; Cro. Eliz. 449; 1 Coke, 26a. (22) The maintenance of poor in houses of correction. 29 Eliz. (23) For impotent and maimed soldiers. 29 Eliz.; 35 Eliz. c. 1. (24) For hurt and maimed mariners. 35 Eliz. c. 1; Moore, 889, pl. 1252. (25) The maintenance of houses of correction and abiding houses. 35 Eliz. c. 7; 39 Eliz. c. 5. (26) For stocks and stores for them, and the use of the poor. 39 Eliz. c. 4; 1 Coke, 26a. (27) To erect and found hospitals. 39 Eliz. c. 5; Co. Litt. 342a; 10 Coke, 25, &c.; Hob. 123; Toth. 32; Moore, 865, pl. 1194. (28) School of learning, colleges and hospitals, for the relief of the poor. 39 Eliz. c. 6. (29) For the relief of orphans and fatherless children. 39 Eliz. c. 6; Swinb. 66. (30) And such like good and lawful charities. 39 Eliz. c. 6. (31) Repairing bridges and roads (39 Eliz. c. 6); making bridges and beacons (6 Coke, 1, 2). (32) Maintenance of free schools and poor scholars. 39 Eliz. c. 6. (33) Or such other good, lawful and charitable purposes and intents. 39 Eliz. c. 6. (34) The true labor and exercise of husbandry (7 Jac. I. c. 3, preamble; Keb. St. 1040; 3 Ruffh. St. 74) recited as profitable to the commonwealth and pleasing to God. (35) The bringing up of apprentices of both sexes in trades and manual occupations. 7 Jac. I. c. 3. (36) The making of stock for poor laborers' husbandry—poor apprentices, and to set them at work. 1 Coke, 26a. (37) For chapels of ease, erected as members of parochial churches. Hob. 123, 124. (38) For erecting cathedrals—of money for their support. Swinb. 66. (39) For the advancement of religion and learning, and the maintenance of the poor. 11 Coke, 70b. (40) For public benefit. 11 Coke, 73b. (41) Works of piety and charity, or any other charitable use. 1 Coke, 26a; 8 Coke, 130b. (42) Poor men decayed by misfortune, or the visitation of God. Moore, 129, pl. 277. (43) Persons imprisoned for conscience sake. Duke, Char. Uses (by Bridgman) 131. (44) A bell for a church, pulpit cushion and cloth, for a session house, or for the ornament of a church, or vestments for service. Poph. 139; 6 Coke, 1, 2. (45) The marriage of poor maidens. 1 Coke, 26a; 6 Coke, 1b, 2a. (46) For any charitable use (1 Coke, 26a; Shep. Abr. 1066); and such uses as concur in decency and good order with the intent of the founder (Duke, Char. Uses, by Bridgman, 155).

The twenty-one cases enumerated in the statute 43 Eliz. are the following: (1) The relief of aged, poor and impotent people. (2) The maintenance of sick and maimed soldiers and mariners. (3) Schools of learning. (4) Free schools. (5) Scholars in universities. (6) Houses of correction. (7) Repairs of bridges. (8) Of ports or havens. (9) Of cawsies. (10) Churches. (11) Of sea banks. (12) Of highways. (13) For education and preferment of orphans. (14) For marriage of poor maidens. (15) For supportation, aid and help of young tradesmen. (16) Of handicraft-men. (17) Of persons decayed. (18) For redemption or relief of prisoners or captives. (19) For ease and aid of any poor inhabitants concerning payment of fifteenths. (20) Fitting out soldiers. (21) And other taxes.

rule which prevents their going to the heir, or any other use than the charity, is founded on the statute of Templars, and the common law, as declared in 8 Coke, 131; 10 Coke, 30. The words "given," "limited," "appointed," "assigned," were taken from the 1 Edw. VI. c. 14, and 37 Hen. VIII. c. 4 (2 Ch. Cas. 18). These are the words on which the effect of the statute has been mainly founded, and courts have extended them very far (P. C. 271); but their meaning is the same in all the statutes. An assignment of the suppressed lands to charitable uses by commissioners, under the statute 1 Edw. VI. c. 14, § 13, had the same effect as an act of parliament, and the final decree of the court of augmentations of the revenue, the court of wards, or exchequer, establishing a charity on the lands or revenues of the king, was conclusive on his rights, let them accrue from whatever source: it followed that such appointment, assignment or decree, by the authority of parliament, had all the effect of a charter, license, and non obstante statuto, or special incorporation.

Independent of any statutory jurisdiction, charities belonged to the king as parens patriae, and fell under the care of chancery by the same authority which they exercised over infants, idiots, lunatics and wards of the king, before the erection of the other courts to whom the powers of the chancellor were transferred. 2 Vern. 342; 2 P. Wms. 103–118; 1 Bl. Comm. 90–92; 2 Bl. Comm. 328; Gilb. Eq. 172. The erection of new courts, or the authority conferred on commissioners to do what had before belonged to the chancellor, virtute officii, or by sign manual, was therefore only a devolution of his powers on the other tribunals; not the creating of a new power not before in existence, nor was the effect of their acts any greater by their special authority than the decrees of the chancellor, in virtue of his inherent or prerogative jurisdiction. The law on this subject was so well settled that in the 43 Eliz. the attorney general, Coke, and the two chief justices, Popham, Sir Francis Moore, and Anderson, by command of Sir Thomas Egerton, keeper of the seal, reported the following resolutions, on divers points on the 39 Eliz. c. 6, directing commissioners to redress frauds and breaches of trust of lands and goods given to charitable uses. If the commissioners decree a lease or feoffment to be void, it is void in interest and estate. If the chancellor decrees it good, it is again good interest, but they thought that the chancellor could make no decree, unless the decree of the commissioners was against equity. That the commissioners could decree the payment of mesne profits received and misemployed, as well as make orders for the future profits. That the word "given," in the proviso excepting hospitals and towns corporate, extends to gifts after the statute, as well as to gifts before. That they could not by a decree, establish a corporation of churchwardens, or others, to take for a charitable use, but they could decree land to a capable body politic, without danger of mortmain, whether the land was held in capite or not, because the king is bound by the statute in that point. That they could appoint lands to natural persons, and their heirs to hold in continuance for charitable uses. That they had power to reform abuses in such corporations as were out of towns corporate, to add land to them, or make orders for them which should have the same effect, as parliament, by private acts of incorporation for charitable uses, gave, as to all things in which the law does not prescribe any special cause of favor. Moore, 559, 560, pl. 762; Moore, Abr. 158, pl. 727. There can be no danger or error in taking the resolution of these common law lawyers as the settled rule by which charities were administered up to this time. There certainly is none in following the statutes which are yet in force, and the adjudications of courts which are recognized as law to this day, as the "general course of the law of England." In thus divesting the 43 Eliz. of its borrowed words, uses and provisions, it will be found that there remains but one important office which it has performed by its exclusive operation in aid of donations to charities—that is, to remove the disability imposed on corporations by the statute of wills. In other respects, it can be considered only as an item in the legislature of England, which, taken in connection with the decisions of the courts, framed the general course of the law on the subject of charities, which had become well defined and systematized; so much so, that we find much less litigation on charities before the 43 Eliz. than immediately afterwards. This was the consequence of the repeal of the 39 Eliz. c. 6, and the very limited enumeration of uses in 43 Eliz., which compelled the courts virtually to re-enact it by construction. In addition to the preceding view of the jurisdiction of chancery over charities, there is a general principle of the law of England peculiarly applicable to this subject.

It is provided by an old statute, that no man shall go from the king's courts without remedy for his right (13 Edw. I., c. 50; Keb. St. 52; 1 Ruffh. St. 111, 112); and was declared as a rule of equity by the chancellor in 4 Hen. VII. fol. 5; Bohun, Ch. Cas. 3; 2 Co. Inst. 405–408, 485; 12 Coke, 114b; Hob. 63; 3 Bl. Comm. 52; 2 Day, Com. Dig. 340–368, 370; 1 Ch. App. 20, 48. The whole judicial power of the kingdom is vested in the different courts (4 Co. Inst. 7071) and there can be no failure of justice by defects of courts, for when particular courts fail of justice, the general courts shall give remedy. 4 Co. Inst. 213; 1 Bac. Abr. 554, 555; 12 Coke, 114. They are supreme within their respective jurisdictions, and that of equity extends to all rights recognized by the law for which there is no legal remedy, the cognizance of which has not been transferred to some other court. 4 Co. Inst. 84. The jurisdiction of chancery,

according to equity and good conscience, extends to all cases cognizable in equity, and the party objecting to its exercise must show that some other court of equity has cognizance of the case. 4 Co. Inst. 82; 1 Bac. Abr. 560; Mitf. Pl. 183; Beames, 57, 91; 2 Vern. 483; 1 Vern. 59; 1 Ves. 204; 1 Dickens, 129. Its course is governed by usage, without any statutory restraint as to persons or the subject matter—except cases affecting the rights or prerogative of the crown, to which it is extended either by statutes or warrant from the king; but is not exercised in virtue of the equity powers of the court (4 Co. Inst. 79, 82; Bohun, Ch. Cas. 56; Hob. 63; 2 Atk. 553; 3 Atk. 635); or the 43 Eliz.; 2 Co. Inst. 552. In acting on cases between subjects the jurisdiction exercised is that which is inherent in chancery as a court of equity, depending on its usage, and co-existent with its existence, by the same rules as are prescribed to the chancellor on an appeal from a decree of the commissioners under the 10th section of the 43 Eliz., which adopted its old principles. It is the same jurisdiction which the constitution confers on the courts of the United States by the words "cases in equity," and which the laws of this state of 1825 and 1828 confer on the state courts in cases of trust, "according to the powers and rules of a court of equity," which this court can exercise to the same extent as in England; subject only to the restriction of the 16th section of the judiciary act [1 Stat. 82], where there is a remedy at law. Baker v. Biddle [Case No. 764; Parsons v. Bedford] 3 Pet. [28 U. S.] 446, 447; [Bank of Hamilton v. Dudley] 2 Pet. [27 U. S.] 525, 526. It is therefore clear, that the extraordinary jurisdiction of chancery was always applicable to charities in England; whenever there was a right to hold property for a charitable use, there was a remedy in the appropriate court, according to their respective jurisdiction, to be administered by its ordinary rules and principles without the aid of any new statute. It is also clear, that the personal or prerogative jurisdiction of the chancellor existed before the erection of the court of wards (2 Atk. 553), and that the court of chancery exercised its jurisdiction at large on cases of charitable uses before the statute, and that there may be a bill by information in that court founded on its general jurisdiction. 2 Ves. 327–329.

There is no case reported or referred to, wherein chancery has refused to sustain a bill or information for the establishment of a charity for the want of jurisdiction. There could be no failure of equitable relief in a proper case, either between a subject and the king, or subject and subject, for before the erection of the court of augmentations and wards the chancellor was invested with all the powers which were given to those courts which were most ample for all purposes of charities. The case of Reg. v. Porter, in 1 Coke, 22, has been considered as opposed to this position, and the importance given to it by the supreme court of the United States, in [Baptist Association v. Hart] 4 Wheat. [17 U. S.] 33, 34, makes it necessary to bestow some attention upon it. The case is too familiar to the profession to be stated, but one historical fact is stated by the lord chancellor, in 3 Ves. 726, which fully accounts for the course of proceeding—the devisee "instead of performing the will made a long lease, and the mode taken to effectuate the charity was this—they found the heir at law, and he having entered, conveyed to the queen, by which means she had it in her power to establish the charity." The attorney general filed an information of intrusion in the exchequer against Porter, who was in possession under the devisee, on which there was a judgment in favor of the queen, which is equivalent to a recovery or possession, as the defendant in such cases is subject to a fine which he can avoid only by making terms. It only remained for the queen to grant a charter to effectuate the charity as she had the legal estate by deed from the heir, and possession of the land on which it was charged; and it was the most direct mode of doing it. In any other way the difficulty would have been great. There had been an adverse possession from the death of the testator, in 32 Hen. VIII. till the 34 Eliz., so that the heir could not have recovered possession by any other proceeding than a writ of right. If successful, he could establish the charity by his own deed, only in the grantees and their heirs, or in trustees for their use. To make a corporation, it would be necessary to apply to parliament, as in the case of the Thetford school, or to the queen for letters patents for at this time there was no power in commissioners by any statute to establish charities on any lands except those in the king's hands under the government of special courts. If the heir had refused, the interference of chancery would have been necessary to give relief to the parties interested in the charity, if the difficulty of obtaining possession at law had been removed. By the special verdict, it appears that the testator had edified "divers meases, mansions and places convenient for a free school," &c., (1 Coke, 19b,) and the devise of the wharf and house was for "the maintenance of the premises in manner and form, as the said N. G. have kept and maintained the same, and as the same is now kept and maintained without any diminution in any wise." There was then a vested interest, a trust created and cestui que trust in existence, and the charity was fastened on the land into whosesoever hands it came. It was binding on the heir who entered for the condition broken—"he shall perform the use because he comes in upon confidence, and the condition was compulsory to perform the use." Moore, Char. Uses; Duke, Char. Uses (by Bridgman) 137, 138, 159–161.

If the powerful reasoning of the judges in

the case of Inglis v. Trustees of Sailor's Snug Harbor, 3 Pet. [28 U. S.] 119, 140, 145, 154, is applied to Porter's Case [supra], it is apprehended that there could be little doubt that the devise would have been carried into effect in a court of law, if the cestui que use of the charity had been in possession of the wharf and house; as the court of exchequer held the devise to be valid in law, and as the donor had an undoubted power over the estate, every principle and rule of equity would have induced a court of equity to compel the heir at law to have carried his intention into effect, by the exercise of its acknowledged jurisdiction over trusts. The queen by her purchase acquired only the right of the heir, she held it subject to the trust, and as the condition which created the trust appeared on the face of her title, the cestuis que trust could have had their remedy in the exchequer, by a bill or information in nature of a monstrans de droit, as fully as in the case of a charity charged upon the abbey lands by the 33 Hen. VIII. But no further proceeding was required after the adverse claim was removed; as the object was the establishment of the charity, no interference became necessary, as the power of the queen was competent to do every act in order to carry the devise into complete effect; by the mode adopted all circuity was avoided, and the object completely effected, as soon as the queen obtained possession by removing the intruder. Plow. 561; Hardr. 460; 7 Day, Com. Dig. 83. The presumption of the want of any equitable remedy to establish and protect the charity, which has been drawn from the lapse of time from the death of the devisor till the filing of the information, is not warranted by any thing which appears in the report of the case, and it is not to be expected that the collateral circumstances attending it can now be traced with accuracy; the one referred to in 3 Ves. 726, is satisfactory, and appears in the whole course of the argument by the counsel of the queen, to have been the only object of her interference. But whatever ground there may have been for such presumption, arising from the particular circumstances of Porter's Case, without referring to the general course of the courts of law and equity, or of the special courts or tribunals instituted by statutes prior to its decision; there certainly is the most abundant evidence that there was in some court a competent power to effectuate all lawful charities according to the intent of the donor. The statutes and adjudications referred to are conclusive to this point, and no presumption can be permitted to overthrow their authority, unless modern doubts shall be more respected than the ancient principles of the law which governed charities before the 43 Eliz., and which have continued to this day the rules by which courts of equity have proceeded in their administration in cases not within the words or equity of that statute, as well as those expressly excluded from its operations by provisos and exceptions, as to which there can be no pretence that the statute either gave any new, or enlarged any old jurisdiction.[2]

There is a large class of cases expressly excepted from the jurisdiction of the commissioners by the 43 Eliz., by declaring "that this act, or anything in it, shall not extend to any city, town corporate," or land in them, given to the uses specified, or to "colleges, hospitals or free-schools," who have special governors or visitors to govern them, to "colleges in the universities of Westminster, Eton or Winchester." 7 Day, Com. Dig. 616, note 19.

The 39 Eliz. embraced all "colleges, hospitals, schools of learning and other places founded or ordained for charitable purposes," but it was repealed by the 43 Eliz. c. 9; 4 Co. Inst. 167; 7 Day, Com. Dig. 614. Yet notwithstanding the repeal of this law, and the proviso in the 43 Eliz. c. 4, chancery has since, as they had done before, exercised a jurisdiction over them, which continues to this day, without any statutory authority, resting on its ancient basis. 2 Fonbl. Eq. 208. Though the 2 Hen. V. placed hospitals under the supervision of the ordinary, yet where the "king or any of his progenitors were founders," the ordinary was not allowed to visit them; "but the chancellor of England is appointed by law to be their visitor." Co. Litt. 96a. The king may have a prohibition to the ordinary that "he shall not visit them, because the chancellor ought to do it and no other," "so shall a private founder, if the ordinary will visit or cite any of the poor to appear before him or remove them." Fitzh. Nat. Brev. 42, 93; Reg. Brev. 40; 1 Lil. Reg. 379. The remedy, must of course, be in the temporal courts. If a resort is had to those of equity powers, it must be by ordinary process of a bill at the suit of a subject against subject, or by information in case the king is party, according to its ancient usages and rules, that wherever property is holden by one in trust and confidence, chancery has jurisdiction to correct fraud, accident and breach of trust. This power is exercised over the governors and visitors of colleges, hospitals and corporations, whenever they are trustees. 3 Atk. 108, 164; 2 P. Wms. 325. Though the jurisdiction of the ordinary is expressly saved by the statute, chancery exercises the same powers over executors and adminis-

[2] The law of charitable uses has always formed a part of the Civil Code of Pennsylvania. The statute of 43 Eliz., as a statute, has never been adopted in this state; but its conservative provisions have been in force here, by common usage and constitutional provision. Not only so, but the more extensive range of charitable uses which chancery sustained before the statute of Elizabeth, and even beyond it. The statute of 9 Geo. II. never was in force in Pennsylvania, and consequently the law of charitable uses here stands unaffected by it. The courts of equity in this state will not hesitate in supplying any formal defect in the execution of a power by will in favor of a charity. Pepper's Will, 1 Pars. Eq. Cas. 436.

trators who hold money for charitable uses, as other trustees. It is the existence of a trust which is executory that gives jurisdiction to chancery, and not the existence of a charity recognized by a statute; a statute has a different office to perform, to remove disabilities or incapacities, imposed by statute or common law, so as to bring charities back to their original capacity, and place them within the cognizance of the appropriate courts, as if they had never been affected by any change introduced by statutes, which had embarrassed donations for uses of charity, piety and education. When that office is performed, and the case becomes disencumbered of statutory restraints, the powers of the courts are brought to act on them, as the highly favored objects of the law. Chancery especially will protect them to the extent of its judicial power as a court of equity; and, by the personal jurisdiction of the chancellor, (which he exercises in right of the crown by prerogative, under the sign manual of the king, as parens patriae,) do what the king in equity and conscience ought to do. This is done in cases of charities for purposes so undefined, as not to come within the statute, or general charities, with which the commissioners have nothing to do, but must be determined by the king in chancery, on an information by the attorney general. In a leading case on this subject, the decree of the commissioners was reversed as to a general charity, but affirmed where the objects were defined with reasonable certainty (2 Lev. 167), so as to come within the statute. In these three classes of cases not embraced in the statute, therefore, viz.—1, where the objects are wholly vague; 2, cases excepted; 3, cases within the jurisdiction of the ordinary, as all cases provided for by the 17 Edw. II., or 1 Edw. VI., the jurisdiction of chancery is wholly independent of its provisions, and is exercised as if it had never passed; as is strikingly exemplified in the cases of hospitals placed under the power of the commissioners by the 39th, but excluded by the 43 Eliz. There was no ground on which chancery could take their supervision as to the execution of trusts, but by its extraordinary or personal jurisdiction existing before the 43 Eliz. It has been supposed that the latter must have been derived from the statutes, from the circumstance of there being no reported cases of its exercise antecedently: if there is any weight in this supposition, it applies with the same force for sixty years afterwards, for there is no reported proceeding in chancery on charities where the king is a party till after the restoration of Charles II.; but this circumstance is satisfactorily accounted for, by referring to former statutes.

All the land of the abbeys, monasteries, &c., which were suppressed by the statutes of Hen. VIII. and Edw. VI. were placed in the hands of the commissioners appointed by the king, under the order and governance of the court of augmentation of the king's revenue, which had also the exclusive cognizance of all claims for charities, charged on, or accruing from the suppressed lands, by which the king could be in any way prejudiced or affected. Keb. St. 608; 4 Co. Inst. 121; Gilb. Ex'ns, 159; 2 Ruffh. St. 226. On the abolition of this court, its powers devolved on the exchequer, without any act of parliament (Dyer, 216a, pl. 55; Skin. 612; 1 Bac. Abr. 597) which had the control of the king's lands and revenues (4 Co. Inst. 194) before the erection of the court of augmentation in 27 Hen. VIII. c. 27; 4 Co. Inst. 121, 122. The king's demesne and purchased lands, with those which accrued by forfeiture and escheat, together with all matters affecting them, were under the supervision of the exchequer, which was a court of original jurisdiction, both in law and equity, by ancient statute and usage, in all cases affecting these lands, or any claims upon them, or his revenues or profits issuing therefrom, in which the proceedings were by bill, information, monstrans de droit, petition of right, or the transverse of inquisitions, as the case may be. 3 Bl. Comm. 44; 2 Co. Inst. 23, 553; 4 Co. Inst. 108; 1 Bac. Abr. 597; Hob. 63; Hardr. 50; 2 Lev. 34; Dyer, 303; 3 Day, Com. Dig. 312.

The court of wards and liveries was erected by the 32 Hen. VIII. c. 46; it was a court of record and equity, in which the proceeding on the part of the king was by information in the name of the attorney general, and on the part of a subject, by the usual mode of proceeding appropriate to the jurisdiction of the court, which extends to all wardships of the king by statute, tenure or prerogative, in any lands or their issues and profits, as well as the estates of idiots and natural fools, and charities charged on the lands of his wards or tenants, which were in his wardship. 4 Co. Inst. 188, 202; Bohun, Ch. Cas. 468; Hob. 136. The jurisdiction of the exchequer was taken away from all cases cognizable by the court of wards and liveries (4 Co. Inst. 189), and the statute 33 Hen. VIII. c. 39, declared the jurisdiction of all these courts to be exclusive over the subject matter within their respective cognizance. Keb. St. 555; 2 Ruffh. St. 324. The courts of augmentation, and surveyors of the king's revenues—of exchequer, and wards, and liveries, had all the powers of a court of equity, in the exercise of which they proceeded by information, petition, traverse of inquisition, or English bill, and decreed for or against the king, according to the equity and conscience of the case as between subject and subject. 7 Coke, 19b; Hardr. 27, 176, 230, 502; 4 Co. Inst. 19; Hob. 136. A reference to matters placed under the supervision of these courts will show conclusively that during their existence the chancellor could in no capacity act upon charities in any case to which the king was a

party in interest, or where he came into court by the attorney general; if a charity was charged upon his lands, or those he held in ward, its orders and governance belonged to some of these courts exclusively, and, as parens patriae, all lands so given to charities as to require his interposition by sign manual, came directly within his wardship—as in the case of infants, idiots and lunatics. 2 P. Wms. 103–118. Hence all jurisdiction over charities which were too vague and general to vest according to the ordinary rules of equity—all charities charged upon lands which would have escheated to the king or mesne lords but for the provisions of the statute of Templars—all charities charged on the suppressed lands for superstitious uses, which would have been seized by the king under the statutes of chauntries, but for the direction of the statute 1 Edw. VI.—and all charities charged on lands belonging to the king's wards, was devolved on the court of wards and liveries.

The powers of this court were derived from the 32 & 33 Hen. VIII. and not from the 43 Eliz., which makes no mention of it. Yet we find from Flood's Case, Hob. 136, the authority of which is admitted, that that court decreed the establishment of a charity out of lands in wardship of the king, Flood being his tenant. The decree was made by the ordinary power of the court, and in a case not only not within the 43 Eliz., but expressly exempted by it, as one of the colleges of Oxford. The only effect of this statute was to remove the disability on corporations imposed by the statute of wills. While the power of this court continued, that of chancery over the subject was necessarily suspended, as the king could not proceed in it by his sign manual appointing charities, or the chancellor as his substitute; but as these charities were originally cognizable by the chancellor, and his jurisdiction ceased by being transferred to another court, and not for any want of a competent power to effectuate all its objects, it would revert to it on its abolition, as was the case of the exchequer on the abolition of the court of augmentations. The court of wards was abolished with tenures in chivalry, first by Cromwell's parliament and afterwards by 12 Car. II. (Keb. St. 1147; 3 Ruffh. St. 192), but the statute contained no provision for devolving its powers on other courts. That portion of its jurisdiction which grew out of feudal tenures was of course extinct, that which was founded on the prerogative of the king in the supervision of charities, the care of lunatics, infants and idiots having been before the erection of the court of wards within the cognizance of the chancellor, returned to him as an original jurisdiction which had been merely suspended. Fonbl. Eq. 207; 2 Vern. 342; 3 Bl. Comm. 427, 428; 2 Atk. 553; 3 Atk. 635; Mitf. Pl. 29.

When the chancellor resumed this branch of his jurisdiction the proceedings were conducted as they had originally been, and as followed by the court of wards, according to the usual course of equity in all courts, by modes of proceeding appropriate to the case, and according to the principles which had been settled by long and uniform usage in the exercise of its powers; by an authority neither conferred nor enlarged by the 43 Eliz. nor assumed from the necessity of the case on the subject of charities, more than any others to which their unquestioned jurisdiction extended. The personal or prerogative jurisdiction of the chancellor has been and continues to be the subject of great diversity of opinion in England and this country; but the radical difference between the two governments precludes the necessity of examining the question in this case. Here the executive of the state or Union has no prerogative powers or authority; his sign manual can confer none on a court of chancery; the chancellor is not the keeper of his conscience, or the attorney general his representative in courts of law or equity; the rights and prerogative of the crown devolved on the several states by their declaration of independence, and the assumption of the powers of self-government. The general supervision of infants, idiots, lunatics and charities, which thus devolved on them, can be exercised only by the authority of the legislature. A state cannot be made a party to a suit, without its consent expressed by a law or resolution, and no judicial proceeding or process by or against the attorney general, unless by the authority of the state, can prejudice its rights. He can have no control over the fund which may belong to the state by escheat, on the extinction of all the objects for which it was created, and a failure of the heirs of the donor, or which comes to the prerogative wardship of the state over persons under legal disabilities; neither can be disposed of without an act of the legislature, who are the keepers of their own conscience, as fully in relation to their prerogative rights over the property of others, as the original public domain of the state.

It suffices for the purposes of this case, to have ascertained that the original inherent powers of chancery proceeding as a court of equity, according to equity and good conscience, can be exercised by this court to the full extent of the emergency of this case, independently of the 43 Eliz., either by its enactments, or any new rules or principles of the law of equity supposed to have been developed in its exposition. Having given our views of the equity jurisdiction of the federal courts, in the case of Baker v. Biddle [supra], we deem it unnecessary to review them, as we are fully satisfied of the correctness of the opinion there delivered. Its application to this case will be found to cover all the questions of jurisdiction which can arise.

Having disposed of the objections to the

capacity of the meetings of Friends in this and other states, to take by deed or will for charitable purposes, the next subject of inquiry is as to the particular uses specified in the will—in the contested items which are, —No. 9. The eight acre lot is devised to the yearly meeting as a fund, the income of which is to be paid as an annual subscription into their stock—the application of which has been to the printing and dissemination of books and writings that have been approved of by the society. 10. The bequest of the one thousand dollars to the five monthly meetings of Woman Friends, is for the relief of the poor members thereof. These meetings having a common stock and treasurer, and it is applied to the support of the poor, and teaching poor girls trades. 11. This is a bequest of £30, and interest from the year 1759, for the use of certain Indians. This sum appears to have been received by the father of the testatrix, from one Captain Newcastle, an Indian, for the use of his cousins, but a small part of it only was paid —the will directs this sum to be put into faithful hands, and was devised to the treasurer of the yearly meeting, for the relief and benefit of said Indians, for whose use it had been received by her father, and was evidently intended as the payment of a debt which she assumed by her will. 12. This was a legacy to the treasurer of the yearly meeting in Philadelphia, appointed to relieve the Indians, to the benefit of said Indians. The objects of the meeting are the civilization and improvement of the Indians of the Seneca and Tuscora tribes in New York, to supply them with articles of husbandry, oxen, and iron for mills. 17. Is a like bequest to the treasurer of the Baltimore yearly meeting, for the relief, benefit, and civilization of the Indians under their care, who live in the state of Ohio. No money appears to have been expended for this object for some years past, but the committee are ready to carry them into effect, if they can be found. 18. This is to Friends composing the Baltimore yearly meeting, towards their "stock," if they have one, if not, to one when it is their pleasure to establish it. It appears that this meeting had a stock at the death of the testatrix, which was applied to the printing of books of a religious character, or on business of the society, the expenses of members attending the legislature, and the keeping of Friends horses during the meeting. 19. This is a legacy to the yearly meeting at Mount Pleasant, in Ohio, for their stock, as in the preceding clause; there is no doubt they have a stock for the same purposes as other yearly meetings. 20 & 21. Are legacies to Quaker meetings in Virginia for the relief of the poor thereof—towards the enlarging their meeting house, and the erection of a stone wall to enclose the lot on which it is built —both meetings having a stock and treasurer, and all yearly meetings have a stock. 22. Is a legacy to the citizens of Winchester, in Virginia, (which is an incorporated town,) for a fire engine and hose.

It would be a waste of time to examine into the validity of these uses. As objects of charity, benevolence or liberality, by the common or statute laws of England or Pennsylvania, they are good and valid by both. [Baptist Association v. Hart] 4 Wheat. [17 U. S.] 45; 17 Serg. & R. 93. Even the statute 9 Geo. II., does not apply to bequests of money or personalty, and the testator has specified purposes, charitable in their nature. 2 Rop. Leg. 105, 106; 9 Ves. 406. There appears no adjudication as to a bequest for a fire engine or hose, but there needs no argument to prove it as much an object of public utility, as a session house (Poph. 139), a town house (7 Johns. Ch. 294), or of charity, as cleansing streets (23 Hen. VIII. c. 10), the repairing bridges, &c. (1 Edw. VI.; 43 Eliz.) or in case of taxes and assessments for the preservation of the property of the citizens. We should administer the law of charity in this state, with little regard to its principles, in excluding from its protection so laudable an object as this.

As to the bequests for the benefit of the Indians, there can be no doubt of their being proper objects of charitable donations, as coming within what Swinburne defines, "poor miserable persons," calling for the aid of the charitable and benevolent. Swinb. 66. They have been so recognised by the legislature of the state in the Laws of 1788, incorporating a society for their relief and improvement, as a pious and charitable purpose (Laws 1788, p. 40). In this particular, both judges fully concur. Though there is a difference of opinion on some matters connected with this bequest, which were much dwelt on in the argument on both sides, there is none as to their being proper objects of charity, and that the uses and purposes to which the donations of the Quaker meetings are applied, are not only lawful, but in the highest degree deserving encouragement and protection. We have thus come to the conclusion that the devise of the eight acre lot, and all the bequests in the will of Sarah Zane, which have been contested, are for pious and charitable uses and purposes, sanctioned by law.

The next inquiry is, are they so limited or appointed as to take effect for the objects intended. It must be observed, that except the 22d,—the devises are all in trust for the objects of the charities; the only interest which any of the Quaker societies have in the bequests, is in aid of their contributions for their stock, which appears to be made up by assessments on the different subordinate meetings, but they take in no other way for any individual or collective use or benefit. The organization of these meetings is very regular, though none of them are incorporated. Their gradation is,—preparative, monthly, quarterly and yearly meetings—the latter having the control of all the subordinate ones, but

all composed of the same members, and each meeting has its stock and treasurer, its application being directed, by the respective meeting, to agreed, approved and definite objects. The testatrix was a member of the Philadelphia yearly meeting, and appears to have been connected, in a friendly manner with the meetings in Baltimore, Frederick county, in Virginia, where she died; and with the meeting of Mount Pleasant, a branch from the meeting of Maryland. We must therefore presume her to be familiar with the organization and discipline of all the meetings, in all their details, as is evident from the provisions of the will. When she devotes part of her property to the stock of a particular meeting, it is most certainly her intention that it shall be applied according to its discipline and usage, as well known and understood by herself. It follows that a contribution to such stock is of the same legal effect as if the objects of its application had been specified in the will, as in the case of a devise to an hospital, or any known institution; it is for the uses and purposes intended by the founder; so a devise by way of contribution to a fund devoted to specific objects, by a society who make it up, is in law a devise to such purposes and such only, it can be directed to no other by the trustees, or a court, though the object may not be clearly defined. 1 Vern. 43, 55; 1 Eq. Cas. Abr. 99; 1 Atk. 356; 3 Mer. 400.

It will be ascertained by usage, by the situation and circumstances of the testator, to discover what he meant when the will gave no explanation (2 Eq. Cas. Abr. 366, &c; 3 P. Wms. 145), as if he was a refugee, and devises generally to the poor, it shall be intended poor refugees of the same nation as himself (Amb. 422; Duke, Char. Uses, by Bridgman, 494; 2 Rop. Leg. 147; S. P., Swinb. 316, 480); or "to the charity school," and there were two in the place, evidence was received to show that the testator was fond of the children in one of the schools, and declared he would leave them something at his death. 1 P. Wms. 674, 675; S. P. [Powell v. Biddle] 2 Dall. [2 U. S.] 70–72; 2 P. Wms. 141. That a devise to the poor of any particular parish or church is good, has been often decided (2 Rop. Leg. 147, 148; Toth. 30). In this case they are more definite, being to the poor of particular meetings, which, by reference, makes the designation complete, when we advert to the master's report, finding, that, at the death of the testatrix, and before, there were meetings of the kind referred to at each place designated by her in the will. Finch, 184, 245; 2 Lev. 167, 168; 1 P. Wms. 425.

The devises for the benefit of the Indians are likewise made specific by the evidence reported by the master, specifying the tribes of Indians, and the particular relief afforded by the committee during thirty years, by the expenditure of large sums of money, from time to time, under the direction of the meeting. The intention to apply the bequests in the same manner is too apparent for any court to entertain a doubt. If any could exist, or should hereafter arise, before a final decree, it is within our unquestioned powers to direct further evidence to ascertain and carry it into execution, if no other objections exist than the want of certainty in the will itself. In [Baptist Association v. Hart] 4 Wheat. [17 U. S.] 1, the devise was to "The Baptist Association that for ordinary meets at Philadelphia, annually," which "I allow to be a perpetual fund for the education of youths of the Baptist denomination, who shall appear promising for the ministry, always giving a preference to the descendants of my father's family." The court declared the association to be described with sufficient accuracy (page 26,) and that such a legacy would be sustained in England, (page 29;) so that there was no doubt of the validity of the devise, had the trustees been capable of taking for the objects intended. In Witman v. Lex, the devise was "To St. Michael and Zion churches, to be laid out in bread for the poor of the Lutheran congregation, of which the testator was a member, and towards the education of young students of that congregation, under the direction of the vestrymen of the first named churches," and held good. 17 Serg. & R. 90–93. So of land appropriated by deed for public uses for the benefit of the inhabitants of a town, as a majority may order and direct. 6 Serg. & R. 211. So of a lot marked in the plan of a town "for the Lutheran church," for religious purposes. [Beatty v. Kurtz] 2 Pet. [27 U. S.] 578. This was held good without further description of either the donees or uses, and to take effect when the church should be erected. The court took into consideration the use to which the lot had been appropriated from the time of the donation, which was for a meeting house and burying-ground, and though the house had fallen down from decay, and no new one had been erected, they decreed it to be enjoyed according to the former use.

A legacy to the town of New Rochelle, to erect a town-house to transact public business in, has been held a sufficient description of the charity. 7 Johns. Ch. 294; S. P., 1 Ch. Cas. 134. Courts of chancery act under an obligation to effectuate charitable donations by all the means in their power (2 Freem. 261, 330; 3 Mer. 391), more liberally than in private cases, without regarding the form or prayer of the bill. 1 Atk. 356; 1 Brown, Ch. 12; 2 Ves. Sr. 426; 1 Ves. Sr. 418; 2 Eq. Cas. Abr. 198; 11 Ves. 365; 1 Ves. Sr. 468–475. It is enough that the testator expresses his general intention to establish a charity by making a donation to any object deemed charitable in law, or by using the word "charity." 2 Ves. Sr. 399; 10 Ves. 535; 17 Serg. & R. 93; [Baptist Association v. White] 4 Wheat. 45. Wherever a trust is created for charitable purposes,

the mode by which it is to be effected, or the specific objects of its application, are not material to its validity. 2 Rop. Leg. 140, and cases cited; [Inglis v. Trustees of Sailors' Snug Harbor] 3 Pet. [28 U. S.] 119; 1 Atk. 469; 3 Brown, Ch. 528; 7 Ves. 69, 86. They are put on the footing of dedications of property to public benefit, requiring no particular grantee or trustee capable of taking. Though the object is not in esse at the time of the devise,—[Town of Pawlet v. Clark] 9 Cranch [13 U. S.] 331, 332; [Beatty v. Kurtz] 2 Pet. [27 U. S.] 582, 583; [City of Cincinnati v. White] 6 Pet. [31 U. S.] 437,—the land remains charged with the charity in the hands of the heir until the object comes into existence—2 Vent. 349; [Inglis v. Trustees of Sailor's Snug Harbor] 3 Pet. [28 U. S.] 114–119; Duke, Char. Uses (by Bridgman) 534. So of money in the hands of a trustee, the profits accumulate for the benefit of the fund. 3 Atk. 238.

Chancery will establish the charity on the application of any person who has any interest in the fund in his own right, or as an inhabitant, or a parish officer (1 Ch. Cas. 134), a member of a society having a common benefit from the donation, or a committee of a voluntary association without charter, though they could sustain no action at law,—[Beatty v. Kurtz] 2 Pet. [27 U. S.] 584, 585;—"according to what may be collected to be the true meaning and intent of the donor, notwithstanding any failure or defect in the bequests, gifts or grants," as is correctly expressed in the rejected law of 1712. The courts of this country have gone pari passu with those of England, in aiding defective descriptions or designations of the places, objects or purposes of a charity, wherever they could, by the terms of the instrument, connected with extrinsic circumstances, give locality and application to the fund according to the intent of the donor as near as may be. [Inglis v. Trustees of Sailor's Snug Harbor] 3 Pet. [28 U. S.] 117. Words will be construed in their most liberal and expanded meaning, in order to make out the substance of a charity capable of being aided on equitable principles, or the existence of a trust in the heir at law, devisee or executor, in the execution of which any individual or society has an interest which can be enjoyed by them, or held for their use, consistently with the terms of the donation by an equitable right; chancery will draw to it the legal interest, and give it full effect by a plan to be drawn up under the direction of the court by a master, or the trustee. [3]

An inscription on a tombstone has been held sufficient (Duke, Char. Uses, by Bridgman, 349–366,) or any direction by any writing, which can be deemed to be a limitation, disposition, assignment or an appointment, or gift of property to a charitable use—it will be enforced against parties and privies, except purchasers for valuable consideration of money or land, without notice of the trust—not regarding the form of the instrument. Moore, 888; Comyns, 250; Finch, Prec. 471; Sugd. Pow. 222, 223. A direction by a nuncupative will, was held to be an appointment or limitation before the statute of wills. Dyer, 72, pl. 2; Swinb. 56, 68; Toth. 31. Chancery acts whenever there is a trust, (3 Atk. 108; 2 P. Wms. 326,) which never fails for want of a trustee, (1 Pa. St. 51, 52,) though he dies before the testator, (2 Eq. Cas. Abr. 293; 1 Brown, Ch. 15; Amb. 571; 3 Brown, Ch. 528,) refuses to act or abuses his trust, (2 Ch. Cas. 131; 7 Day, Com. Dig. 772,) chancery will remove him and appoint another, (Ch. Rep. 78, 79; 2 Eq. Cas. Abr. 194,) or compel him to assign it. Finch, 269. These are the principles of equity which the supreme court, in 17 Serg. & R. 91, 92, declare to be the common law of the state, which have been uniformly applied as far as the powers of the courts could be extended to the exercise of chancery jurisdiction. Since the acts of 1818, 1825 and 1828, they can be applied to all trusts as fully as they can be in England, by the common law of equity or the provisions or construction of any statute. They cover all the ground of equity which it is necessary to assume for the decision of this case; the defendant is a trustee for the purposes of the will; the bequests are to trustees either named or designated, who are capable of holding and distributing the funds intrusted to their management, the cestuis que trust are either sufficiently described or easily ascertained by intrinsic circumstances, and the uses for which the dispositions are made are not only valid, but favored and protected by the law, which can effectuate without the exercise of any personal or prerogative jurisdiction.

We shall direct the administrator de bonis non, cum testamento annexo, to pay the respective bequests to the persons appointed to receive and distribute them. They will be considered as trustees, acting under the supervision of this court, as a court of chancery, with the same powers over trusts, as courts of equity in England, and the courts of this state, possess and exercise. Though our orig-

[3] Though the objects of a charity are uncertain, a devise will not fail for want of a trustee capable of taking, if a discretionary power of selecting is vested anywhere. And such power may be vested in an unincorporated religious association. Thus a devise of real and personal estate to the monthly meeting of Friends, at Philadelphia, for the northern district, (being an unincorporated religious association) to be applied as a fund for the distribution of good books among poor people in the back part of Pennsylvania, or to the support of an institution or free school, in or near Philadelphia, was established in a court of equity, against the heirs and representatives of the testator, on a bill by certain members of the meeting, on behalf of themselves and other members. Pickering v. Shotwell, 10 Barr [10 Pa. St.] 23. And see Beaver v. Filson, 8 Barr [8 Pa. St.] 327; Wright v. Linn, 9 Barr [9 Pa. St.] 433.

inal cognizance of the case depends on the residence of the parties to the suit, yet when the fund is under our control, we can proceed in its final distribution among the different claimants in the same manner as if each was a party competent to become an original complainant, by original bill. Baker v. Biddle [Case No. 764]. When the fund shall be so ascertained as to be capable of a final distribution, it will be directed to be applied exclusively to the objects designated in the will, as they existed at the time of her death, and shall continue till a final decree; if any shall then appear to have become extinct, the portion bequeathed to such object must fall into the residuary fund as a lapsed legacy. Its appointment to other purposes, or cestuis que trust, than those which can, by equitable construction, be brought within the intention of the will or donor, is an exercise of that branch of the jurisdiction of the chancellor of England, which has been conferred on this court by no law, and cannot be exercised, virtute officii, under our forms of government. As the amount of the personal estate is evidently far short of the legacies made payable by the will, there must be a failure or abatement, unless the necessary amount can be raised out of the real estate not specifically devised. The testator having authorized the executor to sell the house in Chestnut street, and the Marlborough estate in Virginia, his powers devolve on the administrator d. b. n. c. t. a., by the acts of assembly of this state, (3 Smith, Laws, 433, 434; 6 Smith, Laws, 102;) and as he is a party before us, we can compel their execution, if the laws of Virginia recognise them as competent. But he has no power over any other portions of the real-estate, nor are the heirs at law, or residuary devisees, parties to the suit; so that no decree which we could make would bind them, or the land situated in another state. Our jurisdiction being both limited and local, we cannot compel parties who reside out of the state to appear on our process, and a sale of land in Virginia, under the authority of the court alone, would pass no title to the purchaser.

It is an acknowledged principle that the title and disposition of real property is exclusively subject to the laws of the country where it is situated, which can alone prescribe the mode by which a title can pass from one person to another,—[U. S. v. Crosby] 7 Cranch [11 U. S.] 116; [Clark v. Graham] 6 Wheat. [19 U. S.] 579; [Kerr v. Moon] 9 Wheat. [22 U. S.] 571; [M'Cormick v. Sullivant] 10 Wheat. [23 U. S.] 202,—to which may be added the case of Hunter v. Bryant, 2 Wheat. [15 U. S.] 32, to which we have been referred, as authorizing the sale of the Virginia lands, now asked to be directed. That was a suit originating in this court, affecting land in Kentucky; but as only five-sixths of the land were represented by the parties to the suit, the court confined their decree of sale to the interest of the five parties before them; the sixth party, in interest resided in Virginia, as to whom the supreme court declared, "That the complainant must pursue his remedy, unless her representatives shall have the prudence voluntarily to join in the sales of any land that may be made under this decree." [Baptist Association v. Hart] 4 Wheat. [17 U. S.] 34, 44, 45. We are therefore following all these decisions of the supreme court, in refusing to make any further order of sale of real estate, other than the two parts thereof embraced in the power given by the will.

The decisions of the supreme court of the state, and of the high court of errors, which bear on the residuary devise in this will, may derange some of the specific devises. If the legacies are a charge on the real estate specifically devised, they might affect not only the devise of the eight acre lot, given to the yearly meeting, but other devises to persons not parties to the suit, who must be heard before we can make any decree, touching such parts of the real estate. The application of the rule laid down in Tucker v. Hassenclever, 3 Yeates, 294–299; 2 Bin. 525–531; Nichols v. Postlethwaite, 2 Dall. [2 U. S.] 131; Witman v. Norton, 6 Bin. 396; and Com. v. Shelby, 13 Serg. & R. 348,—would absorb much of the real estate to pay the legacies; but if they should be considered as a charge only on the residuary fund, according to Shaw v. M'Cameron, 11 Serg. & R. 252, they will not affect the devised lands. On this point we have formed no opinion.

It remains only to apply the foregoing view of the law of Pennsylvania to the dispositions of the will in question.

1. To the devise of the eight acre lot to the yearly meeting. We know historically that this has been a religious society from the settlement of the province. We know, from the acts of the legislature, that they have held real estate, and yet hold it, under deeds from the proprietor, from individuals, and by the laws of the state, guarantied by all its constitutions, have a perfect right and capacity to take, hold and enjoy property without incorporation, or tenure in mortmain.

2. The bequest to the monthly meetings of Women Friends, is for a charitable use, which is good and lawful, and they are capable of taking and distributing the charity, according to the will of the donor, in the most liberal and ample sort.

3. The bequest of the thirty pounds received by the father of the testatrix from Captain Newcastle, and the interest we consider to be intended as the payment of a debt which she considered herself to be morally and equitably bound to pay, and therefore direct it to be paid by the executor, as a debt of the estate, to such Indians as are the relations of the said Newcastle, if to be found; if not to be found, to remain subject to the future order of the court.

4. As to the devises to the Indians, our opinion is, that they are good and valid.

That the treasurer of the societies or meetings, or their committees for the time being, are capable of taking and distributing the fund as a trustee under their direction, and that Indians are proper objects of charitable bequests. But they are to be applied to the relief of such Indians as have heretofore been under the care and supervision of the yearly meetings, or their committees respectively, and to be distributed only for such objects and purposes as were customary in the lifetime of the testatrix, such being her manifest intention.

5. As to all the devises to or for the benefit of the different meetings of Friends in Baltimore, Virginia and Ohio, we are clearly of opinion that they are good and valid in law, and decree accordingly.

6. As to the bequest to the citizens of Winchester, to purchase a fire engine, we consider it good as a charitable use, or one tending to public profit and the safety of property, and in ease of taxes and burdens on the citizens. This is the substance and intent of the bequest, and, being given for a good and meritorious object, it is not material by what name it is given; whether to the corporation, or the citizens who compose it, it must take effect, notwithstanding any misnomer or other defects of name, form or circumstance.[4]

7. The bond of Isaac Zane appearing to us to have been assumed by the testatrix as honestly due by one of her near relations, ought to be considered in equity as a debt due, and be paid by the executor out of her estate, as such was evidently her intention, and from the evidence reported by the master we think the party now before the court entitled to receive it, and decree accordingly.

8. We order and decree that the administrator de bonis non make sale of the house and lot in Chestnut street at such time and place as the court may hereafter direct, or private sale, at his discretion.

9. Also to make sale of the Marlborough estate in Virginia, in the same manner, if such sale is authorized by the law of Virginia. If such sale is not authorized, then we order and direct the administrator to make application for such authority to the legislature or such judicial tribunal as by the law of that state is competent to authorize such sale, according to the will of the testatrix, or the order of this court.

[4] A voluntary association of individuals, who have contributed funds for a public purpose, will be regarded as a charity, and a court of equity in this state has jurisdiction over the parties. Funds supplied by the gift of the crown, or from the legislature, or from private gift, for legal, general or public purposes, are charitable funds, to be administered by a court of equity. Therefore, where money is given by will, gift, or voluntary contribution of individuals, to a voluntary, unincorporated hose company, or fire association, formed for general and public usefulness, without individual emolument or advantage, it is a charity over which a court of equity will exercise control. Thomas v. Ellmaker, 1 Pars. Eq. Cas. 98.

We have been asked to go farther, and decree a sale of all the undevised estate of the testatrix, as necessary to provide a fund to meet the various legacies and bequests; the counsel who made the application considering that the residuary clause in the will was to be so construed that nothing should pass under it till all the former dispositions were satisfied. As the residuary devisees are not before the court, and would not be bound by its decree, we have not considered, and shall express no opinion on that subject—having no power to affect real property in another state, but through the parties in interest, or those having power over it, we must confine our order for the sale of the estate to such parts of it as are in the hands, or within the control of the administrator under the authority of the will. We have full power to see that the will be faithfully and religiously observed and executed, but none to order a sale not directed to be made by any of its provisions.

MAGILL (BANK OF UNITED STATES v.). See Case No. 929.

MAGILL (UNITED STATES v.). See Case No. 15,706.

Case No. 8,953.

The MAGNA CHARTA.

[2 Lowell, 136.] [1]

District Court, D. Massachusetts. June, 1872.

SEAMEN'S WAGES—LAW OF THE FLAG—LEFT IN FOREIGN PORT—RATE OF WAGES.

1. The rights of seamen in respect to wages depend on the law of the flag, without regard to the nationality of the seamen themselves.

2. It appears to be the law of Great Britain, that when a seaman is hurt in the service of the ship, and left behind for that cause in a foreign port, and the cause is duly certified by the consul, the ship is responsible for his care and subsistence, but the wages stop.

[Cited in The W. L. White, 25 Fed. 505.]

3. Where such a seaman was so left behind, and the ship afterwards, on the same voyage, came back to the port and took the seaman on board again, and he served to the port of final discharge, and no new contract in writing was made with him, *held*, the presumption was that he was to have the rate of wages originally agreed on, though the market rate was lower at the foreign port.

4. But it would not be presumed that the seaman was to have wages for the whole voyage, including the time he was away from the ship.

5. So far as the wages only are concerned, it seems to be immaterial by the British law whether a seaman necessarily left behind at a foreign port for injuries received on board, was hurt in the service of the ship, or by his own fault. In either case the wages stop.

The libellant was shipped at New York for a voyage thence to Cette, in France, thence to Russia, and back to a port of discharge

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

in the United States or British provinces, term not to exceed twelve months, at twenty-five dollars a month and received a month's advance. The vessel was registered as British, and the legal title was in a person living in Halifax, Nova Scotia, and the form of the articles was such as is required for such vessels. The voyage began 29th March, 1871; the vessel reached Cette in about thirty-five days, and lay there until 26th June, 1871. On the last-mentioned day, while the bark was still in port, the libellant fell from the cross-trees of the mizzen-mast while performing ship's duty, and was seriously hurt. He was sent to the hospital, where he remained for about seven months, and was wholly cured. The bark returned to Cette in January, 1872, and the libellant was taken on board again by the master, and served until the voyage ended at Boston, 28th May, 1872. The master tendered $71.50 in full for wages due the libellant, which he refused. Two certificates of the British consul at Cette were indorsed on the shipping articles: one, dated 26th June, 1871, that the seaman was left behind for sickness, not being able to go with the ship, and that the master had deposited certain sums for his wages and for hospital expenses; the second, under date 29th January, 1872, recited that the master refused to pay the remainder of the expenses, which was considerable. The answer of the master alleged that the seaman was drunk and unfit for duty, and was forbidden to go aloft, but insisted, and was injured by his own negligence; and that the reshipment at Cette was for fifteen dollars a month, a less rate of wages than the original hiring. There was conflicting evidence on both these points. Whether the ship was equitably owned by American citizens was likewise disputed.

C. G. Thomas, for libellant, contended that the libellant was to have full wages for the whole time of the voyage.

J. Nickerson, for claimant.

LOWELL, District Judge. If American citizens transfer the legal title of their ship to a subject of Great Britain, and she is sailed under a British register, and the shipping articles conform to the change, I know of no law that authorizes me to apply our statutes to such a contract. The law of the flag must control in all such matters. In this case, indeed, there is no sufficient evidence that either the libellant or any owner of the vessel is one of our citizens; and the contract is clearly and wholly British. I must apply, therefore, as well as I may, the foreign law, which governs the rights of these parties. See The Pawashick [Case No. 10,851].

It seems to me that the merchant shipping act of 1854 [Pub. Gen. St. (17 & 18 Vict.) 663], §§ 185, 207, 209, have materially changed the maritime rule that seamen are not only to be cured at the expense of the ship, but to be paid wages until the end of the voyage. The first of these sections enacts that where the service of any seaman terminates before the period contemplated in the agreement, "by reason of his being left on shore at any place abroad, under a certificate of his unfitness or inability to proceed on the voyage, granted as hereinafter mentioned, such seaman shall be entitled to wages for the time of service prior to such termination as aforesaid, but not for any further period." What the certificate is appears by section 207, which makes it a misdemeanor for any master to leave behind any seaman, without obtaining the certificate of a consular officer, in writing, indorsed on the agreement, stating the fact, and the cause thereof; section 228 makes the owners responsible for the expenses and subsistence of a seaman, who receives any hurt or injury in the service of the ship, but does not say any thing about continuing his wages if he is obliged to leave the ship; and section 229 speaks of expenses in respect of the illness, injury, or hurt of any seaman whose wages are not accounted for to the consular officer, as before provided.

As I understand this law, the ship is liable for the expenses and subsistence of seamen who are hurt, but not for their wages, if they are left behind. All the parties to this controversy and the consul appear to have understood the law in this way. The master left with the consul the wages and a certain sum for expenses, and the consul certified to the fact and cause of the leaving behind. When the bark came back to Cette, the libellant did not demand, as of right, to be brought back, but asked the master whether he had filled his place. There appears to have been a dispute at this time between the master and the consul; for we find the latter certifying on the articles that the master refused to pay the full expenses of recovery and subsistence, though the man was injured in the service of the ship; and there is still a third certificate, not indorsed on the agreement, in which he says the master has paid one hundred and seventy-five francs for these expenses, though he had in fact paid only sixty-nine francs. The remainder must have been appropriated, by the master's consent, out of the money which he originally left for the wages of the seaman, and I understood the master to testify that the money was so obtained by the consul, though I do not know that he said it was done with his consent; but as he produces the certificate, and seems to have kept it for a voucher, his assent may be inferred. Here, then, we find evidence of a compromise, by which the master undertakes to bring home the man, and to have the whole sum left with the consul applied to the hospital expenses, which, after all, were only half satisfied. That this was the real purpose is evident; because the master, on his arrival here, tendered much more than was due for the home voyage, on his own

theory of the contract, and says he did this to make up the loss of the wages which he says the consul had improperly retained.

Counsel have furnished me with no evidence of the construction of the merchant shipping act, and I have not succeeded in finding any adjudged cases; but the text-writers understand the law to be, that if the seaman is unable to proceed, and due certificate is made, the wages stop. This being so, it is not material to this case to inquire whether any fault of the libellant contributed to the injury, because that question only affects the liability for expenses and subsistence; and it is neither pleaded nor proved in this case that the master desires to recoup from the wages the sums spent for these expenses, but he himself voluntarily undertook to pay them. So far as mere wages are concerned, it is admitted by the pleadings, and by the conduct of the master throughout, that the libellant is entitled to his wages for the time he actually served; and the only dispute is, whether he is to have fifteen dollars or twenty-five dollars for the home voyage from Cette to Boston. In the uncertainty which arises from the direct contradiction between the only two witnesses who know any thing about the contract, the seaman must prevail, because section 160 of the statute requires the master to make his contract in writing before the consul, and declares that if he does not do so, the burden of proving the agreement shall be upon him; and the only prominent and clear fact being that he took the man on board again, and the consul so certifying in the paper produced by the master, I infer that he took him upon the old terms, which would be a reasonable and just contract under the circumstances, even although wages were a little lower at Cette than at New York. Indeed, I do not know that it would not be a presumption of law, in the absence of any new contract, that the old one was either revived or treated as having been only suspended.

Wages to be made up at $25 a month, deducting the time of libellant's absence from the vessel, and deducting all sums heretofore paid him. If this exceeds the sum tendered, he will have costs.

Case No. 8,954.

MAGNER v. JOHNSTON.

[3 Cranch, C. C. 249.] [1]

Circuit Court, District of Columbia. Dec. Term, 1827.

SALE—TIME OF PAYMENT—SUIT BROUGHT—ASSUMPSIT.

The plaintiff, in October, 1826, sold a horse to the defendant for his bill on the postmaster-general, payable on the 1st of January following. The defendant gave the bill, but countermanded it the next day; and acceptance was refused; *held*, that the plaintiff had no right of action of indebitatus assumpsit for the price of the horse, before the 1st of January.

Indebitatus assumpsit for $60, for a horse sold and delivered by the plaintiff [Thomas Magner] to the defendant [James W. Johnston]. The defendant offered evidence, that the original agreement was, that the plaintiff should sell the horse to the defendant for the plaintiff's draft or bill on the postmaster-general for $60, payable on the 1st of January, 1827. The sale was accordingly so made, on the 19th of October, 1826. The defendant drew the bill, and delivered it to the plaintiff, who delivered the horse to the defendant. The plaintiff, on the next day countermanded the bill; and acceptance was refused; and the plaintiff on the same day, (October 20,) brought this action of indebitatus assumpsit, for the price of the horse.

Mr. Wallach, for defendant, contended, that the plaintiff had brought his action too soon; he should have waited till after the 1st of January. Dutton v. Solomonson, 3 Bos. & P. 582.

Mr. Morfit, contrà, cited Chit. Bills, 128, note c; Puckford v. Maxwell, 6 Term R. 52; Stedman v. Gooch, 1 Esp. 5.

THE COURT, (THRUSTON, Circuit Judge, absent,) at the request of the defendant's counsel, instructed the jury, that if they should be satisfied by the evidence, that it was part of the original contract of sale, and a condition thereof, that the plaintiff should take the defendant's draft on the postmaster-general, payable on the 1st of January, the plaintiff cannot recover in this action of indebitatus assumpsit for the price of the horse, the plaintiff having commenced his action before the 1st of January, although the defendant himself was the cause of the non-acceptance of the draft.

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

Case No. 8,955.

The MAGNET.

[Brown, Adm. 547.] [1]

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

SEAMEN'S WAGES — FORFEITURE FOR DESERTION AND MISCONDUCT.

1. Where a seaman employed upon a steamboat by the month left before the expiration of the month he was then serving, *held*, his entire unpaid wages were forfeited.

[See The Almatia, Case No. 254; The Balize, Id. 809.]

2. Where the second engineer is employed by the first engineer, the latter has a right to discharge him for good cause, without, and even against, the consent of the master.

3. Where an engineer wilfully deranged his engine, in order to compel the boat to stop at a certain port at which he desired to leave, it was *held* such misconduct as worked a forfeiture of wages.

The libel was filed by John B. Howard for a balance due him as wages for services as

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

first engineer on the steamer during a portion of the navigation season of 1871. The balance claimed to be due was $175. The defense was desertion and improper conduct.

H. B. Brown, for libellant.
W. A. Moore, for claimant.

LONGYEAR, District Judge. The law of this case was determined by this court in the case of The John Martin [Case No. 7,357]. It only remains to determine whether, under the law, the proofs make out a case of desertion and forfeiture of wages. That libellant left without the consent of the master, and with the intention not to return, was fully proven, and was not disputed. The only questions therefore are, whether he had the right to leave when he did, under his contract; and if not, then whether he had just cause for leaving. At the hearing there was some dispute whether the hiring of libellant was expressly for the entire season of navigation, or by the month simply, without any express understanding as to the term of service. I think the latter is sustained by the proofs; but it is of no great importance which it was, because it was clearly proven and was undisputed that libellant left before the expiration of the month upon which he had then entered. This, as was decided by this court in the case of The John Martin, supra, was a leaving before the term of service agreed on had expired. Libellant, therefore, had no right to leave when he did, under his contract. Had libellant just cause for leaving? The only cause urged or pretended was that he was dissatisfied with his second engineer on account, as alleged, of his habitual drunkenness, and that the master refused to discharge him. The proofs show that libellant as first engineer, had the right to employ his second, and that he actually exercised that right in the employment of the second engineer, in regard to whom the above mentioned complaint was made. This carried with it and vested in libellant the right to discharge the second engineer for good cause, without, and even against, the consent of the master; and habitual drunkenness would be a good cause, if such was the fact. There was, however, a preponderance of evidence that such was not the fact, but that libellant, having made up his mind to leave, the complaint as to the second engineer's habits was a mere excuse for leaving. I think, therefore, for both reasons, there was no just cause for libellant's leaving. Libellant so left during a voyage, after the steamer had left her home port, and at a place where it was difficult to supply his place, causing considerable delay in the prosecution of the voyage, and thus resulting in damages to the owners to an amount much larger than the balance of wages then due. Under all these circumstances it must be held that libellant's leaving was a desertion, within the meaning of the maritime law, and that the same worked an entire forfeiture of the balance of his wages then due. There was, however, still another cause of forfeiture independent of the desertion. By a preponderance of evidence it appeared that on the way from Detroit to Port Huron, where libellant left, he wilfully, and for the purpose of compelling the steamer to stop at Port Huron, deranged the engine. It was conceded at the hearing, and as is no doubt the law, that if so found by the court, this fact alone would be sufficient cause of forfeiture of wages. Libel dismissed.

Case No. 8,956.

MAGNIAC et al. v. THOMPSON.

[Baldw. 344.] [1]

Circuit Court, E. D. Pennsylvania. April Term, 1831.[2]

STATUTE OF FRAUDS—DECLARATIONS OF DEBTOR—FUTURE MARRIAGE—SETTLEMENT—PRIOR DEBTS—EXTRAVAGANCE—RECORDATION.

1. To make a contract void under the 13th Eliz., for fraud against creditors, both parties must concur in the fraud.[2]

[Cited in Ashby v. Steere, Case No. 576.]

2. The declarations of the debtor are not evidence to defeat the title of the grantor, under a conveyance alleged to be fraudulent.

3. A contract or conveyance, in consideration of a future marriage, is within the sixth section of the statute of 13 Eliz., if bona fide and without notice of fraud, &c.[2]

[Cited in brief in Appeal of Madeira (Pa. Sup.) 4 Atl. 910.]

4. Marriage is a consideration as valuable as money, if bona fide, &c.[2]

5. If a marriage contract is executed, the wife is a purchaser, and the contract is valid though the husband was in debt at the time.[2]

6. If the contract is executory, she is a creditor till it is performed. If part executed, she is pro tanto a purchaser, and a creditor for the residue.

7. The husband has the same right to prefer his wife in completing a settlement pursuant to articles before marriage as he has to prefer any other creditor.[2]

8. Whether her position is as a purchaser or creditor, her rights are the same as purchasers for money, or creditors by bond. Her trustee is the purchaser or creditor at law, and she in equity.

9. If a contract before marriage could be enforced at law or in equity, the voluntary performance by the husband is as valid as if done under a judgment or decree, and is good against creditors who have no lien.[2]

10. The consideration of marriage being deemed valuable, a court of law will not estimate it in comparison with the settlement, equity may do it.

11. After the marriage, the marriage articles will not be presumed to have been abandoned by any delay or negligence of the trustee in their execution.

12. A covenant in the marriage articles by the father of the intended wife, to stand seised to

[1] [Reported by Hon. Henry Baldwin, Circuit Justice.]

[2] [Affirmed in 7 Pet. (32 U. S.) 348.]

her use, after marriage, of a piece of real estate, does not operate after marriage, to pass the legal estate by the statute of uses (27 Hen. VIII.), the use remains executory in the trustee and his heir at law.

13. Where by the marriage articles the husband was to erect a house and furnish it as he thought fit, an indiscreet expenditure for furniture is not, per se, fraudulent against creditors, unless it is so extravagant as at first blush to indicate a fraudulent motive, the creditors of the husband may take the excess.

14. Where the sum stipulated by articles before marriage has not been made up, the husband may do it afterwards on the eve of a judgment against him, if done in performance of the articles, or so accepted by the trustee.

15. Marriage articles are not affected by not being recorded within the time prescribed by the laws of New Jersey.[2]

This case was tried on a feigned issue made up by agreement of parties, for the purpose of ascertaining whether John R. Thompson, the defendant, had any means wherewith to pay a debt claimed by the plaintiffs, or means by the property in his marriage settlement, or otherwise, of satisfying a certain judgment in their favour against him. The agreement was made the 3d of June, 1830. On the 27th of November, 1827, the plaintiffs obtained a judgment in this court against the defendant for 22,191 dollars, an action of debt was brought upon it to April, 1829, in the circuit court of New Jersey, and judgment confessed the 1st of October, 1829 for 24,652 dollars, an alias capias ad satisfaciendum was issued on the judgment to April, 1830, on which the defendant was committed, of this judgment about 12,000 dollars remained due at the time of the agreement. The debt to the plaintiffs was contracted under the following circumstances. The defendant had resided some years at Canton, he left it in March, 1825 to return to the United States, leaving Mr. Rodney Fisher his agent, with full powers to transact business for him, having previously been introduced to the plaintiffs, merchants residing in Canton, by the defendant, as his agent. In November, 1825, Edward Thompson, the father of defendant, had two ships in Canton, for which he could not procure cargoes for the want of funds or credit, Mr. Fisher, as agent for defendant, made up an invoice of goods to the amount of 42,000 dollars, on which he took up from the plaintiffs 30,000 dollars on the 22d of November, 1825; on the 2d of December, 1825 he made up another invoice of 44,000 dollars, on which plaintiff advanced 33,000 dollars, the goods were pledged to the plaintiffs, and shipped on board of the vessels of Edward Thompson, the defendant had no interest in the transaction except his commissions. The goods arrived at this place, and were sold at a loss of 46,000 dollars on the invoice. The judgment of the plaintiffs was for the balance of their advances on the two invoices. The defendant returned to this place in June, 1825, shortly after which he paid his addresses to Miss Stockton, in July an engagement of marriage took place between them, and between that and September proposals of a settlement on her were made by him, and before the agreement was put in writing, had begun to erect a house on the lot therein mentioned. On the 19th of December, 1825, articles of agreement and covenant were made between the defendant, Miss Stockton, and her father Richard Stockton, reciting the intended marriage, and the previous promise of Mr. Stockton to give his daughter a lot of four or five acres near Princeton, "on which lot the said J. R. Thompson has begun to build a house." It was then stipulated, that from and after the marriage, Mr. Stockton should stand seised of the lot and all buildings to be erected thereon, in trust, to permit the parties during their joint lives to reside thereon if they think proper, if not, then the rents to be paid to his daughter during their joint lives. If Thompson should survive her and have issue, he to occupy the lot and house, or to receive the rents for the maintenance and support of himself and family; after his death, in trust for the children of the marriage as tenants in common, if there should be no children then, on the death of either party, in trust for the survivor. Thompson stipulated that if the marriage took effect, and in consideration thereof, he would, with convenient speed, build and furnish said house in a suitable manner as he shall judge fit and proper, which, with all erections, improvements, furniture and additions shall be subject to said trusts, so far as they are applicable to each species of property, and will, in one year after the marriage, place out on good security 40,000 dollars, and hand over and assign the evidences thereof to Mr. Stockton, who shall hold the same in trust; to receive the interest for her use during their joint lives, and her receipt to be good; if she dies leaving issue, to pay the same to Thompson for his and their support without account, and after his death to the children in equal parts; if she survives and has issue, then on the same trusts for her; if either dies without issue, then in trust for the survivor. Thompson had permission to act as the agent, and to change the securities from time to time. It was mutually agreed that the trustee should not be held guilty of a breach of trust for not acting, unless expressly requested to do so by one of the parties, and not to be held answerable as trustee, unless for acts of wilful neglect or misconduct. Vide [Magniac v. Thompson] 7 Pet. [32 U. S.] 349. The marriage took place the 28th of December, 1825. Thompson proceeded to finish the house, which cost about 13,000 dollars, and furnished it, which cost about 5000 dollars, but made no investments on security, or other provision for the 40,000 dollars, during the life of Mr. Stockton, who appears to have taken no measures to compel the completion of the settle-

[2] [Affirmed in 7 Pet. (32 U. S.) 348.]

ment. After his death, Thompson, on the 29th of September, 1829, indorsed to Captain Stockton, as trustee for Mrs. Thompson, on account of the 40,000 dollars, one note for 5000 dollars, which was good, and another of one Morris for 4500 dollars, which was considered doubtful, nothing more was paid on that account. The agreement was proved the 5th of April, 1830, and recorded the 22d of May, 1830. It appears that on his return from Canton, Mr. Thompson was worth about 90,000 dollars, and owed but a small amount of debts; he was under heavy responsibilities for his father, by whom he lost a very large sum. From the statements produced and verified at the trial, the amount of what Mr. Thompson was worth in 1825, was accounted for, and no proof was given that he had concealed, secreted, or kept any thing for his own use, he appeared to be in possession of no property, real or personal, or to have any control over any. The cause turned on the validity and effect of the marriage contract, the conduct of the parties to it, and the mode of its execution. The insolvency of Edward Thompson was publicly known on the 19th of November, 1825. On the 19th of December, 1825, previous to the drawing up of the articles, Thompson made a written statement directed to Mr. Stockton, in substance as follows: "I have no personal debts except to a small amount in common course of business and living. I am surety for my father to S. & L. in a respondentia bond for 200,000 dollars, if the goods sell reasonably well there can be no loss, the freight premiums on dollars and commissions tend to enhance the security, &c., there can therefore be no demand on me. On no fair principle can the loss be more than 20,000 dollars and I consider myself worth that amount, if not more, in addition to the sum proposed to be settled." Signed "J. R. T., December 19th, 1825." Indorsed: "Statement made to the trustee by J. R. T. as the basis of the settlement, and upon which it was made. R. Stockton." Id. 353.

Joseph R. Ingersoll, for plaintiff.

The plaintiff is a meritorious creditor, as to whom the marriage settlement is void for fraud, on account of its having been concealed till after the judgment in New Jersey, and not having been carried into effect substantially. Any conveyance or gift after marriage is void per se, if the husband was indebted at the time (3 Johns. Ch. 492); as to subsequent debts the presumption is in favour of the settlement, (Id. 502); subsequent creditors may avoid it by showing debts existing before, due to other creditors (12 Serg. & R. 448). An ante-nuptial settlement may be good if it is fair, and the bulk of the husband's property is subject to his debts, his mere indebtedness will not invalidate it, and if there is no fraud (1 Rop. Prop. 298), it will be enforced in equity, so far as it is consistent with the policy and principles of law (2 Kent, Comm. 144), provided it be reasonable and not extravagant (Reeve, Dom. Rel. 176). A man in debt may make a valid sale of his property, if it is fair and for good and adequate consideration bona fide and not to withdraw it from his creditors. So he may settle it before marriage, but if the settlement is disproportionate to his means, it is suspicious, and may be held fraudulent as to creditors. 12 Serg. & R. 456; [Sexton v. Wheaton] 8 Wheat. [21 U. S.] 238; 2 Kent, Comm. 146. At the time of this settlement Thompson was in fact worth nothing, the failure of his father was known, and he then estimated his loss at 20,000 dollars, leaving himself worth 60,000 dollars, the settlement required 58,000 dollars, which presents strong ground of suspicion of a design to defraud his creditors. Vide 17 Ves. 263; 1 Rop. Prop. 296, 298. Thompson was to have the control of the fund, to appear as the owner with a power of substituting and changing the investment, equivalent to a power of revocation, which is a strong badge of fraud. He had begun to erect the house before the articles were executed, and with the permission of Mr. Stockton, which would give the creditors a right to take it as Thompson's, on the same principle that permitting a party to make improvements, shall prevent the owner from disturbing him in their enjoyment (2 Atk. 83; 1 Eq. Cas. Abr. 326, pl. 10; 2 Eq. Cas. Abr. 532, pl. 3), or the acceptance of rent which binds the party to confirm a lease (3 Atk. 692). The settlement was never acknowledged, it was proved but not recorded till two days before the capias ad satisfaciendum issued against Thompson; on this account it was void by the laws of New Jersey, which declares all deeds and conveyances to be void as against subsequent judgment creditors unless acknowledged and recorded in fifteen days after their execution. R. L. N. J. 747. As the contract was not a gift, it operated as a deed to Thompson as a purchaser of the lot, investing him with the title so as to make it liable to his creditors if the contract was not recorded so as to give notice of the trust. This principle is settled in 1 Desaus. Eq. 401, 2 Desaus. Eq. 254, in which cases, the debt was contracted after the settlement was recorded, yet having been recorded after the time required by law, the property settled was held to be subject to the debt. In this case the settlement seems to have been abandoned, it remained pocketed till Thompson was arrested on a capias ad satisfaciendum, he remained in possession of the house as apparent owner, no application was made to him to make any investment of the 40,000 dollars or any part, and he did not offer to make any till the 29th of September, 1829, the day before the judgment, when he delivered over the two notes which he had till then retained. The contract, though in form calling for a settlement, has never been treated by the parties as having any substantial efficacy as between the parties, and

their conduct has precluded them from now setting it up against the plaintiffs. Every thing that has been done towards its execution has been since the marriage and the pressure of the plaintiffs' debt; so that in effect and substance it is a post-nuptial contract, which is not good if the consideration does not have a reasonable proportion to the settlement. 2 Kent, Comm. 145, 146. It is under these circumstances a voluntary settlement after marriage, which is void against previous creditors. Ridgeway v. Underwood [Case No. 11,815]. To complete it, required more than Thompson was worth at the time; his father's insolvency was well known, and it was as well known that the settlement could not be completed but at the expense and with the funds of his creditors. A party claiming under such an agreement, which necessarily withdraws property of a debtor from his creditors, ought to be held to all the forms and rules of law in carrying it into execution; it was to have been completed in one year from the marriage, but was abandoned, when Thompson's affairs were wound up and found desperate. The parties could not revive it in 1829, if the delivery of the notes was intended to apply to it, it was, however, as a mere colour, for the agreement was not recorded till seven months afterwards. Though ante-nuptial contracts are highly favoured in courts of law and equity, they ought not to be so at the expense of creditors, especially when, as in this case, it was evident that it could not be completed by Thompson's own means. It must have been ascertained before the house was finished and furnished, that the 40,000 dollars could not be invested for the purposes of the trust; the expenditure of 18,000 dollars for the establishment, without any income to support it, was incompatible with the situation of Thompson, it was extravagant, and indicated an intention not consistent with good faith towards creditors. As Thompson was by the agreement to have the use of the house and furniture, the expenditure of 5000 dollars on the latter was, per se, a fraud on creditors; an insolvent man will not be permitted to apply the money of his creditors for the purposes of useless ostentation, or to gratify the pride of his family.

Joseph P. Norris and Mr. Binney, for defendant.

The burthen of proving fraud is on the plaintiffs. If there was any fraud, the parties interested in this suit are not implicated in it, the settlement was agreed on when Mr. Thompson believed he was worth 90,000 dollars, there has been no concealment of property, or any conduct of his which indicates any actual or intended fraud at that time, but the contrary appears by a reference to the facts honestly believed at that time to exist. The settlement is not contrary to law, it was a covenant to stand seised to uses, which is completely binding on its execution without recording [Carver v. Jackson] 4 Pet. [29 U. S.] 82; and not a conveyance at common law. The time of investing the portion was not of the essence of the contract, it was good whenever made to carry the contract into effect. An ante-nuptial contract is good against husband and creditors (1 Rop. Prop. 297); where the consideration of marriage intervenes, the obligation is perfect and binding (2 Rop. Prop. 33; 17 Ves. 262); though the party is in debt, it is good against creditors, if there is no legal or actual fraud, and made as a bona fide performance of a moral obligation, its specific performance will be decreed in equity (3 Johns. Ch. 494, and cases cited; 2 Kent, Comm. 145; 3 Johns. Ch. 554; 2 Desaus. Eq. 264); who will go further to protect the wife than the husband (2 P. Wms. 700); it will not be avoided by a subsequent act of bankruptcy (Ath. Mar. Sett. 373; 1 Atk. 158, 189; 2 Atk. 445; Cro. Jac. 158); nor will fraud be presumed without manifest proof (2 Com. Dig. [Day's Ed.] 616; 2 Ch. Cas. 85, 114). The title was in Mr. Stockton, who was not bound to convey, but was to hold the property for the purposes of the marriage, on a trust not executed by the statute of uses, but which remained executory from its nature. 1 Vent. 194. If the settlement was not good, the title to the lot did not revert to Thompson, it was good between the parties, the plaintiffs might have levied on it, as well as on the house and furniture under the judgment in New Jersey, or might have proceeded in chancery. In the latter case, the defendant would have had the benefit of his oath, in this suit he cannot be heard, and therefore the plaintiff ought to be held to clear proof of fraud in fact. From the terms of the marriage articles, taken with reference to the then situation of Mr. Thompson, no fraud is imputable in law, he had no knowledge of debts contracted in Canton only a month before; he was not about embarking in any hazardous speculation, as in the case of Thomson v. Dougherty, 12 Serg. & R. 448, &c., but was about to retire from business on a competency, his responsibility on the inchoate agreement for a settlement, and the engagement of marriage attached three months before his agent contracted a debt to plaintiffs. The bona fides of that contract cannot be questioned, for though he had means then in his hands, he did not apply them to the investment of the 40,000 dollars, but suffered them to go to his father's debts. That there was a verbal contract previous to the written one, is evident from his having begun the erection of a house before it was signed. While Mr. Stockton had no security for the 40,000 dollars, the plaintiff had on an advance of 63,000 dollars a pledge of invoices amounting to 86,000, and of the money advanced to Mr. Fisher, Thompson received nothing. Under such circumstances there is no legal presumption or evidence of fraud intended by him, still less by Mr. and Miss Stockton; it

is indeed a singular imputation of a design to defraud creditors, when none of the parties had a knowledge that there were creditors. When Thompson promised to make the settlement, in the summer of 1825, he was not in debt, such promises were binding before the statute of frauds, though not in writing, and equity would have decreed a specific performance, such agreements are always made before they are reduced to writing, the good faith of which is shown by giving time to complete the settlement. Vide [Sexton v. Wheaton] 8 Wheat. [21 U. S.] 238, &c. Marriage is a consideration higher than any other known to the law. 2 Eq. Cas. Abr. 585. It cannot be measured, nothing in exchange for it is excessive or extravagant (unless so gross as to be evidence of fraud), because it cannot be restored or compensation made. The man becomes a debtor to the trustee of his intended wife and to her, either of whom may apply to equity to enforce the contract, without any reference to the proportion between the wife's portion and the sum to be settled. This may be necessary in post-nuptial contracts, but though the wife is to bring no portion, an antenuptial contract is good, per se, against purchasers and creditors, or if made after marriage, in pursuance of an agreement before, whether the purchaser had notice or not, unless he has the legal estate (Ath. Mar. Sett. 125, 128, 149, 151; 1 P. Wms. 277), or the creditor had a lien. Where a father held land on a secret trust, and conveyed it to his daughter on her marriage, the husband, having no notice of the trust before marriage, held it discharged therefrom (2 Rolle, 105); marriage is a purchase of the most favoured kind (1 Vent. 194; 1 Ch. Cas. 99); not on account of the wife's portion, but the marriage (1 Atk. 158, 190); contracts in consideration of marriage are equally protected (2 Ves. Sr. 304, 308; Amb. 121; 5 Ves. 878); no instance is known where a settlement in consideration of marriage has been set aside, unless the intended wife was a party to the fraud (2 Dick. 504, 506; 17 Ves. 263, 268); marriage is a sufficient consideration on which to set aside a former voluntary settlement, or deed (Cowp. 712; 6 Ves. 752). Claims of creditors, unless by judgment, are no objection to the execution of a marriage contract or articles, for though voluntary in their creation, they are the inducement to the marriage, and good against antecedent creditors, unless the wife knew that bounty to her was a fraud on them. Finch, Prec. 377, 402, 405, and cases cited. Wherever the husband can make a valid sale, he can make a valid settlement without any money consideration (1 Swanst. 319), and where the contract is executory, she is the most favoured creditor, and will be preferred unless she has done something to postpone herself. No act of the trustee in neglecting to have the settlement completed could affect her, as equity would protect her rights; if the trustee should abandon or surrender the fund agreed to be settled, equity would make the person who held it a trustee for the wife, or if she should consent to it, equity would protect it for the issue of the marriage, who are deemed parties to the contract as purchasers under it. In this case there could be no abandonment by the husband, the trustee or the wife, there was no necessity of recording the articles because no one could purchase without notice, while Thompson and wife were in possession, which is notice of title. If the omission to record had any effect, it was not to vest the property in Thompson, so as to make it liable to his debts, but to expose it to the creditors of Mr. Stockton, who held the legal title. Thompson was not made the agent to manage the fund by the agreement, he could act as such only by the permission and under the control of the trustee. In marriage settlements, the possession of the property settled must be joint, if consistent with their terms, such possession is no badge of fraud. He was a debtor under the marriage contract, and had a right to make payment in any manner agreed upon to comply with it; the house was to be suitably furnished, so as he might deem fit, the want of an inventory did not make it fraudulent (Ath. Mar. Sett. 173; 6 East, 281; 17 Ves. 272); the articles were executory, the use never was executed; they are considered as instructions by which to draw the formal settlement, and may be executed cy pres (Ath. Mar. Sett. 92, 106). On a covenant to stand seised to the uses of a marriage, they are executory till the uses are well raised by a deed. The amount expended on furniture does not affect the contract on the ground of fraud, if it is extravagant, the surplus is liable to execution by creditors. As the contract remained executory till the settlement was executed, Thompson might make the investments at any time on account of the 40,000 dollars in payment of the debt he had contracted, his transfer of the securities in 1829, was in part execution of the contract, which was no fraud on creditors, because he had a right to pay the debt due on the marriage contract in preference to the debt to the plaintiff. There is no evidence that these securities were transferred collusively or colourably, with any fraudulent purpose.

C. J. Ingersoll, for plaintiffs.

The defendant stands in the position of an applicant for the benefit of the insolvent laws, who must be able to take the oath required by the act of congress. 1 Story's Laws, 715 [2 Stat. 4]. From the nature of the issue in this case, he is bound to prove affirmatively that he has no property, by accounting for all the property which has been traced to his hands, which he has not done, and he cannot honestly take the oath prescribed by that law. He stands here on a presumption of fraud which he must rebut, the plaintiffs

complain of fraud by the concealment and abstraction of property which they may prove by circumstances or negatives pregnant. It is admitted that Thompson has applied 27,500 dollars to the marriage contract, of which he has the use, which is equal to an income to the amount of the interest of that sum; the meaning and effect of the settlement, so far as executed is, that his property has been given to his wife's trustee to keep for him, and prevent the plaintiffs from recovering their debt, under cover of the agreement which had been abandoned. Admitting marriage to be a consideration however high, the contract may be impeached for fraud on a prior creditor, as the plaintiff was in this case, and the adequacy of the settlement will be inquired into; in the case cited from 1 P. Wms. 277, the judgment was after the articles, and the chancellor said that the consideration paid must be somewhat adequate to the thing purchased, or a judgment between the articles and the deed would be let in. Id. 282, 283. A purchase by marriage is in all respects on the same footing as for money, so is a creditor by marriage articles; marriage is but a civil contract between the parties, and where third persons are concerned, is examined and construed like other contracts, and will not be suffered to be available to withdraw a debtor's property from the reach of his creditors, or to defeat a trust under which he holds the property of others. The case cited from 2 Rolle, 105, was not finally decided; it was adjourned (Id. 116); in the case from 1 Vent. 194, and 1 Ch. Cas. 99, no question concerning creditors arose, the conveyances in consideration of marriage were held not to be voluntary and so fraudulent; the case in 1 Ves. Sr. 304, goes no further than to put a settlement after marriage, in consideration of a portion paid, on the same footing as if made before; so of the cases referred to by Ath. Mar. Sett. 28, 31, 39, 81, 160, 301; but the case in 6 East, 257, 280, shows that the consideration of a post-nuptial settlement will be compared with the sum paid by the wife, and if the latter was inadequate, would be set aside on account of abstracting the husband's property from his creditors, and a new trial was directed for the purpose of ascertaining the state of the husband's debts. Id. 282, 283. The law is settled in this state, that though a deed is for a good and valuable consideration between the parties, it is fraudulent in law against existing creditors. 1 Rawle, 353. The law respecting marriage settlements is the same here as in England; yet where a husband entered into articles with trustees to secure to his wife a legacy left her by her grandmother, which he received, but did not execute a mortgage till he was insolvent, and soon after declared a bankrupt; the mortgage was held void, though the husband was solvent when he made the articles. Rundle v. Murgatroyd, 4 Dall. [4 U. S.] 304. Indebtedness at the time is the true criterion of legal fraud, where the settlement is voluntary or for an inadequate consideration [Sexton v. Wheaton] 8 Wheat. [21 U. S.] 242; and the cases referred to are full to the point, that no settlement on a family is good against previous creditors. [Hinde v. Longworth], 11 Wheat. [24 U. S.] 213, 214. The supreme court lay down the law to be, that valuable must also be an adequate consideration. Sexton v. Wheaton, 4 Wheat. [17 U. S.] 507. In this case the inadequacy is apparent, the completion of the settlement would require more than Thompson was worth, according to his own statement previous to the articles; he said he was worth 20,000 dollars more than the sum to be settled, if his losses did not exceed 20,000 dollars. Now the sum to be settled was 40,000 dollars, the house cost 13,000 dollars, the furniture 5,000 dollars, absorbing his whole surplus excepting 2,000 dollars, according to the statement which was the basis of the settlement; besides, there was notice of Thompson being surety for an insolvent to the amount of 200,000, this was clear proof that it was intended to settle his whole estate, and as the fact turned out, the settlement, as partially made, has absorbed his whole property. This taints the contract strongly with actual fraud, but as a badge of fraud in law, it is inherent in the contract itself as matter of law; the fact that a debtor conveys or settles his whole estate, makes it fraudulent, per se, against creditors; so are all the authorities in law and equity, from Twyne's Case, 3 Coke, 80, to Cathcart v. Robinson, 5 Pet. [30 U. S.] 281, however valuable the consideration may be if the purchaser knows of the existence of the debt. It was not material whether Richard Stockton was a party to the fraud, all the parties knew of the failure of Edward Thompson before the contract, and the consequent insolvency of defendant; yet by the terms of this agreement, he was at liberty to build such a house and to furnish it as he pleased, to be the agent of the trustee, with uncontrolled power to change the securities at his pleasure, which are all strong badges of fraud. The legal effect of the covenant of Richard Stockton, to stand seised to the uses of the agreement, was a conveyance of the house, lot and furniture to Thompson and wife, as a use executed on the marriage by the statute of uses. 27 Hen. VIII.; 2 Ruff. 227. The extravagant expenditure for furniture is, in itself, a fraud on creditors, it was not suited to Thompson's condition, and was made after his known insolvency and inability to complete the settlement. The marriage contract was a mere cover under which to conceal the property of Thompson, the first attempt to make any provision for an investment was the delivery of the securities to Captain Stockton, on the day before the confession of the judgment in New Jersey, which was a fraud, per se, on the plaintiffs. There was no delivery of the agreement, which never took effect in law, no act of the parties to give it notoriety; it was a secret conveyance, and void (Twyne's Case, 3 Coke, 81); there was no recognition

of its existence as a binding contract in the lifetime of the original trustee, and no act of the parties by which the public could judge of their true situation. I am aware that courts in England have gone great lengths in supporting marriage settlements, they have indeed adopted principles which protect concubines as well as wives against creditors; but they have grown out of the corruption of manners there, and have not been sanctioned here. The rules which protect creditors against the fraudulent acts of their debtors, have been broken down, and men in debt have been permitted to provide for their families by nuptial contracts, made under circumstances which would invalidate a conveyance for any other consideration. But these decisions are not founded on the principles of the common law, and the affirmative statutes of 13 & 27 Eliz., as adopted in this country, which repudiate a contract like the present, and treated as it has been by the parties, as fraudulent in fact and by the policy of the law.

BALDWIN, Circuit Justice (charging jury). The real parties to this suit are the plaintiffs and Mrs. Thompson, and the real question between them is, whether the marriage contract was valid, if it was, then Mr. Thompson had a right to apply his property towards its fulfilment, and it is lawfully held by the trustees of Mrs. Thompson. If the contract is not valid, then Mr. Thompson is in law deemed to be the legal owner in trust for his creditors, not because the marriage contract is not binding on him, but because his indebtedness at the time put it out of his power to divest himself of property to the injury of his creditors. It appears that the plaintiffs are the only creditors of Mr. Thompson, the existence of the debt is proved by Mr. Fisher, and the judgments confessed by Thompson, which are conclusive against him as to its existence and amount; they are also legal evidence to affect the settlement by showing the indebtedness of Mr. Thompson at the time. Hinde v. Longworth, 11 Wheat. [24 U. S.] 210. No evidence has been offered to impeach the fairness of the debt, and you will take it as proved. The case must turn on the validity of the marriage contract, which is good as between the parties and as to all the world, unless it is liable to impeachment for fraud in fact or fraud in law. As to creditors, fraud in fact, or actual fraud, consists in an intention to injure, defraud, delay or prevent them from recovering their just debts, by any contract, gift, deed, settlement or agreement, withdrawing or attempting to withdraw the property of a debtor from the reach of his creditors. The English statute of 13 Eliz. c. 5, declares all such acts null and void as to creditors, this statute is in affirmance of the common law, is in force in this state and New Jersey, and you will consider it as binding as a law of the state. Proof of fraud need not be express, it may be inferred from circumstances, but ought not to be presumed without either, a jury ought to be satisfied from facts that there was a dishonest intention, and not to infer fraud merely because they have doubts of the fairness of the transaction. From the conduct and situation of the parties, and the effects intended to be produced by the act, something should be made to appear inconsistent with integrity, so as to admit no reasonable interpretation but meditated fraud. [Conard v. Nicoll] 4 Pet. [29 U. S.] 295, 297. Both parties to the alleged act of fraud must concur in the illegal design, the debtor may lawfully sell his property, or prefer one creditor to another, with the direct intention of defrauding other creditors, but unless the purchaser or preferred creditor receives the property with the same fraudulent design, the contract is valid [Sexton v. Wheaton] 8 Wheat. [21 U. S.] 238, &c., against other creditors or purchasers who may be injured by the transaction. The admissions or declarations of the debtor, as to the object intended to be effected, are evidence to contradict his answer to a bill brought to annul the act as fraudulent, but not to affect the parties claiming under it, or to have a bearing on the whole case [Venable v. Bank of U. S.] 2 Pet. [27 U. S.] 119, 120; 2 Hals [7 N. J. Law] 173, 174; you must therefore have evidence to affect Mrs. Thompson and her trustee Mr. Richard Stockton with fraud, in participating and concurring in the fraudulent intention, before you can pronounce this marriage contract void for actual fraud.

The facts of this case, which are not complicated, are for your consideration, they seem more satisfactory than are usual in such cases, and we think proper to say, that in our opinion an inference of intention as fraud, would be a very severe comment on the conduct of the parties; it is however for you to decide, and if you think there was intentional fraud in both parties, you will find for plaintiffs. You are to decide another matter of fact, whether Mr. Thompson has concealed or has in his possession any part of the property he owned in 1825, other than what has been invested in the house and furniture and the securities in the hands of Captain Stockton, in doing which, you will discriminate between the deliberate design to defraud by secreting property for his own use, and losses incurred by casualties and want of prudence or discretion. This question depends on what he has in his actual possession or control, not what he ought to have had, what he has disposed of for any other use than his own, or what has been applied to the marriage contract, which is a subject of distinct consideration. The next and most important question is, whether the marriage contract is fraudulent in law, and for that reason void as against the plaintiff, that is, though the intention of the parties was honest, the policy of the law forbids the execution of the contract, and takes from it all legal efficacy as to the creditors of Thompson. By the sixth section of

the statute of 13 Eliz., it is provided, that it shall not extend to any interest in land or goods and chattels, made on good consideration, bona fide, lawfully conveyed or assured to any person, not having at the time of such conveyance or assurance to them made, any manner of notice or knowledge of such fraud, covin or collusion. The words of the law require that both parties must concur in the fraud, so it has been held for two hundred and sixty years. There are in law two kinds of consideration, "good," which is natural love and affection, and "valuable," which is money or marriage; the word "good" in the sixth section has always been held both in courts of law and equity to mean a valuable consideration.

Hence the law has been expounded to embrace three kinds of conveyances: (1) Those made with a fraudulent intent in both parties, which are declared void as well by the enacting part of the law as by the exemption from the saving in the sixth section, without regard to the consideration. (2) Voluntary conveyances made for good consideration, without fraud in fact, but as they tend to defraud creditors if they vest the property, the policy of the law makes them void for legal fraud, which it imputes to them on account of their tendency, which is deemed equivalent to actual fraud. (3) Conveyances for valuable consideration, bona fide, without notice of any fraud or covin by the person receiving the conveyance, which are excepted out of the statute, are valid at common law to pass the property conveyed, and entitle the purchasers to the protection of all courts. If you should find that this contract does not come within the first class, it cannot come within the second, for if made in contemplation of marriage, the intended wife is on the footing of a creditor or a purchaser for money, and not of a voluntary grantee for the mere consideration of love and affection, or as a volunteer. There is a marked difference between a provision for a wife and children before and after marriage, where there is no portion or money paid as the consideration; in the first, the consideration is as valuable as the debt due a creditor, or the money paid by a purchaser, in the latter it is merely voluntary. There is indeed a moral obligation to provide for the support and comfort of a family, but it must yield to the higher legal obligation towards those who have claims on the property of their debtors. As between creditors and volunteers a man must be just before he is generous. But where conflicting claims arise between creditor and creditor, purchaser and purchaser, or purchaser and creditor, the first inquiry is, whether the party claiming the debt or the property purchased has such a right as is recognized by a court of law; the next is whether such right has been acquired under such circumstances as will annul or modify it in a court of chancery by the established principles of equity. As between debtor and creditor the latter has a right to as much of the debtor's property as will pay his debt, but the debtor may prefer one creditor to another, or give all his property to one, and it is neither fraud in fact or law without covin or collusion. He may make a sale of his whole estate, turn it into money, and distribute it at pleasure among his creditors, and the bona fide purchaser will hold it against all creditors who have not previous liens. [Sexton v. Wheaton] 8 Wheat. [21 U. S.] 242; [Hinde v. Longworth] 11 Wheat. [24 U. S.] 213, 214. These principles cannot be shaken.

A contract in consideration of a future marriage creates a legal and equitable obligation to perform it in good faith; if the contract is executed, the parties become purchasers, if it remains executory till after marriage, they become creditors after its consummation, or assume pro tanto the character and rights of both, if executed only in part, entitled to the protection of all courts in enjoying what is granted, and their aid in enforcing performance of what remains to be done. And if either party voluntarily perform what a court would compel to be done, it would be as valid as if done by its judgment or decree, or as if the execution had been completed on the date of the contract. The law is express in referring to the time of the conveyance and assurance, and embraces not only perfect grants and gifts but "any estate or interest in lands, goods and chattels, made, conveyed or assured." On these principles it is the opinion of the court that the evidence brings the marriage contract within the sixth section of the statute, unless you shall find it not made in good faith, or with notice of fraud in Thompson brought home to his intended wife, and that Thompson actually entered into it with a fraudulent, covinous or collusive intention. If you do not so find it, then Mr. Richard Stockton is considered, at law, a bona fide purchaser for a valuable consideration, without notice so far as the contract has been executed by Thompson, and his creditor for what is executory. Mrs. Thompson has the same character in equity, and Captain Stockton is now standing in all respects in the situation of his father. The case then is a contest between Captain Stockton, the legal, and Mrs. Thompson the equitable purchaser of the house, furniture and securities, by the contract and the marriage, of the lot as her marriage portion, and the plaintiff the sole creditor of Mr. Thompson. Thus they stood at the commencement of the suit, and as creditors at the time of the contract and confirmation of the marriage, Mr. Stockton and Mrs. Thompson having performed their stipulations had a perfect right to call on Thompson at law and in equity to perform his. As a purchaser Mrs. Thompson is one of the most favoured class, the consideration she has given is as valuable as money,

it need not be considered as more so; as a money purchaser of property, a conveyance before marriage by her intended husband would be as valid though he was in debt as if he was not. If he held the legal title the interest would vest by his deed, though he held it in trust for others, as fully and completely as if Thompson had a right as perfect in equity as at law, provided she had no notice of the trust. This is an universal rule, a principle never questioned, and protects all bona fide purchasers for valuable consideration without notice before the money paid or the condition of the grant performed; it applies to Mrs. Thompson not as a privileged purchaser, but as a purchaser from one who has the legal title, subject to an unknown trust for the use of a third person. Placing the plaintiff in the situation of a cestui que trust, and he cannot be placed in a better one, it is a strong one against him; the debt to him was contracted but a few days before the date of the marriage articles, and in a part of the world so remote as to exclude the possibility of notice to any of the parties, which differs this from the common cases of a trustee conveying the legal estate to the injury of cestui que trust, where the trust is necessarily known to the trustee, and he is guilty of direct fraud. Hard as the application of this principle may be, it is not relaxed even in favour of the widow or orphan who has been defrauded by their trustee selling what is not his own; a loss must fall on one of two innocent sufferers whose claims may be supposed equal in justice and equity, in such case the law leaves the property with the one, who has acquired the legal title by fair purchase, in good faith and without notice. A creditor of a fraudulent debtor who settles on his intended wife property which he is bound to apply to the payment of his debts, is entitled to no more favour, than any other person whose property is unjustly conveyed by his trustee to pay his own debts, to rob one family to save another, or secure a provision for an expected one of his own. The creditor can be no where more favoured than the infant, the ward, the widow, or the orphan, whose property is held in trust without lien or security, and subject to a sale by the trustee. The creditors of a deceased debtor have the same rights as those of a living one, yet if the executor sells the personal property to pay his own debt, a purchaser without notice or collusion will hold it even in equity. This is as much a violation of moral honesty and breach of faith, as to settle it on an intended wife, to whom he was under as high an obligation to pay the consideration of the marriage contract, as a bond given for money lent, or property purchased. Vide [Vattier v. Hinde] 7 Pet. [32 U. S.] 268.

The consideration of this contract is both marriage and property, the value of the first cannot be, and of the last has not been ascertained in dollars; but at law, the mere inadequacy of consideration is no ground for declaring a conveyance of real or personal property void, if there is any consideration, the conveyance is valid at law; the amount cannot be inquired into as respects the grantor, his creditors or subsequent purchasers, in the absence of actual and legal fraud in the grantor or notice of it to the grantee. The only resort of parties who complain of equitable fraud, or other circumstances which would invalidate it in equity, is to those courts; they only can decide upon the adequacy of a pecuniary fund, or the equality of marriage to a given sum of money or value of property, under the circumstances of the case. Cases may exist where equity would compare and estimate them for the relief of a creditor, a purchaser, or perhaps the party, in a strong and clear case of injustice; but we know of no instance where it has set aside a purchase for valuable consideration on a marriage contract, when made bona fide and without notice of fraud or defect of title. Those claiming under them have ever been the peculiar favourites of courts of equity, and their rights can never be disturbed unless in extreme cases, none have yet arisen, when they do arise they will be exceptions to a rule which is as yet without any, and growing out of the necessity of the case.

In the present case we perceive nothing which gives it any unusual features. From the evidence it appears, that at the time of the contract of marriage, Mr. Thompson was abundantly able to make the stipulated settlement and pay all his debts. His inability has been accounted for by heavy and unexpected losses on investments made by his agent in good faith; without any ground for the imputation of dishonesty or imprudence in Thompson, his situation is such, that his wife must lose 30,000 dollars of her settlement, or his only creditor lose 12,000 dollars of his debt. Admitting their equities to be equal, she has a legal advantage which no court can take from her; unless her conduct can be impeached for fraud, actual or legal, it would be as unjust as illegal and inequitable, to visit alone on her the consequences of her husband's misfortunes.

Considering Mrs. Thompson therefore as a purchaser under the marriage articles, we are decidedly of opinion, that there is no legal fraud attending the transaction which would invalidate it in a court of law, or any matter given in evidence which would impair its obligation in a court of equity. If she cannot be viewed as the purchaser of the property contracted to be invested for her use, she is certainly a fair and honest creditor from the time of executing the contract, if not from the time of the proposed settlement in August preceding, and after the engagement of marriage was made. If however she was a creditor on the 19th of December,

Thompson had a right to prefer her in preference to any other creditor, to the extent of his whole property whenever he could realize or reduce it to possession. The mere priority of plaintiffs' debt, in point of time, could not affect such preference from being effectual, nor could the previous authority to Mr. Fisher to contract the debt, affect the inchoate rights of Mrs. Thompson by the engagement and proposed settlement in the summer of 1825, which you may fairly infer from the agreement was in a course of execution, by Thompson having begun to build on the lot, of which Mr. Stockton was to stand seised in trust, before the date of the articles. If the settlement had taken Thompson's whole estate, and the certain consequences of its execution, or the intention of the parties had been to exclude the plaintiff from the payment of his debt under cover of the agreement, we would give him relief on the equity side of the court, but the present state of things has not resulted from the effect of the agreement, or the intention of the parties, unexpected losses alone have led to it, the consequences of which are these. The plaintiffs' debt was 63,000 dollars, of which there is now due of principal and interest 12,000 dollars; the debt of Mrs. Thompson estimating the house and furniture at 18,000 dollars was 58,000, of which there is now due 35,000 dollars if Morris's debt is not good, or if good, 30,500 with interest from December, 1825. Though this inequality of loss would be of no importance at law, it would be a powerful circumstance in equity, on an application by the plaintiff for relief, and the present case would be very different if the whole 40,000 dollars had been invested. This view of the merits of the case suffices for the decision of the points directly at issue, without adverting to others which have been made as to contracts for settlements made after marriage; the nature of the issue required us to so view the case. It has been urged by the plaintiffs' counsel, that there has been no delivery of the contract in the present case, but the evidence is sufficient in law to prove it, the building and furnishing the house tend strongly to prove it satisfactorily; the contract is also said to have been abandoned, this is not to be presumed, and we think the facts in evidence do not amount to proof of abandonment by Mrs. Thompson, or any acts done by her which could impair her rights. The omission of the trustee to enforce the payment of the money, and to record the deed, is no waiver by her, and any acts done by him inconsistent with the agreement, would not impair the legal validity of her rights; the acts of a parent are never so construed, unless clearly intended to be so; the law as to these objections is well settled in Carver v. Astor, 4 Pet. [29 U. S.] 28, 82, 93–99.

We have been requested to charge you, that in point of law the covenant on the part of Mr. Richard Stockton to stand seised to uses, operated as an immediate conveyance to his daughter before marriage, and that by the marriage, Thompson became the owner of the furniture in his own right, and had the exclusive use of the house and lot unincumbered with the trusts of the agreement. But inasmuch as by the covenant contained in that agreement, Mr. Stockton was not to stand seised to the use of his daughter till after marriage, the court instruct you as matter of law, that the marriage articles do not operate by the statute of uses (27 Hen. VIII.), to pass the legal estate to the lot, or any other property referred to them to Mrs. Thompson. That it remained in Mr. Richard Stockton during his lifetime, devolved by his death on his heir at law, Captain Stockton, and now remains in him on a trust executory, it never was and is not now one executed by that statute.

We have also been requested to charge you on three other points of law: (1) That the expenditure of 5,000 dollars, in furnishing the house is, per se, fraudulent on creditors. We think not. Furniture is a part of the marriage contract, to be provided by Thompson as he should think fit. He had a reasonable discretion which he might exercise according to their station and associations in life, proportioned to the kind of house and extent of income. The trustee could not at law, or the wife in equity, compel Thompson to furnish it extravagantly, or at useless or wanton expense; if he had done it voluntarily, it would not be within the true spirit and meaning of the marriage articles, and might be deemed a legal fraud on creditors as to the excess. But before we could say that it is a fraud in law, to expend 5000 dollars in furnishing a house costing 13,000, and the establishment to be supported by the income of 40,000 dollars invested, we must be satisfied that it is extravagant and unwarranted at the first blush, and to an extent indicating some fraudulent or other motive, unconnected with the fair execution of the contract. Not being so satisfied, or that there has been a clear abuse of the discretion confided to Mr. Thompson by the contract, we cannot charge you as requested. (2) That the delivery of the notes to Captain Stockton in 1829 was a fraud per se. We instruct you that this was no fraud, if it was done in order to comply in part with the agreement; if it was colourable, made with the intention of covering and concealing so much, under pretence of the marriage contract for Thompson's use, and so received by the trustee, it was legally fraudulent as to creditors; but though delivered with such intention by Thompson, if not so accepted by Captain Stockton, then he might apply them to the trust fund, and was bound to do so. Being done to carry the agreement of December 1825 into execution, its having been done on the eve of the judgment confessed in New Jersey, makes no difference; had it been to make a new settlement after mar-

riage, if it was in consideration of a portion or property, it would not have been fraudulent per se. The time which intervenes between making provision for a wife, and the contracting the debt or obtaining a judgment against the husband, is not a matter which makes it per se a fraud, it may or may not be suspicious, and connected with other circumstances deemed evidence of it. [Wheaton v. Sexton] 4 Wheat. [17 U. S.] 506, 507; [Sexton v. Wheaton] 8 Wheat. [21 U. S.] 238; 3 Johns. Ch. 485, 494. (3) That the marriage agreement is void because not recorded within the time required by the law of New Jersey for recording deeds. The covenant to stand seised to the uses declared, would come within this law if the uses were executed by the statute, so as to make it an actual conveyance or deed passing the legal estate; but being executory, it is only a covenant giving an equitable estate to those for whom the trust was created and continues, and not a deed. But considering it as a deed, the want of recording does not make it void between the parties, though it would become void as to the creditors (perhaps), and purchasers from Richard Stockton without notice, but the omission to record this agreement is no fraud on the plaintiffs, and cannot affect them. Not being void between the parties, it gives Thompson no other estate or interest but such as arises from the trust; he can have none incompatible with it, our instruction therefore is that the marriage contract is not void for want of being recorded in time. The possession and occupation of the house by Thompson is consistent with and a part of the agreement, his use of it and the furniture is a necessary consequence of the marriage, and if the contract is valid, such possession is no evidence or badge of fraud. You will apply these principles of law to the evidence and find according to your opinion of the facts.

The jury found for defendant; judgment was rendered on the verdict and affirmed by the supreme court on a writ of error. 7 Pet. [32 U. S.] 348.

Case No. 8,957.

MAGNIAC v. THOMSON.

[2 Wall. Jr. 209.] [1]

Circuit Court, E. D. Pennsylvania. April Term, 1852.[2]

EQUITABLE RELIEF — EFFECT OF DEMURRER IN EQUITY—UNCONTROLLABLE EFFECT OF A LIBERATION ON CA. SA.—RELIEF AGAINST MISTAKE OF LAW.

1. Where a bill sets forth such leading facts as do not, when analyzed, show a case of fraud or mistake—allegations or averments in the bill that there was fraud or mistake, and the expressions "fraudulently," "deceitfully," "by mistake," &c., interspersed throughout it, will not bring the case within equitable jurisdiction, even on a demurrer to the bill.[2]

[Cited in Voorhees v. Bonesteel, 16 Wall. (83 U. S.) 29.]

2. Admitting, for the sake of argument, that the allegation of a mistake of the law would give jurisdiction to a court of equity in a common case, and be a ground for relief; yet the court will not listen to the allegation that a member of the bar has made such a mistake. It can hardly be successfully averred even by the party whose counsel, he would confess, has made it.

3. Where one, having arrested his debtor defendant on a ca. sa., sets him at liberty on certain terms, at his instance, it being "expressly acknowledged" by the defendant that this is done "for his accommodation, without any prejudice whatever to arise to the plaintiff's right by the enlargement" as aforesaid, "or otherwise howsoever;" the debt is paid at law. No further execution of any sort can be issued there. And the agreement having been drawn and signed by the plaintiff's own attorney, a learned and able counsellor at law, a court of equity will not interpose to enjoin the defendant from pleading this discharge as payment, by allegations in a bill demurred to, that there was either a mistake common to both parties as to the effect of the agreement; or else that the plaintiff not knowing its effect, while the defendant did know it, it would be a fraud in the defendant now to profit of the plaintiff's misconception or ignorance of what he was doing; and set up at law the payment by his liberation on the ca. sa.[2]

On the 19th of December, 1825, John R. Thomson, now a senator of the United States from the state of New Jersey, previously to a marriage then contemplated with a daughter of the late Honourable Richard Stockton, Esquire, of that state, agreed with her father to make a settlement upon that lady of a considerable estate upon this, as a final, among several other previously mentioned trusts, st. that if there should be no issue of their marriage, then the said estate should, on the death of either party, go to the survivor. From a really insolvent condition of Mr. Thomson's affairs at that date, arising from a large foreign suretyship, contracted by his agent abroad, and from other circumstances confessedly not known to Mr. Stockton or his daughter, it appeared afterwards to be a matter of doubt whether this settlement could be supported as against creditors. And Mr. Thomson having been arrested soon after the settlement on a ca. sa. by these same persons who are now here complainants, Magniac & Co., and who were then creditors by judgment for about $22,000, in a common law suit in this court, he made on the 8th April, 1830, the following agreement, an opulent relative being a guaranty for its performance, and Charles Jared Ingersoll, Esquire, the attorney of the plaintiffs, Magniac & Co., who himself drew the agreement, consenting by writing to the "defendant's enlargement on the terms stated" in it. The agreement—referring to the original case, in this court, of No. 18, October term, 1826,—being, as already stated, in Mr. Ingersoll's handwriting, was filed among the court pa-

[1] [Reported by John William Wallace, Jr., Esq.]

[2] [Affirmed in 15 How. (56 U. S.) 281.]

[2] [Affirmed in 15 How. (56 U. S.) 281.]

pers of the case, and was in these words: "Defendant having been taken by ca. sa. in this suit, at his instance, it is agreed that he be set at liberty on giving security to abide the event of an issue to be formed for ascertaining, by judicial decision, whether he has the means, by the property in his marriage settlement, or otherwise, of satisfying the judgment. Both parties hereby consenting to try such issue at the ensuing session of the circuit court of the United States, on the merits, without regard to form. It being expressly acknowledged by the defendant that this agreement is made for his accommodation, without any prejudice whatever to arise to the plaintiffs' right by the defendant's enlargement on security as aforesaid or otherwise howsoever." The marshal accordingly returned to his ca. sa. "c. c. and enlarged by agreement of plaintiffs' attorney." With a view to carry out the agreement, Mr. Ingersoll, for his clients, Magniac & Co., and J. P. Norris, Esquire, as attorney for Mr. Thomson, on the 3rd of June, 1830, made this second agreement: "Whereas, a feigned issue has been agreed upon by the parties in this case, for the purpose of ascertaining, by law, whether the defendant, J. R. Thomson, has the means, by the property of his marriage settlement, or otherwise, of satisfying the judgment recovered against him in this court, to October Sess. 1826, No. 18,—now, it is hereby agreed to be the understanding of the parties to the suit, if the plaintiff recovers, that the liability of the security for said defendant shall be to the extent of the property actually settled by said defendant on his intended wife, by virtue of a marriage settlement, dated the 19th day of December, 1825. And if judgment shall be for the defendant, that the said property contained in said settlement, shall be entirely discharged," and the security entered as above stated, entirely at an end, &c.

The validity of the marriage settlement was tried in this court at April term, 1831, in the case, well remembered in this circuit, of Magniac v. Thomson [Case No. 8,956], where after a vigorous assault upon it by J. R. and C. J. Ingersoll, the settlement was powerfully and successfully defended by Mr. Binney, and under a strong charge of the late Mr. Justice Baldwin, sustained by a verdict of a jury. From this court the case was taken, in 1833, to the supreme court at Washington, 7 Pet. [32 U. S.] 348, where the principles of Judge Baldwin's charge were the subject of another sharp attack, but where it was the unanimous opinion of the court, that the judgment of the circuit court ought to be affirmed. The marriage settlement therefore could never be disturbed. There was no issue of the marriage, and Mr. Thomson having survived his wife, he became of course entitled under the terms of the settlement to the whole of the property himself. The complainants now filed this their bill in chancery for an account of that property, and its profits since the expiration of the trust; and an application of both to the payment of the judgment; and an injunction against parting with them, so far as they might be liable to the judgment, and against setting up at law as a defence, (a matter which it was averred the defendant threatened,) that the debt had been discharged or affected; and that the validity of the judgment on the law side of the court might be declared by this court to be fully established: and the marshal's return to the ca. sa. regarded as an 'inexistence,' so far as it might be used to violate the obligations of the original agreement of 8th April, 1830.

The bill was a good deal argumentative, under a form apparently narrative. It went back to, and coloured highly the circumstances of the marriage settlement, so far as Mr. Thomson was concerned with them. Reciting the original ca. sa. and the arrest of Mr. Thomson, it set forth that he must have either always remained in close confinement, or have obtained his discharge, by proceedings under the Pennsylvania acts for the relief of insolvent debtors; his proceedings under which, if successful, would have driven him to make a deed of assignment to his creditors, of all his estate and property whatsoever, including the right of survivorship and reversion in the settled property upon his wife's death without issue, and have conferred upon him, in return, only an immunity against liability to further bodily restraint or confinement for the non-payment of such of his debts, as were at the date of such proceedings in insolvency, due by him; and any petition for the benefit of which acts could have been filed by him, only after lying three months in custody and confinement under the said writ of ca. sa.: that thereupon the defendant, being so arrested at the suit of the complainants, it was agreed in writing between them and the defendant, that they should, without prejudice to their rights and remedies against the said defendant, permit the said defendant forthwith to be enlarged from custody, &c. The bill averred that by this agreement, &c., the defendant obtained no further advantage than that of "a present discharge from close custody, and a judgment that he had then no means of satisfying; the judgment, the said agreement and proceedings under it being a substitute for proceedings in insolvency; by which substitute, the said defendant, if he did not acquire the same extent of immunity which an insolvent discharge would have bestowed, at least obtained whatever immunity he did acquire by means less painful than an insolvency." It set forth the entire acquiescence of the complainants in the validity of the marriage settlement as adjudged on technical grounds merely, so far as Mr. Thomson was concerned: and that the said trial having resulted unfavourably to the complainants, they were content to abide thereby until the defendant, if it should so turn out in the course of time, acquired wherewithal to satisfy the

judgment. And having patiently awaited the return of his solvency, and his ability to meet his obligations, and he having become once more restored in his circumstances, and a man of wealth, the complainants had recently called upon him to pay, in the expectation that, in consideration of the extreme hardship of their case, (in which the payment of a judgment arising out of a cash loan had been disappointed by a settlement of a debtor upon his wife, although insolvent when he made the settlement,) he would meet the call upon him, not according to the letter only of the agreement, but in the spirit of his own professions of obligation to the complainants for the same, and of their forbearance toward him in his adversity, when, to their astonishment, they were answered by him—not that he was unable to pay or that he would be even 'inconvenienced' by paying off the amount of the judgment, but—that inasmuch as according to law a party discharged by the plaintiffs' consent, after being taken on a ca. sa., was released from the debt, even though he had pledged himself to his creditors not to plead such discharge,—he, the defendant, proposed to set up this said or supposed rule of law, and the said discharge for his protection against his own agreements and pledges, and against any further proceedings by the complainants under their judgment, and that he, the said defendant, then actually regarded and should to the court insist that the said judgment,—his agreement to the contrary notwithstanding,—was cancelled, and himself no debtor at all.

The bill represented that the complainants were prevented from proceeding at law by the said rule of law so set up. The use of or any resort to which they averred would be contrary to equity; because the defendant having pledged himself that he would not resort to the said rule of law,—by agreeing that the taking of the said defendant into and discharging him from custody should not prejudice the rights and remedies of the then plaintiffs,—it would be in direct fraud of his agreement, should he now resort to it, to the prejudice of those rights and remedies. And because the agreement that the defendant should be discharged from custody, was obtained by means, which were inequitable and fraudulent, namely, by a stipulation on the defendant's part—now offered to be violated by him—that the discharge should be without prejudice to the complainants; which means were further inequitable and fraudulent, in this, that the consideration for the discharge was illusory, fraudulent and unreal; and was a stipulation, that the discharge should be without prejudice to the complainant; a stipulation which the defendant could keep or break at his pleasure, and which supposed consideration for the discharge—namely, that the same should be without prejudice,—was not a consideration sufficient to support the said agreement for the discharge. And because the said mutual contract that the defendant should be discharged from custody, but withal, that such discharge should not prejudice the complainants' rights or remedies, was either a contract entered into by the common error of both parties in this, that they both erred in supposing that the contract could be carried into effect, when, in fact, it could not be, (of which said common error the defendant now sought to take advantage,) or it was a contract entered into, the complainants alone being in error, in supposing that the contract could be carried into effect, when, in fact, it could not be, the defendant, at the same time well knowing, and fraudulently availing himself of the error, and entering into the contract for the purpose, and with the fraudulent intent of taking advantage of the error, and intending that he should, by he contract, obtain all the benefit and advantage of a discharge from the ca. sa., and that the complainants should not obtain the benefit of the corresponding stipulation, that the discharge should be without prejudice to their rights and remedies, of which fraud the defendant now sought to take advantage. The complainants then averred that when they accepted the stipulation at the hands of the defendant, that the discharge should be without prejudice to them, they did actually and firmly believe that it was capable of being enforced at law, as well as in equity, according to its terms, and were wholly unaware that the defendant could or would use, or resort to any rule of law whatever, whereby to escape its force and effect.

They set forth that the marriage settlement having been made to secure the property to the wife and children, and on the wife's death childless, to pass it in gross to the husband, had now done its office, and could go no further, and that it would be inequitable that the issue formed under the agreement, and in the framing and on the trial of which, it was assumed by the court, and admitted by the defendant, that the settled estate was liable to the judgment, but for the protection afforded by the settlement, should be construed to have for its effect and consequence, that which was not contemplated by the parties, and was not sanctioned by the court, and which, in itself, was wholly contrary to justice, namely, the discharging from just liability the estate which, in consequence of the defendant's reversion and survivorship, had now come back to him, as completely as he ever did or could own it or any other property.

To this bill, the defendant now demurred, setting forth for cause, that "if the taking into custody, &c., under the ca. sa. was a legal discharge of the alleged debt, the complainants are not relievable in equity from the effect thereof for or by reason of any act, matter or anything alleged in the bill; and if the said taking into custody was not such a legal discharge, then the complainants have full, adequate and complete re-

lief at law." And the case was accordingly heard on the bill and demurrer.

Charles Ingersoll, in support of the bill.

I. Construction of the agreement of 8th of April, 1830. If this paper meant less than the plaintiff insists, its last sentence beginning "it being expressly acknowledged," would have been omitted altogether. That sentence is not merely without purpose or sense, but is directly in the teeth of the meaning of the parties to the contract, if not intended to bind the defendant by a promise to stand by the judgment after the discharge as much as before. The words "or otherwise howsoever" in the case of extremely formal papers, in which the meaning of the parties is expressed at great length, might perhaps have little force, but in a brief stipulation such as this, drawn up in haste probably, and in order to an immediate and pressing object, they ought to have their full force and popular construction. They should be interpreted to signify that if by the words which precede them the plaintiffs' interest under the judgment are not fully guarded, the defendant shall give them protection "otherwise howsoever." They amount to a covenant for further assurance. The agreement interpreted in any other way leads to the absurd conclusion that the plaintiff perilled his whole debt without a motive, while the defendant obtained his enlargement from custody, giving no equivalent whatever therefor.

If the plaintiff had refused all arrangement, and simply permitted the defendant to remain in custody, he would have resorted to the insolvent law of Pennsylvania, or of the United States. In the former case there would have been a trial of the question whether the defendant was possessed of property more advantageous to the plaintiff than the trial in the federal court. In the latter case, of an application by the defendant under the United States insolvent law of 1800 [2 Stat. 19], the plaintiff, had he succeeded in breaking the trust, would have got the whole trust property, and whether he failed or succeeded would have had security of the most binding sort, in the custody of the defendant's person. The plaintiff therefore gained nothing by the agreement, for it is not pretended on the other side that he got anything by it, if he did not get security of a superior character for his debt, or a better trial of the question upon which it turned. He simply, as expressed by the agreement, set the defendant at liberty at the defendant's instance. He did an act of kindness, upon the defendant's agreement that it should be without prejudice. The defendant, on the other hand, acquired first his immediate liberty, which he could get only by agreement; and second, a trial of the question of property in the federal court; a better trial for him than one in the common pleas, and much better than under the insolvent law of 1800, because that would have detained him in custody during the time the cause was pending which, as appears by the statement, was about three years. To give any other interpretation to the agreement would be to stultify the plaintiff, who dealt with the defendant liberally enough, but did not go the length of giving away his debt.

Assuming then our construction of the agreement to be the true one, the next question is:

II. Whether the case is one for equitable relief? The principles and cases found under the equitable heads of fraud and mistake, are applicable to the facts before the court.

1. Fraud. If it were a case of mere breach of contract, it would not be cognizable in equity. Nor if it were a case of fraudulent breach of contract, and not more, for even fraud is cognizable at law unless there be in the case something to oust the jurisdiction. But here is a case where there can be no relief at law, because (we assume for the sake of argument) the courts of law have declared that a judgment is paid when the defendant is taken under a ca. sa.. and that even the defendant's own agreement to the contrary shall not change the rule; that a defendant's conduct in entering into such an agreement and then violating it, is "very scandalous," as the courts have termed it (per Grose, J., Blackburn v. Stupart, 2 East, 243), but that there is no remedy at law. The fraud is palpable. The defendant is in custody. He says to the plaintiff, the rule of law is that if you discharge me, the judgment is satisfied; but I pledge myself that as between you and me there shall be no such rule, and that if you will let me go, your judgment shall stand exactly as it did before your ca. sa. was issued. This agreement, the defendant, having had the benefit of it, utterly violates. He declares the judgment to be good for nothing, and the agreement good for nothing, and when the plaintiff takes proceedings at law he sets them at defiance. That is, having trepanned the plaintiff into the bargain by means of a promise that he will not exact the penalty of the position, he turns round and insists upon it. The plaintiff then comes into equity. This case is like that of a man who, holding a note five years and eleven months old, is told by the drawer to wait six weeks longer before he sues, and that the note shall be as good at six years old as it was before, and then being refused payment, and having gone into court, the defendant pleads the statute of limitation against him; like that of a plaintiff in a judgment who enters satisfaction in order that the defendant may be able to make title to a certain portion of the real estate bound by the judgment, the defendant having agreed in writing that the satisfaction should be cancelled, and the lien of the judgment restored as to the rest of his real estate, immediately after his sale was effected, and then is told by the defend-

ant, your judgment is gone, and you will never get another; like that of one who, having given his receipt in full, but without value, to a debtor, in order that he might settle with a third person, is turned upon by the debtor and told that his debt is paid, and here is the receipt for it; like that of an obligee who, having released one of two co-obligors for the mutual purposes of obligee and obligors, and with the agreement that the discharge should be without prejudice as to the remaining obligor, is informed by him, after the object of the discharge has been accomplished and the advantages from it attained, that he does not mean to hold himself liable after the release of his co-obligor.

These are cases not distinguishable from that before the court, and they are obviously for relief in equity. They are all cases in which a party has gained a fraudulent advantage of another, which not being relievable at law, will be relieved in equity, unless something can be shown to the contrary.

It will be pretended by the defendant that to relieve under this agreement of 8th April, 1830, would be to run counter to that policy which, favouring liberty of the person, has refused to permit a second ca. sa. for the same debt. To this the answers are: (a) There are two cases to the point that this rule concerning the liberty of the person, yields before proof of the defendant's fraud, in procuring his discharge. Baker v. Ridgway, 2 Bing. 41, 9 Moore, 114, and Holbrook v. Champlin, 1 Hoff. Ch. 148. (b) On principle it would be strange indeed if that policy of law and equity and of all society which sets its face against fraud should give way before the co-called policy here invoked, which amounts to nothing at all since arrest for debt has been abolished, and which never did amount to more than a train of unfortunate decisions, which if they could be recalled, would never be made again.

2. Mistake. It is averred in the bill as follows: "And your orators aver that when they accepted the said stipulation at the hands of the said defendant, namely, that the said discharge from custody of the said defendant should be without prejudice to your orators, they did actually and firmly believe that the said stipulation was capable of being enforced by your orators at law as well as in equity, according to the terms of the said agreement, and were wholly unaware that the said defendant could or would use or resort to any rule of law whatever whereby to escape the force and effect of the said stipulation so contained in the said agreement." The plaintiff here avers that he mistook the law, and that the defendant availed himself of his mistake to get a discharge from custody, which, if the construction of the agreement above submitted be the true one, he obtained at the expense to the plaintiff of his entire debt, for which he received under the agreement no manner of consideration or compensation. The general rule is admitted, that a mistake of law affords no ground of relief. But when the mistake of one party is so great, and is so grossly taken advantage of by the other, that the bargain becomes not "do ut des" but "do ut non des," not money paid or a thing done for a consideration but money paid or a thing done for less than nothing, the precedents are that relief will be granted without distinction between ignorance of law and ignorance of fact. Champlin v. Laytin, 1 Edw. Ch. 472.

The rule "ignorantia legis neminem excusat" pushed to extremes would cover fraud, and the averment of the bill here is in truth averment of fraud. To avail one's self of the ignorance of the other party of the law may be fair, or it may be fraudulent. If the grantor understand the covenant of warranty contained in his deed, and the grantee do not, the grantee cannot therefore come into equity and be relieved from the effects of such ignorance. But if the grantor be aware that by law he has no title to the estate which he conveys and the grantee in paying his money for it receives only so much moonshine, the grantee is relievable; for the grantor defrauds him if he pushes his advantage over him to such lengths, though that advantage be but in knowing the law when the other does not. And if here the plaintiff in his ignorance of the law just gave away his debt and the defendant got a receipt in full for nothing; if the plaintiff sold his judgment of $22,000 for a right which was no right, then the defendant has overreached him, he has availed himself of the plaintiff's mistake of law with a vengeance. It is a case of fraud and equity will make him whole. The cases on this head are numerous and go very far. Lansdown v. Lansdown, Mos. 364; Bingham v. Bingham, 1 Ves. Sr. 126; Pusey v. Desbouvrie, 3 P. Wms. 315–321; Evans v. Llewellyn, 2 Brown, Ch. 150; Farewell v. Coker, cited in Cholmondeley v. Clinton, 2 Mer. 352; Cann v. Cann, 1 P. Wms. 727; Acton v. Peirce, 2 Vern. 480; Cannel v. Buckle, 2 P. Wms. 243; Naylor v. Winch, 1 Sim. & S. 564; Hunt v. Rousmanier, 1 Pet. [26 U. S.] 1; Lowndes v. Chisholm, 2 McCord, Eq. 463; Lammot v. Bowly, 6 Har. & J. 500; Evants v. Strode, 11 Ohio, 481; Drew v. Clarke, Cooke, 374–380.

It is not necessary, to entitle the plaintiffs to come into equity with this bill, that they should be absolutely without relief at law. Equity has jurisdiction when relief at law is doubtful or difficult. Weymouth v. Boyer, 1 Ves. Jr. 424; Bynum v. Sledge, 1 Stew. & P. 138; Ludlow v. Simond, 2 Caines, Cas. 39; Livingston v. Livingston, 4 Johns. Ch. 287. "It is not of course to be taken as an answer to a bill praying relief, that the matter might be taken advantage of at law." Campbell v. French, 2 Cox, Ch. 367. The averment of the bill is, that plaintiffs are prevented from proceeding at law.

III. How stands the question at law? The defendant contends that issuing and execut-

ing a writ of ca. sa. at law, discharges the debt at law, and satisfies the judgment, and this although the defendant expressly agrees that it shall not have such affect. The plaintiffs submit the rule on this subject to be, that issuing and executing an execution presumes a satisfaction. To this extent, and no further, has the law gone in regard to any kind of execution; and a careful examination will show that it has never fairly gone further in this regard as to a ca. sa. than as to any other writ of execution, and that the two English cases (and certain New York cases which were decided on their authority) were hastily decided, and without support from principle, reason or authority.

It was originally questioned whether a judgment could have more than one execution, and it was held accordingly, that any writ of execution being once issued, the judgment was functus. But the rule was after established otherwise, that is, that no execution issued is a satisfaction, or prevents an alias, unless satisfaction appear by the return. See the old cases quoted by Lord Hobart, in Foster v. Jackson, Hob. 57. No rule of law can be established so inimical to liberty or so severe upon debtors, as that which would say, that the creditor shall in no way deal with his debtor for his liberation from imprisonment, without discharging the debt and satisfying the judgment. See Jackson v. Knight, 4 Watts & S. 412. A fi. fa. executed presumes a satisfaction; there can no other execution be issued till by the return of the first it be shown that there has not been satisfaction. Slie v. Finch, 2 Rolle, 57; Miller v. Parnell, 6 Taunt. 370. A ca. sa. executed does no more, it presumes a satisfaction.

Many cases, both English and American, may be found, and will be cited by the defendant, where it has been said, and some where it has been held, that "plaintiff receives a satisfaction in law by having his debtor in execution." Hobart, C. J., reasons himself to this in Foster v. Jackson, already cited. This is said in many other cases. Tanner v. Hague, 7 Term R. 420; Ransom v. Keyes, 9 Cow. 138; Crary v. Turner, 6 Johns. 51; Yates v. Van Rensselaer, 5 Johns. 364; Little v. Bank, 14 Mass. 443; Freeman v. Ruston, 4 Dall. [4 U. S.] 214. If this be true, or if there be such a principle in the law, then it is a reason, and a sufficient reason, why the plaintiff may not by any agreement with the defendant, relieve him from imprisonment, and yet preserve the debt and to the judgment its efficacy at law. If this reason be not sound, or if there is no such principle in the law, then no other reason can be given, and none other is in any of the cases given, why the law should not regard and protect such agreement, or why the law should assume for itself the anomalous and discreditable position into which Grose, J., puts it in Blackburn v. Stupart, 2 East, 243, where he says that though the conduct of the defendant may have been "very scandalous," there is for the plaintiff no relief.

That there is any such principle or rule in English law, as that plaintiff receives satisfaction by having his debtor in execution, is contradicted by Lord Coke, in Blumfield's Case, 5 Coke, 86a.[3]

By all the decisions holding that if the defendant after escape, the judgment is good (Basset v. Salter, 2 Mod. 136); for if the judgment is functus by executing the writ, nothing after can restore it. By the decisions holding that executing a ca. sa. on a privileged person, who is after discharged, does not make void the judgment. Merchant v. Frankis, 2 Gale & D. 473. By the statute of 21 Jac. I., that if defendant die in execution, the judgment shall be still effective. By the decisions that an after insolvent's discharge, leaves the judgment effective. Nadin v. Battie, 5 East, 147. By the cases holding that the new writ is in no case void, but voidable. only on cause shown. 1 Scott, 404.

The class of English cases, where it was held that a plaintiff having a judgment against several defendants, could not release one from execution, without entirely losing his debt as to the others, is easily intelligible. and is the law of fi. fa. as well as ca. sa., and is even the law of original liability, for there is no way by which one of several partners can be discharged from an original liability without discharging the others. And this principle explains various cases. Denton v. Godfrey, 11 Jur. 800; Herring v. Dorrell, 4 Jur. 800; Ballam v. Price, 2 Moore, 235. So, too, the class of cases where the plaintiff took, in satisfaction of his judgment, a new agreement, and it was held that this judgment was gone, and he must resort to suit on his new agreement, are clear in principle and reason. Jaques v. Withy, 1 Term. R. 557; Birch v. Sharland, Id. 715; Vigers v. Aldrich, 4 Burrows, 2482; Goodman v. Chase, 1 Barn. & Ald. 297; Da Costa v. Davis, 1 Bos. & P. 242.

The only two English cases going the length that defendant asks in this case, and holding the judgment satisfied, and that plaintiff can have no further remedy in his then suit, whatever defendant's agreement may have been, are Clark v. Clement, in 6 Term R. 525, and Blackburn v. Stupart, in 2 East, 243. In Thompson v. Bristow, reported by Barnes, Notes Cas. 205, the report is in a line, and the question seems to have been one of continuance on the roll. The reporter, at best, is not the most satisfactory.

The two former cases drive the law to the position assumed for it by Grose, J., in Blackburn v. Stupart, that however "scandalous" the conduct of the defendant may

[3] Lord Coke says expressly "The execution of the body is no satisfaction, * * * but a gage for the debt," and he calls on his readers to note "good differences between execution not valuable, as of the body of the defendant, and execution valuable, as of lands," &c.

have been, the law can give the plaintiff no relief against his fraud. Their authority is much shaken, and in some cases contradicted, by later English decisions: as in Baker v. Ridgway, 9 Moore, 114, 2 Bing. 41, which was the case of voluntary discharge by plaintiff from arrest, and is authority for the position that if plaintiff were induced to the discharge by the defendant's fraud, it shall not avail him, but the judgment shall be held effective. In Atkinson v. Bayntun, 1 Scott, 404, Sergeant Wilde in argument, doubts the soundness of the principle established by Blackburn v. Stupart and Clark v. Clement; and Tindal, C. J., plainly thought with him. Parke, J., says, that in Jaques v. Withy, Ashurst, J., spoke too broadly, and that Buller disagreed; and quotes Baker v. Ridgway, that if there were fraud in defendant's procurement of discharge, he may be re-arrested.

The law of ca. sa. in this regard, is refused to be extended to cases of attachment for not complying with award, and Holroyd, J. says, "Indeed those cases (meaning Clark v. Clement and Blackburn v. Stupart) were considered so strong that the legislature interposed. Good v. Wilks, 6 Maule & S. 413.

But be the English law what it may, the Pennsylvania courts hold as we ask this court to hold. In Sharpe v. Speckenagle, 3 Serg. & R. 464, it was held by the supreme court of Pennsylvania on general principles, that a discharge under an insolvent act, of one arrested on a ca. sa., did not discharge his surety for stay of execution. Chief Justice Tilghman says: "I take the law to stand thus: If the plaintiff takes the body of the defendant in execution, he can never have against him while in jail, any other execution; but if he dies in jail, he may have execution against his lands or goods, by virtue of the statute 21 Jac. I. c. 24. I think, too, that in case of death, the better opinion is, that the plaintiff might have had execution against the defendant's lands or goods at common law. The statute 21 Jac. recites, that it had been greatly doubted, &c. It certainly had been doubted, although the decision reported in Blumfield's Case, 5 Coke, 86, was expressly in favour of the execution, and for reasons not easily answered: because the plaintiff having secured his legal remedy, was in no default, and therefore ought not to be injured by the act of God, which works wrong to no man: and it would be most unjust, if in such case, the goods of the defendant should not be liable, &c. In the case of Foster v. Jackson, Hob. 52, decided in the reign of James I., the law was indeed held contrary to Blumfield's Case, but in my opinion, for reasons more technical and artificial, but less substantial and satisfactory. In that case, however, although, &c. . . . . yet it was laid down, that the taking on the ca. sa., 'was not the perfect satisfaction in nature to all purposes, and against all persons.' On the contrary, 'that it was clearly no satisfaction, so as to bar the plaintiff to seek satisfaction against another for the same debt.' This principle the court held 'decisive' of the case before them, as the discharge 'was effected by the act of law, which, like the act of God, injures no man." There was, indeed, in the Pennsylvania act an express provision, that no other person should be acquitted by the principal debtor's discharge, which the court say they could call in aid, if necessary; but it is not called in aid, the case being decided on common law principles. The case of Jackson v. Knight, 4 Watts & S. 412, in the same court, is much stronger and absolutely in point. By agreement in writing, endorsed on the writ, and signed by the counsel, the defendant's body was to be released 'without prejudice to his future liability for the debt and interest of the judgment, which is to remain in full force and unimpaired.' The court held that the agreement prevented a discharge of the judgment against him, which remained a lien on his lands, and so encumbered them as to make an encumbered and unmarketable title. And the court manifestly approves of the charge of the court below, that 'such a discharge is for the benefit of the defendant: it comports with humanity, justice and common sense:' and of the position that the principle which the defendant here seeks to maintain, 'has been carried to an unreasonable and oppressive length, and often to the great injury of unfortunate debtors;' and that no case precisely like the one before them, had been shown."

Reverting to the language of Chief Justice Tilghman, who says, that neither the act of the law, nor the act of God, ought to work an injury to the plaintiff, we ask, where shall the act of the defendant himself—or the act of the plaintiff, done for his benefit and at his request,—which is tantamount to the act of the defendant himself—work any injury either?

J. M. Read, Mr. Cadwalader, and W. A. Jackson, in support of the demurrer.

The thorough view which we propose to take of this case at law, will very much settle the question of equitable aid; for it will show how pervading the rule at law is. The creditor, by issuing a ca. sa., chooses the body of the debtor in preference to his lands or goods, as the source of his satisfaction. By making an arrest, he secures to himself the satisfaction he has chosen, and is thereby estopped from resorting to any other mode of execution. As long as he holds the body, he is in the possession of a continuing satisfaction, and when, with his consent, the body is released, he confesses that his satisfaction is complete; and if the release is accompanied by any agreement with the debtor, or third parties acting for him, such agreement (whatever may be its terms) is a new and original contract, which can in no way affect the completeness of the satisfac-

tion previously received. This is the English law.

From a series of decisions upon these points, covering four centuries, only a single case (Blumfield's Case (1596) 5 Coke, 87), can be cited in conflict with the rule thus stated. The statement of facts in Blumfield's Case by Lord Coke is this: "Two men were bound jointly and severally in a bond, one was sued, condemned, and taken in execution, and afterwards the other was sued, condemned, and taken in execution, and afterwards the first escaped and thereupon the other brought audita querela." Judgment was given against the payer. The decision is law, and in harmony with the principles above laid down. Lord Coke, however, in his annotation cites the Case of Jones and Williams (elsewhere unreported), "where two men were condemned in debt, and one was taken and died in execution, yet the taking of the other was lawful." This case may also be law, but makes nothing against the present appellee. Lord Coke proceeds, "and then" (in Jones and Williams) "it was resolved by the whole court that if the defendant in debt dies in execution, the plaintiff may have a new execution by elegit or fi. fa. for divers reasons," which he goes on to enumerate. It is for this passage that the case has been often heretofore and is now cited, the value of the authority being merely this: that Lord Coke in reporting a principal case, which is entirely with us, refers to an unreported case which is also with us, but in which there is a dictum against us of which he appears to approve. But whatever may have been its original authority, this dictum has been repeatedly declared not to be law. Blumfield's Case was argued in 39 Eliz., and published in 3 Jac., and must consequently have been well known in 4 Jac., when the case of Williams v. Cutteris (1607) Cro. Jac. 136, also cited as Cutter v. Lamb, was decided. Yet in the last-mentioned case the defendant having died in execution, the court held that the plaintiff had no further remedy. In Foster v. Jackson (1613) Hob. 52, 57, where the same point arose, Chief Justice Hobart makes the same decision, and in the course of an elaborate opinion approves the Cases of Blumfield, and Jones and Williams, but condemns the dictum which accompanies them. Since then, in Sir Edward Coke's Case (1624) Godb. 294, and in Cave v. Fleetwood (1630) Litt. 325, it was pronounced "not to be law," and in Taylor v. Waters (1816) 5 Maule & S. 103, where a similar point arose and counsel urged its authority, it was wholly disregarded by the Court. From that time up to the present, though similar questions have frequently arisen, it is believed that this citation has never been offered to the consideration of an English tribunal.

Having disposed of this dictum, we will proceed to examine, first, those cases in which it has been held that the release of a debtor in execution by the plaintiff's consent, is a satisfaction of the judgment and execution, and also an extinguishment of the debt.

In Whiteacres v. Hamkinson (1627) Cro. Car. 75, one of two co-obligors pleaded that the other, being in custody in a suit upon the same bond, the sheriff permitted him to go at large, and upon demurrer, it was adjudged for the plaintiff; but, say the court, "if he had pleaded that the sheriff suffered him to go at large by the license or command of the plaintiff, it had been a discharge, and might have been pleaded in bar."

In Walker v. Alder (1649) Style, 117, the plaintiff consented to an interview with the defendant beyond the prison bounds, but having failed to come to an agreement, recommitted him. The court held that "the execution was discharged by the prisoner's going at large."

In Price v. Goodrick (1653) Style, 387, Chief Justice Rolle held that in a judgment against three, if one be taken and discharged with plaintiff's consent, the other two cannot be taken upon the same judgment.

In Basset v. Salter (1677) 2 Mod. 136, the decision in Walker v. Alder first above cited, is affirmed, and the court say, "He (the defendant), could never after be in execution at his suit for the same matter."

In Thompson v. Bristow (1743) Barnes, Notes Cas. 205, "the defendant was taken in execution, and was afterwards discharged by plaintiff's consent, and a written agreement was entered into by the parties, that the judgment should stand revived for twelve months. After more than a year from the last ca. sa., plaintiff caused defendant to be again taken in execution, without continuance on the rolls, relying on the written agreement. The court held the agreement to be null and void, and made the rule absolute to set aside the last ca. sa., and discharge the defendant out of custody."

In Vigers v. Aldrich (1769) 4 Burrows, 2482, the defendant was released on binding himself to pay the debt by instalments. Upon default, an action of debt was brought upon the judgment. "The court held this to be an absolute consent in the plaintiff to discharge the defendant out of execution, in consideration of a new agreement then entered into, whereby he was to receive several sums of money, instead of the person of the defendant (which was all that he could have had if he had kept the defendant in gaol,) and that he could not bring an action upon the judgment after the defendant had been taken in execution and discharged by the plaintiff's own consent, but ought to have brought a new action upon the case founded upon this new agreement." Yates, J., added, that he could not declare on the old judgment since it was necessary to allege that "it remained altogether unsatisfied."

In the leading case of Jaques v. Withy (1787) 1 Term R. 557, defendant was released

upon giving a bond with warrant of attorney for the debt. A technical error was committed in naming the court where judgment was to be confessed. The original judgment was attempted to be used as a set-off in another suit. Ashurst, J., ... "I know of but one case where a debtor in execution, who obtains his liberty, may afterward be taken for the same debt, and that is where he has escaped; but the reason of that is, because he was not legally out of custody. But where a prisoner obtains his discharge with the consent of the party who put him in execution, he cannot be retaken." Buller, J., ... "The case of Vigers v. Aldrich, 4 Burrows, 2482, goes to the whole length of this. For it shows that if a defendant has been once discharged out of execution, upon terms which are not afterwards complied with, the plaintiff cannot resort to the judgment again or charge the defendant's person in execution."

In Da Costa v. Davis (1798) 1 Bos. & P. 242, a bond was given conditioned to surrender the defendant, who had been discharged by consent of plaintiff, or pay the debt. The court held the first alternative of the bond was void, being to render a prisoner in execution who had once been discharged.

In Clark v. Clement (1796) 6 Term R. 525, there was a judgment and ca. sa. against Clement and English. English was arrested and afterwards discharged upon agreement with the plaintiff by which he bound himself to surrender, if the debt were not paid within a certain time. Clement then moved to quash the ca. sa. and enter satisfaction on the roll. Rule granted so far as to protect Clement from any arrest under the judgment. Upon non-payment, English being re-arrested, moved to quash the ca. sa. and enter satisfaction; citing the above cited cases of Thompson v. Bristow, Vigers v. Aldrich, Jaques v. Withy. Rule made absolute.

In Tanner v. Hague (1797) 7 Term R. 420, the defendant was released upon agreeing to pay the debt at a future day. On non-payment fi. fa. issued, which the court set aside because "the plaintiff received a satisfaction in law by having his debtor once in custody on execution."

In Blackburn v. Stupart (1802) 2 East, 243, the defendant was released upon agreeing to pay the debt at a future day or consent to execution issuing against his person or estate. Upon non-payment he was arrested, and paid the debt to procure his discharge. This was a rule to set aside the execution, and that the money in the sheriff's hands should be refunded. The court made the rule absolute, and Grose, J., said, "a person cannot be taken in execution twice on the same judgment, whether he had so agreed or not."

In Goodman v. Chase (1818) 1 Barn. & Ald. 303, the defendant agreed to pay the debt and costs, provided his son then in execution for them should be discharged. The case turned upon the question, whether this promise of Chase, Sr., was within the statute of frauds. Lord Ellenborough, C. J.: "By the discharge of Chase, Jr., with the plaintiff's consent, the debt as between those two persons was satisfied. No case can be cited in which such a discharge has not been held sufficient. Then if so, the promise by the defendant here is not a collateral, but an original promise, for which the consideration is the discharge of the debt as between the plaintiff and Chase, Jr."

In the case of Ballam v. Price (1818) 2 Moore, 235, it was held to be "quite clear that the discharge of one operated as the release of both the defendants." And to the same effect is Eales v. Fraser (1843) 6 Man. & G., 755.

In Herring v. Dorrell (1840) 4 Jur. 800, where two were in prison, and one was discharged by the plaintiff's consent, Coleridge, J., held that the other was entitled to his discharge as of course, and there was no consideration for a promise made by him in order to procure it.

In Denton v. Godfrey (1847) 11 Jur. 800, the facts were similar to those in Clark v. Clement, and on application made, the same rule was made absolute as to the defendants not arrested.

This branch of the case may be satisfactorily summed up by a citation from the First Report of the common law commissioners (1851) Law Com'rs Report, p. 48, at the head of whom was the present Lord Chief Justice Jervis. After recommending that authority be given the plaintiff's attorney to consent to the discharge of a defendant in execution, they proceed to say (15 Law Mag. pp. 132, 133), "but as a discharge by the creditor's authority from custody on a writ of execution, is a satisfaction of the debt, we think the authority should only be binding, so far as the sheriff is concerned, leaving it to the parties to contest the right of the attorney to give the discharge." Such an incidental recognition of the law, coming from so high an authority, proves in the most conclusive way, how thoroughly it is established in England. It remains,

II. To examine into the effect of an arrest and imprisonment upon a ca. sa. generally; the position of the defendant being, that such an arrest and imprisonment, if regular, constitute a perfect satisfaction, so long as the imprisonment continues, and that the nature of the satisfaction can only be impaired by an interruption of the imprisonment through the tortious act of the defendant himself, or the operation of the law in invitum, as against the plaintiff.

In Y. B. 33 Hen. VI. (1455) p. 48, it is said by Davers: "Suppose a man recover against me and take my body in execution, he shall have neither elegit nor fi. fa., nor any other execution, because this amounts in law to satisfaction." So in Y. B. 13 Hen. VII. (1498) p. 1, it is said by Keble: "If on a ca. sa. the sheriff return cepi corpus, the plaintiff shall

never have another ca. sa., for he learns from the return of the sheriff that he was in execution, and then he had the object of his suit."

The most carefully considered case on this whole subject is Foster v. Jackson (1613) Hob. 52, where the defendant died in execution, and the plaintiff brought scire facias against his executors. After examining Blumfield's Case and reviewing the whole subject at length, Chief Justice Hobart says: "But now singly out of the very point, I hold that a capias ad satisfaciendum is against that party as not only an execution, but a full satisfaction by force and act and judgment of law, so as against him he can have no other nor against his heirs or executors, for these make but one person at law." And in concluding he lays down the broad principle on which many of the decisions already referred to are based, especially those where an agreement to surrender has been held to be void, "that the body of a freeman cannot be made subject to distress or imprisonment by contract, but only by judgment."

The law as thus laid, governed all subsequent cases of death in execution until parliament interfered, and by the statute of 21 Jac. I. c. 24, gave the creditor a further remedy against the estate of the deceased.

In Burnaby's Case (1726) 1 Strange, 653, the plaintiffs having the defendant in execution, afterwards petitioned as creditors for a commission of bankruptcy, but the lord chancellor held, "that the body of the debtor being in execution, it was a satisfaction of the debt in point of law, so that they were not creditors who could petition."

And in Horn v. Horn (1749) 1 Amb. 79, Lord Hardwicke, distinguishing between law and equity, says: "The body being detained is not in this court a satisfaction; the reason is because he is detained for the contempt; but at law the detaining the body is a satisfaction, and you cannot afterwards take his goods."

Taylor v. Waters (1816) 5 Maule & S. 103, was assumpsit by one in prison; a set-off was pleaded, and it was replied that the debt so pleaded, was the same for which the plaintiff was still in custody. Lord Ellenborough held that "the taking of the body in execution does not extinguish the debt, but it bars the remedy against the debtor, and in like manner precludes a set-off against him." Here the defendant being still in custody, the debt is not yet extinguished, but the plaintiff has no other remedy, since he is in the actual receipt of satisfaction, and has the means in his control of continuing that satisfaction till it becomes complete.

In Ex parte Knowell (1806) 13 Ves. 193, after a commission of bankruptcy issued, the plaintiffs committed defendant on ca. sa. The chancellor refused to allow them to prove under the commission, since their act "operated as a discharge." This is a peculiarly strong case because the arrest was made at the request of the assignees to compel the debtor to make certain conveyances.

In Franklyn v. Thomas (1817) 3 Mer. 225, in consequence of delay in filing a bill for a common injunction to stay proceedings at law, the plaintiff at law was enabled by demurring to the bill to gain time enough to take the defendant (Franklyn) in execution. The demurrer being subsequently overruled, Franklyn demanded to be put in the same position he would have occupied, if there had been no demurrer. Lord Eldon says (Id. 233): "It is true that when goods have been taken in execution, that may be easily set right. But here the taking in execution is a discharge of the debt." And on a subsequent day he says (Id. p. 234): "The order therefore to be made in this should be, that he shall be discharged on undertaking to again confess judgment, so that he may not afterwards say, the existing judgment and debt has been satisfied by the execution, from which he is now discharged." Accordingly, the order, which is reported at length (Id. p. 235), was prepared with evident solicitude to avoid on the one hand any implication of a continuing liability upon the old judgment, which was discharged by the release, and on the other to secure to the plaintiff at law, a new and original contract of equal value, accompanied by a warrant of attorney authorizing the confession of a new judgment in the same amount as the former.

A similar question recently arose in the case of Money v. Jorden, 20 Law J. Ch. 174, 15 Jur. 49, 13 Beav. 229, 1 Eng. Law & Eq. 146 (1850), and Lord Langdale relied on the case of Franklyn v. Thomas, and directed the same order to be made.

In Beaven v. Robins (1826) 8 Dowl. & R. 42, a plaintiff who was in execution for the costs of a former suit, brought a second action for the same cause, and the court refused to stay proceedings in the second until the costs of the first were paid. The imprisonment was sufficient.

The above cases not only sustain the position to which they are cited, but they also prove that it is not merely a sharp point of law, adhered to out of respect for ancient authority, but that it has been treated at all times, both by the judges at law and by chancellors, as a well-founded principle, to which a controlling force should be given in every case where it is either directly or collaterally involved. The original debt has uniformly and for all purposes for which it has ever been attempted to be used—whether as a set-off, the foundation of an assumpsit, or of a claim in bankruptcy—been held to be satisfied and the judgment to be valueless.

So far as the examination of the English law is concerned, it only remains,

III. To examine some particular cases, which are considered by the other side as exceptions to the general rule, but which in reality go far to illustrate and strengthen it.

1. Cases of escape. By the oldest authorities (Brooke, Execution, pl. 79; Y. B. 33 Hen.

VI. p. 47), an escape was considered as effectual a discharge of the debt as a release, and Blumfield's Case is the first decision to the contrary. The opposite doctrine was finally established in Whiteacres v. Hamkinson (1627) Cro. Car. 75; and the reason of it was given by Ashurst, J., in Jaques v. Withy (1787) 1 Term R. 557: "I know of only one case where a debtor in execution who obtains his liberty may afterwards be taken again for the same debt, and that is where he has escaped; and the reason of that is because he was not legally out of custody." The result of these cases then is, that where the prisoner has escaped of his own wrong, although the satisfaction which the plaintiff was receiving is temporarily interrupted in fact, yet in intendment of law the defendant is still in custody and may be retaken.

2. Cases of rescue, which depend upon the same principle as those of an escape. Jaques v. Withy; Lark's Case (anno 1430) 1 Hats. Prec. p. 17; Atwyll's Case (anno 1478) Id. p. 48; May, Prac. Parl. p. 107; 1 Hats. pp. 153–157; May, Prac. Parl. (anno 1603) pp. 113, 114. The defendant was never, in contemplation of law, out of custody.

3. Arrest of privileged defendants. The arrest of a member of parliament has from the earliest times been held irregular; and it was occasionally doubted whether such an arrest, followed, as it necessarily was, by a discharge, either upon writ of privilege or without it, did not operate like a release by consent as a total discharge of the debt. Thus, in the celebrated Case of Sir Thomas Shirley, Hatsell says: "It appears that the principal difficulty attending the release of Sir Thomas Shirley was the same that had occurred in the former cases of this nature, viz., 'That the warden would have been liable to an action of escape, and the creditor would have lost his right to an execution.' Nor was it in the power of the house of commons alone to give any security upon either of these points; it therefore became necessary in this case, as in the instances of Lark, Atwyll, &c., to make a particular law 'to secure the debt of the creditor, and to save harmless the warden of the fleet,' and in order to avoid this difficulty for the future, it was thought expedient to pass the general law of the first of Jac. I. c. 13." This act, after reciting that "doubt hath been made, if any person being arrested in execution and by privilege of either of the houses of parliament, set at liberty, whether the party at whose suit execution was pursued, was for ever after barred and disabled to sue forth a new writ of execution in that case," enacts, that after the expiration of the privilege, the party may sue out another writ of execution with the same effect as if the first had never issued.

The material question here is, to determine upon what grounds a second ca. sa. was in any case of privilege allowed to issue. In the case of Cassidy v. Steuart (1841) 2 Man. & G. 437, where the whole subject was examined with great research, the judges were all of opinion that the first ca. sa. was irregular and illegal. Bosanquet, J., says: "The arrest, therefore, of a member of Parliament would clearly be an illegal act. Page 471. But if the thing ordered to be done be illegal, the order must also be illegal." In the earlier privilege case of M'Cormick v. Melton (1834) 1 Cromp. M. & R. 525, 5 Tyrw. 147, 3 Dowl. (House of Lords) 215, Lord Lyndhurst, speaking of the effect of such a ca. sa. as between the parties, plaintiff and defendant, uses the strong language that "a writ set aside for irregularity is a nullity and void, and is no satisfaction of the judgment." Collins v. Beaumont, 10 Adol. & E. 225; Towers v. Newton, 1 Adol. & E. (N. S.) 319; Barrack v. Newton, Id. 525; Merchant v. Frankis, 2 Gale & D. 473. And this is the generally received law as between the parties, although the apparent regularity of the writ may be a sufficient protection to the officer serving it.

The case of privilege then as affecting the service of a ca. sa. is simply this: A plaintiff in possession of a valid judgment undertakes to enforce it by issuing an irregular and illegal execution, which, in the words of Lord Lyndhurst, is a mere nullity, and upon this writ the defendant is arrested, and of course discharged. It is evident that the first ingredient of satisfaction is wanting. The case is exactly the converse of an escape, for as in the one, the defendant, in the words of Ashurst, J., was never legally out of custody, so here he was never legally in custody. A good judgment cannot be satisfied, nor a valid debt extinguished, by serving an irregular, illegal, and void execution. This ruling is by no means peculiar to the case of privilege. As early as the case of Sir William Fish v. Wiseman (1627) Godb. 371, Dodderidge, J., stated the general principle in language quite as strong as Lord Lyndhurst's. "If the execution be lawful, and upon lawful process, and the party be delivered out of execution, then he shall not be taken again in execution. But if he be taken in execution upon an erroneous process, if he be delivered out, he may be taken again in execution; for the first execution is erroneous, and is no record, being reversed."

4. Cases of discharge from imprisonment by the Lord's act, &c. The discharge in these cases has always been held to be the act of the law, and not to imply any consent on the part of the plaintiff. In compliance therefore with the old maxim, the courts have taken care that this act of law shall in no way injuriously affect the plaintiff's rights. Thus in Nadin v. Battie (1804) 5 East, 147, where two were in prison, and one was discharged because of the plaintiff's refusal to pay the prison charges, Lord Ellenborough, on an application to discharge the other, decided that "the discharge cannot be said to have been with the plaintiff's assent, because he did not choose to detain the party

in prison at his own expense. Nor can the law, which works detriment to no man, in consequence of having directed the discharge of one defendant, so far implicate the plaintiff's consent against the fact, as to operate as a discharge of the other." The same, as will be seen hereafter, has been the ruling of the American courts, and for the same reasons here assigned.

5. Cases of debts payable by instalments. Davis v. Gompertz (1833) 2 Nev. & Man. 607. Where the judgment is to be satisfied by instalments, and execution is to issue upon non-payment of any of the instalments, it is held that a release from imprisonment upon one instalment with the plaintiff's consent, will not affect the remedy or bar the execution upon a second instalment. This is expressly upon the ground that the two executions are not for the same debt. Such was the principle that governed the case of Atkinson v. Bayntun (1835) 1 Bing. N. C. 444, which has been relied upon as an authority against the appellee. The defendants were in execution on one instalment, and a third party agreed upon consideration of their release, to be responsible for their appearance, should they become liable to a second execution. Such second execution having issued and the defendants not appearing, this action was brought upon the agreement. It was contended that the agreement was void at law; but per Tindal, C. J., * * * "There is no statement here from which we can infer that the debtor was to be charged a second time, in respect of the same sum for which he had already been in custody. On the contrary, by pursuing the calculation suggested by the agreement, it appears that the second execution was for a sum and a subject-matter different from the original one." Park, J. "It was the duty of the defendant to make it clear that the second execution was for the same sum, as much as if there had been an actual recaption, and the defendant had come before the judge to be discharged on account of a second arrest. Not having done so, it appears to me clear that the plaintiff is entitled to judgment." Vaughan, J. "It is clear that the second execution was not in respect of the same sum as the first." Bosanquet, J. "It was incumbent on the defendant, in order to raise any appearance of an answer to the plaintiff's claim, to show that the two sums were the same. Not having done that, and it being compatible with the whole of his statement that the sums should be different, our judgment must be for the plaintiff."

6. It may be proper, in this connexion, to notice the case of Baker v. Ridgway, 2 Bing. 41, 9 Moore, 114, which has also been cited on the other side. The defendant was in custody under a ca. sa.; a commission of bankruptcy was issued against him; the plaintiffs were compelled, by the St. 49 Geo. III. c. 121, to discharge him out of custody, before they could be admitted to prove their debt under the commission; the commission was afterwards superseded on the ground of irregularity; and the defendant was again arrested. Affidavits were submitted by the plaintiffs, and relied on by the court, tending to prove that the irregularity by which the commission had been avoided, was the result of fraudulent collusion between the debtor and a portion of his creditors. This was a motion to discharge the defendant, and enter satisfaction upon the judgment. The rule was discharged. Such being the facts, it does not seem that the case differs materially from that of an escape. It was, in reality, an escape effected by an abuse of the forms of law, and the same may be said of it, as Ashurst, J., said of Jaques v. Withy: "The defendant was never legally out of custody." At any rate, he was never discharged by the consent of the plaintiff. That these were the grounds of the court's opinion, may be seen from many of the remarks reported by Bingham—thus Best, C. J. (page 46): "If this discharge has been obtained by a fraudulent commission, and the plaintiff has afterwards been cheated by a supersedeas out of the benefit sought by the proof of his debt, the defendant may be taken again, because the fraud has avoided the whole transaction, and the defendant has never been legally out of custody." Burrough, J. (page 48): "With a view to the privileges secured by that act (Sir Samuel Romilly's), a commission superseded, is equivalent to no commission. The plaintiffs who proved, have been induced by a force on their minds, to discharge the defendant." Whatever may be thought, however, of the grounds upon which the rule was discharged, the value of the decision as an authority, is seriously weakened by the manner in which it was extorted from the court. Best, C. J., himself says (page 46): "However, I consider myself no more bound by a decision delivered in the present summary mode of treating the question, than I should be by an opinion delivered at nisi prius."

From all the cases, then, we draw the conclusion that the English law is, and has been for more than four centuries, that the writ of ca. sa. is the highest sort of execution known; that it is capable of affording the plaintiff complete and absolute satisfaction, and that its execution will satisfy the judgment and extinguish the debt, unless this its regular legal effect be avoided by some after contingency. The only after contingencies, whether existing at common law or provided for by statute, which are allowed to have this effect, are an escape by the defendant's own wrong or effected by his actual fraud; a rescue; an avoidance of the writ for irregularity; an enlargement of the prisoner by act of law; or (since 21 Jac. I.) his death in execution. Upon the happening of any of these contingencies, the plaintiff having been deprived, without his own default, of the complete satisfaction to which his writ entitled him, the law will supply him with other

means of enforcing it. Archb. Com. Law Prac. (Ed. 1853) p. 257; Sewell, Sher. p. 198. If, however, after the execution of the writ, the plaintiff voluntarily consent to the discharge of the defendant from custody, while by such execution and discharge the judgment is satisfied and the debt extinguished at law, so the plaintiff's consent operates further as a confession of such satisfaction, and if properly presented to the court, will be entered of record on the roll. The policy of the law, moreover, prohibits the defendant from entering into any agreement by which the judgment or debt, upon which he is in custody, shall, for any purpose whatever, be made to survive his release, and pronounces all such agreements null and void. Nevertheless the discharge of the defendant shall be a good consideration for an original and independent contract, which, if afterwards violated, may be enforced by new proceedings. This last rule avoids the hardship to which creditors might otherwise, even against their inclination, be compelled to subject their imprisoned debtors, who are unable to liquidate their debt by actual payment, but can give satisfactory security in consideration of a discharge.

We have next to ascertain whether the American courts have adhered to the doctrines of the common law as expounded in England. The precise question as to the effect of the voluntary discharge of the debtor from custody, has, it is believed, never been decided by this court. But in two cases, the nature of the writ of ca. sa. has been incidentally discussed in the supreme court of the United States, so far as it bore collaterally upon points then before it. It was only necessary, therefore, to enter into this subject, and to press the conclusions far enough to meet the particular question presented. Thus, in U. S. v. Stansbury (1828) 1 Pet. [26 U. S.] 573, the question before Chief Justice Marshall was, whether the rights of a particular debtor were to be governed by the common law or by an act of congress. Having decided in favour of the latter position, he waives all argument upon the common law, and introduces his opinion by stating it in a form that was unquestioned on either side: "It is not denied, that at common law, the release of a debtor whose person is in execution, is a release of the judgment itself. Yet the body is not satisfaction in reality, but is held as the surest means of coercing satisfaction. The law will not permit a man to proceed at the same time against the person and estate of his debtor; and when the creditor has elected to take the person, it presumes satisfaction, if the person be voluntarily released. The release of the judgment is therefore the legal consequence of the voluntary discharge of the person by the creditor."

So, in the late case of Snead v. M'Coull (1851) 12 How. [53 U. S.] 407, the question was, whether a creditor's lien upon the lands of his debtor could survive the execution of a ca. sa. upon his person. Judge Daniel, delivering the opinion of the court, after showing that no lien on lands can be of superior binding force to that of an elegit, the capacity to issue which never survives a fully executed ca. sa., incidentally alludes to the nature of this latter writ, and the effect of a plaintiff's voluntarily releasing a defendant who is in custody under it. In so doing, he cites at length the strong language of the lord chancellor in Ex parte Knowell, and refers to the leading English cases of Vigers v. Aldrich, Tanner v. Hague, and Blackburn v. Stupart, already cited by us.

But, in U. S. v. Watkins [Case No. 16,650], the subject was fairly brought before the circuit court of the United States for the District of Columbia, and Chief Judge Cranch, in an opinion, in which almost every English authority is examined, sustains all the positions taken by us as to the English law, and recognises them as forming part of the law of Maryland, and therefore binding in the District of Columbia.

Since this decision, the case of Harden v. Campbell (1846) 4 Gill, 29, has been adjudicated in Maryland, and Chief Justice Martin sustains the conclusions arrived at by Chief Judge Cranch.

The case of Snead v. M'Coull, 12 How. [53 U. S.] was decided upon the law of Virginia, and the authorities of that state will be found peculiarly strong. Thus, in Windrum v. Parker (1830) 2 Leigh, 361, Carr, J., says (page 367): "That the levy on a ca. sa., and the release of the debtor from execution by the plaintiff or his agent, is an extinguishment of the debt, I have considered to be as well settled as any point can be, by an unbroken series of decisions." And in Noyes v. Cooper (1834) 5 Leigh, 186, Brockenbrough, J., says: "It has undoubtedly been established by a series of decisions, that where a defendant in execution under a ca. sa., has been discharged from his imprisonment by the direction or with the consent of the plaintiff, no action will ever again lie on the judgment, on which the execution is founded. Nor can any new execution ever issue on that judgment, even though the defendant was discharged on an express understanding on his part, that he should be liable again to be taken in execution, on his failure to comply with the terms on which the discharge took place."

In Massachusetts, Chief Justice Parsons, in the early case of Forster v. Fuller (1809) 6 Mass. 58, decided that a plaintiff who discharges his prisoner, "has no remedy on his judgment." So in King v. Goodwin (1819) 16 Mass. 63, the court were all of opinion, "that the debtor being committed to prison in execution, and liberated therefrom by the creditor, the judgment was satisfied, and a pluries execution upon which the levy on the land was made, was void." The same doctrine is affirmed in general terms in Dodge v.

Doane (1849) 3 Cush. 463, and in the last case (Coburn v. Palmer (1853) 15 Law Rep. 629), upon this subject, the supreme judicial court of Massachusetts, through that sound and discriminating judge and writer, Metcalf, C. J., use the following language: "But a commitment in execution is a discharge of the judgment, when the creditor consents to the debtor being released from prison, though the consent be given on terms that are not afterwards complied with; or upon the debtor's giving new security, which afterwards proves to be worthless; or, though the release from imprisonment be upon the debtor's express agreement that he shall be liable to be taken again on execution, if he fail to fulfil the terms on which he is released. In none of these cases can the creditor (unless circumvented by fraud) maintain an action on the judgment, or lawfully take out a new execution. Nor can he set off the judgment in an action maintained against him by the debtor."

In Vermont the law was early established in the case of Bailey v. Kimbal (1813) 1 D. Chip. 151, where one of two prisoners was released by consent, and the other escaped. Judge Hubbard states the rule very forcibly: "Where a debtor in prison is discharged from his imprisonment by the creditor, he cannot be retaken; it is a discharge of the debt itself. It is therefore immaterial to determine whether the escape of Jesse happened before or after the discharge of Stephen. The discharge of Stephen from his imprisonment being a discharge of the debt, must be good for him, and being so, it must be a discharge of all the defendants."

The same is the law in Rhode Island as is shown by M'Crillis v. Sisson (1840) 1 R. I. 143.

In New York the law has always been perfectly clear. In the early case of Yates v. Van Rensselaer (1810) 5 Johns. 364, the plaintiff agreed to enlarge the jail bounds, and afterwards the defendant escaped. The court held that the agreement was in effect a release from custody and the defendant could not be retaken. So in Cooper v. Bigalow (1823) 1 Cow. 56, where the defendant was discharged by consent, and the plaintiff attempted to use the judgment as a set-off. But the court held, that "the bodies of the defendants being in execution, this is in judgment of law, a satisfaction of the debt." And in Lathrop v. Briggs, 8 Cow. 171, and Ransom v. Keyes (1828) 9 Cow. 128, Judge Woodworth decides, in the clearest terms, that the release by the plaintiff's consent, either of the only defendant, or of one of several, is a discharge both of the judgment and the debt.

The law is the same in New Jersey, as shown by the cases of Miller v. Miller (1819) 2 South. [5 N. J. Law] 508; Strong v. Linn (1820) Id. 799; and Allen v. Craig (1833) 2 J. S. Green [14 N. J. Law] 102. In the latest of these cases, the court, where one of two defendants had been discharged with the plaintiff's consent, ordered the other to be discharged on motion, and satisfaction to be entered on the record, on condition that the said defendant would stipulate to bring no action on account of his imprisonment.

So, in Bowrell v. Zigler (1850) 19 Ohio, 362, the latest Ohio case on the subject, and which, under similar circumstances, was decided upon the same principle as the English case of Nadin v. Battie, Chief Justice Hitchcock says: "We suppose where a creditor causes his debtor to be imprisoned on execution, while the imprisonment continues it is a satisfaction. Or if the debtor is discharged with the assent of the creditor, it will operate as a satisfaction."

In Indiana, in the case of Prentiss v. Hinton (1841) 6 Blackf. 35, which is also similar to Nadin v. Battie, Sullivan, J., says: "The common law principle is that if a debtor, who is in custody under a ca. sa., be discharged with the plaintiff's consent, it operates as a discharge of the judgment."

So, also, in South Carolina, in the case of Eggart v. Barnstine (1825) 3 M'Cord, 165, Johnson, J., says: "By the common law, the discharge of a defendant, arrested on a ca. sa., was a satisfaction of the judgment."

The law of Pennsylvania in 1830 on this subject was the common law of England, and of the other American states, as laid down in the authorities we have already cited. In Freeman v. Ruston (1800) 4 Dall. [4 U. S.] 214, 217, the court said: "The law is settled in England that a ca. sa. operates as a satisfaction of the debt, as an extinguishment of the lien of the judgment. We have no other rule prescribed to us in Pennsylvania, nor can we conceive that there would be any policy or justice in departing from it. Sharpe v. Speckenagle (1817) 3 Serg. & R. 463, where the question arose as to the effect of a discharge under the insolvent laws of Pennsylvania, of a person in execution under a ca. sa. Chief Justice Tilghman said, "that the arrest on a capias ad satisfaciendum is in itself a satisfaction of the debt, is a position not to be maintained unless the plaintiff consented to the discharge; then indeed the debt is gone." The statute of 16th June, 1836, § 31, enacts, that "a judgment shall not be deemed to be satisfied by the arrest or imprisonment of the defendant upon a capias ad satisfaciendum, if such defendant die in prison, or escape, or be discharged therefrom by reason of any privilege, "or at his own request;" but the party entitled to the benefit of the judgment may have such remedies at law for the recovery thereof as he would have been entitled to if such capias ad satisfaciendum had not been issued, &c. And the case of Jackson v. Knight, 4 Watts & S. 412, so much relied on by the other side, was decided in 1842, and was governed by this act. The agreement to discharge the defendant from imprisonment was dated 10th October, 1840, and on the argument the counsel for the plaintiff in error cited the section above quoted.

II. There is no fraud nor any such mistake in the case as equity will relieve against. If there was a fraud, it was one practised by the plaintiff on himself. His own attorney drew this agreement exactly as he saw fit. He was not bound to draw it at all. He did it advisedly, of course. It is not only signed by him, but in his handwriting. To impute the successful perpetration of a fraud or a palpable ignorance of the rudimental principles of law and practice in the case of counsel so advised, so practised and so eminent, is what we should be slow to do ourselves, and what we will not suffer the other side so greatly to underrate the ability of our older and very able bar—as to do, even where they are without any other resort of argument.

GRIER, Circuit Justice. The bill is undoubtedly drawn with much ingenuity, and in view of the difficulties in which the learned pleader saw it to be encompassed. He has, therefore, by allegations of fraud and mistake, endeavoured to draw the case within those well known heads of chancery jurisdiction. But the facts and circumstances stated in the bill, show that there was neither fraud nor mistake in the case.

If a man, ignorant of the law that the release of one joint debtor is a release of the other, should give such a release, equity will not interefere to protect him against the legal consequences of his act. Hunt v. Rousmaniere, 1 Pet. [26 U. S.] 1. And even if the mere allegation of a mistake of the law would give jurisdiction to courts of equity, and be a sufficient ground for relief, the documents connected with this transaction, being executed by most able and learned counsel, leave not the slightest room for any pretence of a mistake of the law. On the contrary, it will appear (as we shall show) that they were fully aware of the legal effect and consequences of the voluntary discharge of the defendant from imprisonment, and obtained all that they expected to obtain by his arrest.

Assuming, for the purposes of this case, that if the defendant had obtained his discharge from the arrest by fraud and deceit practised on the plaintiff, equity would interfere and annul the discharge so obtained, as to all its legal effects prejudicial to the defrauded party; yet the facts stated in the plaintiffs' bill do not allege such a case. Thomson made no false representations in order to obtain his discharge; he made no concealment of his property; he gave security to pay the value of the property settled on his wife, if it should be determined that the property was liable to the payment of such debts; he fulfilled his contract in good faith. These facts are all admitted by the bill which sets forth the agreement. But the imputation of fraud, which it is supposed will justify the interference of a court of equity, is the fact that the defendant and plaintiff differ in their construction of the intention and legal effect of that agreement. And the bill prays that the defendant may be enjoined from setting up his construction of it in a court of law, by way of defence to the plaintiffs' claim. Much as this bill has been seasoned with the phrases "fraudulently, deceitfully," &c.; this is, in fact, all the fraud imputed to the defendant. A court of equity, when examining a bill of complaint to find a grievance which will justify its interposition, looks to the substantive facts averred in it, not to the adjectives or adverbs which may be added to qualify them.

The case presented by the bill, stripped of all unnecessary epithets, is, in short this: The complainants obtained a judgment against the defendant some twenty-five years ago. The only property in possession of the defendant, from which the judgment could in whole or in part be satisfied, was that contained in his marriage settlement, and conveyed for the trusts of that settlement. Whether this settlement was fraudulent or void as against creditors, and this property liable to be taken in execution, was a doubtful question. No bankrupt law was then in existence, by which the defendant could be compelled to assign for the use of his creditors, and thus have the question tried. The plaintiffs, therefore, arrest his body on a ca. sa.; the defendant proposes to give them security for the value of all the property contained in the marriage settlement, and all other of which he was possessed, if they will release him; and if, on the trial of an issue for that purpose, the court shall decide that this settlement was void, as against creditors, then the whole amount to be applied to the satisfaction of the plaintiffs' judgment.

By this contract the plaintiffs obtained a greater advantage than they could have expected from any general insolvent assignment. For if they had continued to hold the defendant's body, he might have made an assignment with preferences, and afterwards obtained his discharge under the laws of the United States. But by this contract they obtained all, even if that all turned out to be nothing. The chance of setting aside the marriage settlement was considered a good one, and well worthy of pursuit; while the expectancy dependent on the chances of his surviving his wife, and failure of issue, was held of no account.

We can see nothing in this transaction tending to show, either that the plaintiffs were not fully aware of the legal effect of the arrest and voluntary discharge of the defendant, or that, after having obtained from defendant an assignment with security to deliver all his property to the sole use of the plaintiffs' execution, they ever calculated on the probability or possibility that Thomson might thereafter acquire property, and be subject to future executions; or intended that this judgment should, notwithstanding his arrest and assignment, remain as an in-

cubus upon all his future struggles to amend his fortunes. Content with the surrender of all the property within the power and control of the defendant, they did not covenant for his future earnings or possible acquisitions, nor for the renewed imprisonment of his body at their discretion. It is not usual to exact such hard bargains. It was a case of actual mercantile bankruptcy, without a technical discharge under a bankrupt law; and we see no reason to believe that either party, at the time of the contract, had any intention that there should be any future recourse to the judgment. They took good security for the performance of the agreement which was the consideration of defendant's release, knowing that such a release would operate as a legal satisfaction of their judgment. The transaction was bona fide, without any suspicion of deceit, misrepresentation, or fraud, on the part of defendant. Why, then, should equity interfere, if the judgment stands satisfied at law?

When a plaintiff has a valid legal judgment, equity may interfere as ancillary to a court of law, to enable the plaintiff to reach means of actual satisfaction, which were beyond the grasp of an execution. But where a judgment is satisfied at law, equity will not interfere, unless where this satisfaction has been obtained by fraud or deceit, or made under some mistake of fact. As the facts exhibited by this bill, when severed from the epithets and adjectives used in framing it, show a transaction of which these qualities cannot be predicated; the defendant seems to have supported the first proposition of the hypothesis stated in their demurrer, viz., that if the arrest and discharge of defendant has operated as a legal satisfaction of the judgment, the plaintiffs have shown no sufficient ground for the interference of a court of equity. The second proposition, that if the arrest and discharge had no such operation in law, then plaintiffs have full and adequate relief at law, is one which needs no argument; and, as a necessary corollary, this bill would have to be dismissed.

But as the question as to the legal effect of this arrest and discharge will recur to us immediately, on the law side of the court, and as its decision cannot be avoided by leaving it to another tribunal; and, moreover, as it has been fully and ably argued by the learned counsel, it will be proper to notice it and state our conclusions.

The doctrines of law as laid down by Chief Justice Hobart, in Foster v. Jackson, Hob. 60, seem to have been sanctioned by the subsequent decisions in England and this country. Blumfield's Case, 5 Coke, 86b, reported by Lord Coke, which preceded it, is noticed in that decision. The difference of opinion between the learned judges, Coke and Hobart, as expressed in these cases, seems to have caused the statute of 21 Jac. I. c. 24, which gives an execution against a defendant's lands and goods, who has been arrested and died in prison. The question in Blumfield's Case arose, where the plaintiff had several judgments against joint and several debtors for the same debt. It was decided that the arrest and discharge of the defendant in one judgment was not actual satisfaction of the debt so as to bar an execution on the other judgment. The distinction between actual satisfaction as regards other parties bound for the same debt, and the legal and quasi satisfaction as between the parties, by an arrest and discharge of the defendant, is admitted in the case of Foster v. Jackson. To this extent Blumfield's Case has always been held as good law; but the other dicta and speculations of the learned reporter of that case cannot be received to affect the authority of the subsequent cases.

Without attempting to notice all the cases which are to be found in the more modern books of reports, the following may be stated as containing principles which have been universally admitted to be correct law, both in England and this country. They all proceed on the admitted axiom, that as between the parties, plaintiff and defendant, in the judgments, the arrest of the body of the defendant is legal satisfaction of the judgment, unless the party has been discharged by the act of God, or the act of law, without the plaintiff's consent.

Thus, in Vigers v. Aldrich, 4 Burrows, 2483, and Jaques v. Withy, 1 Term R. 557, it is decided, that if a defendant has been taken in execution and discharged on an agreement, the judgment is satisfied, and the action must be on the agreement. Clark v. Clement, 6 Term R. 525, and Tanner v. Hague, 7 Term R. 420, confirm the same doctrine. In Blackburn v. Stupart, 2 East, 243, reported by East, where the defendant was discharged on his agreement that he should be liable to be taken in execution again, it was held that the defendant could not be twice held in execution on the same judgment.

The question in the Pennsylvania case of Sharpe v. Speckenagle, 3 Serg. & R. 463, was, whether a discharge of the principal under the bread act, operated such a satisfaction of the judgment as could be pleaded by the bail in an action on his recognisance; and it was decided that it did not, on two grounds: 1st. Because the surety in a collateral suit could only set up actual satisfaction; and 2dly. The act of assembly permitting the discharge of the principal, provided that it should not acquit any other person bound for the debt.

This decision does not in the least deny the doctrine of the English case, Blackburn v. Stupart, already referred to and reported by East, but rather admits and affirms it. The other case, Jackson v. Knight, would, as a statement of common law doctrines, be somewhat anomalous; but this decision was after

the common law had been changed by statute, which allows another execution where the "defendant is discharged at his own request." The necessity for such a provision in the statute, is evidence of the state of the law antecedently.

If the plaintiffs in this case had exacted from the defendant, as the price of his discharge, not only an assignment of all his property, but also a covenant and agreement that the judgment should be considered as unsatisfied, and that his property and his body should be liable at any time thereafter to be seized in execution, we think it clear that this latter agreement would be treated at law as altogether void. The common law, while it gave the power to the creditor of seizing the body of his debtor in execution, discouraged the use of a power so liable to abuse. It treated such an arrest as the ultima ratio, the end of all executions on that judgment, and legal satisfaction of it; and while it left the imprisoned debtor capable of making any contract for future payment, as a consideration for his discharge by the creditor, it gave such creditor no further remedy than he could obtain by an action on such contract. An agreement made by the debtor, under duress of imprisonment, by which he should be again liable to imprisonment on the same judgment, was contrary to the policy of the law, and void. He was not permitted, when once in duress, to bargain away his liberty.

It is very evident, also, that an executory agreement which may be made the consideration of the discharge, even though indorsed on the execution, or filed in the court, can neither be treated as a judgment nor recognisance, or as matter of record of any description; and if it be not under seal, the action on it will be as liable to be defeated by a plea of the statute of limitations, as it would be on any other simple contract.

Now, the argument for the plaintiffs in this case assumes that the agreement was intended to give the plaintiffs a right to issue further executions on this judgment; and, as we have seen, if such were its literal tenor, it would be void. But we think it due to the plaintiffs to say, that a proper construction of this contract will vindicate them from the charge of exacting so hard a bargain from a debtor under duress of imprisonment, and more especially when the debt is one of suretyship only. Among mercantile men, if a debtor, and more especially a surety, surrenders all his present property to his creditors, it is not usual to exact a lien on his future acquisitions. This agreement, while it very properly demands, as the price of defendant's discharge, an assignment of all his property, and security for its delivery, in case the issue as to the validity of the marriage settlement should be adjudged in favour of plaintiffs, does not contain, in direct terms, any covenant that the arrest and discharge should not operate as satisfaction of the judgment, or that future executions might be issued on it. It merely states, in general terms, (what was no doubt a fact) that the agreement to release the defendant, was for his accommodation, and covenants that no "prejudice whatever should arise to the plaintiffs' right by the defendant's enlargement, or otherwise howsoever."

Now, the very learned counsel for plaintiffs, who dictated this instrument, well knew that this arrest and voluntary discharge of the defendant operated as a legal discharge of the judgment; and he knew, also, that a court of law would not regard any agreement for future execution made by a prisoner, as binding. He cannot, therefore, be presumed, by this very vague and indefinite language, to have intended what he was unwilling to express in plain terms, to wit, that the defendant having given good security for the delivery of all his property to plaintiff, as the price of his discharge, should nevertheless be liable to imprisonment the next day, or at any time thereafter. Yet such is the construction which it is now contended should be given to this language, a construction which makes the plaintiff take, and the defendant give, every thing for nothing.

What, then, may be supposed to have been intended by these words, "prejudice to the plaintiffs' rights?" When lawyers covenant about judgments and executions, they do not usually seek out such ambiguous and general phrases to express their meaning. What were the plaintiffs' "rights" which were the subject-matter of the contract? For to these must we look to ascertain the meaning of this clause. The right they contracted for, and for which they got security, was the application of all the property of defendant to their debt. Whether that all was much or little, cannot affect the case. They considered the marriage settlement as void; the chance of setting it aside valuable; and the chance. from the possibility of Thomson's survivorship, without children of the marriage, as nothing. They accordingly agreed, that if the issue should be decided against them, the "property should be entirely discharged." Knowing that the discharge of defendant operated as satisfaction of the judgment, they were anxious that the "rights" obtained by the contract as a consideration for it, should not be affected. The language used plainly indicates some uncertainty in the mind of the scrivener, whether the discharge might not be possibly set up as actual satisfaction of the debt, and not merely as technical satisfaction of the judgment. To guard against any such attempt to affect or injure the "rights" which were the subject of the contract, and guaranteed to plaintiffs by it ex majore cautelâ, was this language inserted in it. The words "otherwise, however," mean anything or nothing, and only tend to show that there was some vague notion of a possible legal

advantage which might be taken, and which the learned counsel could not foresee clearly, and thought might be excluded by these comprehensive terms.

The intelligent and honourable men who executed this agreement cannot be supposed incapable of expressing clearly their intention. Nor can we presume any intention to coerce the defendant into so hard a bargain, or conceal it under vague and ambiguous generalities, as a different construction of this agreement would import.

We are of opinion therefore: 1st. That the judgment against the defendant was legally satisfied by his arrest in execution and voluntary discharge. 2d. That this effect of his discharge was not affected nor intended so to be, by any thing contained in the agreement made on that occasion. 3d. That the bill shows no reason for setting aside this contract on the ground of fraud or mistake. 4th. That it is no part of the functions of a court of equity to enjoin a defendant from setting up a legal and just defence in a court of law, under the allegation that it is a fraud for him to differ with the plaintiffs in their construction of his contract. The defendant has as good a right to impute fraud to the plaintiffs for the construction they put upon it. The court imputes it to neither party, but dismisses the bill with costs. Decree accordingly.

[On appeal to the supreme court, the decree of this court was affirmed. 15 How. (56 U. S.) 281.]

MAGNIN (JURGENSEN v.). See Case No. 7,586.

Case No. 8,958.

The MAGNOLIA.

SHUTE v. GOSLEE (two suits).

[3 Am. Law Reg. 465.]

Circuit Court, E. D. Louisiana. Nov., 1854.[1]

COLLISION—MISSISSIPPI RIVER NAVIGATION — ASCENDING BOAT—UNCERTAINTY—CARE—LOOKOUT.

1. Duties of steamers in the navigation of the Mississippi.[1]

[See Bates v. The Natchez, Case No. 1,102.]

2. A steamer leaving the ordinary and usual track of vessels under the circumstances, is bound to show some palpable necessity for the deviation.[1]

3. An ascending boat, running at great speed in a dark night, at a time when a descending boat is visible, of whose course she is doubtful, takes the risk of a collision: she ought to ease or stop her engines, till she is assured of the course of the other.[1]

4. A steamer is responsible for a collision which a better lookout than she had might have prevented.[1]

5. Where a collision is produced by the fault of one boat, she cannot complain that the other had not used extraordinary measures of precaution before, or the clearest judgment in the selection of the method of extrication after, the collision became imminent.

[1] [Affirmed in 18 How. (59 U. S.) 463.]

In admiralty.

CAMPBELL, Circuit Justice. These are cross appeals from a decree of the district court, pronouncing a division of the damages sustained by the respective parties in a case of collision. In February, 1851, the steamboat Autocrat, (of the largest class,) bound on a voyage up the Mississippi river, had a collision with the steamboat Magnolia, (of the same class,) near Butler's plantation, in the parish of Iberville, and was sunk, occasioning the death of several persons and the loss of the boat. The libel charges that the Magnolia was seen rounding out from Robertson's wood-yard, on the east bank of the river, and going apparently square across. That the pilot of the Autocrat tapped her alarm bell, to signify her intention to go to the right, and proceeded towards the east bank; and then the Magnolia tapped her bell, signifying her intention also to go towards the east bank, and did so accordingly;—thus the boats were brought into collision by this unskillful or reckless procedure. The Magnolia answers, that she was rounding out from Robertson's wood-yard, on the starboard wheel only, and had reached to near the middle of the river, and was nearly stationary, her head pointing down, when the Autocrat, with a full head of steam and with great rapidity, "came upon her"—that the Autocrat left her usual and proper track without any necessity, to come upon the proper track of the Magnolia, and in disregard of the signal bell, which she rang upon the first perception of this movement. This abandonment of the proper track of the Autocrat, and this neglect of the signal bell, are pleaded as the causes of the great calamity. The officers of the respective boats who were on duty at the time, have been examined, and to them we are indebted for an account of what took place. I conclude from that testimony, that the collision took place a short distance above Butler's house, about one hundred miles from New Orleans, and near the middle of the river; that when the Magnolia left Robertson's Landing the Autocrat was crossing from the head of Bayou Goula bar to the western bank of the river, with the view of prosecuting her voyage along that bank, aiming to come close to it, near Butler's house, and was, when first seen, nearly two miles from the Magnolia; that when the Magnolia commenced her movement this purpose of the Autocrat was discovered, and that her officers acted upon that conclusion, and that the fact that the Magnolia was a descending boat, was ascertained by those aboard of the Autocrat when she was a mile distant; that the course of the Autocrat was about midway between the west bank and the middle of the stream until the signal bell referred to in the libel was rung, and that her velocity was fully ten miles an hour. In reference to the signal bells, in comparing

the different accounts, my conclusion is that the bells were rung almost simultaneously, the Autocrat ringing hers first, but that the signal of the Magnolia was not rung as a reply, but that it was an anxious, convulsive movement, to warn the Autocrat of the imminent risk and peril of the course she was taking, and to admonish her to desist, rather than a response. I cannot understand the evidence of the officers of the Magnolia to bear any other interpretation. The pilot of the Autocrat furnishes the following explanation of his conduct: "They were pretty nearly a mile apart, when he made up nis mind she (Magnolia) was a descending boat, from the way she was worked. It was then witness varied his course from the line leading to X, (a point on the map near Butler's and near the west bank,) and straightened the Autocrat up stream so as to give the descending boat room to pass on the right shore. If witness had not varied his course under this impression, and with the desire to give more room to the Magnolia, but had continued on to the letter X, he thinks the collision would not have taken place, as the Magnolia continued rounding out into the middle of the stream. But if he had gone to letter X, and she had continued down the river and kept the shore, as I supposed she would do, we would most inevitably have come together, and it was to avoid this that I diverted from the course to the letter X." We have here an explanation of the conditions in which the Autocrat was placed, the motives which they originated with her pilot, and the conduct which resulted. The testimony proves that the pilot misconceived the design of those who managed the Magnolia. This is shown by his own statement. He says "up to the time he rang the signal bell he thought the Magnolia was going into the right shore, but perceiving from her bow that she was leaving the bend, or the west bank, I rang the signal bell." He was also mistaken as to the mode in which the Magnolia was managed, and her rate of speed—for he "judges that both boats were running at the same rate of speed." These misconceptions require me to examine into the condition of the boat in reference to watches and assistance available to the pilot. The captain of the Autocrat was not on duty. The mate who supplied his place, "was sitting behind the chimneys," and was only aroused by the tapping of the bell of the Magnolia. He then came forward, but so little did the pilot profit by his presence, that he testifies the mate went below at this critical moment. There was a watchman in the pilot-house, but he seems to have said nothing. The mate and watchman, however, testify they had observed the Magnolia was moving on one wheel, and the engineer had no doubt, from her movements, that she was a descending boat. The inquiry will arise, whether the Autocrat, "which does not answer her wheel readily," was sufficiently supplied with efficient and active officers and men at this time. For the present, we will consider the facts contained in the statement I have quoted from this testimony. The course from which the pilot departed was certainly the correct one. He says, "the line witness has marked on the map, terminating at X, he would have run if the river had been entirely clear and he had no boats descending. That is the usual course for ascending boats of the Autocrat's size at the then stage of the water." The pilot, Paris, also of the Autocrat, says: "In running the river at the stage of the water at the time of collision, witness has been in the habit of holding a straight course from the head of Bayou Goula bar to the point above Butler's house, falling in to the left shore, ascending, about Butler's house, and this is the usual manner of running the river at that point at low stage of water."

These opinions are sustained, and the evidence of the practice supported, by the mass of the pilots who have been examined. This narrows the inquiry to an examination of the causes for the deviation in the circumstances of the particular case. The Magnolia had an equal right to pursue her voyage, and was subject to the same conditions as the Autocrat, to adopt the ordinary and reasonable precautions, which skill and experience had ascertained, to avoid disasters. When her officers came to the deck to arrange for their departure from Robertson's, they were to consider whether the necessary evolution of bringing her out and around, could be performed without crossing the track of the Autocrat, and without awakening a well-grounded apprehension of such a peril. The Autocrat was within sight, and had indicated her character as an ascending vessel. It is a favorable circumstance in the case of the Magnolia, that both her pilots were now on deck, and her movements were conducted at first under the observation of both, and also, that the captain was at his place and attentive to his duty. No doubt seems to have been felt by either of these experienced men, that they could bring their vessel to its proper place without peril; and the result shows that she performed her circuit and was in the middle of the stream when the collision occurred, and was nearly abreast of the point X, on the west bank, to which the Autocrat had been directed. In this connection the statements of the protest of the officers of the Autocrat and of the witnesses, to the place of collision, are important. There is, too, the confession of the pilot, that but for his deviation there would have been no collision. Was the movement of the Magnolia proper, and properly performed? It is a fact to be noticed, that neither in the protest, nor in the libel, nor in the testimony of the pilot of the Autocrat, who was on duty, is there any complaint of the departure of the Magnolia from the landing in the manner and

at the time it was performed. The attention of the pilot at the wheel was brought directly to the point, and his answers are clear and exculpatory. He says: "Witness would have done as the pilot of the Magnolia did to get her head down stream, from leaving the wood-yard." He describes the manoeuvre he would have executed, corresponding to that performed by the Magnolia. The pilot, Robb, of the Magnolia, says: "From what I saw of the collision, I believe the Magnolia was managed as well as she could have been. In descending the river at that point, boats keep in the middle of the river; the ascending boat, at that stage, crosses over into the bend, just above Bayou Goula, and runs the right shore for four or five miles. In saying everything was done that was proper, by the Magnolia, to avoid the collision, I say the engine was stopped ready to back, and the boat was in her right place in the middle of the river, and on her right course." The pilot, Duffey, examined for the libellants, says: "The proper course for an ascending boat, at Butler's, and for a mile above, is close in to the left shore, ascending; at Butler's, the descending boat should be about the third of the river from the Butler shore, with her head pointing about one hundred yards above Bayou Goula bar." The pilot, Scott, says: "The descending boat, about Robertson's wood-yard, ought to be in the middle of the river." Captain Thomasson, of the Magnolia, says: "The Magnolia was in about the middle of the river at the time of the collision, if anything slightly nearer the Butler shore, just in the position she would have been, as a descending boat, if she had not made a stoppage, except her head was pointing, &c., &c." The weight of the testimony is, that under ordinary circumstances, the middle of the river is the proper place for the descending boat at this place. But it sometimes happens that the descending boat, for business objects, or to take the bend below, crosses to the western bank, and in the present case a recollection of this influenced the pilot of the Autocrat. The allegation of the libel is, that the Magnolia was apparently going square across the river. The officers of the Magnolia disprove this allegation, and say there was no design to cross the river; that she moved with one engine, her larboard engine being at rest, and that they came around as quickly as possible, "rounding all the time," and were ready to go ahead when the diverging movement of the Autocrat was discovered, and then orders were given to stop the engines, which were promptly obeyed. The evidence is not clear as to the length of the circuit described by the Magnolia, nor as to the space required for this evolution; but there is reason to conclude that within two-thirds of the distance across the river it could be performed with facility, and was so on this occasion. Without any headway of consequence from the time the Autocrat took the alarm, we find the Magnolia, at the time of the collision, in the middle of the stream—her range to the west of that line could not have been a wide one.

Before proceeding to the complaint presented in the libel, I will notice the testimony of the pilots examined by the parties, and especially those by the libellants, relative to the management of boats and the customs of the river. I select the testimony of Capt. Swan, with the view of collecting about it the mass of concurring opinion that these depositions afford. 1st. He says: "If a steamboat upon a descending trip were at a wood-yard at night, and another boat should be coming up, and so near that a meeting would take place by the time the descending boat could make her rounding, it would be imprudent for the descending boat to start out or leave the shore. 2d. That he has frequently rounded out when there was an ascending boat in sight below him, but not when such boat was very near. 3d. Thinks, if a boat was within a mile of him, of a dark night, it would not be safe to round out. 4th. If a boat were more than a mile below, there ought not to be more danger from rounding out than from meeting a boat in a dark night. 5th. If a descending boat was rounding out, and had her head down stream, and a collision were to occur between her and an ascending boat, in a part of the river where the descending boat was in her proper place, and the ascending boat out of her proper place, witness does not think the fact of collision would be evidence of imprudence in the descending boat rounding out."

This testimony was given in the direct and cross-examination, and applies to the case I have examined. The witnesses generally lay down the first proposition as it is found in the foregoing statement. The imprudence of leaving the shore is ascertained by the test, "whether the boat would cross the line of the ascending boat's course;" and some of the witnesses used these words, (Allen and Clements.) Duffey says, "she ought not to leave unless she had time to round out, get across the river, and straighten down under headway, before meeting the ascending boat." A number of the witnesses, looking to the facts that the river at this place is wide, straight, and deep, with ample room for either boat to move in her appropriate track, without interference, find no reason for any restriction when a descending boat, under the circumstances, and say there is none in the daily management and conduct of boats. Without declaring any judgment upon this, my opinion is that the Magnolia did not fall under any of the restrictions found in the testimony of this witness, and those who agree with him. Upon his re-examination, the same witness (Swan) says, "he thinks it would be more proper in an ascending boat, seeing a descending boat leav-

ing and rounding out from Robertson's, to make for that shore, and for the descending boat to make for the other shore, and thus a collision would be avoided. This would be proper, no matter what, under ordinary circumstances, was the proper track of an ascending boat. 2d. But, if he were dropping in to the left bank, ascending, and he were to see a descending boat rounding out from the opposite bank, and so far round that her bow was pointing down in the direction of the ascending boat, but still rounding out, witness's boat being nearer the left shore than the right, he thinks the proper course for the ascending boat to avoid the collision would be to keep to the left shore."

These opinions are received with more hesitation by the body of pilots, and the weight of the opinion is, that the ascending boat would hardly be justified in leaving her appropriate shore, by the single fact of seeing a boat coming out. But if the ascending boat were to promptly pass to the shore left by the other, before the other came round, the chance of collision would probably be avoided. With this qualification, the opinion seems unobjectionable. The Autocrat did not cross to the shore left by the Magnolia. Her pilot, assuming that the Magnolia designed to cross the river at a point above him, made a provision for that contingency, but made none for the more probable contingency of her descent in the ordinary and usual manner. On the contrary, he took the measures which brought about the collision, when the contingency occurred. His testimony is, "the reason he indicated his intention to go to starboard was, that the Magnolia was at the time closer to the right bank, descending, than the Autocrat was, and he could not go to that shore without crossing her bows. When the Magnolia gave her signal, he does not think she was more than from three to five hundred yards distant. The Magnolia was coming round, when she rung her signal, and so continued until she struck the Autocrat. He did not know whether she was on one wheel or two, but he knows she never stopped." On his cross-examination he says: "Up to the time he rung the signal bell, he thought the Magnolia was going in to the right shore, (western,) but perceiving from her bow that she was leaving the bend or the right bank, he rung his bell, &c." At this time the Autocrat could not have been more than one-third, or perhaps fourth, of the width of the river from the western bank. The Magnolia was then rounding, and upon a single wheel, with but little headway, and, upon the sight of the Autocrat's movement, immediately suspended the action of her engine. The course of the Autocrat was direct to the opposite bank, and her velocity was great, yet she encountered the Magnolia in the middle of the stream. The Magnolia could not, within the time, have materially altered her position with respect to the opposite shores. The testimony of the captain, mate, pilots, watchman, steward, and one passenger of the Magnolia, is, that they saw the approach of the Autocrat from the western bank. The pilot says: "When the Magnolia had got nearly round, and when deponent, who was at the wheel, had slacked her up, and was about to go ahead with the larboard engine, he perceived the Autocrat leaving the right bank, and coming towards the Magnolia. Deponent then, instead of going ahead, on the larboard engine, stopped the starboard, and rang both bells to back. The Autocrat was then heading towards the wood-pile we had left, and we were heading down stream. It was not more than a minute after deponent rung the engine bells to back, before the collision took place." The captain says, "that seeing this movement of the Autocrat, he exclaimed to the pilot to stop the engines and to back the boat, and that he rung the signal bell, and that the second tap of his bell, and the single tap of the bell of the Autocrat, were simultaneous." The statements of these officers are sustained by the evidence of witnesses on their respective boats.

I do not look for concordance in the statements of witnesses in these cases. Discrepancies must arise, in consequence of the excitement and alarm under which witnesses receive their impressions. Especially must we look with hesitation upon all statements in regard to time and distance, and in this case, the exact solution of the questions of fact materially depends upon evidence in regard to time and distance. This exhibition of the evidence is sufficient to enable me to declare the opinion I have formed upon the whole case. I am forced to the conclusion that an important cause which operated to produce this melancholy catastrophe, in which life and property were sacrificed, is that the Autocrat had not on duty a complement of efficient and attentive officers and men at this time. The character of the pilot is good, his testimony in the case is clear and frank, and, with competent aid, seems to have been adequate to the duties of his place. For any practical purpose, he was the only person in charge of the boat. The mate was where he could see nothing—the watchman said nothing—the captain was asleep in his room. The pilot having thus a large boat, running with great speed, not easy of management, commits a series of mistakes which have led to fatal consequences. When he ascertained the Magnolia was a descending boat, he supposed she was moving square across the river. He did not discover that she was moving only on a single engine; and at the last, when she was a sluggish mass, nearly stationary, supposes she was running with the speed of the Autocrat. I cannot but think that if he had obtained the information which an intelligent and responsible officer, stationed in front of the vessel,—[St. John v. Paine] 10 How. [51 U. S.] 557,—would have given, this calamity might not have taken

place. In the important case of The Mellona, 5 Notes Cas. 450, the judge of the admiralty court says: "With respect to the second proposition, I worded it very carefully, I asked the masters whether, if there had been a good lookout, there was a possibility that the collision might have been avoided; and the answer was, that such a possibility did exist; and I am of opinion, in point of law, that if there had been previous negligence, in not keeping a good lookout, then that party is responsible for all the consequences which might by possibility have been prevented. If, indeed, a party is to blame, but by no possibility whatever could injurious consequences have resulted from that culpability, then the court might not hold him responsible; but if a party is to blame in the manner in which it is now satisfactorily established this party was to blame, I hold that he is liable for the consequences, which by possibility, he might have prevented." The cases of The Iron Duke, 2 W. Rob. Adm. 378, and The Europa, 2 Eng. Law & Eq. 557, are to the same effect.

The supreme court of the United States—12 How. [53 U. S.] 443—employs, in the case of The Genesee Chief, a line of argument and a force of expression which are applicable to the circumstances of this, and the case of St. John v. Paine, 10 How. [51 U. S.] 557, has an important bearing upon it. In the navigation of the Autocrat there were two capital errors, which materially contributed to produce this disaster, and its fatal consequences. This boat was run in a dark night, at great speed, (some rating it as high as twelve and fourteen miles an hour,) at a time when a descending boat was visible, and the pilot at her wheel doubtful of the course she was taking. This pilot, testifying under the belief that the speed of the two boats was alike, says: "If the Magnolia had stopped, the collision would not have taken place." But the Magnolia was nearly stationary, and it was to the excessive celerity of the Autocrat that we must charge this misadventure, which left no time for prudential calculations, or for measures of evasion or escape. It is certainly true, that commerce has greatly profited from the energy and daring that are displayed in the steam navigation of the United States. But the convenience and profit of commercial men must be held subordinate to the security of life and property, and no prospect of commercial advantage can justify or excuse those who employ this great power in exposing incautiously to peril the lives and property confided to them. Under the circumstances, the pilot should have eased his engines or stopped his boat, until he was assured there would be no collision. 3 W. Rob. Adm. 75; 2 W. Rob. Adm. 202. Nor was the Autocrat justified in attempting to cross the river at the time her signal bell was rung. This manoeuvre was commenced when the circuitous movement of the Magnolia was apparent, and her direction to the middle of the stream ascertained. The pilot (who seems to have discovered this after the engineer and watchman) then left the ordinary and usual track of vessels of this class, and in doing so, encountered a descending boat at her proper place in the river. There may be circumstances which suspend the rules and usages of navigation, and make a rule for the particular case; but the circumstances must be controlling. A pilot cannot depart from a rule upon a surmise, conjecture, or a speculation on probabilities. He assumes, in every case of a departure, to show a palpable necessity. If this were not so, there could be no confidence in navigation, no assurance to pilotage—perils would be increased, and security correspondingly diminished. The Flint, 6 Notes Cas. 271; The Gazelle, 5 Notes Cas. 101; 1 W. Rob. Adm. 471. The Magnolia, from the time her officers discovered the Autocrat to be an ascending boat, to the time the signal bells were rung, was managed with reference to the fact that the Autocrat had a track defined by the usages of the river navigation, which they were not to encroach upon. That this was not done, is apparent from the evidence already quoted. In the circumstances attending the use of the signal bells, which formed the gravamen of the complaint of the libellant, I can find no ground for a decree against the Magnolia. It is probable that the conduct of the officers at the time was injudicious; but conceding that a responsive affirmative of the signal of the Autocrat would have been preferable, in the facts of this case, the responsibility would not have been changed by this failure. The circumstances of peril were then imminent, creating apprehension and confusion of mind. The inquiry must be, whose fault was it that such conditions existed? A party who has involved himself and others in peril, cannot be heard to complain of their want of the clearest judgment in the selection of the modes of extrication.

Upon a careful examination of the testimony, I do not find the charges of ignorance, recklessness, or neglect of the rules of river navigation, made against the officers of the Magnolia, sustained. By remaining at the landing place, by the free use of signals and other measures of strict caution, which are always praiseworthy, the Magnolia might have avoided the catastrophe. She would thus, by extraordinary care, have been secured against the faults I have exposed in the management of the Autocrat. But it would be unjust to give a sentence of condemnation for her failure to provide for remote and contingent dangers, arising from the errors of those who require the indemnity. The importance of this case, the sacrifices of life and property which so often occur in cases of this description, have led me to sift the questions of law and fact, which arise upon the record, and to expound

at length the doctrine of the court applicable to them. A firm and impartial enforcement of these doctrines will serve to promote order and security in this vast department of the social economy, and give stability to the interests embraced within it. Decree of reversal; libel dismissed, with costs.

[On appeal to the supreme court the decree of this court was affirmed. 18 How. (59 U. S.) 463.]

MAGNOLIA, The (THURSTON v.). See Case No. 14,017.

MAGOON (UNITED STATES v.). See Case No. 15,707.

MAGOUN, The (FURNISS v.). See Case No. 5,163.

Case No. 8,959.

MAGOUN et al. v. FIFTEEN THOUSAND DOLLARS.

[N. Y. Times, Oct. 2, 1852.]

Circuit Court, S. D. New York. 1852.

SALVAGE—AMOUNT OF—PER CENTUM.

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

Before NELSON, Circuit Justice.

Claim for salvage service. Decree of the court below reversed, so far as salvage on the $15,000 is denied, and salvage to the amount of 1½ per cent. allowed.

Case No. 8,960.

MAGOUN v. NEW ENGLAND GLASS CO.

[3 Ban. & A. 114.] [1]

Circuit Court, D. Massachusetts. Oct., 1877.

PATENTS—INFRINGEMENT—SPECIAL LICENSE.

Where the infringing articles were constructed and used with the knowledge of the complainant, and with his consent, and were constructed by him or under his direction, and put into defendant's factories at its expense while in its employment, and were used under his direction before and up to the date of his application for a patent: *Held*, that such a state of facts operates as a special license to use such specific articles.

[Cited in American Tube-Works v. Bridgewater Iron Co., 26 Fed. 336; Jencks v. Langdon Mills, 27 Fed. 624.]

[This was a bill in equity by Joseph Magoun against the New England Glass Company, alleging the infringement of a patent which was granted to complainant September 10, 1867.]

Geo. E. Betton, for complainant.

Geo. L. Roberts & Bros., for defendant.

SHEPLEY, Circuit Judge. The defendants are not proved to have used any moulds of the construction set forth in complainant's patent, No. 68,633, except such as were constructed and used with the knowledge of the complainant, and with his consent, and were constructed by the complainant or under his direction, and put into defendant's factories and used under his direction before and up to the date of his application for the patent. Such construction of the moulds at defendant's expense while complainant was in their employment, operates as a special license to continue to use those specific moulds. No infringement being proved, the bill is dismissed with costs.

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

Case No. 8,961.

MAGOUN v. NEW ENGLAND MARINE INS. CO.

[1 Story, 157; [1] 3 Law Rep. 127.]

Circuit Court, D. Massachusetts. May Term, 1840.

MARINE INSURANCE—CAUSA PROXIMA—CONDEMNATION—PROHIBITED TRADE—SENTENCE OF FOREIGN COURT—LIABILITY.

1. The maxim, "Causa proxima, non remota, spectatur," does not exclude incidental losses following as a natural, or legal consequence of peril, insured against and properly attributable thereto. Thus, in case of a capture, if, before the vessel is delivered from that peril, she is lost by fire or accident or negligence of the captors, the whole loss is attributable to the capture.

[Cited in Dole v. New England Mut. Marine Ins. Co., Case No. 3,966.]

[Cited in McCargo v. New Orleans Ins. Co., 10 Rob. (La.) 202; Dole v. Merchants' Mut. Marine Ins. Co., 51 Me. 473; De Rothschilds v. Auditor, 22 Grat. 48; Brown v. St. Nicholas Ins. Co., 61 N. Y. 340.]

2. It is not necessary, that there should be a justifiable cause of condemnation, but only a probable cause of seizure, to bring a case within the exception in the Boston policies, with regard to seizure on account of illicit or prohibited trade.

3. The sentence of acquittal of a foreign court acting in rem, in cases of revenue, seizure, and prize, is conclusive, except in cases of fraud. Concealment of facts affords no ground to avoid the sentence of a foreign court, acting in rem, whether it be a sentence of acquittal or of condemnation.

[Cited in Allen v. Blunt, Case No. 217; Cushing v. Laird, 107 U. S. 80, 2 Sup. Ct. 204.]

4. Quaere. Whether such a sentence would be open to a reëxamination, upon the ground of false swearing in the case by the agents of the interested parties.

5. A vessel was seized in a foreign port by the custom house officers, for an alleged violation of the revenue laws, and upon trial the court affirmed, that there was no justifiable ground for the seizure, and the vessel was restored. But from long exposure, in consequence of these proceedings, it was found, that she could not perform her voyage home without great repairs, amounting to more than her value. She was accordingly abandoned to the underwriters, and in an action against them, it was *held*, that the abandonment was good, and the underwriters were liable for a total loss.

[1] [Reported by William W. Story, Esq.]

This was the case of a policy of insurance, underwritten by the defendants, on the 20th of March, 1838, whereby they insured the plaintiff [David C. Magoun], for whom it concerns, payment to him, four thousand dollars on the schooner Yankee, and on her freight, at and from St. Thomas to Rio de la Hache, and at and from thence to New York, viz. $3200 on the schooner and $800 on the freight, against the usual risks in the Boston policies. The declaration alleged a total loss by the arrest and detainment by the authorities of the Republic of New Grenada, and also a total loss by the peril of the seas. The parties agreed to a statement of the substantial facts, which was as follows: The schooner proceeded from St. Thomas to Rio de la Hache, in ballast, under a charter party, to take on board a cargo of hides and logwood at the latter port, to be carried to New York, for the freight of which $600 was to be paid. A cargo was accordingly taken on board at Rio de la Hache, about the 7th of March, 1838, and the schooner, being then ready for sea, the master applied for a clearance, which was refused, and he was arrested and imprisoned, and his vessel was seized and forcibly taken possession of by the local authorities. The asserted ground of the arrest of the master and the seizure of the vessel was, on account of a supposed illicit and prohibited trade. It appears, that about the time, when the vessel was about to sail, six bags of beans were supposed to have been landed in a canoe from the schooner, without a permit, they being of the value of about $25. The beans were seized on shore by the custom house officers; and afterwards, on searching the schooner, they found certain bags of beans of her stores were missing; and thereupon they arrested the master, and seized the schooner as forfeited, presuming that the missing beans were those illegally landed. Proceedings were duly had against the vessel, in the proper tribunal of the district of Magdalena; and on the 23d of May, 1838, a sentence was pronounced, confiscating the beans seized and the canoe, condemning the master to pay $25, the value of the beans found missing from his vessel, and the costs of suit, but acquitting the vessel. Up to the time of this decree, the master was held in imprisonment. From this sentence an appeal was taken to the superior tribunal of the republic, at Carthagena, where a sentence was pronounced on the 25th of July, 1838, by which the sentence of the court below, as to the acquittal of the vessel and the condemnation of the beans, was affirmed; but was reversed as to the canoe, on account of the value of the beans not being sufficient to justify the confiscation thereof. The sentence then proceeded to declare, that the master was guilty of a fraud in allowing the landing of five bags of beans from the schooner without a permit; but that the fraud not being to the value of fifty dollars, the vessel was not subject to any forfeiture therefor; and it then directed, that the master should pay the value of the five bags of beans landed, viz. $25, and condemned the judge below to the payment of costs. The vessel was accordingly restored; but when restored, it was found, from her long exposure to the weather in a hot climate, in an open roadstead, that her hull and sails and rigging were so much injured, that she could not, without very great repairs, be enabled to perform the voyage; that the repairs could not be made at Rio de la Hache, or at any other port, to which the vessel could proceed; and that the repairs would cost more than the vessel was worth; that the hides belonging to the cargo had become rotten, and were thrown overboard; and that no other vessel could be found at the port to carry the residue of the cargo to New York. Under these circumstances, the master refused to receive back the vessel without indemnity, and abandoned her. On the 8th of October, the plaintiff, as soon as he received information of the facts, abandoned the vessel and freight to the underwriters, who refused to accept the abandonment.

The cause was argued upon this statement, and the written evidence and documents referred to in the case, by F. C. Loring, for the plaintiff, and by S. Hubbard, for the defendants.

The argument for the plaintiff was, in substance, as follows:

The facts in evidence prove, 1st. A seizure and detention. 2d. That such seizure, though under color of law, was without justifiable cause. 3d. That upon the release of the vessel, she was destroyed in value so that it was impracticable to repair her; that part of her cargo was destroyed; and that there were no means of forwarding the remainder. 4th. That an abandonment was made in due season. About these facts, there can be no dispute, unless it be about the second proposition. On this, the decree of the supreme court, reversing the decree of the inferior court and condemning the judge in costs, is conclusive; as it distinctly finds; 1st. That there was no real cause for the seizure; and 2d. That there was no probable cause; because the reason assigned for the seizure did not by law authorize it. There being no imputation of fraud, or irregularity in the proceedings of the court, and the proceedings being in rem, the facts found by the court are conclusive on all the world. Bradstreet v. Neptune Ins. Co. [Case No. 1,793]; Carrington v. Merchants' Ins. Co., 8 Pet. [33 U. S.] 495. These facts show a total loss; but the defendants say, that the vessel was released, and that her destruction is attributable immediately to the effects of climate, a peril not insured against, and only remotely to the seizure. The distinction between the proximate and remote cause of a loss, does not seem to be well settled, and the authorities do not agree. The rule, most agreeable to the true principles of the law of insurance,

seems to be, that where the damage is a direct and unavoidable consequence of the occurrence of a peril insured against, the insurers are liable, though the immediate agent was not such a peril. In the present case, the heat of the climate and worms operated upon and destroyed the vessel. The liability of the vessel to this destruction, however, was owing to an illegal seizure and detention, and that was the immediate cause of, though not the active agent, in the destruction. Barker v. Blakes, 9 East, 294; Hagedorn v. Whitmore, 1 Starkie, 157; Savage v. Pleasants, 5 Bin. 403; Shieffelin v. New York Ins. Co., 9 Johns. 21; Patrick v. Commercial Ins. Co., 11 Johns. 9.

2d. The facts show a total loss of the voyage, caused by an illegal seizure, and this constitutes a total loss of the vessel. If the voyage is retarded by the operation of a peril insured against, until the ship becomes incapable of prosecuting it, there is a total loss, for which insurers are liable. Peele v. Merchants' Ins. Co. [Case No. 10,905]; Goss v. Withers, 2 Burrows, 683; Miles v. Fletcher, 1 Doug. 231; Idle v. Royal Exchange Assur. Co., 3 Moore, 155; Marine Ins. Co. v. Tucker, 3 Cranch [7 U. S.] 357; Barker v. Blakes, 9 East, 294; Smith v. Universal Ins. Co., 6 Wheat. [19 U. S.] 176; Bradlee v. Maryland Ins. Co., 12 Pet. [37 U. S.] 400. See, also, Williams v. Smith, 2 Caines, 1. In this case, the voyage was retarded by a peril insured against. This retardation rendered the ship incapable of performing the voyage, because, when it ceased to operate, she was unseaworthy, and could neither be repaired where she was, nor carried elsewhere. The voyage was utterly destroyed, and it was impossible to accomplish the adventure, in consequence of the operation of a peril insured against. The master was bound, in duty to the owners, to claim and prosecute an appeal from the decree of the inferior court. Otherwise they could have sustained no claim for indemnity, as the facts, as stated in that decree, would have given them no legal claim, and it would not have been competent for the owners to disprove them. But if he had committed an error in judgment in so doing, that would not have exempted the insurers from liability for this loss, if caused by a peril insured against. If, as is well settled, insurers are liable for losses by perils insured against, when attributable remotely to the negligence or misconduct of the master or crew, a fortiori they would be liable where there was only an error in judgment.

The argument for the defendants was, in substance, as follows:

The plaintiff states his loss to be by arrest and detainment, and by the perils of the seas. It cannot, however, have arisen from both causes. That it did not grow out of the arrest and detainment, appears from the fact, that the vessel and cargo were released. Nor was it occasioned by a peril of the sea, because destruction by worms is not covered by the policy; and the injury to the sails and rigging arose either from neglect, or after the acquittal in May. Even if there has been a loss, for which the defendants are answerable, it has not been a total loss; because the captain might have received a very considerable salvage, if not a total indemnity, if he had not refused or neglected to obtain it. The defendants contend, that they are not liable for the loss, because, 1st. It was occasioned by a seizure and detention on account of illicit trade, or, 2d. By the barratry of the master. The sentence of the court of appeals does not seem to preclude the proof of collateral facts, not inconsistent with the facts therein stated, though they may go to affect the character and force of that sentence, and even render it nugatory. Such facts, for example, as go to prove, that the seizure was not malicious, nor without probable cause of suspicion; or such as prove, that the party was guilty of fraud and falsehood in relation to the facts supposed to be proved by such sentence. Again, the clause in the contract seems to allow the parties to go into the question of fact, as to whether there were articles contraband of war on board, or whether, or not, there was any attempt to carry on an illicit trade. Supposing, for a moment, that we cannot go behind the decree, and admitting also, that, by the decree itself, it appears, that there was no justifiable cause for the condemnation of the vessel; yet, that decree does not as clearly prove, that the original seizure was neither malicious, lawless, nor wantonly made under a false pretext. Bradstreet v. Neptune Ins. Co. [Case No. 1,793]. There was a well founded suspicion of illicit trade, and the detention and subsequent seizure, on that account, were the cause of the loss. This brings the case within the very exception in the policy. The conclusion is, that if there had been no illicit trade, there would have been no seizure, no detention, and no loss. The master having been guilty of fraud and falsehood in relation to the facts supposed to be established by the sentence, and the general acquittal being founded on his perseverance in his false statements, he is guilty of barratry. His barratry was, in fact, the actual cause of the seizure and consequent loss; and we are, therefore, absolved from all liability.

STORY, Circuit Justice. The first question, which arises in the present case, is, whether there has been a total loss in the sense of the law of insurance. It is clear, that there has been no loss by the perils of the seas. But there has been a restraint and detainment of the government within the words of the policy. Has there been a total loss by reason of that restraint and detainment? I think there has been. The argument is, that the injury to the vessel, by the long delay

and exposure to the climate, was the immediate cause of the loss, and the seizure and detainment the remote cause only; and that, therefore, the rule applies, "Causa proxima, non remota, spectatur," and the underwriters are not liable for injury by mere wear and tear, or by delays in the voyage, or by worms, or by exposure to the climate. But it appears to me, that this is not a correct exposition of the rule. All the consequences naturally flowing from the peril insured against, or incident thereto, are properly attributable to the peril itself. If there be a capture, and before the vessel is delivered from that peril, she is afterwards lost by fire, or accident or negligence of the captors, I take it to be clear, that the whole loss is properly attributable to the capture. It would be an over-refinement and metaphysical subtlety to hold otherwise; and would shake the confidence of the commercial world in the supposed indemnity held out by policies against the common perils. The decision of the supreme court of the United States in Peters v. Warren Ins. Co. (at the last term) 14 Pet. [39 U. S.] 99, is directly in point; and in my judgment fully settles, that the restraint and detainment under the seizure are to be treated as the proximate cause of the loss in the sense of the rule. The vessel was never delivered from that peril, until she was virtually destroyed and incapable to perform the voyage. But, if it were possible to get over this point, as I think it is not, the loss of the voyage arising from the total incapacity of the vessel to perform it would, under the circumstances, it being by a peril insured against, be decisive upon this point.

In the next place, as to the sentence of the court of appeals. The policy contains a clause, "that the assurers shall not be answerable for any charge, damage or loss, which may arise in consequence of seizure or detention for or on account of illicit, or prohibited trade, or trade in articles contraband of war." The true construction of this clause of the policy was finally settled by the supreme court of the United States, in the case of Carrington v. Merchants' Ins. Co., 8 Pet. [33 U. S.] 495. It was there held, that it was not necessary to bring the case within the clause, that there should be a justifiable cause of condemnation; but only, that there should be a justifiable cause of seizure, or in other words, a probable cause of seizure. If the seizure be tortious, and without such cause, it is treated as not bonâ fide done, as an act of lawless violence, or of arbitrary power, or of gross fraud, or at all events of unjustifiable force, according to circumstances.

The question then arises, whether the seizure in this case was justifiable, or founded upon probable cause. Now, the sentence of the appellate court expressly affirms, that there was no justifiable ground for the seizure of the schooner; that the very act of illegality in landing the six bags of beans, asserted in the libel or proceeding in rem, supposing it to be true, furnished by law no ground for the seizure of the schooner, because the value was only $25, and no penalty could attach upon the vessel by law, unless the goods illegally landed from the vessel were of the value of fifty dollars. Now, this is an adjudication upon the very point in controversy, as to probable cause; and it negatives the existence of it.

Then, is this sentence conclusive, or are the parties at liberty to go behind it, and to prove aliunde the existence of a probable cause of the seizure. It appears to me, that, independently of fraud, (a point, which will be presently considered,) the sentence is conclusive. This is the established doctrine of the supreme court of the United States, which was fully examined and considered by this court in the recent case of Bradstreet v. Neptune Ins. Co. [Case No. 1,793], and, therefore, it need not be here further discussed. But, then, it is said, that here the sentence was founded in fraud. It is not pretended, that there was any fraud, or participation in any fraud, on the part of the court; and certainly, if contended for, there are in the case no proofs to support it. The only ground, asserted for the imputed fraud, is, that the master of the schooner swore falsely, in relation to the matters in controversy before the court, upon the trial of the seizure, and thereby procured the sentence of reversal of the appellate court; and that it is apparent from the other evidence now produced, that there was probable cause of the seizure. Now, in the first place, I do not know, that it any where appears, that the master was a witness, or what in fact he did swear to, if a witness, at the time of the hearing of the trial of the cause; for it is not stated in the transcript of the proceedings, nor does it appear, what effect, if any, the evidence given by him had, or could have upon the ultimate decree, pronounced by the court below, or by the appellate court. What the master said, if he was a witness, might have had no influence upon the decision, for aught that the record directly states or discloses. The most, that can be said, is, that the master concealed the fact, that eleven bags of beans had been illegally landed from the schooner instead of six; and that thereby both courts were misled in their decrees. But concealment of facts would be a new head of the law, upon which to avoid a sentence of condemnation or acquittal in case of a seizure and proceedings in rem. Nor do I know, (but I give no opinion on the point) that it has ever been judicially held, that a sentence of a foreign court, acting in rem, as in cases of revenue seizures and cases of prize, has ever been held to be reëxaminable, as to its validity, either in cases of condemnation or of ac-

quittal, upon the mere ground, that there had been false swearing in the case by the agents of some of the parties in interest. That would be a very broad ground, and open a wide door to impeach the validity and conclusiveness of such sentences. If such evidence be admissible at all, it is equally admissible to disprove and vacate a sentence of condemnation, as well as a sentence of acquittal. It seems to me, that if evidence of false swearing in such cases be admissible to disprove the sentence, and establish fraud in it (on which I give no opinion), it ought to be clearly shown, that it was the real, substantial, and efficient cause of the sentence, and not, that it might have formed an ingredient in it.

In the present case, it is far from being clear, that eleven bags of beans were illegally landed from the schooner. There is considerable confusion in the evidence on this point. But it is unnecessary to consider it, since it is plain, upon the very face of the proceedings, that the only asserted ground of forfeiture was the illegal landing of six bags of beans. No other matter was, or could be brought into controversy in the suit. The seizure was for that act, and for that alone. It is wholly immaterial, what other causes might have existed to justify a seizure. The only question is, what in fact was the positive cause of the seizure, not what might have been a good cause. From what has been already stated, the professed cause of the seizure was an act, which, by law, could not induce any forfeiture, and consequently could furnish no justifiable or probable cause for the seizure. By our law,—Act 1799, c. 128, § 50 [1 Story's Laws, 617; 1 Stat. 665, c. 22],—the landing of goods of the value of four hundred dollars from a vessel without a permit will subject the vessel to forfeiture. But, if a vessel were seized for landing goods of the acknowledged value of not more than fifty dollars, it would be impossible for the court to hold, that there was any justifiable or probable cause for the seizure of the vessel. In truth, therefore, whether there was any false swearing or not, or any fraudulent concealment, or not, by the master, it is clear, that the appellate court proceeded in its sentence upon the fact, that the illegal landing of six bags of beans was the sole cause of the seizure; and that, consequently, it was without any justifiable or probable cause in law or in fact.

This view of the matter disposes of the whole merits of the defence; and it is unnecessary to discuss the other points, incidentally suggested at the argument. Upon the whole, my opinion is, that the loss is clearly a total loss within the policy; and that the case does not fall within the clause exempting the underwriters from losses and charges and damages occasioned by seizure or detention, on account of illicit or prohibited trade.

Case No. 8,962.

MAGRUDER'S CASE.

[2 Cranch, C. C. 626.] [1]

Circuit Court, District of Columbia. Dec. Term, 1823.

ADMINISTRATORS — NOTES TAKEN PERSONALLY — DECEASE—ACTION—ENTRY OF JUDGMENT.

If the administratrix of her deceased husband sell the goods and take notes payable to herself personally, bring suit on one of the notes, and die, and her administrator enter his appearance in the suit and obtain judgment, the court will not order the judgment to be entered upon the docket for the use of the administrator de bonis non of her husband, unless he can show that the sureties of the administratrix are insolvent, and that the balance of her administration account is against her.

Mary Ann Magruder, administratrix of Thomas Magruder, sold the goods of her intestate and took notes payable to herself personally. She brought suit upon one of the notes and died before judgment. Her administrator entered his appearance in the suit and obtained judgment. The administrator de bonis non on her husband's estate moved the court to order the judgment to be entered upon the docket for his use.

Mr. Key, contra. She has given an administration bond with sureties who are liable for this money. She may have paid debts upon the faith of these notes. She is liable upon her bonds only for the balance of funds which comes to her hands. It is better for her husband's estate because her sureties are directly and immediately liable for the money, whether it be recovered from the defendant or not.

Mr. Jones, for the administrator de bonis non. The administrator de bonis non has shown his title in equity to this money. To rebut this the administrator of Mrs. Magruder must show that she has paid debts to this amount, or that she has fully administered all that came to her hands. If the debtor be insolvent and she has used due diligence, she would not be liable for this fund.

THE COURT (THRUSTON, Circuit Judge, absent) said they would not deprive the legal plaintiff (the administrator of Mrs. Magruder) of his legal right, unless the administrator de bonis non could show that the sureties of Mrs. Magruder were insolvent, and that the balance of her administration account was against her.

MAGRUDER (ALLEN v.). See Case No. 230.

Case No. 8,963.

MAGRUDER v. BANK OF WASHINGTON.

[Cited in Brent v. Coyle, Case No. 1,837. Nowhere reported; opinion not now accessible.]

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

Case No. 8,964.

MAGRUDER v. BOWIE et al.

[2 Cranch, C. C. 577.] [1]

Circuit Court, District of Columbia. May Term, 1825.

SHIPPING — PART OWNERS — PARTNERS — SHIP'S HUSBAND — ACTION FOR FREIGHT.

Part owners of a ship are not joint partners. Each may maintain a separate action against the ship's husband for his proportion of the freight, and it is no objection that the ship's husband is one of the part owners.

Assumpsit for one-fourth part of the freight earned by the ship Alleghany, of which Magruder owned one-fourth, Thomas Peter one-eighth, George Peter one-eighth, and the defendants [Bowie and Kurtz] one-half.

Mr. Marbury, for defendants, contends that this is a partnership, and that one partner cannot sue another at law. The reasons applicable to general partnerships apply to this case as between these parties.

THE COURT (THRUSTON, Circuit Judge, absent), stopped Mr. Key and Mr. Dunlop, in reply, and said that part owners of a ship are not joint partners, each may maintain a separate action against the ship's husband for his proportion of the freight, and that it was no objection that the ship's husband was one of the part owners, as their interests were separate, and not joint.

Verdict for the plaintiff, $929.58, with interest from 1821.

MAGRUDER (HOBBS v.). See Case No. 6,551.

MAGRUDER (McCORMICK v.). See Case No. 8,723.

Case No. 8,965.

MAGRUDER v. McDONALD.

[3 Cranch, C. C. 299.] [1]

Circuit Court, District of Columbia. May Term, 1828.[2]

NOTES — INDORSERS — ACCOMMODATION — ACTION INTER SE.

If two persons, without any communication or agreement between them, severally indorse a note for the accommodation of the maker, and the first indorser is obliged to take up the note, he may recover one half from his indorsee.[2]

Indebitatus assumpsit, for money paid, laid out, and expended by the plaintiff, for the use of the defendant, at his request, and upon an insimul computasset. At the trial a verdict was rendered for the plaintiff by consent, subject to the opinion of the court upon the following case agreed:

In this case it is agreed that the plaintiff produced in evidence a promissory note, in these words and figures, to wit: "$950. George Town, November 25th, 1823. Sixty days after date, I promise to pay George B. Magruder, or order, nine hundred and fifty dollars, at the office of discount and deposit, Washington, for value received. Sam'l. Turner, Jr." Which note was written and signed by the said Samuel Turner, and indorsed by the plaintiff, the said George B. Magruder, and by the defendant, the said John G. McDonald. That the said note was so drawn and indorsed, with the understanding of all the said parties thereto, that it should be discounted in the said office of discount and deposit, for the sole use and accommodation of the maker, the said Samuel Turner, no value being received by either of the said indorsers. That it was so discounted, and the proceeds thereof applied to the credit of the said Turner in the said office. That long before the making of the said note, viz., in the year 1819, the said Turner had two notes discounted for his use and accommodation in the said office, namely, one for $270 indorsed by the said George B. Magruder and by the said John G. McDonald; and one for $710 indorsed by the said George B. Magruder and one Samuel Hambleton; which last-mentioned note was continued by renewal with the indorsement of the said Magruder and Hambleton until September, 1820, when, in consequence of the said Hambleton's absence, it was protested; after which the said office permitted the accommodation to be renewed, upon condition that the said Turner should get another good indorser in the place of the said Hambleton; whereupon the said John G. McDonald, at the solicitation of the said Turner, indorsed a note for the said sum of $710, which was brought to him already indorsed by the said George B. Magruder. That in March, 1821, a small part of the money having been paid, the two notes were consolidated and renewed by one note for $950, drawn by the said Turner, and indorsed by the said Magruder, and by the said McDonald, which was, from time to time, renewed by notes similarly drawn and indorsed, the last of which is the aforesaid note so produced in evidence by the plaintiff. That neither at the time of indorsing the said notes respectively, nor at any other time, was there any communication between the said Magruder and the said McDonald upon the subject of such indorsement. Both of them, however, knew, at the time of indorsement, that the said notes were intended to be discounted for the accommodation of the said Turner; and in every instance the said Magruder was the first indorser. That the said note so as aforesaid produced in evidence by the plaintiff, not having been paid when due, was duly protested, and the payment thereof having been duly demanded, and due notice of such demand and of non-payment having been given to the said indorsers, judgments at law were obtained against both, by the Bank of the United States; and the whole amount having been paid by the said Magruder, he brought this suit to recover, from

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

[2] [Reversed in 3 Pet. (28 U. S.) 470.]

the said McDonald, one half of the amount so paid by the said Magruder.

By consent of the parties in this suit, a verdict is rendered for the plaintiff for one half of the amount so paid by the said Magruder, as aforesaid, in satisfaction of the judgment against him, subject to the opinion of the court upon this case agreed; and if, upon this case agreed, the court should be of opinion that the plaintiff is entitled to recover, then judgment shall be entered according to the said verdict; but if the court should be of opinion that, upon the said case agreed, the plaintiff is not entitled to recover, then the said verdict shall be set aside, and judgment of nonsuit shall be entered for the defendant.

Mr. Wallach, for defendant, cited Robertson v. Williams, 5 Munf. 381; Hixon v. Reed, 2 Litt. (Ky.) 174; Brown v. Mott, 7 Johns. 361; Morgan v. Reintzel, 7 Cranch [11 U. S.] 273.

Mr. Key and Mr. Dunlop, for plaintiff, cited Wood v. Repold, 3 Har. & J. 125.

MORSELL, Circuit Judge (CRANCH, Chief Judge, dissenting). This action was brought to recover of McDonald one half of a sum of money, which the plaintiff has been compelled to pay to the Bank of the United States, as indorser for Samuel Turner. This was the case. In the year 1819 the bank discounted two promissory notes, for the sole accommodation of Turner: one indorsed by George B. Magruder and John G. McDonald, for $270; the other indorsed by George B. Magruder and Samuel Hambleton, for $710. On the 20th of September, 1820, the last-mentioned note was renewed, and McDonald received as indorser, in lieu of Samuel Hambleton. In March, 1821, the two notes were consolidated; some small sum of curtail having been paid. Magruder was the first indorser in each instance. This note of $950 is a renewal and continuance of other notes, similarly drawn and discounted for the said Turner's sole accommodation. At length, Turner failing to pay, it was duly protested; and the bank recovered several judgments against Magruder and McDonald, as indorsers. Turner obtained the indorsement of Magruder, with the understanding that another accommodation indorser was to come on the note. The note, with Magruder's indorsement, was taken to McDonald, by Turner, who presented it to him for his indorsement merely, and McDonald, as soon as he had indorsed it, returned it to Turner, who offered it to the bank, and for whom it was discounted. McDonald, at the time he received and indorsed it, knew that it was for the sole accommodation of Turner, and for that purpose was indorsed by Magruder. McDonald indorsed it at the instance and request of Turner, and for his like sole accommodation, and without having paid any consideration for the note.

The substance of the argument against the recovery, as I have understood it, is, that this cannot be considered as a case of co-securities (sureties); that the indorsements are separate, made at different times, and not joint, and without any understanding between them that they were so; and, from the nature of the instrument, the indorsement is evidence of a sufficient consideration, and amounts to an agreement, on the part of the first indorser with the second, that, in the event of non-payment by the drawer, the first indorser was to pay the full amount. Several adjudged cases were cited and relied on, to support the defendant's objections. The one which seems to me most like the case before the court, was that of Wood v. Repold, in the court of appeals in Maryland; though in that case there was the absence of a fact which exists in this, and which might have been thought material. In that case Wood did not look to the case of any subsequent accommodation indorser coming on the note. In this case it was otherwise with Magruder. But, supposing the cases alike, let us examine its principles, to show in what cases persons are to be considered as securities, (sureties,) where they will be equally bound to each other to pay one half of the debt of their principal, and the principle of law by which they are so bound. The very familiar case of a joint bond is put. It is, however, conceded, that the bond need not be executed by the sureties at the same time; and there is no necessity that there should be any previous express agreement or understanding between them; and that it is not even necessary that the first-signing surety should know who, or that any one is to come after him, as surety in the bond; yet, by operation of law, they are co-securities, and either, who pays the whole, may call upon the other for his contribution.

Now what is here meant by the operation of law, creating or imposing upon them a joint liability? or, by operation of law they would be bound to contribute? Is it meant that there is any express or implied contract contained in the bond, between the securities? We are all too familiar with the terms of a joint bond to entertain a moment's doubt that there is not, from beginning to ending of it, one single stipulation between the securities, either express, or from which the law can imply any such obligation. Therefore, if any such obligation is created between them by operation of law, it is upon other principles; which principles we shall endeavor to show are not peculiar to the form of a joint bond. It is said, with a view to show a difference in principle between indorsers and co-securities in a bond, "that consideration is always presumed in the case of indorsers, inter se, and never in that of securities in a bond." We shall endeavor to show that, without an actual real consideration, there is no difference in the cases. Other reasons are assigned, for the purpose of showing that the indorsers, in

that case, were not to be considered as cosureties, and not bound by the operation of the same principle of law as in the case of a bond. It is objected that their indorsement is several, and not joint; at different times, and without any understanding between them to that effect. But I understand it to be conceded that, in the case of a bond, they would be equally bound if it were a joint and several bond, and although it were signed at different times, and without any knowledge, by the first signer, who or whether any other was to sign it as such.

The other part of the opinion is taken up in showing that want of consideration could not be available as a defence in that action. It proceeds: "The bill in question, though drawn and indorsed for the accommodation of the drawer, to enable him to raise money upon it, must be considered as if it had been made in the ordinary course of business, subject to all the law and incidents attending bills of exchange, indorsed and passed in the regular course of negotiation. The same principles of law, and the same rules of evidence, equally apply to both; and, when so considered, the objection that Wood received no money consideration at the time of his indorsement, appears to me to have no weight." "The want of consideration" "extends to all bills of exchange, whether for accommodation or otherwise. But that principle, when tested by the established practice and settled forms of proceedings in actions on bills of exchange, will, I think, be found applicable only to the particular stage of the negotiation in which the bill has stopped in the hands of the party suing, who, having never passed it away, has, consequently, been obliged to pay nothing upon it, nor has created any liability on himself to pay; and, therefore, can only recover in virtue of a consideration passed by him to the party from whom he received it; and, in such case, it is that consideration alone which gives him a right of action. And although the law supposes a consideration, and the plaintiff is under no necessity to prove one, yet, if none did pass, it was a naked undertaking, of which the defendant may discharge himself at the trial, by showing a want of consideration, or that it was an illegal one. But the same principle does not apply to this, or any case of an indorser or intermediate indorsee, who, under his liability on his indorsement, has been obliged to pay or take up the bill. If it did," (exist in such a case, or could apply in such a case,) "there never could be a recovery on a bill of exchange, by an indorser, or intermediate indorsee, against the drawer or immediate indorser; for every indorser, by his indorsement, discharges the preceding parties, as to himself, and constitutes his indorsee the payee. No consideration, therefore, which he may have originally paid for the bill can afford him a ground of action; for, having parted with all his interest in it, he is presumed in law to have received a valuable consideration for it, and can have no right to the money a second time. He cannot, then, recover, in consideration of what he may have originally given for the bill; nor could he have an action on the bill, in consideration of payment by him in virtue of his indorsement; as such payment is not a consideration originally given for the bill, but must be subsequent, which is contrary to every day's experience; for no action is more common than that by an indorser against the drawer, or an intermediate indorsee against his indorser, in which the plaintiff can only recover on the proof of payment by him to the bona fide holder of the bill, which payment gives him a new title to receive the money from the antecedent party, and is the very foundation of the suit; and the consideration-money between them, as immediate parties to the bill, is never made a subject of inquiry, and, if proved, could not aid the plaintiff."

The judge then draws his conclusion: "And this shows that the principle, that, as between immediate parties to a bill of exchange, the want of consideration is a sufficient defence, is only applicable where a payee or indorsee has never parted with the bill;" "and that it does not apply to any party to a bill, who, on its being protested, has been obliged to take it up; in which case it is not the consideration originally moving from him which entitles him to recover, but it is the subsequent payment alone on which the law raises the promise, and gives him a new cause of action; and he sues in the capacity in which he paid, and not in that in which he received it."

In answer to the principles and reasoning in that part of the case just stated, I hold the law to be, that where a person merely indorses a bill for the purpose of assisting another in raising money, he is only a surety for that other, and he has no demand till the payment of the money. See Evans, Bills, p. 149. And if there were many, instead of one, they would be all equally sureties.

On the subject of the right to go into the consideration of the equitable circumstances attending the transaction, I understand the law to be, that it is not owing to the form of a bill of exchange, or note, nor the circumstance of its being in writing, that the law gives it the effect of carrying with it the same presumption of a consideration as a bond, or other specialty, when in the hands of a third person; but it is in order to facilitate and strengthen that commercial intercourse, which is carried on through the medium of this species of security. Therefore, in an action brought against the party, by the person with whom he was immediately concerned in the negotiation of the instrument, or by the person who has given no value for it, in such regular commercial intercourse, he will be at liberty to prove, either that the consideration was an unlawful one, or none at all, or what it was, with all the circumstances. Where a bill is not taken in the usual course of trade, it is subject to all the equities that subsisted between

the original parties. Evans v. Smith, 4 Bin. 366.

A bill or note, therefore, does not become clothed or protected by the presumptions or incidents of real commercial negotiable paper, (the consideration whereof shall not be impeached,) until it gets into the hands of a bonâ fide holder before the bill or note falls due, and without notice. It is true that there are cases in which the equitable circumstances may be gone into, and where the want of consideration would not be an available defence, and this is sometimes the case of indorsements for the accommodation of the drawer; but it is in those cases only where the indorsee, or holder, has paid a valuable consideration for it at the time he receives it. If it has been paid to the drawer, for whose accommodation the note was drawn and indorsed, it is considered, in law, as being also for the benefit of the indorser, or indorsers; and so the following cases will show it has been adjudged. "If the indorsee knew that the bill was an accommodation bill, he can recover no more against the indorser than the value he has paid; but if the bill was made on a good consideration, he may recover the whole; and if he has not paid full value for it, he is a trustee for the indorser in respect of the surplus." Starkie, pt. 4, p. 282, o. "Whenever the holder has given full value for the bill before it is due, the defendant will not be at liberty to show that he had received none, although the plaintiff knew that circumstance at the time he became the holder, unless he also knew that the party from whom he received it was acting fraudulently." Chit. Bills, 84, 86.

A plaintiff cannot, in general, maintain his action against the person from whom he received the bill, unless he gave him a valuable consideration for it. 7 Term R. 350, 378, 571. But it is said, "these principles will be found applicable only to the particular stage of the negotiation at which the bill has stopped in the hands of the party suing, who, having never passed it away, has consequently, been obliged to pay nothing upon it," &c. It really has been my most sincere desire rightly to understand, and duly appreciate this part of the opinion; but I doubt yet whether I have succeeded. That we may not be carried away by the mere sound of words, let the reasons assigned be taken. "Because, having never passed it away, he has, consequently, been obliged to pay nothing upon it, nor has created any liability upon himself to pay." Is this position correct? The case put is of immediate parties; such as the drawer and acceptor, the indorser and indorsee. Let us take the very case put, of an intermediate indorsee (or indorser). Such an indorser has paid to his immediate indorser, one half of the amount of the bill only, or has paid no value at all for it, or the consideration between them has been an unlawful one, or such, his next antecedent, indorser has passed (it) to him for his own accommodation, and he indorses to another for a full consideration received of such other, and that other indorses it for like consideration. When the bill falls due, it being unpaid by any of the other parties, this intermediate indorsee is obliged to take it up, or pay the amount to the last indorsee; can he recover any thing more from his next immediate indorser than he paid him for it, —suppose one half? Or, suppose he has received it from such immediate indorser without paying him any thing for it, but for his own accommodation; the books abound with authorities which support the position that he could not. The very case just cited by me, Starkie, pt. 4, p. 282, proves this; see, also, Chit. Bills, 91.

The next reason, "for every indorser by his indorsement, discharges the preceding parties as to himself, and constitutes his indorsee the payee. No consideration," &c. Suppose it to be the case. How could that be a reason to prevent the party sued from showing want of consideration, &c. But is it the case? By his indorsement or assignment, it is true, whilst the bill remains in the hands of the assignee or indorsee, his rights and remedies upon the bill are suspended, but the moment he is obliged to pay the holder and receives back the bill, do not all the rights revive, and he become just as much entitled to recover upon the bill against the antecedent parties, as he ever was; and upon what consideration? Upon the new consideration, as it is stated, which is given him by thus having been obliged to pay it and take it up? Not at all so; it is upon the old consideration and none other; and to this effect is the case of Dugan v. U. S., 3 Wheat. [16 U. S.] 182, 183. The words of the judge are: "After an examination of the cases on this subject, which cannot be all of them reconciled, the court is of opinion that if any person who indorses a bill of exchange to another for value, or for the purpose of collection, shall come to the possession thereof again, he shall be regarded (unless the contrary appear in evidence) as the bonâ fide holder and proprietor; and shall be entitled to recover notwithstanding there may have been one or more indorsements in full, subsequent to the one to him, without producing any receipt, or indorsement back from either of such indorsers, whose names he may strike from the bill, or not, as he may think proper." This case then, surely answers all the reasons with respect to the want of consideration, &c. being applicable only to the cases where the bill or note was stopped in the hands of the last indorsee. The Kentucky case of Hixon v. Reed rests upon the authority of the New York case of Brown v. Mott. That case differs essentially from the one before the court. The second indorser did not indorse it solely for the accommodation of the drawer. He was as real a party as the last indorsee. He was to have, for his own use, one half of the amount of the

bill, $250. In that case the court say, "If there had been any fraud in this case, or the plaintiff had not made any advance upon the note, the taking it under the knowledge stated in the case," (that is, of the first indorser's indorsing it for the accommodation of the drawer,) would have let in a defence."

From the best consideration I have been able to give to the case before the court, I think it is not so much a matter of consequence what the particular form of the instrument is, as what is the nature of the undertaking and engagement of the parties relatively considered to Turner the drawer. Is it a fair, proper case of contribution between the parties? To make it a case of that kind, and to be decided upon such principles, it is wholly immaterial what is the form of the instrument, which signs first, whether joint or several, with an understanding between the parties or not, whether signed at one time, or at different times, or whether it be by one instrument or several. The principle by which they are obliged is not founded in the written contract, either express or implied inter se, at all. The only material matter required is, has the undertaking, entered into by them, been in the same character? Are both of them bound as sureties for the same person, in the same sum? Are they in æquali jure, common in interest, common in burden? To this effect see Poth. Obl. pp. 68, 69, and 2 Bos. & P. 268, 270–272, in which last case it is thus stated by the court. "The point remains to be proved that contribution is founded on contract. If a view is taken of the cases, it will appear that the bottom of contribution is a fixed principle of justice, and is not founded in contract." Again, in another part of the same case, the court say, "In the particular case of sureties, it is admitted that one surety may compel another to contribute to the debt for which they are jointly bound. On what principle? Can it be because they are jointly bound? What if they are jointly and severally bound? What if severally bound by the same or different instruments. In every one of those cases, sureties have a common interest, and a common burden. They are bound as effectually quoad contribution as if bound in one instrument," &c.

Upon the whole, therefore, I think the verdict for the plaintiff is right, and ought to stand.

THRUSTON, Circuit Judge, concurred.

CRANCH, Chief Judge, dissented, and delivered the following opinion:

The counsel for the defendant cited the following cases:

1. Robertson v. Williams, 5 Munf. 381, which was a joint action of debt in Virginia, against the maker, Williams, and the first indorser, Smith, of Williams's promissory note which had also been indorsed by Lockhead and the plaintiffs, and discounted by a broker, and the proceeds received by Lockhead. The plaintiffs took it up, after protest, and recovered judgment against Williams and Smith who never received any consideration for the note, the same having been fraudulently negotiated by Lockhead, but the plaintiffs were ignorant of the fraud. The court of appeals gave no reason for their judgment. But Leigh and Wickham, in arguing, said, 1st. "The risk which the plaintiffs ran by indorsing, was a sufficient consideration to vest the property in them by relation back to the time of the indorsements, if they were afterwards made liable for the contents, and, 2d. The plaintiffs did actually pay the full contents of the note as a consideration for it when they retired it from the bank; and this consideration has relation to the time of their indorsement." "Suppose the first indorser, Smith, had been the sufferer, could he not have recovered of Williams? yet he gave no consideration for it at the time. Suppose an ordinary accommodation note protested for non-payment, as to the maker, taken up by the indorser; cannot such indorser recover of the maker? yet in no case of that kind, does such indorser pay a consideration for the note at the time of indorsement." These may be presumed to be the reasons for the judgment.

2. The next case cited is Hixon v. Reed, 2 Litt. [Ky.] 174, in the court of appeals of Kentucky. Ward made his note to Reed, who indorsed it to Hixon, who indorsed it to the bank, who discounted it for the accommodation of Ward, the maker, who became insolvent. The note was duly protested so as to charge both indorsers, neither of whom received any consideration for his indorsement. The note was taken up by Reed, the payee and first indorser, who brought his action against Hixon, the second indorser, for one moiety of the money paid to the bank, and recovered in the court below. But that judgment was reversed in the court of appeals. The court cited the case of Brown v. Mott, 7 Johns. 361, with approbation, and said that if the plaintiff in error, the second indorser, had discharged the whole of the note to the bank, he could have recovered the full amount against the defendant, and consequently the defendant in error having first paid it, cannot be entitled to recover any part from the plaintiff.

3. The next case cited, is Brown v. Mott, 7 Johns. 361. Dean made his promissory note payable to the order of Mott, who indorsed it for the accommodation of the maker (Dean); but the person applied to, to discount the note, refused without another indorser. The plaintiff offered to indorse it for the maker, if he would pay him, out of the money to be obtained, $250 which he owned him; which he agreed to do. The plaintiff then indorsed the note and received the $250. The note never was in the possession of the defendant, and no consideration passed between him and the maker, or the plaintiff who knew that the de-

fendant had indorsed the note solely for the accommodation of the maker. The note was duly protested, so as to charge the defendant. Verdict for the plaintiff, subject to opinion of the court on a case stating the above facts. The court said: "The defence is that the defendant indorsed the note for the mere accommodation of the maker, and that this fact was known to the plaintiff when he subsequently indorsed the note. This, however, is not, of itself, a defence. The indorser cannot set up that he indorsed the note without consideration, because by sending the note into circulation, by a general indorsement, and making it thereby a negotiable bill, a consideration is implied by the law merchant, and an inquiry into that fact is precluded. If there had been any fraud in the case, or the plaintiff had not made any advance upon the note, the taking it, under the knowledge stated in the case, would let in a defence; or if he had purchased it or taken it up at a reduced price, it would seem that he could recover only the amount paid. Wiffen v. Roberts, 1 Esp. 261; Braman v. Hess, 13 Johns. 52. But as the drawer" (maker) "originally raised the money upon the note, with the indorsement of the present parties, the note must have been returned to the plaintiff by the subsequent holder, and he must have taken it up for the full value. He has, then, as good a right to resort to the defendant as a prior indorser, as if he had originally received it for its value. An indorser, for the accommodation of the maker, is entitled to all the privileges of an indorser, by being fixed in due season, (2 Caines, 243; [French v. Bank of Columbia] 4 Cranch [8 U. S.] 141; Smith v. Becket, 13 East, 187; Brown v. Maffey, 15 East, 216); and he must be equally chargeable, as indorser, to the persons standing after him on the note." Yeaton v. Bank of Alexandria, 5 Cranch [9 U. S.] 49; Violett v. Patton, Id. 142. "The cases of Smith v. Knox, 3 Esp. 46, and Charles v. Marsden, 1 Taunt. 224, show that the principles of the commercial law are settled, that where there is no fraud in the case, and the indorsee has given full value for the bill, he shall recover of the acceptor, notwithstanding the bill was accepted without consideration, and for the accommodation of the drawer, and that fact was known to the indorsee when he took the bill, and though he even took the bill after it was due. It is impossible to distinguish this case in principle from those last mentioned, and the plaintiff is entitled to judgment." When the court, in the above case of Brown v. Mott, said, "or the plaintiff had not made any advance on the note," they evidently alluded to the fact that the maker of the note was indebted to the plaintiff in the sum of $250, and gave the note in payment, to that extent; so that as to so much of the note there was a good and valuable consideration as between the maker and the plaintiff; so that the latter was a bona fide holder for a valuable consideration to that extent; and therefore the defendant who had indorsed the note generally, to give credit to the note, and had put it in circulation as a negotiable bill, could not defend himself by the want of a consideration. It is not necessary that the indorser should have received any thing; it is sufficient if the plaintiff has parted with any thing in consequence of the credit of the defendant's name upon the note. This I take to be the argument of the court upon that point. But the point in the opinion of the court in that case which relates to the present case of Magruder v. McDonald, is, that the plaintiff, having taken up the note, had as good a right to resort to the defendant as if he had originally received it for its value.

4. The next case cited is Wood v. Repold, 3 Har. & J. 125. Brown's bill of exchange on Gould indorsed by Wood and by Repold for Brown's accommodation, and discounted by a bank in Baltimore, was taken up by Repold, the last indorser, who, by the judgment of the court of appeals of Maryland, (Buchanan, Polk, and Gantt, JJ., against Chase, C. J., and Earle, J.,) recovered the whole from Wood, the second indorser, there having been no communication between the indorsers at or before the time of indorsing. Two grounds of defence were taken:—1st. That they were co-sureties; and, 2d. That there was no consideration between them. Buchanan, J., in delivering the opinion of the court, said: "There is no doubt that two or more may jointly indorse a bill of exchange, and in such case each would be bound to contribute his just proportion of the amount; but then the indorsement itself must be joint, and not several and distinct; or, at least, to create, between two successive indorsers, a liability to contribution, there must be a correspondent understanding between them." "Every man, who signs an instrument of writing, is considered as understanding the nature of the obligation or contract into which he enters; and, by his signature, subjects himself to the operation of the law governing such instruments." After stating that co-sureties in a bond, whether they sign at the same or at different times, are liable to contribution, says: "But not so with respect to the indorsers of a bill of exchange. Every indorser is considered, in law, as a several and collateral security, and is as a drawer to his indorsee. An indorsement presupposes a consideration passing from the indorsee to the indorser, and of necessity precludes the presumption of a joint undertaking. For the law is consistent, and both presumptions cannot stand together." "I cannot, therefore, entertain the first objection; but think that the indorsements of Wood and Repold must be considered as several and successive; to be operated upon by the law regulating such transactions." With regard to the second objection, the want of consideration between Wood and Repold, after observing that the want of consideration between immediate parties to a bill of exchange, whether for accommodation or not, is a good defence, says:—"But that principle, when tested by the established practice

and settled forms of proceedings in actions on bills of exchange, will, I think, be found applicable only to that particular stage of the negotiation at which the bill is stopped in the hands of the party suing, who having never passed it away, has, consequently, been obliged to pay nothing upon it, nor has created any liability on himself to pay, and therefore can only recover, in virtue of a consideration passed by him to the party from whom he received it; and in such case, it is that consideration alone which gives him a right of action. It does not apply to any party to a bill who, on its being protested, has been obliged to take it up; in which case it is not the consideration originally moving from him which entitles him to recover; but it is the subsequent payment alone on which the law raises the promise, and gives him a new cause of action; and he sues in the capacity in which he paid the bill, and not in that in which he received it."

These cases satisfy me that this court was wrong in refusing a new trial, at December term, 1825, in the case of McDonald v. Magruder [Case No. 8,761], where the jury gave damages to the plaintiff for only one half of the note; the circumstances in that case being substantially the same as those in this, excepting that in that case McDonald had paid the whole, and being the last indorser, brought his action as indorsee against Magruder, his immediate indorser; whereas the present suit is by the indorser against his indorsee. The form of the instrument is very material in determining the nature of the contract. The parties have adopted a form which, according to the law applicable to such instruments, makes the parties severally and successively, and not jointly liable, and which gives the holder a right to resort to all the preceding parties on the note. Prima facie the indorsee has a right to recover the whole amount of the note from a prior indorser, and the burden of proof is on the defendant to show a different contract, and to rebut the evidence arising from the form of the instrument. The facts in this case do not show a different contract, and do not rebut the presumption. The circumstance that both parties are accommodation indorsers is not evidence of a different contract. It is now settled that the rights of all the parties upon accommodation paper are the same as on transaction paper; with this single exception, that the person for whose accommodation the paper was issued cannot defend himself by the want of demand and notice. I am therefore of opinion that the judgment upon the case stated ought to be rendered for the defendant. But the other judges being of a different opinion, the judgment must be entered upon the verdict for the plaintiff.

[This cause was subsequently taken on writ of error to the supreme court, where the judgment of the court below was reversed. 3 Pet. (28 U. S.) 470.]

MAGRUDER (McDONALD v.). See Case No. 8,761.

MAGRUDER (RIGGS v.). See Case No. 11,828.

MAGRUDER (THOMAS v.). See Case No. 13,904.

MAGRUDER (UNION BANK OF GEORGETOWN v.). See Case No. 14,360.

MAGUIRE (DALY v.). See Case No. 3,551.

MAGUIRE v. MARTINETTI. See Case No. 9,173.

MAGUIRE (TRASK v.). See Case No. 14,145.

MAGUIRE (UNITED STATES v.). See Case No. 15,708.

MAHER v. The ACORN. See Case No. 10,252.

MAHER (GREENLEAF v.). See Cases Nos. 5,779 and 5,780.

Case No. 8,966.

MAHN v. HARWOOD et al.

[3 Ban. & A. 515;[1] 14 O. G. 859; Merw. Pat. Inv. 462.]

Circuit Court, D. Massachusetts. Oct. 9, 1878.[2]

PATENTS—BASE-BALL COVERING—PATENTABLE INVENTION.

Where a patentee claimed: "The covering of a base-ball consisting of an outer and an inner covering, each of which is composed of two pieces of leather, and applied to the ball independently of each other, substantially as and for the purpose specified:" *Held*, that although the patentee was the first to combine the double leather cover (which was well known on certain kinds of balls), and apply it to a ball of a harder kind equally well known, but which before had been used with a single leather cover or with none, the change would not constitute a patentable invention.[2]

[Cited in Alcott v. Young, Case No. 149.]

[This was a suit by Louis H. Mahn against Harrison Harwood and others to restrain the infringement of a certain patent.]

Joseph C. Fraley and P. J. Flatley, for complainant.

J. E. Maynadier, for defendants.

Before CLIFFORD, Circuit Justice, and LOWELL, District Judge.

LOWELL, District Judge. This suit is brought for the infringement of James H. Osgood's patent, issued May 21st, 1872, No. 127,098, as reissued April 11th, 1876, reissue No. 7,046. The description is substantially similar in both patents, but the general statement of the invention in the opening, and the claims at the close are different. The invention relates to the coverings for base-balls and other similar articles, but the claims make no mention of other articles beside base-balls. The patentee describes coverings of leather cut in a hemispherical shape, and

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

[2] [Affirmed in 112 U. S. 354, 5 Sup. Ct. 174, and 6 Sup. Ct. 451.]

how they are to be fitted and sewed, with a peculiar stitch, which is the subject of claims not now in controversy. After one leather cover has been put on, and has become dry, another similar cover is fitted and sewed in like manner above the first. The third claim, which is alleged to be infringed, is: "The covering of a base-ball consisting of an outer and an inner covering, each of which is composed of two pieces of leather, and applied to the ball independently of each other, substantially as and for the purpose specified."

By reference to the specification, the purpose of the second cover is to enable the ball to bear severe usage better than it could with a single cover. The defendant makes a ball with leather covers, each of which is composed of two pieces, and is, therefore, within the third claim, unless that claim shall be confined to the hemispherical form described in the patent. His ball has a certain amount of yarn wound round the inner cover or binder before the outer cover is put on.

In a suit by this complainant against another defendant in the third circuit, this form of ball was held to infringe the patent, and we see no reason to dissent from that decision. Our information concerning the decision above mentioned is derived from certain admissions and other oral testimony contained in this record, with copies of some of the depositions used in that case, from which it would appear that the novelty of the invention was decided on a very different state of facts from that which is before us.

It is proved in this record, and admitted in argument, that long before 1872, balls made of twine, wound on a core, with a single cover of leather, were old and well known; and that balls made in other modes, such as by winding yarn or twine round a bunch or bundle of scraps of cloth, or other similar substance, or by winding yarn loosely round a core of lead or a small bag of shot, were covered with two covers of leather in substantially the mode of the patent. It is admitted in this case, though it was not in the case in Pennsylvania, that this double cover was used by the defendant years before the date of the patent, and that this use was known to the patentee.

In this state of facts the plaintiff cannot hold a patent for a double covering for balls generally; and he contends that the term "base-balls," in his third claim, means only the balls used by a certain association of persons who regulate the games of the clubs, which are made of yarn, wound on a small core of cork or India-rubber to a certain size and of a given weight. These are much harder, and will bear, and are required to bear, much more severe usage than the balls used some years ago. The regulations were substantially what they now are, when the patent was issued. On the other hand, the defendant contends that the claim cannot be thus contracted, and that if it were, it is still void for want of novelty.

It is quite within the decisions, to construe a word in the patent, such as "base-ball," in a way to save the patent, if that is one of its meanings, though not the only or even the most common one; provided that, by such a construction, the patentee will receive exactly what he has invented, and every one else can use all that is old. We are, therefore, disposed to say that the third claim may be limited, and that upon this record it may be held that the patentee was the first to combine the double leather cover (which was well known on balls made of "gimpings," with yarn wound round them, and on other forms of ball), to a ball of a harder kind, equally well known, but which before had been used with single leather cover or with none.

But we are of opinion that such a combination is not patentable. It is not claimed in the patent, and does not appear to be true, that any new or different effect is sought or obtained, unless, perhaps, in degree, by the double cover as applied to the one ball rather than the other. A changed mode of playing the game required a harder ball, and one of well-known form was adopted, and to it was added the second cover, which was also well known, and often used in the softer balls. This is a change of form which appears, in view of the state of the art, to be within the line of ordinary mechanical adaptation, and nothing more. Bill dismissed.

[On appeal to the supreme court the decree of the circuit court was affirmed. 112 U. S. 354, 5 Sup. Ct. 174, and 6 Sup. Ct. 451.]

Case No. 8,967.

MAHON v. GRACE'S EX'RS.

[Cited in Bond v. Grace, Case No. 1,622. Nowhere reported; opinion not now accessible.]

MAHONEY (STEWART v.). See Case No. 13,434.

MAHONEY MIN. CO. (ANGLO-CALIFORNIAN BANK v.). See Case No. 392.

Case No. 8,968.

MAHONEY MIN. CO. v. BENNETT.

[4 Sawy. 289;[1] 1 San Fran. Law J. 33.]

Circuit Court, D. California. Aug. 20, 1877.

REMOVAL OF CAUSES — PROVISIONAL REMEDIES — JURISDICTION AFTER REMOVAL.

1. Where proceedings have been perfected for removing a cause from a state court to the circuit court of the United States, under the act of congress of 1875 (18 Stat. 470), the circuit court, upon petition and notice to the adverse party, will grant leave to file a copy of the record in said court before the first day of the next succeeding term thereafter, for the purpose of administering without delay any of the provisional

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

remedies to which the petitioning party may be entitled.

[Cited in Delbanco v. Singletary, 40 Fed. 180; Pelzer Manuf'g Co. v. St. Paul & Marine Ins. Co., Id. 186.]

2. The circuit court, upon such petition and notice, has jurisdiction to grant leave to file the record before the day appointed by statute; and, after the filing of the record in pursuance of such leave, to proceed to grant any provisional relief to which the party may be entitled.

[Followed in Commercial & Sav. Bank v. Corbett, Case No. 3,057. Cited in Re Barnesville & M. Ry. Co., 4 Fed. 13; New Orleans City R. Co. v. Crescent City R. Co., 5 Fed. 161; Portland v. Oregonian Ry. Co., 6 Fed. 323; Texas & St. L. Ry. Co. v. Rust, 17 Fed. 280; Kansas City & T. Ry. Co. v. Interstate Lumber Co., 36 Fed. 11; Delbanco v. Singletary, 40 Fed. 180.]

[This was an action by the Mahoney Mining Company against Samuel Bennett.] Motion for leave to file record in a case transferred from the state court before the time appointed by law, and for a preliminary restraining order.

Wm. M. Stewart, for motion.

Wm. H. Sharp, contra.

SAWYER, Circuit Judge. On July 16, 1877, the complainant filed its bill in the state district court of the Nineteenth judicial district, among other things, praying an injunction against the sale and working of the mine claimed by the complainant. At the same time it gave defendant notice of an application for a preliminary injunction. On August 6, the defendant gave notice of his appearance, and of a petition to remove the case to the United States circuit court, on the ground that the defendant is a citizen of Prussia, the complainant being a domestic corporation; which motion was granted on August 14, before the application for a preliminary injunction had been heard by the court. The first day of the next succeeding term of the said circuit court would be the fourth Monday in November, nearly four months distant. The complainant thereupon immediately gave defendant notice of an application to the circuit court for leave to file a copy of the record of the case in said court; and that upon leave being granted it would apply for a preliminary injunction upon the same grounds as stated in the application for an injunction in the state court before the making of the order of removal. The defendant objects to the hearing of the application for leave to file the copy of the record, as well as the further motion for an injunction, on the ground that, under the statute, he has till the first day of the next term to file the record; and that, until that day, this court can have no jurisdiction over the cause. It is true, as urged by defendant, that the statute makes no provision for filing the copy of the record before the first day of the next succeeding term, or by any other person than the party removing the cause. But it is also true that there is nothing prohibiting the filing of the record at an earlier day, or by any party interested, other than the one removing the cause. Where a sufficient petition is filed in a proper case for removal, and a sufficient bond given, the proceedings being all regular and sufficient, the state court can take no further proceedings in the case without usurping jurisdiction. 18 Stat. 471, § 3; Insurance Co. v. Dunn, 19 Wall. [86 U. S.] 224. If, after completing the proceedings for a removal, so far as to deprive the state court from taking any further action, there is no means by which the circuit court can get hold of the case till the first day of the next succeeding term, there will be a case pending, in some cases for many months, in which no court has jurisdiction to take any action whatever. An attachment may have been obtained, which ought to be dissolved, and which it would be ruinous to the defendant to continue; so an injunction, or the appointment of a receiver may be imperatively required to protect the interest of the complainant pending the action, which no court has power to grant until too late; or an injunction, or a preliminary restraining order may be improperly granted, and the removal made before the injured party can be relieved. In case of a removal pending a motion for an injunction, or application for a receiver, a party might be obstructed in obtaining a provisional remedy to which he is entitled, at a ruinous sacrifice. He could not move in that case, because it is suspended between two courts, neither of which can act; and he could not even dismiss his action and commence a new one in the national courts, wherein the court would have jurisdiction to afford him provisional relief, because, if neither court has authority to take action, it has no authority to enter an order of dismissal of the action once pending, until the statutory time for filing the copy of the record in the national courts has elapsed and the record has been filed. The injured party would, therefore, be remediless. If such be the law, causes will doubtless often be transferred for the purpose of accomplishing these results, thereby defeating the ends of justice. From the moment that the proceedings for removal are perfected, the circuit court, in my judgment, is in a position to take jurisdiction for the purposes indicated; and it only needs the record to enable it to proceed. Under sections 7 and 8 the court is expressly given authority to take the means prescribed to obtain the record, where the state court, or its officers, refuse to furnish a copy. For some purposes, at least, the circuit court may take action before the record is filed. The only obstacle to proceeding is the want of the record. After a careful consideration of the act of congress, I have reached the conclusion that, where the necessary proceedings have been taken in a proper case, to remove a cause from a state to a national court, and the facts are made to appear in a petition filed in the court to which the cause

is removed, this forms a sufficient basis upon which such court has jurisdiction to act, after due notice to the adverse party, and upon which leave to file the record may be granted; and, after the record has been filed in pursuance of such leave, that the court has jurisdiction, in its discretion, to proceed and administer all provisional remedies applicable to the case. Any other construction would work intolerable inconvenience and remediless injury to the parties, and could not have been contemplated by congress. It was intended to put the burden of making the transfer of the record upon the party availing himself of the right given; and it was only to secure this end that he is mentioned in the act in this connection and means provided for securing his action within a reasonable time. As no duty was imposed upon the other party, there was no necessity for naming him in connection with these provisions. I think, however, the act should be amended, authorizing either party, at any time, to file the record upon giving notice to the adverse party, and expressly authorizing the circuit court to thereupon proceed with the case, as otherwise great delay may often result from a removal. Mr. Circuit Judge Dillon, also, seems to be of the opinion that the circuit court may take jurisdiction, upon due notice, for the purposes of administering provisional remedies. Dill. Rem. Causes, p. 71. Let leave to file a copy of the record be granted.

The record having been filed, and the defendant not being ready to respond to the motion for an injunction, the court, upon ex parte application at chambers, upon security being given, granted a restraining order till the application could be heard.

[See Case No. 8,969.]

Case No. 8,969.

MAHONY MIN. CO. v. BENNETT.

[5 Sawy. 141; 6 Reporter, 99.] [1]

Circuit Court, D. California. April 22, 1878.

CORPORATIONS—BOARD OF DIRECTORS—FRAUDULENT LEASE OF A MINE.

Where a board of directors of a mining corporation makes a nominal lease of the mine owned by the corporation, to a party really acting in the interests of a minority of the stockholders, not in the ordinary course of the business of the corporation, but for the purpose of withdrawing the mine from the control of a board of directors about to be elected at an approaching meeting of the stockholders, and thereby perpetuating the control of the minority, a court of equity will cancel the lease on a bill filed by the corporation for that purpose.

Bill in equity [by Mahony Mining Company against Samuel Bennett] to set aside a lease on the ground of fraud. [For a former hearing on a motion for leave to file record in the case and for a preliminary restraining order, see Case No. 8,968.]

McAllisters & Bergin and Stewart, Van Clief & Herrin, for complainants.

S. Heydenfeldt and Wm. H. Sharp, for defendant.

SAWYER, Circuit Judge. This case was argued very thoroughly, and the testimony was very fully read on the hearing. It is a bill in chancery to set aside a lease of a mine for three years, with an option to purchase at the price of two hundred and fifty thousand dollars within that period. The ground alleged is that this lease was made, not in the due and proper course of the business of the corporation, but by a conspiracy, in fraud of the rights of the majority, and in the interest of the minority, of the stockholders. The bill is filed to cancel the lease on that ground.

Testimony has been introduced and arguments have been made with reference to the irregularity of the election of both the boards of directors claiming to represent the corporation; but I do not find it necessary, in the view I take of the case, to decide as to the ultimate validity of those elections; and I shall assume, for the purposes of the decision, that the election of the first board of directors, by whom the lease was made, was valid. The result of that election is only important, in the view I take, so far as it bears upon the question as to the purpose for which this lease was made. There are certainly some irregularities in it, and some extraordinary circumstances connected with that transaction. Nevertheless, I shall consider those in this case only as indicating the motives of the actors, and their bearing upon the validity, or legal propriety, of this lease.

The mine seems to have been worked without any difficulty up to a certain time in April, 1877. The two principal stockholders owned fifty-two hundred shares each, and there were sixteen hundred shares outstanding, belonging to Sharon, Bell, Sunderland and Flood & O'Brien. One of the directors—the director who, as I understand it, represented the interests of Sharon, Bell, Sunderland and Flood & O'Brien—resigned; and the remaining directors called a meeting of the stockholders for the purpose of electing a new board of directors. This meeting was called apparently in the interests of the Seligmans—one of the two large stockholders. The other large stockholder, Stewart, owning an equal number of shares with the Seligmans, was at the time temporarily absent on business in New York, and was not notified of the calling of the meeting of the stockholders. A thousand shares of the stock of the company, owned by Sharon, Bell and Flood & O'Brien, stood in the name of one Bush, as trustee, and were voted at that meeting by him without the knowledge or

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 6 Reporter, 99, gives only a partial report.]

consent of the owners, who were in the city at the time; and neither Sharon nor Bell was aware that his stock had ever been issued, and neither had notice of the calling of the meeting. These shares were required to constitute a majority of the stock.

At that meeting a new board of directors was elected, most of them, apparently, being merely nominal owners of stock, holding a few shares in order to qualify them to act as directors. The meeting seems to have been organized, and the new directors elected, under the management of Benjamin, acting in the interest of the Seligmans; at all events these directors were elected to control the corporation; and, for the purposes of this decision, I shall assume that they had authority to act as directors in the usual business of the corporation.

When Stewart returned to the city within a few days after, and ascertained what had been done, there was dissatisfaction, and some discussion over the matter. Previous to this time there had been no meeting of the stockholders or election of directors since the first board was elected, three or four years before; and, as the by-laws of the corporation contained no provision for the calling of an annual meeting, the statute provides that, in such a case, the time of meeting shall be the first Tuesday in June. Civ. Code, § 302. In case no meeting is called by the board at the time appointed by law, one half of the stockholders are authorized to call one. Id. §§ 310, 314. The extraordinary meeting was held on May 1, a few days only over a month prior to the time appointed by the statute for the annual meeting. Stewart, upon ascertaining the condition of things—that the one thousand shares of Sharon and Bell and others had been voted without their knowledge and consent—bought up these outstanding shares before the first of June, and immediately notified all the stockholders and the directors of the calling of a stockholders' meeting in June, in the mode designated by the statute. Immediately on receiving that notice, the directors elected on the first of May met, on the first of June, and, without having previously had any consultation in regard to the matter, Benjamin, representing the Seligmans, being the active party, it was proposed to make a lease of the property to one Bennett, a brother-in-law of Benjamin; and the board passed a resolution authorizing the making of the lease, and the lease was thereupon made, the lease in question here. All this was accomplished before and on the fifth of June.

Now the question is as to the purpose of that lease. It is claimed on the one side that it was made in good faith, in the interest of all the stockholders; and on the other side it is claimed that it is a mere sham, gotten up for the purpose of keeping the control of the mine from passing into the hands of the majority of the stockholders in case they should elect a new board of directors at the meeting called in June. It is admitted by the principal witnesses, and by the ones particularly active in the matter, that that was one of the purposes of the lease. It is so stated in their testimony, and I think no one can read that testimony without being satisfied that that was the moving and controlling purpose of this lease. It is very manifest, to my mind, that Bennett was not the real lessee, but was a mere instrument in the hands of Benjamin, acting in the interest of the minority of the stockholders at that time. Bennett was a man not likely to take such a lease, having no sufficient means with which to carry on such an undertaking, and not being a man of experience in mining, or a person whom business men of ordinary judgment and prudence would be likely to entrust with such an enterprise. From the testimony, it appears manifest to my mind that the money paid out by him, after assuming control of the mine, was furnished by other parties, and not by Bennett; that Benjamin was still the active and controlling man as before. It is impossible, it seems to me, after reading the testimony in the case, to come to the conclusion that the transaction was really a bona fide lease to Bennett, for his own purposes. Bennett was but the instrument, the shadow of the real parties seeking to withdraw the control of the mine from the board of directors about to be elected by the majority of the stockholders.

Now, it may well be, that, in making such a lease, the parties, representing the minority, may have believed that the interest of all the stockholders was advanced; but in this case, where this lease is given with an option to purchase the mine for two hundred and fifty thousand dollars, it is certainly a remarkable fact that the man who was active in the matter should have been Benjamin, both before and after the lease. Manifestly, the controlling purpose was to circumvent the other stockholders, who were seeking, at the proper time and in the mode appointed by the statute, to elect a new board of directors, and to put the mine beyond their reach and control, in order that the Seligmans might control it according to their own ideas of what was right and proper. Whether or not this was, as the complainant insists, intended as a fraud, the manifest operation of the proceeding, if consummated, would be to work a fraud upon the rights of a majority of the stockholders. Upon that ground I think the lease was not made in the due and regular course of business of the corporation, or for any legitimate purpose. It was made for the purpose of diverting the mine into the control of the minority of the stockholders, against the opposition of the majority, without any representation on the part of the majority, in case the majority should succeed in establishing their control of the corporation—should elect a new board of directors at the coming meeting.

It is said that this new election was void,

and that the acts of the new board of directors are not the acts of the corporation. The new board was elected by a majority of the stockholders at a meeting held at a time and in the manner authorized by law, and a state court has decided that election to be valid; and, although there is an appeal pending, that judgment is still unreversed. At all events, the new board is in active control, and, as I understand it, in possession of the books, etc., of the corporation; and its members are now, and were at the time, de facto, acting as directors.

As to the management of the mine, we have nothing to do with that here. Upon the vacation of the lease the mine, as it should be, will be subject to the control of the legal board of directors, whoever they may be. The new members were doubtless all elected in the interest of those opposed to the Seligmans, as the old ones were in their favor. But we have nothing to do with that in this suit. I have disposed of the only question involved in the case in determining that this lease was made for an unlawful purpose—for the purpose of taking the mine out of the control of those who were to succeed in the management of the mine, should an election be lawfully held, in pursuance of notice already given: a purpose which, in my judgment, renders the lease an unlawful exercise of the powers assumed and exercised by those parties by whom it was made, and therefore that it should be canceled.

Let a decree be entered canceling the lease, in pursuance of the prayer of the bill, and making the preliminary injunction issued perpetual.

Case No. 8,970.

MAHOON et al v. The GLOCESTER.

[Bee, 395;[1] 2 Pet. Adm. 403.]

Admiralty Court, Pennsylvania. 1780.

PRIZE—SEAMEN'S SHARES—HOW FOUNDED—VOYAGE BEGUN—PUT ON SHORE.

1. Admiralty has jurisdiction in cases of claims made by seamen to shares of prizes.

2. The right of a seaman to wages is not founded in the articles, but in the service.

[Cited in Worth v. The Lioness No. 2, 3 Fed. 925.]

3. The captain of a vessel, without giving any reason for his conduct, forces some of his crew on shore after a voyage is begun. They shall be entitled to share in the prizes taken.

[Cited in Emerson v. Howland, Case No. 4,441; Pratt v. Thomas, Id. 11,377.]

The brig Glocester had been captured by Roger Kean in the privateer Holker, and condemned as prize to the captors. The marshal being about to make distribution of the booty amongst the crew, according to the list handed in by Captain Kean, was notified to stay in his hands twenty-five shares of the said prize, claimed by Patrick Mahoon, and others, as being a part of the crew belonging to, and concerned in the said privateer Holker. Notwithstanding that their names were not to be found in the captain's return; the libel, now before the court, is for these twenty-five shares.

HOPKINSON, District Judge. The circumstances of this case appear, by the testimony exhibited, to be as follows: The printed articles of the privateer Holker were set up at a common house of rendezvous for the enlistment of privateer's men, according to custom. The libellants, in common with many others, signed these articles, and made the necessary preparations for the cruize. When the Holker was ready to sail, the libellants, with the rest of the crew, repaired on board by order of the captain, and the vessel set sail. When they arrived at Chester on the Delaware (fifteen miles below Philadelphia) Captain Kean mustered his crew upon deck, called over their names as subscribed to the articles, and then, without giving any reason for his conduct, selected Patrick Mahoon and twenty-four others, and ordered them on shore; refusing to let them proceed on the cruize, and when they earnestly solicited to be continued on board he forcibly drove them away, and the captain proceeded on his voyage, leaving the libellants behind. A few days after Kean again called his crew together and produced to them another printed copy of articles, which he urged them to sign. Some objected, observing that they had already signed, and did not understand signing two sets of articles for the same cruize; but the captain enforced them with threats and even blows, to sign the new articles; declaring at the same time, that his view was to exclude those men whom he had left behind from having any share of the prizes they might take. The brig Glocester was captured during this cruize.

The respondents have rested their cause principally on a plea to the jurisdiction of this court; alleging that the injury, if any, was exclusively of common law cognizance; because the libellants' claim was founded in articles executed on shore, within the body of a county: that although the admiralty could determine the question of prize or no prize; yet it could not determine to whose use, having no jurisdiction in disputes between owner and owner, owner and captain, or captain and mariner, except only in the case of a mariner's wages, which is allowed out of special favour, and not of right, further than as communis error facit jus.

The facts being fully ascertained, and not controverted, no difficulty arises from that quarter. It is in proof that Captain Kean forced the libellants on shore after the voyage was begun, and compelled the remain-

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

der of the crew to sign the new articles, with a view to exclude the libellants from any advantage they might claim under the former; and it is contended that this court cannot redress the injury, because the suit respects damages, which the common law alone can ascertain. The truth, however, is, that the parties do not sue for redress of an injury; but for their shares of a prize legally condemned to the use of the owners, officers, and crew, and of all persons belonging to, or concerned in the privateer Holker: of which crew, they say, they are a part. The articles of enlistment, executed on shore, is no bar to the jurisdiction of the admiralty. Mariners are generally engaged on shore, and always sue for their wages in this court. In the one case the mariners are paid by monthly wages, or by the run, in the other by a share of the booty taken. There is the same reason in both cases. But I am of opinion that the articles are not the true foundation of a seaman's claim. If one or more mariners should enter on board a vessel, with the knowledge and consent of the master, should receive his orders and perform the duties of the station, they would be entitled to customary wages, or a proportion of the booty taken in common with the rest of the crew, although they had signed no articles at all: the right is not founded in the articles, but in the service.

It has been said, that this court can only determine the question prize or no prize, but cannot adjudge to whose use. Broom's Case, Carth. 399; Id. 475,—is express in point to the contrary. The admiralty not only decreed lawful prize, but also to whose use, viz. to the king's; and Broom having converted the property to his own use, was sued in the admiralty by the king's proctor for the value. Broom applied for a prohibition, which was denied; because the court of admiralty, having determined the property to be prize to the king, this second suit was deemed to be only a continuation of the original process. Moreover, it cannot be supposed but that during the many maritime wars in which England hath been engaged, contests about the rights of seamen to shares of prizes must have frequently occurred. If then such claims were only triable at common law, they would doubtless appear in some of the books of reports. But no actions of this kind can be found in those books, nor even prohibitions prayed for in such cases. The inference is, that such suits were allowed to be exclusively of admiralty jurisdiction. If Captain Kean had any reasonable objections against the libellants, he should have made those objections before he received them on board, or at least before the vessel had weighed anchor and commenced her voyage. As the libellants were in fact forced from the service, I do not see why this wrong, on the part of the captain, should deprive them of the right they had obtained in this cruize by the enlistment, and by the captain's confirmation of that enlistment when he received them into his service.

I adjudge that the libellants have and receive their respective shares of the prize brig Glocester, and her cargo, in common with the rest of the Holker's crew.

The respondents appealed from this decree; but the court of appeals confirmed the sentence. [See Case No. 7,632.]

MAIDEN, The (BROWER v.). See Case No. 1,970.

Case No. 8,971.

MAILLARD et al. v. LAWRENCE.

[1 Blatchf. 504; [1] 12 Law Rep. 354.]

Circuit Court, S. D. New York. Oct. Term, 1849.

CUSTOMS DUTIES—SHAWLS—WEARING APPAREL.

1. Shawls or scarfs, manufactured on looms, and in strips or pieces containing several, the place of separation indicated by threads which form, when cut, the fringe, and the articles being actually separated before importation, and being, in the state in which they are imported, suitable and adapted to be worn by women and children as articles of dress, and, at the time of importation, usually so worn, and imported for that purpose, come within the description of wearing apparel, under Schedule C of the tariff act of July 30th, 1846 (9 Stat. 45), and are chargeable with a duty of 30 per cent.

2. By the use of the words "wearing apparel" in the act of 1846, congress intended to make the purpose, adaptation, and use of an article, and not its commercial designation, the test of its dutiable description.

[Cited in U. S. v. Washington Mills, Case No. 16,647; U. S. v. Oppenheimer, 61 Fed. 284.]

This was an action [by Thirion Maillard and others] against [Cornelius W. Lawrence] the collector of the port of New-York, to recover back an excess of duties paid upon shawls and scarfs, composed some of worsted alone, some of silk alone, some of silk and worsted, and some of worsted and cotton. It was tried before Mr. Justice Nelson, in April, 1848. A duty of thirty per cent. was charged upon the articles, as "wearing apparel of every description, of whatever material composed, made up or manufactured wholly or in part by the tailor, sempstress, or manufacturer," under Schedule C of the act of July 30th, 1846. 9 Stat. 45. The plaintiffs claimed that a duty of only twenty-five per cent. should have been charged on the articles, as "manufactures of silk, or of which silk shall be a component material, not otherwise provided for," and "manufactures of worsted, or of which worsted shall be a component material, not otherwise provided for," under Schedule D of the same act. Id. 46. It appeared in evidence that the shawls and

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

scarfs were manufactured on looms, and in strips or pieces containing several shawls or scarfs, the place of separation being indicated by threads, which formed, when cut, the fringe, and the articles being actually separated before importation, and being, in the state in which they were imported, suitable and adapted to be worn on the person by women and children, as articles of dress, and, at the time of importation, usually so worn, and imported for that purpose. There was much evidence given for the purpose of showing that the articles were not known in trade and commerce as "wearing apparel." The court charged the jury that the articles in question were not "wearing apparel" under Schedule C of the act, but were manufactures of worsted, cotton, and silk under Schedule D of the act, and were, therefore, chargeable with a duty of only twenty-five per cent. A verdict was found for the plaintiffs, and the defendant now moved for a new trial, on a bill of exceptions.

Benjamin F. Butler, for defendant.
Francis B. Cutting, for plaintiffs.

NELSON, Circuit Justice. We are of opinion that the shawls and scarfs in question come within the description of "wearing apparel" under Schedule C of the tariff act of July 30th, 1846, and were properly charged with a duty of thirty per cent. This phraseology for the purpose of describing a dutiable article, was used for the first time in the act of 1846, and was introduced for the purpose of describing a class of articles, not as known in trade and commerce by any particular appellation, but by the actual use for which they were designed, and to which they were adapted, taken in connection with the fact that they were made up or manufactured wholly or in part by the tailor, sempstress, or manufacturer. Congress intended to depart from the commercial designation as the test to determine the description within which the duty should or should not be charged, and to leave such determination to the test of the actual use of the article. Hence, the purpose for which it was made, its fitness and adaptation as an article of dress, and the actual use of it, are the proper subjects of inquiry in determining whether it comes within the clause in question; not the name or description by which it may be known to the manufacturer, or importer, or others dealing in the article. Is the article wearing apparel in point of fact, made up or manufactured by the tailor, sempstress, or manufacturer? That is the question to be determined for the purpose of ascertaining the rate of duty. The words are used in their natural and ordinary sense, and are to be so interpreted by the court. A new trial must be granted, with costs to abide the event.

[Upon the new trial there was a verdict for the defendant. The case was then taken to the supreme court upon error where the judgment was affirmed 16 How. (57 U. S.) 251.]

Case No. 8,972.

MAILLARD et al. v. LAWRENCE.

[3 Blatchf. 378.] [1]

Circuit Court, S. D. New York. Nov. 30, 1855.

CUSTOMS DUTIES—VALUE OF GOODS—TIME OF PURCHASE—OF EXPORTATION—PENALTY—PROTEST.

1. Where goods were invoiced and entered at their market value at the time of their purchase, and their value had increased between that time and the time of their exportation, and, under instructions from the treasury department, they were appraised at their value at the time of their exportation, and duties were assessed on that valuation, and also an additional duty of 50 per cent., under section 17 of the act of August 30, 1842 (5 Stat. 564), and were paid under a protest "against the demand of the duties charged upon the merchandise specified in the within entry," which said: "The difference between the sum so charged and what ought to have been levied upon the prices mentioned in the invoice, we shall claim to recover back, and we also protest against the penalty of 50 per cent. in addition to the duties charged, because the invoice was fair, and the said last mentioned sum is levied without the due process of law:" *Held*, that, under such protest, it could not be objected that the collector did not, under section 17 of said act of August 30, 1842, order a reappraisement, or that one of the examiners was partial and hostile to the importer.

[See Bangs v. Maxwell, Case No. 841.]

2. As the treasury instructions were given to the appraisers by the collector, to govern them in making the valuation as of the time of exportation, this fact, in connection with the protest, made the protest sufficient, under the act of February 26, 1845 (5 Stat. 727), to raise the objection that the goods were erroneously valued by the appraisers as of the time of their exportation, instead of as of the time of their purchase.

3. Under the said act of August 30, 1842, the valuation of the goods as of the time of their exportation, instead of as of the time of their purchase, was illegal.

4. The 50 per cent. penalty could be recovered back, as there was a protest against its exaction; and such protest was necessary, under said act of 1845, because such penalty was only an increase of duties.

This was an action [by Thirion Maillard and others] against [Cornelius W. Lawrence] the collector of the port of New York, to recover back an excess of duties and a penalty. The jury found a verdict for the plaintiffs, subject to the opinion of the court on a case.

John S. McCulloh, for plaintiffs.
J. Prescott Hall, for defendant.

BETTS, District Judge. The goods in question were invoiced in France, March 19th, 1845, at their actual market value and price at the time and place of their purchase, and were entered at the custom-house in New York, July 5th, 1845, at the invoice prices. Between the period of purchase and the period of exportation, the goods had largely increased in value. They were appraised at the custom-house, under the instructions of the secretary of the treasury, according to their value at the time of exportation, and the defendant collected duties

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

on that valuation, and also imposed an additional duty of 50 per cent., under the 17th section of the act of August 30, 1842 (5 Stat. 564).

It is not contended by the defendant that the duties were rightfully assessed. He admits that the time of purchase should have been the period taken for the valuation. But he insists that the protest does not entitle the plaintiffs to maintain this action. The protest is as follows: "We protest against the demand of the duties charged by the collector upon the merchandise specified in the within entry. The difference between the sum so charged and what ought to have been levied upon the prices mentioned in the invoice, we shall claim to recover back, and make the present payment under protest. We also protest against the penalty of 50 per cent. in addition to the duties charged, because the invoice was fair, and the said last-mentioned sum is levied against our will, without due process of law." The act prescribing the character of the protest to be made by importers, was passed in the February preceding this entry and protest (Act Feb. 26, 1845; 5 Stat. 727); and, although, anterior to that enactment, the form of protest in question might have been accepted, as giving the collector amply sufficient notice, different requisites are now demanded, and the protest must possess those exacted by the existing law, to enable the importer to call in question the legality of the proceedings of the collector.

The plaintiffs now claim, that the appraisement was not a legal basis for duties, because the defendant did not order a reappraisement, according to the provisions of the 17th section of the act of August 30, 1842 (5 Stat. 564). But it is to be observed, that it is not proved that the plaintiffs gave written notice to the collector of their dissatisfaction with the official appraisement. The collector is not authorized to call in a merchant appraiser, except upon such notice, and the first appraisal, accordingly, stands as fixed, under the provisions of the 16th section of the act of 1842.

Nor can the evidence given by the plaintiffs, proving the partiality of one of the examiners and his avowed hostility to the plaintiffs, and thus laying a foundation for the inference that his valuation was maliciously wrongful and extortionate towards them, be of any avail, because their protest does not allege notice to the defendant of those facts, so that he might have rectified the error, if he believed that any was produced thereby.

The plaintiffs proved, by one of the assistant appraisers, that the valuation of the goods was made under direction of the treasury department, as of the time of their exportation; and there is attached to the proofs the circular of the secretary of the treasury to collectors, bearing date May 15th, 1845, which orders appraisements of merchandise to be made at the market value at the period of exportation. The direction in the present case to the appraisers could only come through the collector to whom the circular was addressed. It emanated from the treasury department less than two months previous to this appraisement, and was given by the defendant to the appraisers, as the rule governing the valuation of the goods at their market price when exported, and not when purchased. We think that these facts, connected with the protest, bring sufficiently home to the defendant notice that the valuation and appraisement in question were, for that cause, not authorized by law. The defendant made his instructions the ground of his action, and estimated the entry, accordingly, at the period of exportation. The protest notified him that the price was beyond the market value of the goods, and that the true value was the invoice price, which plainly imported that the value was to be determined by the state of the market at the period of purchase. The evidence on the trial established the fact that the market value of the goods at the time of purchase was not more than the invoice prices. In view of the fact that the treasury circular was in the hands of the defendant, and was used by his officers as the rule governing their valuation of the goods, we think that the protest is to be regarded as an objection to that rule, and as an adequate compliance with the act of February 26, 1845, and that it set forth, with all necessary distinctness, the grounds of objection to the amount of duties assessed.

We have frequently decided that the act of August 30, 1842, required the duties to be assessed on the value of imports at the time of their purchase. Therefore, the adoption of a different period of valuation in this case was illegal; and, on the proofs given at the trial, the plaintiffs are entitled to recover the difference between the duties levied on the appraisement and those chargeable on the invoice, together with 50 per cent. thereon, collected as additional duties, together with interest on both sums.

We do not accede to the proposition of the plaintiffs, that the 50 per cent. added to the regular duties may be recovered by them without protest, on the ground that it is a penalty. We regard it as an increase, on the contingency specified, of the duties chargeable on the imports, and, accordingly, are of opinion, that the importer must pursue the same course, in respect to that incident, as to the principal, and cannot recover it as a separate demand and cause of action, but only upon protest, as required by the act of 1845. The chief duties, however, not having been rightfully assessed in this case, the incident or consequent increase charged upon the goods was unlawfully exacted, and must be repaid. Judgment for plaintiffs.

MAILLARD (UNITED STATES v.). See Case No. 15,709.

MAINE (CALDWELL v.). See Case No. 2,304.

Case No. 8,973.

MAIN et al. v. GLEN.

[7 Biss. 86.] [1]

District Court, W. D. Wisconsin. Dec., 1875.

BANKRUPTCY — FRAUDULENT SALE — IGNORANCE OF INTENTION — JURISDICTION.

1. A sale by a retail dealer of his entire stock at once is presumably fraudulent, and the presumption of fraud arising from the unusual nature of such a sale can only be overcome by proof on the part of the buyer, that he used all reasonable means to ascertain that the sale was an honest one.

[See Babbitt v. Walbrun, Case No. 694.]

2. It is not enough to show that the buyer did not know that the seller's intentions were to defraud his creditors.

3. A suit to set aside a contract upon grounds created and established by the bankrupt law [of 1867 (14 Stat. 517)], is one over which the federal courts have jurisdiction, and these courts will entertain jurisdiction to prevent their officers being placed in unreasonable jeopardy.

This is a suit in chancery [by W. S. Main and others, assignees] to set aside a pretended sale of the bankrupt's property and effects to the defendant [John Barr Glen] made on the 28th day of January, 1874. The bankrupt, Siegrist, was at the time a merchant at Wausau, doing a general retail business. The defendant was his clerk. The stock of goods invoiced at about $16,000, and the accounts amounted to from $8,000 to $9,000. The bill shows that the bankrupt was largely indebted, and was being pushed for payment before that time, and as early as the beginning of December, 1873; that he went to New York, about the 10th of December, to settle with his creditors, leaving the defendant in charge of his store; that he remained away until the 27th day of January, when he returned to Wausau about noon, and on that day negotiated, and on the morning of the 28th completed a sale to defendant of his entire stock of goods and accounts, and left before noon, without paying any of his debts, and has never returned. It is set up that defendant claims to have paid $13,000 for the goods and accounts, but the bill denies that any such amount was paid. The bill charges that defendant knew of the bankrupt's insolvency, and of his purpose to abscond and defraud his creditors, and that defendant conspired with and aided him in the execution of such purpose. It also shows that on the 30th day of January, some of the creditors disregarding the sale, commenced suits in the state courts, and caused the goods to be seized upon attachments by the sheriff of the county of Marathon; that others of the creditors at once instituted proceedings in bankruptcy against Siegrist, and that this court, sitting in bankruptcy, issued a provisional warrant to the marshal to seize and hold the property of the debtor, and that the marshal presented his warrant to the sheriff and that thereupon he voluntarily surrendered the possession of the goods and store to the marshal, who took and held them until after adjudication of bankruptcy, when provisional assignees were appointed who received them from him and to whom he surrendered them, and that they were sold by the provisional assignees under an order of this court, and the proceeds were ordered to be deposited in the registry of this court to abide the result of the claim of the defendant thereto; and that afterwards this defendant sued the marshal in the state court for wrongfully taking the goods, which suit was still pending, and a part of the relief sought by the bill is an injunction restraining the defendant from prosecuting that suit or any suit for the recovery of said goods or their value, and further providing for an accounting and decree for such portions of the goods as defendant had sold, and for such portions of the accounts as he had collected. The defendant answered denying all fraud or knowledge of insolvency or knowledge of any fraudulent intent by the bankrupt, and denying the authority of this court to restrain the defendant from prosecuting his suit against the marshal in the state court, and setting up that he purchased and paid for the goods and accounts the sum of thirteen thousand dollars in cash, and that the purchase was in good faith and without any intent on his part, or knowledge of any intent on the part of the bankrupt, to defraud his creditors.

William F. Vilas, for complainants.
Gregory & Pinney, for defendant.

HOPKINS, District Judge. The testimony read on the hearing shows beyond a question the insolvency of the bankrupt, and that he intended by the sale to defraud his creditors. This was not disputed by defendant's counsel, but the purchase was sought to be maintained upon the ground that defendant had paid a fair price for the goods, and bought without any knowledge of the bankrupt's circumstances, and without reasonable cause to believe him to be insolvent, and without any knowledge or belief or reason to believe that he was intending to defraud his creditors.

The bankrupt law, section 5130, Rev. St., makes a sale of debtors' property "not made in the usual and ordinary course of business of the debtor, prima facie evidence of fraud." The ordinary course of business of the debtor here, was to sell at retail, and a sale of the whole stock, including accounts and other effects, was clearly outside of his ordinary business, consequently presumptively fraudulent.

A case involving such a sale was before the supreme court of the United States, Wal-

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

brun v. Babbitt, 16 Wall. [83 U. S.] 577, and it was there held that the sale of a retail dealer of his entire stock at once was out of the ordinary course of business of such dealer, and fraudulent, and that the presumption of fraud arising from the unusual nature of such a sale could only be overcome by proof on the part of the buyer that he used all reasonable means to ascertain the pecuniary condition of the seller before making such purchase.

The law casts upon a person purchasing an entire stock of a retail trader the obligation of investigating his condition and motives for such a sale. It pronounces such a sale fraudulent prima facie, and the purchaser must be prepared to overcome that presumption by showing it to have been honest, or that upon vigilant inquiry no reason appeared to doubt its honesty. It is not enough to show that he did not know that the debtor's intentions were to defraud his creditors. The law told him they were, and he should have investigated and ascertained as a fact that they were not. As I have before said, in this case there was no controversy but that the bankrupt made the sale to defraud his creditors, just what the law presumed he did it for, and I do not see, therefore, how the sale can be sustained; the prima facie case is not overthrown, but on the contrary, is fortified by the evidence that the defendant's counsel on the hearing did not attempt to deny that the debtor intended just what the law presumed from the character of the sale, to-wit: to defraud his creditors.

The ignorance of the defendant of the condition and purposes of the bankrupt in making such sale does not defeat this presumption, even if that was established. He should have shown either that the sale was honest in fact, or that from a thorough examination of the seller's affairs he had reasonable cause to believe it to be so, which he wholly failed to do.

But I do not wish to rest my decision alone upon the legal presumption. The evidence supports the charge that the sale was made with intent to defraud the bankrupt's creditors. I do not believe the testimony that the defendant paid $13,000 in cash at that time. The evidence of the defendant and the McDonalds on that question is incredible, and cannot be true.

The transaction as stated by defendant was substantially this: Siegrist on the 10th of December went to New York to see about making some arrangement about his debts, leaving the defendant in charge of his business at Wausau. He wrote to defendant once while there to send him money to pay his expenses; that he returned on the 27th of January following about noon, and that before tea-time of that day the agreement to sell his entire stock of goods, together with his accounts and all other effects at the price of $13,000 was made; that defendant had $5,000 in cash in his possession at that time, $1,500 of which had been paid to him that day by Mr. Siegrist for gold sold to him while in New York; that before tea he went out and found two young men by the name of McDonald, and borrowed of them $7,000—$4,000 of one and $3,000 of the other; that he also borrowed $1,000 of one Kemp, and that the money was placed in the safe for Siegrist that night.

The defendant was a saloon keeper, and his wife kept a small millinery and dress making shop. He, in company with another party bought the saloon of the McDonald boys in July previous, for $1,500, and paid down $600 and got time for the balance by giving a chattel mortgage on property as security. He claims that he had then in his possession $5,000, among which there were three $1,000 bills. He says he got in the money borrowed from the McDonald boys, four more $1,000 bills, and that he paid Siegrist seven $1,000 bills, that on the morning of the 28th he had a formal bill of sale prepared by his attorney, and that the parties and his attorney went to another attorney's office where it was executed and witnessed, and the money was handed over in a package said to contain $13,000, but not counted then by any one, in the presence of this attorney who was used as a witness of the execution of the paper and the passing over the package; that this was before the parties had breakfasted; that the defendant engaged the evening before, at the livery stable, a team to take Siegrist to the railroad at Stevens Point in the morning; that after getting the money Siegrist went away, claiming that he was going to Milwaukee and Chicago to settle his debts, but never returned; that he was owing his clerks and various parties, including his banker, quite a large sum, which he did not pay, and thereupon defendant took possession of the goods; that he did not give the McDonalds any security for the $7,000, nor Kemp for the $1,000, but gave Kemp notes for about $700 against customers and paid him $270 in money the next day, and took up his own note.

Now this story is so strange and unusual, not to say absurd, as to effectually refute itself. The idea that he had such an amount by him, is negatived by his whole life and conduct. There were two responsible banking houses in Wausau, and although he resided there about eighteen months, he had never kept a bank account, but had, as he says, his money in a trunk in his room in the hotel, where he boarded, before his marriage, and after that in his house. If he had that money, why did he get time in purchasing the saloon of the McDonalds in July previous, and why did they then require a chattel mortgage to secure the balance of the purchase price, $900, when they let him have $7,000 on the day of the sale, without any security but his note? Men with money do not do business in that way, and I cannot credit such evidence. He refused on his

examination to divulge his business or his whereabouts during several years of his life, and I think hereafter he should class this transaction and his testimony here among the list of unmentionable acts. The shallow trick of going before an attorney ignorant of the facts and circumstances of the trade, to get him to witness the very formal bill of sale prepared by his own counsel, is an additional circumstance of the fraudulent nature of the whole matter. Such artifices are often employed to give character to a dishonest act, but it is very seldom they do any injury to any one except the party resorting to such practice.

If this sale was made to raise money to pay debts, as he claims he thought it was, why did they go to the office of another attorney to get him to witness the bill of sale and see the money paid over, instead of having their own attorney who prepared the papers and who would naturally be supposed to know something about the affair, sign it and witness the transaction? This part of the affair seems farcical. It seems strange that parties should think that courts could be deceived by such weak inventions. It is unnecessary to consider his testimony further. The transaction was wickedly corrupt and all the parties connected with it were guilty of a most flagrant attempt to defraud the creditors and parties who had confided in Siegrist's integrity, and sold him these very goods on credit.

It is true that the McDonalds corroborated the story of their lending the money. They made out that they loaned him $1,000 more than he wanted, but their characters and business do not warrant a court in giving their story credit. They had been saloon keepers, and sold out to defendant, and had a chattel mortgage to secure them. They were river pilots, and as they themselves swear, quite extensively engaged in gambling, and, in short, they do not account for their having any such amount of money in their possession, and I don't believe it. They probably had some money, but I think if they had had much, they would have loaned it, as the evidence showed they had some time before to the wealthy lumber-men residing there, or have placed it in one of the banks. The story is not such as to receive credit. It is too unreasonable and unnatural. They may have let defendant have some money, and probably did. Siegrist came back knowing he could not pay. He had been sued, and over $1,000 of his debts were past due. He had doubtless made up his mind to abandon the whole concern, and get what he could and flee the country, and the defendant and the McDonalds were just the kind of characters to embark in such a scheme; and I presume they got together what they could and paid over to him, and thought they could cheat the creditors out of their pay. The nature of the transaction and circumstances of the men, convince me that such was the case and object of the parties. It was a bold, wicked fraud, and has been sought to be maintained by what I cannot but regard as false and corrupt swearing.

I direct that the pretended sale be set aside and declared void, and that the defendant must account for any property he sold or converted, and for all debts that he collected during the time he was in possession under such fraudulent purchase. He must also be enjoined from further prosecuting his suit against the marshal, or any other party for the recovery of said goods or accounts, or any part of them, or from commencing any other or further suits for such purpose.

An objection was taken to the jurisdiction of this court to enjoin the prosecution of the suit against the marshal in the state court. It was argued that it was like the case of Buck v. Colbath, 3 Wall. [70 U. S.] 334, but I do not think it falls within the doctrine of that case. Here the marshal seized the property and delivered it to assignees, and the assignees, by the order of the court, sold it and placed the proceeds in the registry of the court to abide the result of the claimants' rights therein before the suit was commenced in the state court. This court had therefore taken the property, and it alone should have the right to determine the question as to whom it belonged. This is a suit to set aside a contract, upon grounds created and established by an act of congress—the bankrupt law—and doubts have been intimated by the supreme court of this state, of the jurisdiction or duty of the state courts to grant the relief authorized by that law. Brigham v. Claflin, 31 Wis. 607. Such a suit is a suit arising under the laws of the United States, and this court has jurisdiction. The federal courts are the appropriate tribunals for the trial and hearing of such cases, and as the rights of the parties rest upon the provisions of the laws of the United States, the parties have the right to the decision of the supreme court of the United States upon them. After they shall have litigated the case all through the state tribunal, the unsuccessful party may have writ of error from the state court to the United States supreme court. It is not, therefore, an unwarrantable interference with the jurisdiction of the state courts.

This suit has a broader purpose than the suit in the state court. It is to protect the fund in the registry, and to settle the rights of the creditors and defendant to it, so that when these are settled it may be either paid over to the defendant or distributed without further delay among the creditors.

The case of Kellogg v. Russell [Case No. 7,666] was a case like this, and Judge Woodruff held the suit was maintainable. The case of Marsh v. Armstrong [20 Minn. 81 (Gil. 66)] decided by the supreme court of Minnesota, was held to be substantially like the case of Buck v. Colbath, supra. It did not appear in that case that the United

States district court had taken any control of the property, only that the marshal had seized it by virtue of a warrant which directed him to take the bankrupt's property, like an ordinary execution. But in this case, before the case in the state court was commenced, the marshal had delivered the property to the assignees and the court had taken possession of it and expressly held the proceeds to await the issue of the defendant's claim of ownership. Under such circumstances I think the question of title to the avails was pending in this court when that suit was commenced, and the state court had not jurisdiction of the question. Under such circumstances this court cannot surrender its jurisdiction. This circumstance distinguishes this case from the one decided in Minnesota.

The prosecution of suits against officers of the federal courts in this state, who can alone defend under the provisions of the bankrupt act, when the state courts refuse to enforce those provisions, is placing such officers in unreasonable jeopardy; and when they institute proceedings to test their titles in courts, decided by this state to be the appropriate courts to settle them, to be met with the objection that suits are pending in the state courts, is ungracious, to say the least, and I do not think the objection maintainable. I think this is the appropriate tribunal to determine the controversy, and that it is not an unwarrantable interference with the jurisdiction of the state courts, but a proper and eminently just, if not absolutely necessary, exercise of jurisdiction in this state, in view of the law as settled by the state courts in such matters.

The objection to the jurisdiction is overruled, and a decree is ordered for complainants, as before directed, and that it be referred to a master to take an account of the property converted and accounts collected and not paid over by defendant.

NOTE. To set aside a mortgage as a preference, void under the bankrupt act, it is not necessary to find that the mortgagees knew the condition of the bankrupt and his intentions. It is sufficient if they had reasonable cause to believe him insolvent, and if they had notice of facts sufficient to put them on inquiry they are chargeable with knowledge which an investigation of the bankrupt's condition would have developed. Burpee v. First National Bank of Janesville [Case No. 2,185].

Case No. 8,974.

MAIN v. MILLS.

[6 Biss. 98.] [1]

Circuit Court, W. D. Wisconsin. May, 1874.[2]

BANKS—CAPITAL STOCK—UNLAWFUL DIVIDENDS—STATUTE OF LIMITATIONS—BANKRUPTCY—STATUS OF ASSIGNEE.

1. The capital stock of a moneyed corporation constitutes a trust fund for the payment of its debts, and its officers have no right to make a dividend unless there are actual profits over and above all losses.

[Cited in McCann v. First Nat. Bank, 112 Ind. 360, 14 N. E. 255.]

2. An officer of the corporation is bound to know the condition of its affairs, and has no right to receive a dividend unless legitimately earned; if he does, it may be recovered by the assignee in bankruptcy.

3. In deciding whether a dividend was rightfully made, the transaction must be viewed from the stand-point of that time, and not in the light of subsequent events. Notes or overdrafts by persons then considered abundantly good should not be counted as losses, because they afterwards proved such.

[Cited in McCann v. First Nat. Bank, 112 Ind. 360, 14 N. E. 255.]

4. Statute of limitations does not begin to run, in such a case, until the fraud is discovered by the assignee.

5. The general statute of limitations of Wisconsin does not apply to such a case, but it is controlled by section 35, c. 138, Rev. St. 1858.

6. The assignee, for the purpose of this suit, stands precisely in the position of the corporation itself, and has no greater rights, nor does it make any difference whether there were but two stockholders or a larger number.

This was an action by W. S. Main, assignee of the Bank of Madison, to recover dividends claimed to have been wrongfully received by the defendant [Simeon Mills], while the bank was actually in an insolvent condition.

W. F. Vilas and H. S. Orton, for plaintiff.

Geo. B. Smith and P. L. Spooner, for defendant.

BLODGETT, District Judge (charging jury). The controverted questions of fact to be passed upon by you are comparatively few. It is conceded that on or about the 16th of April, 1860, defendant Mills and one James L. Hill united under the general banking law of this state in the organization of a bank by the corporate name of the Bank of Madison, with a capital stock of $25,000, of which each held one-half; that said bank commenced the transaction of the usual classes of business carried on in this city by banking corporations and bankers, and continued in said business until the 7th day of October, 1873, when it was adjudicated bankrupt in this court on its own petition; that up to about the middle of January, 1869, defendant continued to hold half the stock of said bank and acted as its president; that during the time aforesaid, said bank paid the defendant dividends on his stock as follows: January 1, 1865, $6,084.66; January 1, 1866, $1,630.37; July 1, 1866, $1,740.28; January 1, 1867, $3,003.65; July 1, 1867, $815.55; January 1, 1868, $2,088.14; July 1, 1868, $1,565.57; January 1, 1869, $1,014.91; and that dividends to the same amount were declared and paid to said Hill, who held the other half of the stock at the same time. It was also admitted that about the middle of January, 1869, defendant sold to said Hill his stock and interest in said bank at a price much below par. But I think it may be taken as an admitted fact that the stock was treated between the parties to this transaction, Hill and Mills, as of little intrinsic

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[2] [Reversed in part by the circuit court (case unreported).]

value at that time; that the defendant retained the presidency of the bank until January, 1871, although the evidence tends to show that his connection with it was merely nominal after he sold his stock.

It is also admitted that during the time the bank continued in business, regular reports of its financial condition were made as required by law to the bank comptroller of this state, and filed in the office of the secretary of state, and that these reports are mostly, if not all, signed, and purport to be sworn to, by the defendant as president.

The plaintiff has also given evidence tending to show that at the time these dividends were paid the capital stock of the bank had become so impaired by losses from bad debts and mismanagement that no actual profits were made from the business of the bank; that at the time when each of these dividends was paid the current losses of the bank by hopelessly bad and suspended debts were such as to have absorbed and sunk all the profits of the business, so that in fact no dividend was really earned and payable to stockholders.

Upon the facts thus admitted to be true or claimed to be proven, plaintiff insists that he is entitled to recover from defendant the dividends which he has from time to time received from January 1, 1865, to January 1, 1869, inclusive. To this the defendant interposes by way of defense: (1) A general denial of the plaintiff's right under the law to recover upon the facts set forth in the complaint; (2) a denial of those facts, which puts the plaintiff upon proof of such as have not been admitted on the trial; (3) that as to part of said dividends the right of action accrued more than six years before the commencement of the suit, and is therefore barred by the statute of limitations.

It is the province of the court to instruct you upon some of these questions of law which arise upon the facts which you may find in the case. There is, perhaps, at this day no better established rule of law than that the capital stock of a moneyed corporation, whether it be a banking, insurance, mining or manufacturing company, is to be treated and deemed as a trust fund for the purpose of securing the payment of the debts of the corporation. In banks the capital stock stands as a guaranty to the extent of its amount, for the payment of the creditors of the bank. Theoretically under your law this stock and a certain degree of personal liability of the stockholders is pledged, first to secure the payment of the circulating notes of the bank, and after that to the general creditors. But it being admitted that there is no circulation in this case, the general creditors may be said to be the parties directly interested in this fund.

The officers of such a corporation have no right to make dividends to stockholders unless there are profits to be divided, over and above all losses, because the necessary result of so doing is to deplete the capital fund. The capital stock being, as I said, a trust fund, the first duty of the officers of the bank is to keep this fund intact and unimpaired. If there are gains and losses, the gains should be set off against the losses so far as may be necessary to keep the capital fund whole. All net profits above what are requisite for that purpose, may, as a general rule, be rightfully divided to stockholders. And while it is not necessary for me to say in this case how far in my opinion a stockholder who is not an officer might be protected in the receipt of dividends, I will say that officers, who know and are bound to know the condition of the affairs of the bank, have no right to take dividends unless legitimately earned and on hand.

Applying these general principles to the case before us, you see that it becomes an important inquiry for you, and really the only material and important issue of fact for you to determine in this case, whether the bank had gains or profits which it rightfully could divide to its stockholders at the time the dividends in question were made.

You have heard the testimony bearing upon this branch of the case. The plaintiff has put in proof, which as he claims, shows that at the time each of these dividends was declared the losses, or suspended debts which ultimately proved to be losses, greatly exceeded the gains then on hand, and he therefore insists that those dividends were wrongfully made to the defendant and should be returned by him, because he, being an officer of the bank, was bound to know that these debts were either hopelessly lost, or so precarious and uncertain of collection that the bank had no right to consider them as part of its living available assets.

The defendant, on the contrary, insists that at the time these dividends were paid no serious losses had been sustained; that while some paper was suspended or overdue, and some accounts overdrawn, yet the debtors were all substantially solvent and good for their indebtedness to the bank. And it is for you to say whether the proof satisfies you that at the time any or all these dividends were paid the bank had made or had not made gains over and above its losses which authorized the making of the dividends.

If you are satisfied from the evidence that at the time these several dividends, from January 1, 1865, to January 1, 1869, were made, or either of them, the losses of the bank did at the time exceed the gains, so that in fact there were no profits over and above losses, then you should find for the plaintiff as to such of said dividends as you are satisfied from the evidence were made when there were no profits over and above losses to divide.

But in passing upon this testimony you must view it as far as possible from the standpoint of the transaction itself, and not

in the light of subsequent revelations. The proper inquiry is, would a sagacious, prudent banker, in the light of all the facts disclosed to you in the evidence, have considered Darwin, Parkins, and the other persons whose names appear in the testimony as debtors of the bank, as solvent, and the debts of the bank against them as good and collectible at the time these dividends were made?

From the nature of the business the assets of a bank must all the time be represented by what is due to it from its debtors. The officers of a bank cannot collect in all its bills receivable on some special day, and then say, Now we will make a dividend. We know we have no bad debts because no body owes us, and therefore we have a right to divide our surplus. This rule would be impracticable, and if acted upon would prevent any dividends being paid. But there is a constant demand for the exercise of sound judgment and sagacity as to the standing and value of its paper. The bank officer is not only bound to be honest, but he is bound to possess the requisite ability for the ordinary exigencies of the business he undertakes. He is not expected to be infallible, nor to make no mistakes, but he must use the caution of an ordinarily prudent man engaged in such business. Your own good sense and experience in life will teach you that it does not necessarily follow, because a man has overdrawn his account at a bank or has not paid his note at maturity, that the debt is therefore bad and should be charged up to profit and loss. It may be the overdraft is allowed because the bank officer knows, or thinks he knows, that the drawer is abundantly good, although it is probable that a banker who habitually, to any considerable extent, allowed overdrafts and overdue papers to remain unadjusted would soon lose his reputation as a safe and competent man in the business, and deservedly lose the confidence of the community. As I said before, you must as nearly as possible put yourselves in the place of the managers of this bank at the time these dividends were paid, and decide as well as the proof will enable you whether these debts now claimed to have been losses then, ought to have been so considered at that time by this bank officer and stockholder. Ought these debts to have been classed as doubtful or desperate at the time? If they ought, common prudence would have dictated the withholding of a dividend at such times. And if made at such times an officer of the bank occupying the responsible position in its affairs which was occupied by the defendant, would have no right to excuse payment of a dividend, because he is bound to know all the facts about its affairs which are disclosed by its books and records, or can be ascertained on close inquiry. He cannot be heard in a court of justice to say he did not know these things, because it is his duty to know them, and the law will conclusively presume he did know them. From what I have said as to the facts you must find, in order to sustain the plaintiff's case, you will readily infer that unless those facts are found by you from the proof the defendant is not liable.

I come now for a moment to speak of the defense of the statute of limitations urged by the defendant. And upon this point I instruct you that the statute pleaded is a valid bar to the recovery in this case of all dividends which were paid more than six years before this suit was commenced.

This relieves you from the consideration of the circumstances surrounding the payment of all the dividends paid prior to January 1, 1868, but the rules I have laid down seemed equally necessary to the proper understanding of the rights of the parties as to those paid subsequent to that time, and I have therefore reserved the consideration of this branch of the defense to this time.

The bank, as a corporation, is bound to keep its capital stock intact, and the banking law has many provisions intended to secure that result. If there is any reduction of the capital funds, the bank can bring suit to recover back such funds, from those who have appropriated them wrongfully, and in case the bank refuses or neglects to do so, a creditor or person aggrieved may bring such suit, but the cause of action accrues to the bank and the statute begins to run when the misappropriation is made.

For the purposes of this suit the plaintiff, as assignee of the bank, stands just where the bank would have stood if it had brought the suit. His rights are no greater and no less. The bankrupt law [of 1867 (14 Stat. 517)] has clothed him with no special powers in regard to this claim. It originated, if at all, long before any act of bankruptcy was committed, and it is undoubtedly true, as a practical fact, that while the management of the bank remained in the hands of those officers who had declared and received the dividends in question, it is equally true that the right of action accrued to the bank as a corporation on the wrongful receipt of each dividend shown in the proof to have been taken by the defendant when there were no profits. This right of suit accrued to the bank as a corporate entity, because of the reduction of its capital stock, which it was bound to keep whole, and the plaintiff in this case has, in my opinion, only succeeded to whatever right of action the bank itself had, and therefore the statute applies in this case.

The fact that Mills and Hill were the only stockholders and only officers in this bank, does not change the legal aspect of the questions raised in this case. A bank corporation is just as much an artificial body, and has the same rights and duties, with two stockholders, as though it had a hundred stockholders. The ownership of the stock in

a bank, under the law of this state, is a fact of which any person can, by due inquiry, obtain information. The law requires lists of stockholders to be filed semi-annually in the office of the state bank comptroller and in the office of the register of deeds of the county where the bank is situate, so that all depositors can ascertain, not only who the stockholders were, but how many there were. The reports were only admissible to show the act of defendant in representing the stock as remaining intact, and also as tending to show the extent to which he participated in the actual management of the bank affairs.

Much testimony has been admitted on the trial of this case which, perhaps, was not necessary to elucidate the issues on which you are to pass. I have already called your attention to these issues, and it is enough to say that you ought not to consider in this case any testimony which does not tend to prove those issues.

Verdict for amount of dividends paid out after January 1, 1868, with interest.

NOTE. On error to the circuit court (Drummond, J.), this case was partially reversed on two grounds, no written opinion being given: 1. It was a fraud on the depositors of the bank, for Mills and Hill the sole stockholders and managers to divide between themselves, under the name of profits, money belonging to the capital or to the depositors, when no profits were in fact made. The fraud was not discovered until the failure of the bank and the appointment of an assignee, but was concealed from the depositors by Mills and Hill. The statute of limitations did not begin to run till the fraud was discovered by the assignee, and this on general principles of law. 2. The "six years" statute of Wisconsin did not apply to the case, but the 36th section of chapter 138 (2 Tayl. Rev. St. 1871, p. 1628), which declares that "the title" shall not affect actions against directors or stockholders of a moneyed corporation or banking association, to recover a penalty or forfeiture imposed, or to enforce a liability created by law, but such actions must be brought within six years after the discovery by the aggrieved party, if the facts upon which the penalty or forfeiture attached, or the liability was created. Judge Drummond held that it was not material how the liability was created, whether by statute or by the general principles and usages of law. The point first decided was afterwards affirmed by the supreme court of the United States, in the case of Bailey v. Glover, 21 Wall. [88 U. S.] 342. See the case of Gratz v. Redd, 4 B. Mon. 178, as to dividends wrongfully paid. The charge of Judge Blodgett was not otherwise disapproved, and the case was remanded for computation of the full amount of the dividends thus unlawfully received, judgment to be entered accordingly. See further, that payments of dividends out of capital are not legal unless specially authorized by the statute. Painesville & Hudson R. R. Co. v. King, 17 Ohio St. 534; Pittsburg & C. R. Co. v. Allegheny County, 63 Pa. St. 126. For a discussion of the point that the capital stock is a trust fund for the creditors, see Ang. & A. Corp. (2d Ed.) 475; Scammon v. Kimball [Case No. 12,435].

Case No. 8,975.

MAIN v. MURRAY.

[Cited in Corbet v. Johnson, Case No. 3,218. Nowhere reported; opinion not now accessible.]

Case No. 8,976.

MAIN v. SECOND NAT. BANK.

[6 Biss. 26; [1] 1 Thomp. Nat. Bank Cas. 200; 6 Chi. Leg. News, 359; 10 Alb. Law J. 204; 1 Am. Law T. Rep. 471; 20 Int. Rev. Rec. 122; 1 Cent. Law J. 232; 31 Leg. Int. 278; 21 Pittsb. Leg. J. 205.]

District Court, W. D. Wisconsin. March, 1874.

FEDERAL COURTS—JURISDICTION—PRACTICE ACT OF JUNE 1, 1872.

1. A national bank cannot be sued in the federal courts outside of the district where it is located. Service on the cashier when found within another district does not give jurisdiction.

[Cited in Fonda v. British-American Assur. Co., Case No. 4,904; Hughes v. Northern Pac. Ry. Co., 18 Fed. 111.]

2. Manufacturers' Nat. Bank v. Baack [Case No. 9,052], approved.

3. The practice act of June 1, 1872 [17 Stat. 197], does not change this rule nor enlarge the jurisdiction of the federal courts.

[Cited in Howard v. American Dairy, etc., Co., Case No. 6,753.]

[This was a suit in bankruptcy by W. S. Main, assignee, against the Second National Bank of Chicago.]

Motion to dismiss for want of jurisdiction, the defendant being a national bank, located and doing business in the city of Chicago, state of Illinois, and service having been had upon John P. McGregor, the cashier, who was found within the district.

Tenneys, Flower & Abercrombie, for the motion, cited Crocker v. Marine Nat. Bank of New York, 101 Mass. 240; Cooke v. State Nat. Bank of Boston, 50 Barb. 339.

H. S. Orton and W. F. Vilas, contra.

HOPKINS, District Judge. In the argument filed in support of the motion, it is claimed that a national bank cannot be sued in any court out of the judicial district where it is "located" or "established." I do not think that the general banking law admits of such an interpretation. The eighth section of the act of June 3, 1864 (13 Stat. 101), provides that such corporations may sue and be sued in any court of law and equity as fully as natural persons.

I do not think that the provision in the 57th section of the act restrictive of this general authority, but that it was intended rather to enlarge the operation of the 11th section of the judiciary act of 1789 (1 Stat. 73, 78), and to confer upon such organizations the right to sue and be sued in the federal courts in the district where located, by a citizen of the same district; and I fully concur with Judge Blatchford's views expressed in his opinion in Manufacturers' Nat. Bank v. Baack [Case No. 9,052], that the banks organized under the general banking act of congress are to be deemed residents or inhabitants of the state and district where they are "located" and "established." The provisions of the act

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

referred to by him are sufficient to warrant that conclusion, and if this were the only point I should have no hesitancy in overruling the motion.

But there is a question arising under the provision of the 11th section of the judiciary act of 1789, which, as interpreted by numerous decisions of the federal courts, seems to me to constitute an insuperable objection to the plaintiff's right to prosecute this defendant in this court. That section provides that "no civil suit shall be brought before either of the courts (circuit or district) against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ."

That the defendant was not an "inhabitant" of this district when this suit was commenced, is too plain for discussion. The remaining question is, was the defendant found "here at that time?"

The defendant, as before stated, was "located" at Chicago; that was its habitation, which does not move around with the person of its officers. The corporation is not migratory. It could not, of its own will and without authority of the law, change its location to this state. Therefore, I must hold that this court has no jurisdiction over this defendant; that it was not "found" here, within the meaning of the statute. In the case of Bank of Augusta v. Earle, 13 Pet. [38 U. S.] 519, the court say, in speaking of locality of corporation: "It must dwell in the place of its creation, and cannot migrate to another sovereignty." This, it is true, was said of a state bank, but the same may with equal propriety be said of a national bank. They have a local habitation, an office, and place of business within a state or district, as well as a state bank. Justice Nelson, in Day v. Newark India-Rubber Manuf'g Co. [Case No. 3,685], and in Pomeroy v. New York & N. H. R. Co. [Id. 11,261], examined this question very fully, and arrived at the conclusion in both cases, notwithstanding there was a statute of the state of New York authorizing service to be made upon officers of such foreign company within the state, which would give the state courts jurisdiction of the corporations, that the corporations were not "inhabitants" of the state, and were not "found" there because their officers and agents resided or came into that district; that the officers were not the corporations, and the corporations were not therefore found within the district. This is a jurisdictional question, and "state laws can confer no authority on this court in the exercise of its jurisdiction, by the use of state process, to reach either persons or property which it could not reach within the meaning of the law creating it." Toland v. Sprague, 12 Pet. [37 U. S.] 328.

I do not think the practice act of June 1, 1872 (17 Stat. 197; Rev. St. 173), changes the rule. That relates to the practice and proceedings in suits against parties who may be prosecuted in the federal courts, but does not profess to enlarge their jurisdiction or to extend it over persons or cases not before within the cognizance of the court. As said in Toland v. Sprague, 12 Pet. [37 U. S.] 330, "the acts of congress adopting the state process, adopt the form and modes of service only so far as the persons are rightfully within the reach of such process, and did not intend to enlarge the sphere of the jurisdiction of the circuit courts."

I think the same construction should be given to the act of 1872 above-mentioned, and so construed it does not relieve the case of the question of the habitat of this defendant being without the district, and therefore not subject to the process of this court.

The motion is therefore granted, and this suit dismissed.

Since the above decision the jurisdiction of the United States circuit courts has been changed under the act of March 3d, 1875 [18 Stat. 470], and the clause in the 11th section of the judiciary act of 1789, above described, now reads "or in which there shall be a controversy between citizens of different states."

Case No. 8,977.

MAINE v. HALEY.

[2 Hask. 354.] [1]

Circuit Court, D. Maine. May, 1879.

TROVER—HOW CONVERSION PROVED — WRONGFUL POSSESSION—OWNER'S RIGHT.

To establish a conversion of chattels, there must be proof of wrongful possession, or of exclusion of the owner's right, or of unauthorized and injurious use, or of wrongful detention after demand.

Trover for the conversion of logs. Plea, not guilty. The cause was tried before the court without a jury. The only question in dispute was that of conversion.

Albert W. Paine, for plaintiff.
Bion Bradbury, for defendant.

FOX, District Judge. This is an action of trover for a parcel of pine and spruce logs, cut in 1874–75 upon township No. 8, R. 5, W. E. L. S. by C. W. Clayton, under a permit from the land agent dated November 11, 1874. This permit is in the usual form, the state thereby "reserving and retaining full and complete ownership and control of all lumber cut upon the premises, wherever and however it may be situated, until the stumpage shall be fully paid, &c." The case was transferred under the act of congress [18 Stat. 470] to this court from the supreme court for the county of Penobscot, and is submitted to the presiding justice for decision without the intervention of a jury.

It appears in evidence that supplies for logging operations for the winter 1874–75 were furnished to Clayton, by Messrs. Jew-

[1] [Reported by Thomas Hawes Haskell, Esq., and here reprinted by permission.]

ett Bros., mill men at St. John, under an agreement that they were to receive the lumber from Clayton at their mills near St. John, paying therefor the fair market price.

This firm of Jewett Bros. was composed of Edward L. Jewett, N. M. Jewett and F. H. Pitcher; at the same time another firm of E. D. Jewett & Co., composed of E. D. Jewett and George K. Jewett, was carrying on business at St. John in purchasing timber lands and operating on the same, and in buying and selling logs, but not in their manufacture. These two firms were entirely independent of each other, neither having any interest in the other's business. Two of the sons of George K. Jewett were members of the firm of Jewett Bros.

Clayton's logs were marked III W III; were put into a tributary of the Aroostook and driven out of that river into the St. John. All that could be were boomed and rafted at Frederickton, but large quantities passed by the boom and were caught and rafted below by the boom company; these were mixed rafts, an account being taken of the precise quantity of each mark in the raft; those boomed at Frederickton and those rafted were sailed and rafted separately by their respective marks.

Clayton had lumbered upon the St. John waters for many years, always using this mark, which was well known by all persons upon the river as his special mark. E. D. Jewett & Co. had furnished him with supplies for some years, and had received his logs during the early part of his lumbering; but, for four or five years prior to 1874, Jewett Bros. had received from him all his timber under the same arrangement that existed in 1874–75.

The logs now in question came down the St. John river, and, in the month of October 1875, were in various places on the shores of that river near St. John and the mills of Jewett Bros., and were in the charge of James F. Ellis, as agent of Jewett Bros. E. D. Jewett & Co. had about eighteen millions of logs in the same condition, which were also under Ellis' charge. E. D. Jewett & Co., having become embarrassed, insolvency proceedings were instituted against them and a warrant of attachment to the official assignee issued against their property October 15, 1875, upon which were seized, not only the eighteen millions of logs then in the St. John river belonging to that firm, but all the other logs in the river, amounting in all to forty millions, without regard to marks and ownership, and among other logs those now in question.

All these logs were afterwards frozen up in the ice and were placed by the assignee under the charge of Joseph Horncastle and McLellan and Holly. The official assignee, Ezekiel McLeod, was afterwards chosen assignee of the creditors, and an arrangement was subsequently made between him and the defendant, John J. Haley of Boston, by which, in consideration of $100,000 paid said McLeod by said Haley, he sold to Haley all the copartnership effects and estate of E. D. Jewett & Co. in the province of Canada; and, on January 29, 1876, made and executed a deed by which he conveyed to said Haley, "all and singular, the joint estate and effects both real and personal, of every name and kind whatsoever of the said insolvents, Edward D. Jewett and George K. Jewett, being the joint estate within the dominion of Canada which came into the possession of said Ezekiel McLeod, assignee as aforesaid, subject to all subsisting liens upon any part of said estate, for stumpage, boomage, tonnage, rafting or otherwise." It is proved most conclusively that E. D. Jewett & Co. never claimed to have and never did have any right, title or interest whatever in this lot of logs, and that Haley never acquired any interest in them by the deed of the assignee of that firm. It is also established that Jewett Bros. were to become the owners of the logs under Clayton; that they were in possession of them at the time of their seizure by the process in insolvency, and that they never surrendered their possession voluntarily to any one, and resumed through their former agent their possession as soon as the assignee had sold to Haley the logs belonging to the insolvent estate, and that they never, in any way, made any transfer of their interest in these logs to Haley. It also appears that Haley never saw any of the logs, or in any way personally exercised any control or acts of ownership over them, or attempted to dispose of the same.

It is claimed, however, that by an order given by Haley on the 29th day of January and by proceedings under said order, he was guilty of a conversion of this property, and has thereby rendered himself accountable to the state for its claims for the stumpage.

This order is as follows: "St. John, N. B., January 29, 1876. Messrs. Holly & McLellan, Indian Farm, N. B. Gentlemen.—Having purchased of E. McLeod, Esq., assignee of the estate of E. D. Jewett & Co., all spruce and pine logs, timber and other lumber belonging to that estate, marked, L P C, C X C ✻, I V ✻, X F X, III W III, ✻ X, with other marks, situated at Drury Cove, Kennebecasis river, Fairy Cove, South Bay or other points in the river St. John, whereever they may be situated or found, you will please take notice, Mr. E. G. Dunn is my appointed agent in charge of this property. He will take full charge forthwith, and assume all care and risks, requiring no action whatever from any party formerly having them in charge. John M. Smart, John J. Haley."

A like order, with the omission merely of the words, "belonging to that estate," was at the same time drawn, addressed to Joseph Horncastle, and the orders were handed to these parties the same day. E. G. Dunn,

the party named as the agent of the defendant in these orders, never in any manner meddled with the property or took any charge or direction of it, and does not appear to have been informed that his name was mentioned in the instrument. These papers were drawn at the office of E. D. Jewett & Co. in St. John by a friend, who was a ready penman, and it does not distinctly appear from whom he learned the names of the various marks of logs. The principal object in giving these orders was to stop the expenses of the persons in whose possession they were, and which were somewhat burdensome, and Dunn's name was inserted, merely nominally, with no intention that he should so act in the matter.

Ellis, in fact, immediately took charge of the property, and, when the river opened, delivered to Jewett Bros., under their instructions, all of the logs in question, and the same were sold by them, or sawed at their mills, and the lumber manufactured sold by them and applied to their own benefit. The eighteen millions which formerly belonged to E. D. Jewett & Co. were sold by defendant's agents to Sutton, and the remainder of the forty millions was subsequently claimed and received by those who were entitled to it.

The logs marked III W III, having been mentioned specifically in their orders, if Dunn had acted under the orders and claimed this mark of logs and, by his interference as agent of the defendant, deprived the state of its property, it might well be that Haley would be accountable to the state for the consequences resulting from the acts of his agent; but the fact is, that Dunn never did in any respect act as agent of the defendant. He was the only person to whom Horncastle and the others named in the orders were authorized to surrender the property. Nothing was ever done under these orders directly, and, as they of themselves confer no authority upon any other party than Dunn to act in behalf of the defendant, and as Dunn never did so act, it cannot fairly be said that these orders and the action of any one under them can render the defendant accountable for converting the property.

The whole effect of these orders was to induce Horncastle and McLellan & Holly to surrender their possession, which, by directions from McLeod, February 8, 1876, they were authorized to do. These directions were as follows: "February 8, 1876. Jos. Horncastle, Esq. Dear Sir:—You will please deliver over the logs and lumber now in your possession and held by your firm, to Mr. John J. Haley, or to Messrs. E. D. Jewett & Co., for him, having sold the same to Mr. Haley. Yours. E. McLeod."

McLeod never sold or pretended to sell to Haley any other timber than that which belonged to E. D. Jewett & Co., and Dunn never made any claim to the possession of any portion of the property; but Ellis, by directions from Haley and E. D. Jewett & Co., took charge of all that he had purchased from the assignee of E. D. Jewett & Co., and nothing more; and at the same time Ellis, by directions of Jewett Bros. and as their agent, secured them possession of that portion in which they were interested. Haley in no way ever made any claim upon the logs in dispute, either personally or by any authorized agent or attorney; he received and disposed of only the logs he bought, and, having by his purchase exonerated the property of E. D. Jewett & Co. from the insolvency proceedings, the residue of the property was, without any interference by Haley, claimed, received and disposed of by the parties in whose possession it was when insolvency proceedings were instituted.

The state has lost nothing by the doings of Haley; those in whose hands the property in dispute rightfully was have again received it without burden or incumbrance; it has never for an instant been in the possession of Haley or any party acting in relation to it in his behalf, and there is nothing to establish a conversion by him of the property.

It is said that McLeod paid the boomage and expenses of towage on these logs to the Fredericton Boom Company, and that they were repaid to him by Haley; they were in fact paid by McLeod out of the $100,000 he received from Haley, and were subsequently so paid by Jewett Bros., and the court fails to find anything in this transaction which affords any support to the plaintiff's claim to hold the defendant chargeable.

What constitutes a conversion was very fully examined by Judge Shepley in Fernald v. Chase, 37 Me. 289; and it was there held that, to make a conversion, there must be proof of a wrongful possession, or of the exercise of a dominion in exclusion or defiance of the owner's right, or of an unauthorized and injurious use, or of a wrongful detention of the property.

The defendant was never in possession of this property, never used it or detained it from the plaintiff or exercised any dominion over it. In all that Ellis did with these logs, he was acting as the agent and by the authority of Jewett Bros. and not as agent for Haley; and the case fails to show that the defendant did either of the acts which, according to the opinion in Fernald v. Chase, are necessary to effect a conversion.

The learned counsel for the plaintiff in his argument, as the basis of his claim, asserts that Haley took a bill of sale of this property from Mr. McLeod; but such is not the fact, as that bill of sale or deed as before recited was expressly limited to the joint property of E. D. Jewett & Co.; and the defendant thereby never acquired title to any other logs than such as formerly belonged to that firm, who never were the owners or in possession of the logs here in dispute.

The counsel also insists that these logs were taken and disposed of by Ellis as agent of E. D. Jewett & Co., and by their authority; in this assumption he is also laboring under an important error. Ellis testifies that the logs which came down the river were in his keeping as agent for Jewett Bros. before they were taken by the sheriff, and that, the next spring, he had orders from Edw. L. Jewett, one of the firm of Jewett Bros., to resume his possession and take care of this particular mark of logs as usual, and that he did so, and delivered them to Jewett Bros.' mills. Whatever Ellis did in and about this lot of logs, therefore, was done by him in his capacity of agent for Jewett Bros. and by their order and direction; and in no respect does it appear that he received any directions from E. D. Jewett & Co. as to this property, or acted in regard to it for their benefit, or for the defendant. Ellis, being the agent of E. D. Jewett & Co. who were acting for the defendant, and also agent for Jewett Bros., was acting in both capacities, taking the charge and control of the logs which belonged to his respective principals, obeying their orders and directions as to his disposal of their logs, but never receiving any instructions from the defendant or E. D. Jewett & Co., as to the logs cut by Clayton.

A large number of cases have been cited, both from the English and American reports, by the learned counsel for the plaintiff, all of which have been examined, and none of them afford any support to the claim of the plaintiff. The one most relied on is Hollins v. Fowler, L. R. 7 H. L. 757, in which it was held "that any person, who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person, is guilty of a conversion;" as this defendant never had possession of these goods, and never disposed of them, the plaintiff cannot derive much advantage from this decision of the house of lords, as his case fails in two essential particulars which were there requisite to constitute a conversion.

In Polley v. Lenox Iron Works, 2 Allen, 182, one of the cases in brief of plaintiff's counsel, Judge Metcalf, on page 183, says: "Conversion, ex vi termini, imparts a wrongful act, and is the assuming upon one's self the property and right of disposing of another's goods, either by a wrongful taking of them, or by some other illegal assumption of ownership, or by illegally using or misusing them, or by wrongfully detaining them"; neither of which requirements, to effect a conversion, are shown to have been committed by the defendant.

Reference is also made to Savary v. Germania Bank [Case No. 12,387]. In that case, the defendant delivered over the plaintiff's notes to a person not entitled to them, assuming the right to deal with the notes in disregard of the plaintiff's title, and this was held to be a conversion, the court saying: "A wrongful intent is not an essential element of a conversion; it suffices that the rightful owner has been deprived of his property by some unauthorized act of another, who assumed dominion or control over it." As the state has not been deprived of its property by any act of the defendant, as in fact the defendant has never been in possession of this property, or in any way done anything with it, he cannot be made accountable for the loss which the state may have sustained from the proceedings of Jewett Bros., or those acting in their behalf in disposing of these logs. Judgment for defendant with costs.

MAINE STEAMSHIP CO. (WELLS v.). See Case No. 17,401.

Case No. 8,978.

MAISONNAIRE et al. v. KEATING.

[2 Gall. 325.] [1]

Circuit Court, D. Massachusetts. May Term, 1815.

PRIZE—BILL GIVEN FOR RANSOM—QUESTION OF PRIZE—HOW DECIDED—CONTRABAND GOODS—PROPERTY OF NEUTRAL.

1. A bill of exchange, expressed to be for the ransom of a vessel, and given as collateral security for the payment of the ransom bill, was *held* to be a contract, on which an action may be sustained in a court of common law—the plaintiff and payee being an alien friend.

[Cited in Waring v. Clarke, 5 How. (46 U. S.) 500.]

2. In an action upon such a bill of exchange, the capture must be taken to be justifiable, and the ransom regular.

3. A court of common law cannot, even incidentally, decide a question of prize.

[Cited in U. S. v. New Bedford Bridge, Case No. 15,867; Brown v. Noyes, Id. 2,023; Studley v. Boker, Id. 13,559.]

4. It seems, that provisions, when destined to a port of naval equipment of the enemy, and a fortiori, if destined for the supply of his army, become contraband, and subject the vessel and cargo to confiscation by the other belligerent—more especially, if the country of the captured vessel be at war with the country, to which she is destined.

See The Commercen [Case No. 3,055].

5. Of the probable cause, which justifies capture by a friendly belligerent.

6. Duress, arising from threats of destruction of the vessel and cargo, cannot be admitted to avoid a contract of ransom, where the capture was justified by probable cause.

7. It is competent for a friendly belligerent to ransom the property of a neutral after capture.

8. Of the foundation and nature of ransom.

See Abb. Shipp. pt. 4, c. 4, § 2, note 2; Story's Ed. 1829, pt. 4, c. 3, § 2; also, pt. 4, c. 10, p. 477, 7th Lond. Ed. of the same book, by Sergeant Shee.

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

9. The admiralty has exclusive jurisdiction to entertain suits on ransom bills.

[Cited in Knox v. The Ninetta, Case No. 7,912; Leland v. The Medora, Id. 8,237; Jackson v. The Magnolia, 20 How. (61 U. S.) 328.]

Assumpsit on a bill of exchange in the following words: "At sea, in the longitude of 27° west from Paris, and in the latitude of 37° 39′ north, on board the privateer Invincible, French, of Bayonne, ninety days after sight this my first of exchange, second of the same tenor and date unpaid, I promise to pay to Messrs. Michael Maisonnaire and Derouet, merchants, Bayonne, five thousand dollars, for the ransom of brig Nancy & Mary and cargo, to be paid at Boston. April 3, 1813. Richard Keating." Upon the trial of the cause under the general issue, it appeared that the bill was presented for acceptance on the 29th of March, 1814, and protested for non-payment on the 30th of June of the same year. It further appeared, that the defendant was master of the brig, at the time of her capture by the Invincible; that she was an American vessel, and sailed, on the 7th of March, 1814, from Wilmington, N. C. bound to Lisbon, having on board a cargo of corn and rice of the value of $15,000, and a protection and license for the voyage from the British government, commonly called a Sidmouth license; that, after the capture, the captain of the Invincible threatened to burn and destroy the brig and her cargo, and actually made preparation for that purpose, and that thereupon the defendant agreed to ransom the same for $5000, and accordingly executed a ransom bill in the form prescribed by the French ordinances, and, as a collateral security, or in the language of the ransom bill, as a hostage,[2] gave the bill of exchange in controversy. Upon the execution and delivery of these papers, the vessel was released, and safely pursued her voyage to Lisbon, and had since returned to the United States. Upon this evidence, a verdict was, by consent, taken for the plaintiffs, for the amount of the bill of exchange and interest, subject to the opinion of the court upon the questions of law arising in the case. The defendants moved for a new trial, upon the grounds, which will appear in the argument and opinion of the court.

Mr. Prescott and Mr. Blake, Dist. Atty. for defendants.

1. In this case a common law court has no jurisdiction. The act of the cruiser was either a marine trespass, or it was a capture as prize. If the former, then the promise was without consideration and void. But the facts show, that it was a taking as prize. The transacton was intended as a ransom, which may be defined, "a restoration of property captured, for the use of the owner, for a stipulated price." The contract of ransom grows out of the capture as prize, and is founded on it. The capture is the principal thing, and the ransom but an accessory. This then is not a mere maritime question. It is not like the case of seamen's wages, arising partly on land and partly on the sea, and therefore of doubtful jurisdiction; but it is one depending solely on national law—on the jus belli. To determine, whether there was a consideration, it becomes necessary to inquire, whether the capturing vessel was commissioned, and whether there was probable cause for the capture. These are not questions to be submitted to a jury. As they grow out of capture, they belong exclusively to the admiralty, and from the exclusive cognizance of that court there results a general benefit, in the uniformity of decisions in different countries. The weight even of common law authorities is with the defendants. In the case of Ricord v. Bettenham, 3 Burrows, 1734, 1 W. Bl. 563, the question was, what effect the death of the hostage should have; and the question of jurisdiction was waived by the counsel. In Cornu v. Blackburne, Doug. 641, the point of jurisdiction was not considered, and the principal subject of discussion was, whether by a capture of the ransom bill the contract was dissolved. In Anthon v. Fisher, Id. 649, note, two judges were against the jurisdiction, but the case was finally decided on another point. See Cond. Marsh. 504.

2. It is not competent for a belligerent to ransom the property of a citizen of a friendly nation. This appears from the nature and form of the contract. It is called a repurchase, and the property is supposed to have been first devested. But the property of neutrals does not vest in the captors until condemnation. The property of an enemy is, by the law of war, devested immediately on the capture; but that of a friend can be forfeited only by some misconduct, which must be made judicially to appear. The cruiser has no authority to pardon. It is essential to a ransom-bill, that it should protect the property ransomed to its port of destination. 2 Valin, Comm. 286, lib. 3, tit. 9, art. 19; 1 Emer. 477; Le Guidon, c. 6, arts. 3, 7, 9. But the usual cause for the seizure of vessels of friendly powers being the carrying of contraband goods, the cruiser cannot grant a safe-conduct to the port of destination. The owners of a neutral ship provide her with proper documents, and take upon themselves the risk of their being legal. They give no authority to the master to compromise. The French law requires that a hostage be given together with the ransom-bill. No hostage can be given by a friendly power. 2 Valin, Comm. 282, lib. 3, tit. 9, art. 19; 1 Code des Prises, 278.

3. There was no legal cause of capture. If the cruiser have a right to ransom the property of a friend, it can only be, when

[2] The bill of exchange was recited in the ransom-bill, and there said to be received "instead of hostage."

it is lawfully captured. If the capture be unlawful, then the promise was extorted by violence and is not binding. This court has a right to inquire into the cause of the capture, and the legality of the ransom. It is not denied that the courts of the captor have this right. But in ransoming, the captor agrees to transfer the right to the court of the captured, in which, it is known, the contract of ransom must be enforced. It is incident to every tribunal, that has original jurisdiction, to inquire into the consideration and the manner of obtaining the contract. It would be a mockery, in such a case, to compel the captured to pay the ransom, and then to look to a court of the captors for damages. What circumstances, then, were there in the present case, which could make the property good prize to the belligerent? It was American, regularly documented, and bound on a lawful voyage. There is no pretence of contraband. The British license, however it might be a cause of forfeiture to our government, could not be so to any other. The reasons for inflicting this penalty are, that the act of sailing under a license of the enemy involves a breach of the duty of the citizen; that it leads to a commercial intercourse, which, in time of war, is dangerous; that the citizen thereby creates a neutrality for himself; and that it shows a connexion with the enemy. With the conduct of our citizens, in any of these respects, a nation in amity with us can have no concern. It would have been lawful, in time of peace, to take such a certificate, and our rights are not altered by a war. Suppose that our government had permitted its citizens to take licenses of this description; could a friendly power interfere? It is to be recollected, that we were not allies of France. The cargo was not for the use of the British, but was going to our own consul. There was, therefore, nothing which could justify a condemnation. When the vessel was captured, the only question was, whether she was an enemy, or had forfeited her neutrality. The ransom shows, that the captor knew her to be an American. The neutral character was not forfeited by merely having a British license on board. But even if the circumstances were such as to justify sending in, this would not authorize the master to ransom.[3]

D. Davis and Mr. Sohier, for plaintiffs.

Two questions arise out of the facts, as they have been stated. 1. Has the court jurisdiction? 2. Was there a legal consideration for the contract?

In regard to the first question, it is to be observed, that the case is within the express words of the statute. The jurisdiction of the court over the parties is unquestionable, the plaintiff being an alien, and the defendant a citizen of the United States. The subject matter, too, or the contract, is one, which is every day enforced in courts of common law. It is a bill of exchange, and intended by the parties to be governed by the rules of the common law. But even if the laws of nations are to be taken into view, there would seem to be no reason, why these should not be noticed by a common law court, as well as the maritime or the ecclesiastical law. This, then, being a contract between persons who were able to contract, and who were not subjects of hostile states, and being, in its nature, such as is usually enforced in courts of common law, the right of the plaintiffs, and the jurisdiction of the court are established, unless some of the objections, urged by the defendant, should prevail.

It is said, that a question of prize is involved in the case, which makes it exclusively cognizable by the admiralty. But the contract, upon the face of it, does not necessarily involve a question of prize. The words in the bill of exchange, "for the ransom," &c. express the consideration for which it was given. It does not, from these words, appear, that the contract grew out of a capture as prize. A ransom bill may be given under such circumstances, that no legal question of prize or no prize can result. It is difficult to imagine, whence the doubts arose in the minds of the judges in the case of Anthon v. Fisher, Doug. 649, note. They are completely answered by the argument of Dr. Wynne in reply to Dr. Scott. This action is not founded on a ransom bill, and, in that respect, it is stronger than the case of Ricord v. Bettenham, 3 Burrows, 1734, which is the only one, in which the question of jurisdiction has been decided.

Another important distinction, which differs this case from any arising in Europe, is, that by the statute creating this court and defining its jurisdiction, the right of a common law remedy is expressly reserved to the citizen, in all cases where it may be had. The common law jurisdiction is uniformly preferred by the laws and constitution of our country. There is, therefore, every motive to induce the court to adopt that construction, which favors the common law jurisdiction. The reason that, in England, actions upon contracts, and for torts, which depends upon the laws of nations, are held to

[3] Yates v. Hall, 1 Term. R. 73, and Helly v. Grant, there cited, and Browne, Civ. & Adm. Law, 260, were cited by defendant's counsel. In the course of the argument, Story, J., inquired of the defendant's counsel, if they supposed the form of the contract to be of any importance? Prescott.—If the ransom did not conform to the law of France, it could afford no protection against a subsequent capture, and so, not having the effect, which was contemplated by the parties, the ransom-bill ought not to be enforced. Story, J.—I have no doubt, that the law of France, as to the form of the contract, cannot affect its validity here. It is no more to be regarded, than the statute of frauds would be in France, in reference to a contract for lands made in this state. Prescott said, it was not his intention to urge this point.

belong exclusively to the court of admiralty, is, that they are such, as must be governed by the municipal law entirely, if at all. 4 Bl. Comm. 67. Such are marine assaults, forcible abduction of property on the high seas, &c. Here the whole subject matter is either out of the jurisdiction of the common law court, or within it. But the principle now contended for is, that where the court has jurisdiction of the principal question, it has also jurisdiction of the question of prize or no prize, if incidentally arising. A contract made on the land to be executed at sea, is cognizable in the common law courts. Hoare v. Unton, 4 Inst. 139. It is believed to be equally true, that a contract made at sea to be executed on the land, is cognizable at common law. Personal contracts have no situs; they are to be governed by the law of the place, where they are to be performed. By enforcing this contract in a court of common law, the defendant is not deprived of any right, which he would have in the admiralty. In that court, the very giving of the ransom bill would be held an implied hypothecation of the ship. The general authority of the master would be sufficient for this purpose; but, in this case, the master was also an owner. Wilson v. Bird, 1 Ld. Raym. 22; Tranter v. Watson, 2 Ld. Raym. 931. The owners are bound, by the law of nations and the law merchant, to accept a bill of exchange drawn by the master of the ship for ransom. Marsh. Ins. 432; 1 Emer. 472. In the case of Ricord v. Bettenham, 3 Burrows, 1734, but better reported 1 W. Bl. 560, this question was expressly decided. Great interest was then excited by it, and the most eminent lawyers were engaged. Blackstone, after examining authorities and consulting foreign lawyers, declined to argue for the defendant. Lord Mansfield said, he was in favor of the jurisdiction upon principle, but doubted, principally, because it was confidently stated by counsel, that in other countries, an action would not be sustained on such a contract. A question of prize, arising incidentally in a case of insurance, may be entertained and decided upon. Berens v. Rucker [1 W. Bl. 313] Marsh. Ins. 430; Bingham v. Cabot, 3 Dall. [3 U. S.] 19.

It is contended, that the legality of the capture is admitted by the bill of exchange; but if the court should be of a different opinion, the plaintiff is prepared to show that the vessel was, to all intents and purposes, prize of war.

STORY, Circuit Justice. This question is open only in consequence of your consenting, that the evidence should go to the jury, and having been open at the trial, it must be so here. I was prepared to rule against the admission of the evidence.

Mr. Davis. From the facts, as reported, it is evident, that had the vessel been captured by an American cruiser and brought in, she would have been liable to condemnation by the law of nations.

STORY, Circuit Justice. In the case of The Julia [Case No. 7,575]; Id., 8 Cranch [12 U. S.] 181,—the ground of decision expressly was, that the taking of a license impressed upon the ship a hostile character.

Mr. Davis. It is upon that ground, that the plaintiffs rely. And further, the license has all the effect of a British convoy. It is impossible to contend, after the principles that have been adopted in the cases decided, that this ship would not have been condemned, if carried into France.

STORY, Circuit Justice. The case was thought stronger, at the argument of The Julia, with regard to a neutral than an American. Had a French vessel been going, with a British license, to supply the British armies, it would have been an unneutral act.

Mr. Davis. Every reason that can apply to a neutral, applies with still greater force to a co-belligerent.

STORY, Circuit Justice. Three points have been argued in behalf of the defendant. First. That this is a question of prize, over which this court, sitting in its common law capacity, has no jurisdiction. Secondly, That it is not competent for a friendly belligerent to demand or take a ransom, for restoring the property of a neutral after capture. Thirdly, That there was no legal cause for the capture, and consequently no valid consideration for the contract of ransom. Each of these points involves important considerations of national law, and deserves a separate examination. For convenience, however, they will be discussed in an order, the reverse of that adopted in the argument.

And, in the first place, was the capture legal? Assuming for a moment, that it is competent for a court of common law to entertain such an inquiry, this question must be answered by reference to the law of nations, and the prize regulations of France. For the legality of the conduct of the captors may under circumstances, exclusively depend upon the ordinances of their own government. If, for instance, the sovereign should, by a special order, authorize the capture of neutral property for a cause manifestly unfounded in the law of nations, there can be no doubt, that it would afford a complete justification of the captors in all tribunals of prize. The acts of subjects, lawfully done under the orders of their sovereign, are not cognizable by foreign courts. If such acts be a violation of neutral rights, the only remedy lies by an appeal to the sovereign, or by a resort to arms. A capture, therefore, under the Berlin and Milan decrees, or the celebrated orders in council, although they might be violations of neutral rights, must still have been deemed, as to the captors, a rightful capture, and have authorized the exercise of all the usual rights of war. It is quite another question, whether

a neutral tribunal of prize would lend its aid, to enforce such captures, though, perhaps, in the strictness of national law, it would be bound to abstain from all obstruction of the captors.

Under circumstances, therefore, it might have become material to the plaintiffs, to institute an inquiry into the law of prize, as regulated and administered in the tribunals of France. But, upon the facts of the present case, such an inquiry may well be waived. It is clear, beyond any reasonable doubt, that by the law of nations, the vessel and cargo were confiscable. Here was a cargo of provisions destined for the principal port of military and naval equipment of an enemy of France, and, as the British license obviously implied, for the use of the allied British and Portuguese armies acting against France. Admitting that provisions are not, in general, contraband of war, it is clear that they become so, when destined to a port of naval equipment of an enemy, and a fortiori, when destined for the supply of his army. Nor is this all. The carrier vessel, and master were American, and open hostilities existed between the United States and Great Britain, at the very moment when the voyage was undertaken. It has been already settled in our own courts, that the acceptance of, and sailing under, a license of the British government, is such an act of illegality in an American citizen, as rightfully subjects the property to forfeiture. The ground of this determination is, that the act is utterly inconsistent with the duties, which a belligerent citizen owes to his own government, and is such an incorporation into the objects and interests of the enemy, as stamps the party with a completely hostile character. It is certainly not competent, in general, for a friendly belligerent to enforce by confiscation the mere municipal regulations of a foreign government, or to punish foreigners for a mere breach of allegiance or duty towards their own government. But, it will be difficult to show that an act, which, by the law of nations, is held to impress a hostile character on the party with reference to his own government, shall not have precisely the same effect as to all other belligerents, against whom the act may be directed. The case of The Clarissa, cited 5 C. Rob. Adm. 4, has been supposed to indicate a different doctrine; but it certainly will not support it, and, after the answer given to that case in The Julia [Case No. 7,575], Id., 8 Cranch [12 U. S.] 181, it is unnecessary to give it a further consideration. Upon either ground, therefore, that the cargo was contraband of war, or that the whole adventure was tainted with hostile interests and connextions, the property would have been justly condemnable as prize of war. It is not, however, necessary to assume this ground, incontestible as it seems to be. It is sufficient to justify the conduct of the captors, if there is probable cause for the capture. See The Invincible [Case No. 7,054]. In the present case, it is quite impossible to doubt on this point. The very presence of a British license, on board of an enemy's vessel laden with a cargo of provisions, afforded a violent presumption of concealed British interests, or of subserviency to British policy. The capture was strictly legal, and although this unfavorable presumption would not justify the destruction of the vessel and cargo on the high seas, yet it would have authorized a carrying of them in for adjudication, if not for condemnation. But even if the captors had proceeded to destroy the vessel and cargo, the only remedy for this wanton and unjust excess of authority would have been in the courts of the sovereign of the captors. The commission of the sovereign, although abused, would still exonerate the parties from the imputation of piracy. And this leads us to the consideration of the argument, urged by the defendant, that the ransom bill was extorted by duress. There is no pretence, that it was procured by personal duress, or maltreatment. The only duress pretended is, the threat to burn and destroy the vessel and cargo; and the ransom bill was given to save them. Threats of this sort cannot, either by the common or the maritime law, be admitted to avoid a solemn contract of ransom, where the capture was justified by probable cause; and a fortiori, where condemnation must have ensued the regular prize proceedings. The first ground of defence cannot be supported.

The second question is, whether it be competent for a friendly belligerent to demand, or take, a ransom for restoring the property of a neutral after capture. It is argued by the defendant, that every ransom supposes a vested right in the captors; that this does not exist in respect to neutrals, for the captors have only a right to bring in for adjudication; that neutral property is liable to condemnation, only in case of delinquency; and that captors have no right to remit, in behalf of their sovereign, a forfeiture for violation of neutral duties. It is not true, however, that the right to take a ransom is founded in a vested title in the captors to the captured property. For, whether the property vest after twenty-four hours' possession, or after bringing infra praesidia, as seems the doctrine of civilians; or after condemnation, as is the doctrine of Great Britain; it is clear, that the right to take a ransom exists from the moment of capture. And, by the general practice of the maritime world, a decree of condemnation is deemed necessary to ascertain and confirm the inchoate title of the captors, at least in respect to the sovereign and subjects of their own country. Nor is a ransom, strictly speaking, a repurchase of the captured property. It is rather a repurchase of the actual right of the captors at the time, be it what it may; or, more properly, it is a relinquishment of all the interest and benefit, which the captors might acquire or consummate in the property by the regular adjudications of a prize tribunal, whether it be

an interest in rem, a lien, or a mere title to expenses. In this respect, there seems to be no legal difference between the case of a ransom of the property of an enemy, and of a neutral. For if the property be neutral, and yet there be probable cause of capture, or if the delinquency be such, that the penalty of confiscation might be justly applied; there can be no intrinsic difficulty in supporting a contract, by which the captors agree to waive their rights in consideration of a sum of money voluntarily paid, or agreed to be paid, by the captured. Indeed, the case stands upon a stronger ground, than that of a ransom between enemies; for the latter have not, in general, a capacity to enter into contracts. The very law of war prohibits all commercial intercourse, and suspends all existing contracts between enemies; and the case of ransoms is almost the only exception, which has been admitted, from the general rule. If, then, neither the subject matter, nor the nature of the title or consideration, nor the capacity of the parties, presents any serious objection to the contract, as between a friendly belligerent and a neutral, it remains to consider, if there be any thing in the objection, that it is a remitter of the right of forfeiture, which belongs exclusively to the sovereign. The commission of the sovereign, in general, authorises only captures of enemies' property. But without any express clause, this commission clearly extends to the capture of all neutral property seized in violating neutral duties, for in such case the property is deemed quasi enemies' property. And, for the same reason, it authorises the bringing in of property, under neutral passports and papers, for adjudication, where there is probable cause to suspect its real character; for, until adjudication, it cannot be ascertained, whether it be entitled to the protection of the neutral character. If, therefore, the commission gives hostile property to the captors, and enables them to deliver it up on ransom, it also enables them to do the same in respect to neutral property, which has acquired a hostile taint; and the ransom is not, in the one case, any more an exercise of the sovereign's prerogative to remit a forfeiture, than it is in the other. In both instances, it is considered, by the law of nations, as a mere remitter of the rights of the captors acquired jure belli; and every prohibition of its exercise must expressly depend upon the municipal regulations of the particular country. Upon principle, therefore, the distinction of the counsel for the defendant, as to the incompetency of a belligerent to deliver neutral property on ransom, is unsupported; and there is not a scintillation of authority in its favor.

The next and most important question is, whether this is a case within the jurisdiction of a court of common law. It has been truly said by the plaintiffs' counsel, that the plaintiffs, being alien friends, are entitled to sue in this court; and, that a bill of exchange is a contract clearly cognizable at the common law. There is nothing, therefore, in the character of the parties, or of the contract, which should induce the court to decline jurisdiction. It is the consideration of the contract, which purports on its face to have been given for a ransom, and was in fact given as collateral security for a ransom bill, that creates the difficulty of entertaining jurisdiction. It is argued, that the legality of the consideration of a bill of exchange may always be inquired into, and that, as the legality of a ransom bill involves the question of prize or no prize, a court of common law is not competent incidentally to decide such a question. It exclusively belongs to the admiralty to adjudicate on questions of prize, and by parity of reason also on questions of ransom. Primarily, all questions of prize belong to the tribunals of the capturing power; and foreign tribunals will not interfere, unless where their territorial jurisdiction or rights have been violated. And ransoms, taken upon captures, belong to the same jurisdiction, and may be there enforced or set aside. It is however competent for the captors, if they so choose, to change the forum in cases of ransom, and to apply for redress in any country, where the person or property can be found. And, in such case, the proper tribunal undoubtedly is, a court sitting to administer the law of nations. Whether a foreign court is bound to enforce such a ransom without inquiring into the legitimacy of its origin, upon the principle of comity; or whether it will remit the parties to their own forum, to ascertain and settle that point; or will of itself examine and decide it; it is not now necessary to consider. On a proper occasion, it will be fit to give the subject a very liberal and dispassionate consideration. At all events, there can be no doubt, that a ransom is a subject within the jurisdiction of the admiralty. It is taken for granted in the discussions of the courts of common law, and has been asserted without contradiction by the admiralty. Is this jurisdiction exclusively vested in the admiralty? On this point the parties are at issue; and the same authorities have been pressed into service on both sides. Three cases have been relied upon, viz. Ricord v. Bettenham, 3 Burrows, 1734, 1 W. Bl. 563; Cornu v. Blackburne, Doug. 641; and Anthon v. Fisher, Id. 649, note 1. In all these cases, the action was brought directly on the ransom bill in a court of common law. In the first, the point of jurisdiction was expressly waived by counsel, although stated in the report to be greatly relied upon by civilians. In the second, the point was not started. In the last, the exception was taken by Doctor (now Sir William) Scott on the argument in the king's bench, when Lord Mansfield declared his opinion in favor of the plaintiff; Willes, J., and Buller, J., thought that the courts of common law had no jurisdiction, and that the objection might be taken, although not par-

ticularly pleaded; Ashhurst, J., expressed doubts on that point, and judgment was given pro forma for the plaintiff. This judgment was afterwards reversed in the exchequer chamber upon another point, so that the question of jurisdiction never came to a solemn decision. It remains therefore to be determined in the case at bar. And I have no hesitation to pronounce, that the cognizance of ransom bills exclusively belongs to the admiralty. They necessarily involve the question of prize or no prize, of the legality of the capture, and of the regularity of the commission and conduct of the captors. They also may involve questions as to the prize ordinances of foreign governments, the practice and regulations of courts of prize, and the rights and duties of neutrals. Of most of these questions, it cannot be pretended, that courts of common law have cognizance, and all of them seem more fit for the investigation and determination of a court of the law of nations. Every reason urged in the case of Le Caux v. Eden, Doug. 594, against the jurisdiction as to prize, applies with equal force as to ransoms. Indeed, it might be correctly declared, with greater force; for the rights of foreign captors, a subject of a very delicate and national character, necessarily come into discussion; and these rest upon the great doctrines of the jus belli.

It is very clear, that, in this case, no action for damages could be maintained at common law, even if the capture had been tortious; for it was a taking as prize. Admitting that trespass will lie, at common law, for a marine tort on the high seas (a doctrine somewhat difficult to sustain upon principle, although not upon authority), it is otherwise, if the supposed trespass be a seizure as prize. And it is immaterial, whether the objection be presented directly on the record, or arise at the trial, for if the decision of prize or no prize be involved, it exclusively belongs to the admiralty. And this leads us to the argument of the plaintiffs' counsel, that where the principal matter is cognizable at common law, every incident of prize may be there also tried. I should pause a great while, before I should admit the soundness of this doctrine, in the latitude, in which it is stated. If a question of prize be necessarily involved in the foundation of an action, whether it be as a principal or as an incident, I shall be glad to learn, how the common law can draw it ad aliud examen than the prize jurisdiction. Suppose a question as to the right to prize proceeds should arise; could a court of common law, in an action for money had and received, incidentally entertain the question, as to who are the actual or constructive captors? Such a jurisdiction has never yet been asserted. Camden v. Home, 4 Term R. 382; Duckworth v. Tucker, 2 Taunt. 6. Suppose a marine assault and battery were the subject of a suit, could the common law sustain an inquiry into the nature and propriety of the supposed trespass, when it appeared to have been an incident to a capture? Such a pretension has been expressly over-ruled. Le Caux v. Eden, Doug. 594. It is said, however, that in an action on a policy of insurance, the question of prize has been and may be legally entertained and decided. The cases cited do not come up to the position. Wherever any remarks, touching the legality of captures, have fallen from the court, they have been made with reference to the conduct of the captured, or to the effect of sentences of condemnation and acquittal in matters of prize. In no instance has the court undertaken to decide a question of prize, forming a necessary incident in such a cause. And it is extremely difficult to conceive how it could so do. For if the admiralty has, as it is conceded on all sides it has, jurisdiction over the incidents, as well as the principal matter of prize, it must be just as much exclusive in the first case, as in the last. And it would be strange, if the admiralty might decide an incident of prize one way, and a court of common law might collaterally overrule the sentence.

Upon the mere footing of general reasoning, it appears to me difficult to resist the impression, that the cognizance of ransoms belongs exclusively to the admiralty. And, taking into consideration the clear opinion of civilians, and the judgment of Mr. J. Buller and Mr. J. Willes, in Anthon v. Fisher, after a very elaborate argument, the weight of authority is on the same side. If, therefore, this were an action upon a ransom bill, I should be prepared to deny the jurisdiction of a court of common law. Can the case of a bill of exchange, given as collateral security for the payment of a ransom bill, be distinguished in principle? This question presents the turning point of the cause, and is not unattended with difficulties. On the one hand, if the legality of the consideration be, under all circumstances, inquirable into, then the same questions of prize may arise, as on the ransom bill itself. On the other hand, the contract of exchange is clearly cognizable at common law, and it is not easy to see, how the collateral origin of the consideration should defeat the jurisdiction. It never was imagined, that an action upon a policy of insurance could be defeated, at common law, by the circumstance that the loss claimed was a ransom after capture; and as little can it be imagined, that, in such an action, it is competent for the court to settle the question, whether the property be good prize or not. Suppose a mortgage of land had been given as collateral security for the ransom, would the admiralty have entertained jurisdiction, to give possession to the captors, or to foreclose the equity of redemption? No person would pretend to assert such a doctrine. Suppose, on the other hand, a stipulation, and a mortgage as collateral security, on the bailment of captured property, would a court of common law en-

tertain an inquiry as to the legality of the capture, before it could enforce it?

On the whole, on this point I have come to the conclusion, although not without diffidence, that the present action may be sustained in this court. I consider the bill of exchange, as the parties have considered it, as merely collateral to the ransom. The consideration of it, involving matter of prize, is not inquirable into at common law. It must here be taken, that the capture was justifiable, and the ransom regular. If it were otherwise, a remedy lies in the admiralty courts of France, and perhaps of the United States, to set aside the ransom bill, and restore the parties to their rights. If an action were brought, at common law, upon a collateral security like the present, under circumstances calling for inquiry, the court might suspend its judgment, or a court of equity might grant an injunction, until the parties should have ascertained, in the proper prize tribunal, the validity of the ransom bill, or of the original capture. I have the less hesitation in adopting this conclusion, because the facts of the case abundantly show, that the capture was rightful, and that of course the ransom was valid. It would, therefore, be turning round the parties to another jurisdiction without a hope of benefit. I will only add, that if I had thought the case not cognizable at common law, the circumstance, that the objection was not pleaded in abatement, would have had no weight with me. Where the subject matter is not within the jurisdiction of the court, the exception may be taken under the general issue. Let judgment be entered on the verdict for the plaintiffs.

Case No. 8,979.

The MAITLAND.

[2 Biss. 201;[1] 2 Chi. Leg. News, 113; 17 Pittsb. Leg. J. 18.]

District Court, D. Wisconsin. Dec. Term, 1869.

MARITIME LIENS—REPAIRS—CONTRACT OF OWNER—CLAIM OF LIEN.

1. Repairs upon a vessel in winter quarters in a foreign port, done by contract with the owner, there being no express claim at the time of a lien upon the vessel, and no immediate necessity for such repairs, do not constitute a maritime lien.

2. The power of the owner and master in binding the vessel considered.

3. Various cases distinguished and commented upon.

In admiralty.

Libel for repairs [by William H. Wolf and others against the schooner Maitland]. It is alleged in the libel that on the 15th of February, 1869, while this vessel was at the port of Milwaukee, her owner or agent represented to libellants that she stood in need of repairs in order to make her sea-worthy, and competent to proceed on her intended voyage, and requested them to furnish such materials and supplies; they were supplied by libellants on the credit of the vessel, the said owner or agent not having either money or credit to purchase said materials and supplies, which were suitable, proper and necessary to enable the vessel to depart in safety upon her intended voyage; [and the value thereof is, by maritime law, a lien upon said vessel, her boats, tackle, apparel and furniture, and that a balance of $1,474.71 remains unpaid, although these libellants have often requested the said owner or agent to pay the same.][2] The vessel's home port was Buffalo. John H. Moore, of Buffalo, claimed the vessel, as owner, subject to a mortgage of $10,000, the mortgagee having power to take possession of her at any time. He alleges that before the time the repairs were done by libellants, the vessel had been stripped, and was laid up in winter quarters in the port of Milwaukee, without any intention or possibility of her being employed until navigation should open in the ensuing spring; that after the close of navigation in the fall of 1868, and after the vessel was laid up in winter quarters, claimant, believing that certain repairs would improve her condition for the next season of navigation, and raise her rate, entered into correspondence with libellants as to the price of such repairs, and in January, 1869, received from libellants a proposition in writing to make such repairs. The proposal was required to be accepted by claimant within ten days. Claimant answered in writing: "I accept your offer, and will give five hundred and fifty dollars to do the following work on barque Maitland," (describing the work to be done, &c.) Claimant denied that the repairs were made on the credit of the vessel alone, as propounded in the libel, or that they were necessary to enable her to proceed on her voyage; and he alleged that they were furnished by libellants on his own credit, and that he had money and credit to procure the same. [He denies that the repairs were necessary to enable the vessel to depart in safety upon her intended voyage, and alleges that she could have been employed in navigation with safety during the ensuing season without repairs, and that such repairs were made not for the purpose of rendering the vessel seaworthy or safe for navigation, but to put her in better condition and in a higher class.][2]

Emmons & Van Dyke, for libellants.

Finches, Lynde & Miller, for respondents.

MILLER, District Judge. As the issue here raised is one of admiralty jurisdiction, I omit all reference to the portions of the answer and evidence, which relate to the amount of the bill of repairs and the manner of the work.

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

[2] [From 17 Pittsb. Leg. J. 18.]

Further correspondence took place between these parties in the month of January, 1869, respecting additional repairs to the vessel. In a letter of January 23d claimant wrote to libellants: "Enclosed please find my acceptance of your proposition. I understand you make no objection to my former terms, and suppose you accept them, as you say nothing to the contrary. But I don't expect to keep you out of the pay any longer than you wish to. I will not be able to go up now, and will depend on your doing me a good job. I shall ask Mr. Vance to step around and consult when you get the deck off. Please take care of the ropes in the hold. The other work to be done may remain until the captain goes up, except such of the beams as need repairing."

In a letter dated Buffalo, July 16, 1869, claimant wrote to libellants: "Your valued favor of the 13th inst. is received, which is accepted." He then directs as to the work, and then proceeds: "You will have to take acceptances, or some way wait for pay until the vessel makes one trip, unless I can conveniently pay you. I have money that is promised, ample, but I may be disappointed, yet I hope not; but I will strain every point to pay you when you want it. But should I not be able to collect, then I will want the time." Libellants then did the work on the vessel in the port of Milwaukee.

By rule No. 12 of practice in admiralty and maritime jurisdiction it is provided that, "in all suits by material men for supplies, or repairs, or other necessaries, for a foreign ship, or a ship in a foreign port, the libellants may proceed against the ship and freight in rem, or against the master or owner alone in personam. The home port of this vessel being Buffalo, she was foreign, in the sense of this rule, to the port of Milwaukee.

The season of navigation being ended, the vessel was laid up at Milwaukee for the winter. The repairs may have been necessary for putting the vessel in a sea-worthy condition, as a grain-bearing vessel, for the ensuing season. The vessel was not then on a voyage, bearing a cargo, or intending at the time to proceed on a voyage, or trip from Milwaukee to Buffalo or any other port. There was no intention of putting her in employment before the opening of navigation the ensuing spring. Present necessity for the repairs did not exist when ordered or when made. The master did not order the repairs from pressing necessity, nor did he order them at all, but the owner, and that, too, at a time when the vessel was not actually in employment. She might probably as well have been returned to her home port and repaired there as in the port of Milwaukee.

The rule of the admiralty is of ancient date, that a master of a vessel has power to create a lien for repairs and supplies obtained in a foreign port in a case of necessity. The case of Thomas v. Osborn, 19 How. [60 U. S.] 22, and the cases cited in the opinion conclusively establish this rule, without further references. And this power of the master extends to a case where he is charterer and special owner pro hac vice. Here the master is entirely unknown to the libellants as such. The whole negotiation and contracts were between the owner and the libellants. The master had returned to his home in Buffalo before the repairs were contracted for or performed. In the case of Pratt v. Reed, 19 How. [60 U. S.] 359, the steamboat Sultana was owned in Buffalo and employed in trade between that port and other ports of the upper lakes. She was supplied with coal from time to time at the port of Erie, her owner being the master, and present; and of such ownership, Reed, the libellant, had knowledge when he supplied the coal. There was no representation of the necessity of the supplies, other than that they were directed by the master at the times when furnished. When the owner was not present the coal was furnished at the request of the person in command. The bill rendered by the libellant contained a running account of debit and credit through a period of nearly two years, and there did not appear to be any doubt of the necessity of the supplies when furnished.

The court considered it essential for libellant to prove not merely a necessity for the supplies, but also a necessity at the time of procuring them, for a credit upon the vessel. This proof is as essential as that of the necessity of the article itself. The court says: "The supplies having been furnished at a fixed place, according to the account current, and apparently under some general understanding and arrangement, the presumption is that there could be no necessity for the implied hypothecation of the vessel; there could be no unexpected or unforeseen exigency to require it. For aught that appears, the supplies could have been procured on the personal credit of the master, and in this more especially as he was the owner. We do not say that the mere fact of the master being owner, of itself excludes the possibility of a case of necessity that would justify an implied hypothecation; but it is undoubtedly a circumstance that should be attended to in ascertaining whether any such necessity existed in the particular case. The Sophie, 1 W. Rob. Adm. 309. It must appear that the supplies could only be procured on the credit of the vessel." The same position is reiterated by Justice Nelson, who wrote the opinion in one of the above cases and approved the other, in The James Guy [Case No. 7,196], where it is decided, "to sustain a libel in rem against a vessel owned in New York for repairs done upon her at Baltimore, at the instance of the master, the necessity of the repairs, and for a lien upon the vessel to enable the master to procure them, must be shown." And the court says that, "the necessity for the repairs and for the lien

must depend upon the facts and circumstances of the case."

In the case of The Neversink [Case No. 10,133], the court again declares that in the cases of Thomas v. Osborn, 19 How. [60 U. S.] 22, and Pratt v. Reed [supra], the rule which requires evidence of an apparent necessity existing at the time for supplying on the credit of a vessel, supplies furnished to her in a foreign port in order to create a lien upon her in favor of a material-man, was not extended beyond its ancient strictness as to the degree of proof required. And in that case it is decided that where the master of a steamer has no funds to pay for coal, and her charterers who owned her pro hac vice resided in a foreign jurisdiction, and the coal was a necessary supply, and it was obtained by the master, and credit was in fact given to the vessel and her charterers; it was held that a lien was given on the vessel.

It was also held that when the material-man resided at the home port of the vessel, and furnished coal at a foreign port, through an agent there, the supplies were considered as furnished by the agent at the foreign port, the same as if the principal resided there.

It evidently is the duty of material-men furnishing supplies at foreign ports to vessels, at the instance of the master, who is agent of the owner, to ascertain the necessity of the supplies and also of the inability of the master or owners of the vessel to pay for them, before the vessel can be subjected to a maritime lien. Such, also, is the duty of material-men in dealing directly with the owners of a vessel, as in this case. It does not appear that libellants required direct hypothecation of the vessel, or that such was agreed upon or promised by the owner. Nor does it appear that the libellants made inquiry into incumbrances on the vessel, or questioned the pecuniary ability of the owner. The supplies were furnished at the instance and on the credit of the owner, without the aid of any facts upon which a presumption can arise of a legal hypothecation of the vessel.

In the case of The St. Lawrence, 1 Black [66 U. S.] 522, the evidence showed that the supplies being furnished, the amount and value being ascertained to the satisfaction of claimant's proctor, the owner of the vessel at the time gave his notes for the amount of the libellants' demand, under the express stipulation between him and libellants that their lien against the vessel should not be discharged or released unless the notes were paid. The notes were afterwards surrendered. It was held that the lien was not waived by the acceptance of the notes. That was an express hypothecation of the vessel. In the case in hand, the owner accepts the proposal of libellants to furnish supplies, and promised individually to pay a certain price, and again he agrees personally for additional repairs, libellants not at any time claiming a lien upon the vessel, even after notice from claimant that they might not be paid when the repairs were completed, but at a subsequent time.

It is contended that this libel should be sustained by reason of the remark of the justice in delivering the opinion in the case of The Belfast, 7 Wall. [74 U. S.] 624, that "material-men who furnish materials or supplies for a vessel in a foreign port, or in a port other than in the state where the vessel belongs, have a maritime lien on the vessel as a security for the payment of the price of all such materials and supplies. They have such a lien, because, upon the principles of the maritime law, such materials and supplies are presumed to be furnished on the credit of the vessel," referring to cases anterior to those cited above. This remark of the judge in an opinion in a case involving the question of exclusive jurisdiction of the district courts on libels on contracts of affreightment, and not in any manner touching the lien of material-men for supplies, cannot be taken to overrule the cases of Thomas v. Osborn and Pratt v. Reed [supra].

The court cannot step aside from the contract between the parties, because it appears in the answer of the claimant that the vessel is incumbered by a mortgage to the amount of $10,000. The claimant, for aught we know, may be abundantly able to pay all that libellants can or may recover, irrespective of his interest in the vessel. The fact of the mortgage is no evidence of his inability to pay this debt. Libellants should have satisfied themselves of claimant's pecuniary circumstances before furnishing the supplies and making the repairs, and if they had doubt of his ability to meet his contract, they should have required a lien upon the vessel, or notified him that the supplies would only be furnished on the credit of the vessel. I am satisfied that libellants have no maritime lien on the vessel, and that the libel must be dismissed.

NOTE. For a full discussion of liens for repairs, see 2 Pars. Shipp. & Adm. and authorities there cited. Consult The Eclipse [Case No. 4,268], 1871, and The Selt [Id. 12,649], 1872, and cases there cited. Also The Lady Franklin [Id. 7,982]; The Celestine [Id. 2,541]. For a discussion of the lien of material-men under the maritime and state law, and the jurisdiction of the admiralty courts, especially since the amendment of May 6, 1872, to the 12th rule in admiralty, examine two recent decisions for May, 1873. The Cicassian [Id. 2,720a]; In re Kirkland [Id. 7,842].

Case No. 8,980.

MAITLAND et al. v. The ATLANTIC.

[Newb. 514; [1] 3 Am. Law Reg. 477.]

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

BOTTOMRY—MORTGAGE—LIEN—SIMPLE LOAN—BILL TAKEN WITH BOND.

1. Where A., the master of a brig, puts into a foreign port by reason of a leak, and there bor-

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

rows money from B., and draws a bill of exchange upon C., which bill is unpaid at maturity, and at the same time that the bill is drawn, he also executes a mortgage or hypothecation, in which there is a special stipulation that B. is not to take the usual marine risks in cases of bottomry and hypothecation, neither instrument establishes a lien upon the brig, which can be enforced in the admiralty, for want of jurisdiction.

[Cited in The J. R. Hoyle, Case No. 7,557; The Edward Albro, Id. 4,290.]

2. The essential difference between a bottomry bond and a simple loan is, that on the latter, the money is at the risk of the borrower, and must be paid at all events; in the former, it is at the risk of the lender during the voyage, and the right to demand payment depends on the safe arrival of the vessel.

[Cited in The Edward Albro, Case No. 4,290.]

3. Admiralty cannot enforce a claim for money which has been advanced on the personal credit of the vessel, owner or master, in a suit in rem.

[Cited in The J. R. Hoyle, Case No. 7,557.]

4. Where a bill is drawn, and a bottomry bond taken for the same sum, the bill must share the fate of the bond.

[This was a libel in rem by R. L. Maitland & Co. against the brig Atlantic, to enforce the payment of money advanced upon the hypothecation of the vessel. The case is heard upon an exception to the jurisdiction of the court.]

Mr. Semmes, for libelants.

Mr. Gaither, for respondent.

McCALEB, District Judge. The libel in this case alleges that prior to the 12th of December, 1853, the brig Atlantic, while on a voyage from Philadelphia to New Orleans, with a cargo of coal, sprung a leak, and went into the port of Key West for repairs, to enable her to complete her voyage. That the master, Henry C. King, being a stranger in Key West, and being in want of money to pay for the necessary repairs, and having no other means of procuring the same, borrowed of the commercial firm of H. H. Wall & Co., at Key West, the sum of eight hundred and thirteen dollars and twenty-one cents, upon the hypothecation and mortgage of the brig, her cargo and freight. It is further alleged that, in consideration of the said advance, the master drew his draft or bill of exchange for the sum of eight hundred and sixty-two dollars, which sum included the loan for repairs, and six per cent. thereon for interest and commission. The draft was drawn upon Henry Simpson & Co., of Philadelphia, payable one day after sight; and in order to secure the payment thereof, the master by a certain instrument of writing, dated 12th December, 1853, and executed before a notary public at Key West, hypothecated and mortgaged the brig, her cargo, freight, apparel and furniture, unto the said Wall & Co. The draft was duly assigned by Wall & Co. to the libelants, who, after due diligence, not being able to find the drawees, caused it to be protested for non-acceptance and non-payment, and gave notice thereof to the drawer. This action is now instituted to hold the brig liable for the payment of the amount of the draft. Both the draft and instrument of hypothecation and mortgage are annexed to the libel as part thereof. The latter, after the usual terms of hypothecation and pledge, concludes with the following stipulation: "It is expressly understood and agreed, that the said Wall & Co. do not take upon themselves the marine risks usual in cases of bottomry and hypothecation." To the libel an exception had been filed by the claimants, to the effect that this court, as a court of admiralty, has no jurisdiction to enforce the payment of the sum demanded. It is evident that an extravagant rate of interest has been exacted by the house of Wall & Co., and it is this fact, coupled with the stipulation in the instrument of hypothecation, to which reference has just been made, which forms the basis of this exception. Although the lender of the money seems to have intended to secure the payment of the draft, by exacting both a mortgage on the ship, and a pledge of the merchandise laden on board also, the instrument cannot be properly regarded either as a bottomry bond or as a security in the nature of respondentia. That the master had a right, in this instance, in a port of a state other than that of the residence of the owner, to raise money for the payment of the necessary repairs done upon the brig, by pledging the ship, cannot be denied. And if the court could regard the instrument before it in the light of a bottomry bond, with the usual stipulations, it would feel itself compelled to exercise jurisdiction to grant the party relief. There would be a clear and well established lien upon the vessel, which, according to the principles of the maritime law, could be enforced in the admiralty.

Contracts of bottomry are so called, because the bottom or keel of the vessel is figuratively used to express the whole body thereof; sometimes, also, but inaccurately, money lent in this manner is said to run at respondentia—for that word properly applies to the loan of money upon merchandise laden on board a ship, the repayment whereof is made to depend upon the safe arrival of the merchandise at the destined port. In like manner, the repayment of money lent on bottomry does in general depend upon the prosperous conclusion of the voyage; and as the lender sustains the hazard of the voyage, he receives, upon its happy termination, a greater price or premium for his money than the rate of interest allowed by law in ordinary cases. The premium paid on these occasions depends wholly on the contract of the parties, and consequently varies according to the nature of the adventure. Abb. Shipp. 150, 151. The high rate of interest exacted by the lenders in this case, would, therefore, be no valid objection to the libelants' recovery, if it appeared from the act of hypothecation that the usual maritime risks

had been incurred; but, so far from this being the case, the clause in the act of hypothecation, to which reference has been made, expressly declares that no such risk was to be assumed. The essential difference between a bottomry bond and a simple loan is, that in the latter the money is at the risk of the borrower, and must be paid at all events; in the former, it is at the risk of the lender during the voyage, and the right to demand payment depends on the safe arrival of the vessel. And if the lender of money on a bottomry or respondentia bond be willing to stake the money upon the safe arrival of the ship or cargo, and to take upon himself, like an insurer, the risk of sea perils, it is lawful, reasonable and just, that he should be authorized to demand and receive an extraordinary interest, to be agreed on, and which the lender shall deem commensurate to the hazard he runs. But a bond executed as an hypothecation, but not upon the principles which govern such securities, is not a bottomry bond, capable of being enforced in a court of admiralty, but must be proceeded on as at common law. It is absolutely necessary that the liability of the lender to the sea risks should appear or be fairly collected from the instrument; otherwise, the reservation of maritime interest will render the security void on the ground of usury, not only as a charge upon the ship, but also against the person of the borrower. And where an instrument, called a bottomry bond, contained an express clause that the sum secured should be paid within thirty days after intelligence of the loss, Lord Stowell doubted his jurisdiction to entertain the suit at all, and dismissed it on the ground that the very essence of bottomry, which alone could give jurisdiction to the admiralty, was wanting. From this sentence an appeal was prosecuted to the delegates, and that court, after directing a search for precedents, decided that as the maritime interest was reserved, and maritime risk was excluded from the bond, it was void. 1 Hagg. Adm. 55; 2 Hagg. Adm. 57.

It is contended by the proctor for the libelants, that the hypothecation in this case, though bad in part, may, by a court of admiralty, be regarded as good in part, and as such, still be considered as a legitimate contract for the exercise of its jurisdiction. If, by assuming this position, the proctor would maintain that the clause in the hypothecation by which the libelants refused to assume maritime risks, may be rejected by the court, and the instrument be enforced as a valid hypothecation independently of this clause, he is widely mistaken. As the parties have chosen to bind themselves, so shall they be bound, and the court has no authority whatever to vary the stipulations of their contract, simply for the purpose of administering equitable relief, as a court of admiralty. It is perfectly true that a bottomry bond may be bad in part and good in part, and that as to the good, it is competent for a court of admiralty to exercise jurisdiction to grant relief. But I apprehend that this well recognized principle was never applied to a case like the present. It has sometimes happened that advances have been made for repairs in foreign ports, partly upon the personal credit of the owners, and partly upon the credit or security of the ship; and the whole amount of advances so made, has been included in one bottomry bond. In such cases, it has been uniformly held that as to the particular sum advanced on the personal credit of the owners, the bond was bad; but as to the sum advanced on the security of the vessel, it was good, and that as to the latter amount, a court of admiralty would exercise jurisdiction to enforce its payment. Such was the principle recognized by Lord Stowell in the case of The Augusta, 1 Dod. 287. "It is quite clear," said the court, "that the bill of exchange was founded on considerations of personal responsibility only, and that a bond of hypothecation was not at that time in the contemplation either of the borrower or lender. I have therefore no hesitation in saying that with respect to the £600, the bond is not effective; but with respect to the other part of the money, I am of a different opinion. For it is evident that no other security was held out than the ship and the freight, and it is therefore so far indisputably, a bottomry transaction. The foreign merchant, it is true, wished to extend the same species of security to the whole of his debt, and I see nothing dishonest or dishonorable in his attempt to do so; but, at the same time, this court cannot lend its assistance by enforcing the bond beyond the extent of its legal validity. It cannot permit the party to say the master had no other resource for procuring supplies except bottomry, when he himself had been content to advance the money on the personal responsibility of the owner. As far, then as it relates to the £600, I think the bond is invalid; but for the rest, I think it ought to be enforced. It is not necessary here, that a bond should be either good or bad, in toto: in the equitable proceedings of this court, it may be good in part and bad in part." The case of The Hero, 2 Dod. 139, and that of The Hunter [Case No. 6,904], will be found to correspond with the one just cited, and the decisions of the courts are in strict conformity with the rules here laid down. It is true that in the case of The Hunter, Judge Ware held that although there was a fatal objection to the instrument as a bond securing marine interest, it was not perhaps quite certain that the creditor could have no remedy upon it in a court of admiralty for the principal sum advanced, with land interest. In that case an amendment to the libel was allowed, and upon a new allegation that the libelant had a right to be paid upon general principles of the maritime law, the amount which it was shown had been originally advanced up-

on the personal credit of the owner, was decreed to be paid with land interest only.

Without undertaking to question the correctness of the course adopted by the learned judge of the district court of Maine, in giving a remedy in rem for a sum which he previously declared had been advanced upon the personal credit of the owners, it will be sufficient to show that the case now under consideration differs materially from that in which the amendment was allowed. In the latter case, there was the usual assumption of maritime risks, whereas the libelants here, as we have already seen, expressly refused to take any such risks. The claim of the lenders should have been made to depend upon the safe arrival of the vessel. This was necessary to justify the court in granting them now a remedy in rem. It is perfectly true, as the proctor contends, that the very fact that advances had been made to defray the expenses of repairs, would create a lien upon the vessel, if such advances had been made upon the credit of the vessel, and that such a lien would exist if there were no special act of hypothecation or mortgage. It would indeed exist by operation of law. But if instead of relying upon the general principles of the maritime law, the lender of the money chooses to exact of the master a special hypothecation of the vessel and cargo, and causes to be inserted in the instrument, clauses which operate as a waiver of his lien, or as a forfeiture of his right to proceed in rem, how can a court of admiralty grant him relief? If, as in the case now under consideration, he exacts maritime interest upon his loan, and at the same time expressly refused to assume maritime risks, is it not clear that the very instrument upon which he relies for his security is, by the well recognized principles of the maritime law, an abandonment of all claim against the vessel? It is well settled that if a material man gives personal credit, even in the case of materials furnished to a foreign ship, he loses his lien so far as to exclude him from a suit in rem. Zane v. The President [Case No. 18,201]. This rule is doubtless subject to the qualification that an express contract for a stipulated sum is not of itself a waiver of the lien, unless the contract contains some stipulations inconsistent with the continuance of the lien. [Peyroux v. Howard] 7 Pet. [32 U. S.] 324. The drawing of the bill of exchange does not, in my judgment, help the case of the libelants. In the case of The Augusta, already referred to, Lord Stowell considered that the taking of a bill of exchange by the holder of a bottomry bond, was a strong circumstance to show that the advances were made on the personal credit of the owners, and not on the credit of the vessel, and he held the bond void for the amount of the bill, and good for the advances made after the bill was drawn. It is, however, the usual practice to draw bills of exchange; and there is no inconsistency in taking this collateral security, nor has it ever been held to exclude the bond, nor diminish its solidity. So it was distinctly held in the case of The Jane, 1 Dod. 466. But it is well settled, that when a bill is drawn, and a bottomry bond taken, with maritime interest, for the same sum, the bill must share the fate of the bond. Until the vessel arrives in safety at the end of the voyage, the loan is at the risk of the lender, and if she is lost, nothing is due upon the bill more than upon the bond. When a bill is therefore drawn, and a bottomry bond given for the same consideration, the owner is not bound to honor the bill; at least not before the safe arrival of the vessel and the end of the risk. For it does not appear that anything will ever be due until the happening of the event on which the bond becomes payable, and then the payment of one security extinguishes both. The Hunter [supra].

It is further contended by the proctor of the libelants, that it is altogether premature, upon a trial of this exception to the jurisdiction, to regard the interest charged by the lender as usurious; that it is competent for the party upon the trial of the case upon its merits, to show that under the charge of interest and commission, there is no usury; that the interest is one thing and the commission another, and that there is nothing to prevent the court from considering the one as separate and distinct from the other. When the question of jurisdiction was first presented to the consideration of the court, I certainly did not understand the proctor to deny that maritime interest had been charged in the bill of exchange and the instrument of hypothecation, and I cannot upon an examination of that instrument, resist the conclusion that usury lurks under this apparently harmless name of commission. The aggregate amount borrowed by the master was $813. This was loaned at the rate of what is specifically denominated six per cent. commission, and the advance and commission amount to $862. For this, a draft is drawn, payable one day after sight, on the owner, residing in the city of Philadelphia. Here, then, is the sum of $49 commission, charged upon a loan of $813 for the space of perhaps ten days—allowing this time for the bill to be sent to the residence of the owner, from Key West. To use the expressive language of Lord Stowell, in the case of The Gratitudine, 3 C. Rob. Adm. 277, "I know that the word commission sounds sweet in a merchant's ear; but whether it is a proper charge or not on this occasion, I will not take upon myself to determine without a reference to the registrar properly assisted." I entertain but little doubt that maritime interest has been stipulated to be paid, and I have as little doubt that it is fully within my power, sitting in a court of admiralty, to reduce the rate of interest, where it is manifestly exorbitant, that is to say, in a case coming within my jurisdiction. The power possessed

will, however, be exercised with great care and caution. The Zodiac, 1 Hagg. Adm. 326. But I do not pretend to assert the doctrine, that to justify this court, as a court of admiralty, to exercise jurisdiction over a bottomry transaction, it is indispensably necessary that maritime interest should be charged. This would, in my judgment, be altogether unreasonable. The lender of money on a bottomry bond certainly has a right to relinquish a portion of the profits he would be entitled to realize; and the owner of a vessel would come with a bad grace to contest the validity of a bottomry security, upon the ground that the lender of the money had charged the master less than he was authorized to exact under the maritime law.

Conceding then, that in the case before us, maritime interest was not demanded, and that the charges under the name of commissions will not amount to usury, can this court, as a court of admiralty, exercise jurisdiction of the case, when it is perfectly ap parent that no maritime risks were incurred? I am clearly of opinion that it cannot. In the language of Sir Stephen Lushington, in the case of The Emancipation, 1 W. Rob. Adm. 128, "I must look to the bond itself, without referring to extrinsic evidence at all; and unless I can come to the conclusion, from the words of the bond, that any maritime risk is to be directly or indirectly inferred, I must hold that I have no authority to pronounce in favor of its validity." Again, that eminent civilian says, in the same opinion: "I am perfectly satisfied that whatever might have been the intention of the contracting parties to the bond, both upon the face of the bond itself, and according to legal inference, the payment of the money advanced does not depend upon the safe arrival of the ship. I must, therefore, pronounce against the bond."

Upon mature consideration, therefore, I am of opinion that, as the pleadings now stand, I have no jurisdiction of the case, and that the libel must be dismissed, with costs.

MAITLAND, The (WOLF v.). See Case No. 8,979.

MAJESTIC, The. See Cases Nos. 17,005 and 17,006.

Case No. 8,981.

In re MAJOR.

Ex parte CARTER'S EX'R.

Ex parte MOORE.

[2 Hughes (1877) 215.] [1]

District Court, E. D. Virginia.[2]

BANKRUPTCY — ENCUMBERED PROPERTY — SALE WITHOUT NOTICE—PETITION TO SET ASIDE—EXECUTORS—FUND COLLECTED—PROPER COURT TO PASS UPON DISTRIBUTION.

1. Where lands bound by liens are sold by a bankruptcy court free of incumbrances, without notice to lien creditors, the same court may at any time thereafter, on proper petition and notice to the purchasers, set aside such sale as null and void as to lien creditors without notice.

[See Ex parte Bryan, Case No. 2,061.]

2. Where the executor of an estate, who is the officer of a state court, in respect to the estate is a lien creditor of an estate in bankruptcy, and recovers from that court the debt due him, the state court of which the executor is an officer is the proper tribunal to control and pass upon his distribution of the fund received by him from the bankruptcy court.

In bankruptcy.

HUGHES, District Judge. Samuel B. Major filed his petition in bankruptcy on the 1st of September, 1868, and was duly adjudicated as a bankrupt. He surrendered personal estate, and between six and seven hundred acres of real estate capable of being sold in separate tracts. There were judgments against him as principal and surety binding as liens upon his real estate to the amount of more than ten thousand dollars, due to some ten or twelve lien creditors. He had made, in May, 1868, a deed of trust for the general benefit of his creditors conveying to a trustee all his estate, worth not more than six thousand dollars. In due course of proceedings Walter W. Wood was chosen his assignee, but gave no bond as such. Elisha Barksdale was at the time and continued to be the law partner of W. W. Wood, and acted as counsel for the assignee in the progress of the cause. On the 12th of January, 1869, this assignee filed a petition in this court setting forth that certain judgments had been obtained against the bankrupt, some of them at dates longer than four months before the petition in bankruptcy, others within the period of four months, making no mention of judgments which had been taken against the bankrupt as surety, and setting forth the execution of the deed of trust of May, 1868, by the bankrupt. He prayed that as this deed had been executed within four months before the bankruptcy, and as certain judgments had been also obtained within that period, the same might be declared null and void; that E. B. Jeffries, the trustee in the said deed, be required to convey to himself, the assignee, the property covered by the said trust deed, and that he might have an order of court for the sale of the real estate of the bankrupt free of all incumbrances. On the same day on which this petition was filed, without notice to the trustee, Jeffries, or to any or either of the lien creditors, the then judge of this court signed an order directing Jeffries, the trustee, to convey to the assignee the property embraced in the trust deed, and directing the assignee to make sale of the real estate thus implicated, free of liens and of all incumbrances except the contingent right of dower of the bankrupt's wife. No account of liens or incumbrances had been taken or of their priorities at that time. The assignee in pursuance of this decree, on April 7th, 1869, sold all the real estate in question, and his

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

[2] [Affirmed by circuit court (case unreported).]

counsel, E. Barksdale, bought three hundred and one acres of this real estate, which is the tract now in question, at the price of $1565.20. The order of sale was made on the 12th day of January, 1869. The sale, thus uncertain as to its real date, was not reported to the court, nor the report of it filed in the record, until the 22d of September, 1869, and on that same day, without opportunity being allowed for exceptions, and without notice to any human being, the sale was confirmed by the then judge of this court, and deeds ordered to be made to the purchasers on payment. On the 29th of December, 1869, this assignee conveyed the three hundred and one acres which have been named, by deed to the said E. Barksdale, before any money was paid him by said Barksdale as the purchase-money for the property. Some time afterwards, however, Barksdale claimed before a commissioner that he subsequently became entitled to credits from the estate (including a fee as counsel for this assignee) to an amount approximating the price he had bid for the land.

There were various proceedings from time to time in after years against the assignee, charging and implying default or misapplication as to funds in his hands, and especially as to the purchase-money of the land he had sold. These proceedings resulted in the removal of Wood as assignee, and the substitution of W. H. Allderdice in his stead. On the 10th of March, 1873, the new assignee, Allderdice, filed his petition alleging that although four years had elapsed, the purchasers of the several tracts of real estate from Wood, his predecessor, had not paid the purchase-money due by them and had all the time remained in possession of the land they had claimed to purchase without paying rent, and asking authority to resell. These allegations were afterwards shown not to be true as to one of the purchasers, J. M. Carrington, of one of the tracts. On the same day on which this petition of Allderdice for a resale was filed, its prayer was granted, and a resale ordered without notice to any one. Confining the remainder of this recital of facts to the three hundred and one acres which had been purchased by Barksdale: A resale was not made under this order. On the 12th of November, 1873, on the "application" of J. J. Hill, by attorney, and of C. H. Cabaniss, executor of Samuel Carter, whose judgment liens had priority of others in the funds arising from the sale of the bankrupt's lands, another order was made for resale. No notice or rule had been served upon other lien creditors, or upon purchasers under the order of 12th January, 1869, and under the sale of 7th April, 1869, of this "application," which must have been made orally to the court. Under this order, made on the 12th November, 1873, the assignee, Allderdice, made sale, on the 12th December, 1873, of three hundred and one acres in question, and made report of the sale on the 18th February, 1874. But this report, filed on the day last named, embraced a note by the assignee, which stated that although this land had been cried out to W. V. B. Moore, yet that Moore having failed to comply with the terms of the resale, one M. Palmer had agreed to take the land at Moore's bid, and that the assignee therefore had contracted with him, and he now reported his sale as having been made to M. Palmer. On the 3d of December, 1873, an order was obtained from Judge Underwood, by E. Barksdale, setting aside the order "entered on the 11th day of November, 1873," meaning doubtless the order made on the 12th of November, 1873. This last-named order was made in advance of the sale made by Allderdice on the 12th December, 1873. It is in the handwriting of E. Barksdale, was signed "John C. Underwood," and must have been personally held by E. Barksdale, as it was not filed in the record of this cause until the 20th of January, 1874, until which filing it had no validity; and, of course, the sale made by the assignee on the 12th December, 1873, was made in ignorance of its existence. Judge Underwood died in the latter part of December, 1873, and this cause came before the present judge of this court with the record showing the first assignee to have been removed for having been largely in default, and incumbered with the illegal and futile orders and reports of sale which have been described. The matter of the 301 acre tract of land had been further complicated by the first purchaser, E. Barksdale, having delivered possession of the tract, under what they believed to be a purchase from him, to two of his nieces, and by one of the nieces having intermarried with W. V. B. Moore. It seems that the judgment of J. J. Hill, one of the lien creditors, was settled in part out of the sale which had been made of another part of the bankrupt's land to J. M. Carrington. But neither from the sale to Barksdale, nor from that to Palmer, was the judgment lien in favor of Carter's estate satisfied, in whole or part.

Such being the position of affairs, the present judge of this court, on the 12th of March, 1874, made an order, on motion of Allderdice, the assignee, consented to by E. Barksdale, purchaser under the illegal sale of 7th April, 1869, and by M. Palmer, purchaser under the illegal sale of 12th December, 1873, and by C. H. Cabaniss, the representative of Carter's estate, for a resale of the 301 acre tract of land. By this order W. R. Barksdale was, at the suggestion of E. Barksdale, who was his father, appointed a commissioner to make the sale. Commissioner Barksdale made the sale on the 25th July, 1874, at which Andrew Easly and others became purchasers at the price of $2580.60, and reported his sale on the 5th August following. By supplemental reports, the last of which was filed on the 6th of April, 1876, he reported all the deferred payments for the land to have

been made, and after paying off all liens prior to that of Carter's estate, he held in his hands a balance to the amount of $1725.73. The judgment lien in favor of Samuel Carter's estate more than equals this amount, and there are liens following that of Carter's estate in priority to the amount of several thousand dollars. To this sale made by Commissioner Barksdale there was no exception, and it was duly confirmed. On the 20th of November, 1874, and on the 17th of December, 1875, orders were made referring to R. W. Watkins as commissioner sundry matters connected with these sales of the 301 acre tract of land. He was directed, among other things, to report all liens resting upon the land and their priorities; what amount E. Barksdale had paid on his purchase of January, 1869; what amount was due upon the judgment in favor of Carter's estate; who was entitled to the benefit of this judgment in the event that it had been sold by the distributees of Carter's estate; what amount had been paid for it if so sold; whether the judgment was obtained against Major, the bankrupt, as principal or surety; whether, if as surety, the principal obligor was not responsible, and whether this judgment could not be enforced against the principal obligor's estate; whether, if so, Carter's representative was seeking to enforce the claim against the principal obligor's estate, etc., etc. This commissioner made reports dated respectively on the 9th August, 1875, and April 1st, 1876, responsive to these orders of reference, which showed a balance still due to Carter's estate from the bankrupt's estate of $1857.27; and that the lien of Carter's estate for this amount was the first lien in priority now binding the fund of $1725.73 in the hands of Commissioner W. R. Barksdale. One of these reports of Commissioner Watkins further showed that this judgment in favor of Carter's estate was due by Major as surety, and that suit was going on against the estate of the principal obligor, which latter was probably responsible for the debt. One of the reports further showed that half of the judgment of Carter's estate against Major's estate had been purchased by C. H. Cabaniss, executor of Carter's estate; and it further showed that the other half had been purchased by E. Barksdale, and paid for by W. R. Barksdale during the period when the latter held in his hands the balance of $1725.73 due from him as commissioner of this court. A petition has been presented by W. V. B. Moore, husband of one of the Misses Barksdale, in behalf of his wife and her sister, complaining of the hardship of their case, stating that they were in danger of being thrown out of a home which they had innocently purchased and paid for, and praying the protection of the court, etc.

From the extraordinary mass of matter, a great deal of it irrelevant, which incumbers the record of this case, I have eliminated the foregoing statement of such facts as control me in my decision on the questions presented. There may be some inaccuracies of detail in the statement, but none that can affect the judgment I am required to give on the leading facts thus evolved and set forth. It is useless to say what must appear self-evident, that the sale to Barksdale of January, 1869, was wholly illegal, null, and void, as to all the parties to the order of court under which it was made. As to lien creditors without notice the order of court by which the sale was directed was illegal, null, and void, not only in authorizing the sale itself, but as to most of its other provisions. It cannot be countenanced for a moment in a court of justice in bar of, or in any manner to prejudice, the rights of lien creditors without notice. As against such lien creditors the purchaser under the sale, E. Barksdale, has no title under it whatever, not even an equitable title; because he was in fiduciary relations as counsel of the assignee, Wood, to the trust with which the assignee was clothed. Nor is the case of the Misses Barksdale any better, however much they may really suffer by the sale being treated as null and void. The evidence shows that they actually paid E. Barksdale no money, but that he sought to pass off this land to them for a debt he had previously owed them. This debt, whatever it might have been, remains due from him to them now as fully as on the day on which they entered upon the land. On losing the land they are placed precisely where they stood before. Their claim against E. Barksdale is just where it was, and they have no right, either legal or equitable, to call upon the court to make good a debt due to them from E. Barksdale with land or its proceeds to which E. Barksdale has neither a legal nor an equitable right, and which the court itself has no power to divert from those to whom the land or its proceeds is legally and equitably due.

The sale to M. Palmer of 12th of December, 1873, was equally illegal, null, and void, as to all but the representatives of the liens of Hill and of Carter's estate. The former purchaser had no notice of the order under which it had been made, nor had any other lien creditor of the bankrupt. It is true that inasmuch as the judgment in favor of Carter's estate consumes all the proceeds of sale, it is not likely that any creditor later in priority would be disposed to impeach the sale; but non constat, that some subsequent creditor might have bid enough at the sale to afford him a surplus if he had had notice, and the court would on motion of any such creditor have set aside the sale because made without notice to him. E. Barksdale, too, having been a purchaser under an order of sale made by the court, and having had no notice of the "application" on which the sale of the 12th December, 1873, to Palmer was made, had a right to an order setting

aside the sale on his mere motion, though the order which he did obtain for that purpose not having been put in the record was futile. It is therefore my decision that the sales of January, 1869, and December, 1873, were illegal, null, and void, as to lien creditors without notice. Any lien creditor aggrieved by them would have been heard to impeach them, and they would have been at any time set aside by me on motion and notice. This was done in the proceedings which resulted in the consent order of the 12th of March, 1874. That order was the first and only one under which a valid sale has been made of the land now in controversy. If that order did not in terms rescind the previous orders of sale, it did so by necessary implication. As against the liens which still bound the real estate of the bankrupt on the 12th of March, 1874, it was by necessary implication, being by consent implying notice to all parties actually interested, a rescission of the former orders on the subject-matter to which it related, and was so understood to be by the court, and must have been so understood to be by all those who were parties consenting to it. The sale of the 25th of July, 1874, to Andrew Easly and others is the only sale that has been made of the tract of land in question, which is valid as to the judgment liens of Hill and Carter's estate. The whole proceeds of that sale, so far as they were appropriated in pursuance of the consent given in the order of the 12th of March, 1874, must go to discharge the liens binding upon the land. E. Barksdale's claim to the surplus of purchase-money paid by Easly under the last sale, over and above that bid by himself at the first sale cannot be entertained. In the consent order of 12th March, 1874, the representatives of Carter's estate agreed to allow on the purchase-money of the 301 acre tract of land any payment that might be proved to have been made by E. Barksdale on the liens existing on the said lands, and impliedly consented to allow any payments that might have been made by the said Barksdale on the purchase-money of the land he had bought after being charged with the rents and profits of the land for the period during which he had held possession since January, 1869. I say there was an implied consent that these latter payments should be allowed, though the decree only directed an account of these payments and of these rents and profits to be taken; for the subsequent proceedings which have been taken in the case connected with those matters all implied that such consent had been given, and would not have been taken if such consent had not been virtually given. Proceeding on the assumption that this consent had been given, the orders in reference to Commissioner Watkins were entered by the court and the case was heard on the reports of that commissioner, and on the various exceptions that were filed to these reports.

Upon a full and careful consideration of the evidence, notes of argument, reports of commissioners, and exceptions to the latter, which were submitted to me in November last, I made up the decree which was entered in this cause on the 19th of December. Upon as careful consideration of the case now, and of the papers subsequently filed, the evidence subsequently taken, and the notes of argument and oral arguments since submitted, I see no cause except in one particular to vary that decree in any material respect, and will not do so. As to the claim of Barksdale that Carter's executor can make his debt out of some other estate, that was the excuse made by W. W. Wood some six years ago when he was first called upon to account for moneys in his hands by this executor. It cannot be denied that where a creditor has two sources from which to recover a debt, he may elect the one from which to receive his debt. In this case it seems that the other recourse has produced nothing for six years; and this court can safely concede to this executor the right to make his money here. If hereafter the other resource should yield the fund, the assignee here may justly claim to be subrogated there to the rights of Carter's executor, and will be instructed to do so by this court. I do not think that this court should be required to pass upon the respective rights of persons to whom the distributees of Carter's estate may have assigned their interests in the judgment against Major's estate, and itself distribute this fund among them. That is more properly within the jurisdiction of the probate court, of which Carter's executor is an officer. But as it seems pretty clear that half that judgment belongs to E. Barksdale, who has deposited $1000 of the $1725.73 in his son's hands in bank to the credit of this court, in that respect and that alone I will modify the order of 19th December, 1876. As to whether the purchase of one-half of this judgment by Cabaniss, the executor of Carter's estate, and the purchase of the other half by E. Barksdale, were transactions which this court should or should not condemn, it will be time enough for it to pass its judgment when some one of the distributees, who would be the persons really aggrieved by those transactions, shall appeal to it for redress. I will sign an order dismissing the petition for review; and as to the petition filed on the 22d of December, 1876, revoking the order of that date, but discharging Commissioner W. R. Barksdale for the present from the duty of depositing to the credit of the court the $725.73 remaining in his hands, provided that security in some form be given by him that it will be held subject to any future requisition of the court.

Affirmed by the chief justice, on petition for revision.

MAJOR, In re. See Case No. 2,061.

Case No. 8,982.

MAJOR v. HANSEN.

[2 Biss. 195.] [1]

Circuit Court, N. D. Illinois. Nov., 1869.

NOTES—ALTERATION—NOT MATERIAL—BONA FIDE HOLDER.

1. A bona fide holder of a promissory note from which the place where it was payable has been erased by an unauthorized person and without his knowledge can recover against the maker.

2. The alteration is not material, and enlarges but does not limit the rights of the maker.

Assumpsit upon a promissory note for $1,500 in gold "payable at the Commercial Bank of Canada." These words were erased, and the proof showed that this had been done after the note left the maker's hands, and without his knowledge or consent, but there was nothing to connect the plaintiff with the alteration, and he was a bona fide holder for value.

Beckwith, Ayer & Kales, for plaintiff.

Scoville, Bailey & Brawley, for defendant.

DRUMMOND, District Judge. There is no material alteration of this note. The effect of the words "payable at the Commercial Bank of Canada" was to give the defendant the right to discharge his obligation by tendering the money at the place designated, and the only effect of erasing them was to give him the additional right of tendering the money wherever he might find the plaintiff. The rights of defendant are thereby enlarged, and in no respect limited, and he cannot complain unless he can in some manner connect the plaintiff with the alteration, or can show that he tendered the money at the place stated and has been damnified. If these words had been added the case would have been different for that would have been a material alteration—a limitation of the rights of defendants.

In this case the maker has shown no injury to himself from the erasure of these words, and the note being negotiable the responsibility rests upon him to prove his equities. Judgment for plaintiff.

For general doctrine of alteration of instruments, consult 2 Pars. Cont. 716-724.

Case No. 8,983.

The MAJOR BARBOUR.

[Blatchf. Pr. Cas. 167.] [1]

District Court, S. D. New York. May 28, 1862.

PRIZE—VIOLATION OF BLOCKADE—NECESSITY—ENEMY PROPERTY.

1. A clear necessity will justify an entrance into a blockaded port, but satisfactory evidence will be required of the reality and urgency of the necessity.

2. Vessel and cargo condemned as enemy property, and for an attempt to violate the blockade.

In admiralty.

BETTS, District Judge. The libel of information avers that the vessel and cargo were captured as lawful prize, January 28, 1862, at the mouth of the Grand Caillou bayou, on the coast of Louisiana, by the United States steamship De Soto. The prize was sent in charge of a prize-master and crew to this port, and was delivered to the prize commissioners here, February 21, 1862. The firm of Prooss & Oliveros intervene and answer the libel, and claim portions of the cargo, as subjects of the queen of Spain, and residents of Havana, in Cuba. .No other claim is filed. No regular bill of sale, or registry, or other original document, verifying the title or true ownership of the vessel, was produced from the vessel, or on the trial. The only papers relating thereto, found on board of her at the time of her capture, were a certificate of the British consul at New Orleans, dated June 6, 1861, stating that the vessel was built in New Jersey, in the United States, and registered at the port of New Orleans, September 20, 1856; that J. Roberts is her master, and that John Bronasses, of the city of New Orleans, has purchased all the shares in the vessel. That certificate was indorsed at Havana, by the British consul, June 26, 1861. Its effect is continued, by a subsequent indorsement to December 6, 1861, and is again continued by an indorsement made under the previous one, by the British consul at Havana, until March 6, 1862, by which time, as it states, "the vessel must proceed to a British port, to be registered." This last entry was dated January 17, 1862, and was made about a week previous to the seizure of the vessel.

The only further documentary evidence found on the schooner, respecting her nationality or individual proprietorship, consists of two "agreements for foreign-going ships," or shipping articles, in the names of the master and crew of the vessel, on the outward and return voyage in question. The first one is a printed form, filled up, in manuscript, with the names of the master and crew, and the date of its execution, and a description of the intended voyage. It purports to have been executed at New Orleans, December 3, 1861, by James Roberts, captain, two mates, five seamen, a cook and a steward, and to be for "a voyage from New Orleans to Havana, and any other port or ports where freight or cargo may offer, at the discretion of the master, and back to a final port of discharge in one of the British colonies, for a time not to exceed six calendar months." The other agreement is drawn up in manuscript and is substantially of the tenor of the printed one, containing the same complement of men, but with a change of four names. It purports to have been executed at Havana, January 10, 1862, and is for a voyage from that "port to Matamoras, and from thence to a port of discharge in

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

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

the West Indies." The capture of the vessel and cargo took place in the vicinity of the mouth of the Mississippi, eighteen days thereafter.

An account of the voyage was given on the preparatory examination, February 27 and 28, by the master and mate of the vessel, one seaman, and two passengers. They were present at the capture. The master and seaman have resided in New Orleans twelve or thirteen years, and are British subjects. The mate is unmarried, is a native of the state of New York, and has no particular residence. The two passengers are Spanish subjects. One, Morey, has resided eleven years in New Orleans, and is married; the other, Prats, is a single man, who lives in Havana. One of the passengers, Prats, for himself and firm, claims a portion of the cargo. No claimants have intervened for the residue of the cargo. The other witnesses testify that they had no interest in the vessel and cargo. They concur in stating that the capture was made February 27, or 28, a short distance off the western coast of Louisiana; that the vessel belonged to John Bronasses, of New Orleans, who appointed the master; that she had been carrying all kinds of cargo generally between New Orleans and Havana; and that her last clearing port before her capture was Havana. The captain says that a Spanish house in Havana were the ship agents there, and obtained the cargo, consisting of coffee, cigars, salt, cases of merchandise and boxes of powder, and other boxes, barrels and bales, the contents of which he does not know; that he does not know that they have any interest in the cargo; and that he thinks that the owners of the cargo reside in Matamoras. The vessel, after leaving Havana, touched at no other port before her capture. She sailed under the British flag. The captain says that he knew of the blockade of the Southern ports before he left New Orleans, but did not know that Grand Caillou, where he was trying to put in, was blockaded. No warning or notice of such blockade had been given him. He says that he was going into Grand Caillou because he was in a leaking condition, in consequence of a heavy gale which had been raging for about forty-eight hours; and that, for that reason, the vessel, before and at that time, was sailing wide of Matamoras, and was going into Caillou, which was the nearest port. The mate says that the vessel had always carried general cargoes, similar to her present one, and has generally delivered them at the same place, about twenty-five miles up the Caillou river; that he knew, and supposed the captain did, that Louisiana was at war with the United States, and that New Orleans was blockaded by United States vessels; and that he did not know of the blockade of the mouth of the Caillou, where the vessel was attempting to enter, and had never been warned off or had notice of such blockade. He says that the voyage was a round voyage, commenced at Caillou river on or about the 11th of December. The statement by the mate, of the course run by the vessel on her voyage, varies materially from that asserted by the master. The captain says: "The course, at all times when the weather would permit, was directed for Matamoras. The reason I was going into Grand Caillou was, because I was in a leaking condition. The vessel was sailing wide for Matamoras, and we were going into Caillou for that reason. It was the nearest port." The answer of the mate to the same interrogatory is: "Her course was not, at all times when the weather would permit, and was not at the time of her capture directed to Matamoras, where she was destined by the ship's papers. We were upwards of 300 miles from Matamoras. Her course was altered for Caillou river on the morning of the day we were captured, I suppose for the purpose of entering that river and making a landing. It may have been for the purpose of discharging cargo, or for some other reason; I cannot say."

The question, whether the vessel was off her due course when arrested because of stress of weather, or other necessity compelling or justifying it, or whether she made a deviation intentionally, and under circumstances importing culpability on her part, is of moment on the issue between the parties. The master and mate differ broadly in their testimony on the point, and they speak positively upon a personal knowledge of the facts. The seaman adopts essentially the representations given by the master of the occurrence set forth in answer to the 36th interrogatory, but qualifies the force of his statement most essentially, by adding: "I only answer this question on information and belief, having no personal knowledge of the matters inquired of." The log of Saturday, January 25th, Sunday, the 26th, and Monday, the 27th, notes the weather each day, to the hour of capture on the 27th, as being generally clear, the sails all drawing. It remarks on Saturday that the middle of the day was partly squally, with light rain showers and baffling wind, and the latter part fresh breezes, but set the square sail; on Sunday, that the square sail and topsail were taken in—not certain of position of ship; sounded in 18 fathoms, and jibed ship—strong breezes; that Monday came in clear, and at 3:30 struck on shoal of Bay Caillou, and at 3:51 was boarded by the United States ship-of-war and taken in charge. Her log was kept in an exceedingly loose and unseamanlike manner. These facts, however, appear distinctly enough upon it: that the vessel left on this voyage, and commenced keeping sea time at 2 p. m. on Saturday, the 18th of January, 1862, though it omits entering her port of destination or departure. The latter, it is to be implied, was Havana, because the preceding entry ends with the ar-

rival of the vessel there, December 23, 1861. On Monday, Tuesday, Wednesday, and Thursday the vessel encountered heavy weather, amounting, on Thursday, to what was noted as a gale. She was hove to, and furled her sails, and made some water. No mention is made of her touching ground, or becoming leaky, during that period. The two passengers give no clear information as to the condition of the vessel or her navigation. They both of them avow their ignorance of the coast and of nautical matters, and their alarm in the storm, and anxiety that the master should put back or make a harbor. But it is evident, from the log and the testimony of the mate, that the storm or leaking of the ship in no way compelled him to seek shelter in Caillou bay. The gale had ceased and moderate weather had prevailed for more than two days prior to her attempt to do so; and the antecedents of the vessel and the character of her lading supply strong suspicions against the integrity of her movements. There is more weighing against them than the suspicions ordinarily recognized in prize courts, as violent presumptions affecting the innocency of a bottom unquestionably neutral in its character, which claims to be excused for seeking a blockaded port for necessary repairs, supplies, or shelter. An act done clearly from necessity, and fairly and with good faith, in entering a blockaded port, will be excused: but such allegations are regarded with distrust, and satisfactory evidence is demanded of the reality and urgency of the necessity. The Arthur, Edw. Adm. 202; The Fortuna, 5 C. Rob. Adm. 27; The Christianburg, 6 C. Rob. Adm. 376. In this case, the evidence shows that the attempt to enter the blockaded port was not compelled by any suffering or peril of the vessel or cargo. It was made in calm weather, two days after the cessation of any dangerous wind, or any evidence, from the pumps of the vessel, or otherwise, that she had sustained any positive injury in the gale; and the peril seems to have been unnoticed and unknown by the mate and seaman, or any one else having the management of the vessel. The alarms of the two passengers rested upon no facts, and were founded on their ignorance and timidity alone; and the testimony of the master, as to the state of the vessel, and the cause of her proximity to the blockaded coast, affords no satisfactory justification for her efforts to that harbor.

Extrinsic facts and circumstances aggravate the suspicions as to the integrity of the doings and statements of the master. The latitude of Havana, noted at the foot of the log, was, by observation, 23° 58′ north, and the longitude about 84° 40′ west, which corresponds substantially with the ordinary maps and geographical descriptions. The mouth of the Rio Grande, and alleged port of destination, is laid down on the charts at about latitude 26° north, and longitude 98° west. The vessel was arrested on the Louisiana coast, a few miles from the Mississippi, which, from the last previous entry on the log, would probably be about latitude 29° north, and longitude 89° 58′ west. The daily distances run are not given in the log, and the courses are stated obscurely and imperfectly. The port of departure, Havana, and the alleged port of destination, Matamoras, approximate to nearly the same parallel of latitude, and are separated by several degrees of longitude, and by the entries on the log, the vessel was captured about nine days out, several degrees north of her declared destination. No adequate cause is proved for such deviation. It is not attempted now to fix, with mathematical exactness, the position of the points mentioned, because, without such minuteness of correspondence, the bearings of the facts is sufficiently indicated by showing that the vessel was actually running on a line terminating more than 300 miles from her destination, her course being about the same length as the distance between Havana and Matamoras, with no cause assigned therefor on the log, or by the testimony of the master, or of any of the ship's company. Nor is any reason intimated, in the proofs, for navigating several hundred of miles contiguous to the low and dangerous shores of Louisiana and Texas to reach a port lying southerly of those states and directly in front of Havana, and open to the sea. The master and mate state in their testimony that the vessel was steering a course wide of Matamoras when she was captured, and before she discovered the capturing vessel. Looking at the prominent facts in proof—that the vessel was owned by a New Orleans merchant, and commanded by an enemy master; that she had been during the blockade engaged in other voyages from and to New Orleans; that she had evaded the blockade in leaving and entering that port under the same master and owner; that she had also before entered and sailed from Caillou bay; that she was attempting, in this instance, to take in a cargo chiefly, if not wholly, the produce of the outward one, and adapted to the urgent necessities of the enemy; that the purpose was manifested in the preparation and conduct of the voyage of running the blockade at that place with full knowledge of its existence and efficiency; and, moreover, that no satisfactory evidence is produced, or is found in the preparatory examination, or the ship's papers, that a necessity existed for the vessel to make a port to obtain repairs or relief, being in distress, or that she deviated from the general course pursued by her during the voyage until the same morning, and immediately before her arrest,—I am satisfied, first, that the vessel and all the cargo not included within the claim of the claimants are enemy property; and second, that the vessel and her entire cargo are guilty of knowingly attempting to violate the blockade alleged in the suit;

and that, for these causes, the vessel and cargo are lawful prize of war, and must be condemned to be forfeited.

[After final decree, a motion to reopen the question of costs and the distribution of the proceeds of the prize property was denied. Case No. 8,984.]

Case No. 8,984.

The MAJOR BARBOUR.

[Blatchf. Pr. Cas. 310.] [1]

District Court, S. D. New York. Jan., 1863.

PRIZE—FINAL DECREE—PRACTICE IN ADMIRALTY—MOTION TO REOPEN—COSTS.

1. The question of the allowance by the court of costs and fees to counsel and officers in prize cases discussed.

2. The court having at a previous term made a final decree distributing the proceeds of sale in the case, and awarding costs to various parties, a motion to reopen the question of costs was denied.

3. After the lapse of the term in which a decree is rendered in a prize case, the authority of the court to revoke or alter it is extinct.

4. The act and joint resolution of July 17, 1862 [12 Stat. 600, 627], in respect to prize cases, discussed.

In admiralty.

BETTS, District Judge. This vessel and cargo were captured as prize, January 28, 1862, off the coast of Louisiana, by the United States war steamship De Soto, and sent to this port for adjudication. She was here libelled, March 18, 1862, in the name of the United States, and the capturing ship De Soto, and process of attachment and monition was on the same day issued thereon to the marshal against the prize, and was returned by him April 1 thereafter, duly served. In the intermediate time (March 28, 1862), an intervention was made, by claim and answer, in behalf of affreighters of the cargo, for the voyage on which the vessel was arrested, and the litigation was prosecuted upon that issue between the libellants and claimants to the final decision of the cause in this court. The suit was noticed for trial and brought to hearing April 28, 1862. Two days were fully occupied with the oral discussion of the case, and the counsel also reserved the privilege of laying before the court written arguments for the respective parties. Those supplementary arguments were received, and the whole case was considered by this court, and on the 28th of May the final decision on the merits was rendered [Case No. 8,983], but it was not presented by the United States attorney to the judge, in form, for signature, until July 29, 1862. On the 13th of April Mr. Upton gave in a petition of the master, for himself and crew, to intervene in the suit as captors of the prize, and to share in the distribution of its proceeds. On bringing in the report of the prize commissioners upon the order of reference to them, a decree designating the vessels entitled to share in that distribution was signed October 13, 1862. On the 12th of September the prize commissioners had their bill of costs for services rendered in the suit taxed by the judge; Mr. Upton his, as counsel for the captors, on the 27th of September; the district attorney his, August 2; the marshal his, December 15; and the clerk his, December 9, 1862. The counsel for the schooner Kittatinny presented no bill of costs in their behalf for taxation.

The venditioni exponas had been issued on the condemnation decree April 21, returnable the first Tuesday of June, and $800 of the proceeds of the vessel were paid into the registry of the court on the process, July 3. The residue, $43,767.76, appears, by the clerk's entries, to have been paid by the marshal directly into the treasury December 10, 1862. Previous notices of the time of the taxation of costs in the suit were given reciprocally by all the officers, except the counsel for the schooner Kittatinny, to the district attorney, and by the district attorney, as to his costs, to Mr. Upton, counsel for the captors. The commanding officers of the captor-vessels must be named in the libel. Stated Prize Rule 47. It was those captors named in the libel for whom alone the notice of appearance was given by the counsel (Mr. Upton), as far as was officially known to the court; although, undoubtedly, all other vessels participating in the capture were entitled, on their application, to be made co-parties as captors in the suit. After entering the decree of condemnation of the prize property before mentioned, proofs were brought before the prize commissioners, upon an order of reference to them, to determine what vessels were entitled to share in the distribution of the proceeds of the prize property; and upon the coming in of the report of such proofs by the prize commissioners, October 13, 1862, the court admitted the Kittatinny as one of the capturing vessels, and on the same day the decree of distribution conformably thereto was made and signed by the judge.

It appeared from the report of the commissioners that E. C. Benedict, appeared before them as counsel for the officers and crew of the Kittatinny, and conducted the proceedings in support of their interests, and had also appeared in court on their behalf, upon the hearing on the merits, but took no part in the oral discussion of the case in court. Upon representation to the court by E. C. Benedict, on the part of the firm of Benedict, Burr & Benedict, proctors, that the other officers of the court concerned in the suit before named had obtained a taxation of their costs for services rendered in the suit, and that their firm had received no notice from either of them, or from the court, of the time or place of such taxation, and that allowances of costs to such officers were made, on such taxation, to the prejudice of the parties they represent,

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

and that the whole proceeds of the condemned property adjudicated upon in this suit are about to be disbursed to the captors, after deduction therefrom of the allowances taxed as aforesaid, and without any compensation being reserved to those proctors for their services in the suit, he moved the court for an order rescinding such former taxations, and that such taxations shall be opened for review and rectification, and that the costs justly due and allowable to their firm in the cause be also taxed and adjusted by the court, and be deducted from the gross proceeds of the prize, before they are paid over to the libellants.

Several considerations of weight, both of practice and legal rights, are involved in this application. It is, under all circumstances, a most irksome and perplexing service imposed upon courts of justice, to measure and determine the rate of compensation to be allowed their officers, especially if not fixed by law, or if left in any degree to the unrestricted discretion of the court. The struggle between the demands for large allowances on the part of officers, and for severe restrictions and limitations to rates of compensation by those to be charged with the payment, are always embarrassing and vexatious, when no other rule is prescribed by law than the judge's appreciation of the character and value of the claims to be assessed and adopted; and most essentially so if the charges are constructive in character, and are claimed for services not rendered in the presence of the court. In prize cases, there is superadded a difficulty rarely presented in other instances—that the compensation of the officer is to be provided by assessing annually on each suit its individual proportion of the yearly allowance or salary payable to the officer for services rendered within the same year the suit was pending; that is, all the suits in prosecution during the year must each be taxed upon the amount recovered in it a common proportion of the costs (limited compensation to all but to counsel for captors) earned by the officers during the year. So that, by the laws as they stand, the district attorney, the marshal, the clerk and the prize commissioners, are prohibited receiving beyond fixed sums to each for a full year's service, and no rate or rule of taxation in respect to costs to counsel for captors is given; and, by other statutory provisions, the proceeds recovered in prize cases, after the deduction of costs, are alloted to the pension fund for seamen and to the captors. The counsel for prize captors are entitled to receive costs, together with the officers above specified, out of such proceeds recovered. The secretary of the navy has, under the law of July 17, 1862 (section 12), employed F. H. Upton, Esq., as counsel to act for captors in all prize cases in this district, when the captors do not appoint counsel, to assist the district attorney and protect the interests of captors, with such compensation as he may think is just and reasonable.

In this case, it appears that the copartnership of Benedict, Burr & Benedict were appointed proctors by the officers and crew of the schooner Kittatinny, and acted in that capacity, with the district attorney and the general counsel for the capturing ship named in the libel, in conducting the legal proceedings in the cause, up to the coming into court of the report of the prize commissioners, upon which it was decreed that the vessel was co-operating with the De Soto in the capture of the schooner Major Barbour. It also appears that no notice was directly given to the Messrs. Benedict by the district attorney, or to any other of the officers of court claiming costs in this suit, of the time and place of the taxation of their own costs in the case, or that the Messrs. Benedict should produce and have taxed their own therein, and that the costs of the other officers were taxed by the judge, and that the Messrs. Benedict have just acquired knowledge of the fact, and that the marshal, after paying such taxed costs, has remitted the residue of the proceeds in his hands to the United States treasury. The Messrs. Benedict, on notice to the other officers whose costs were taxed, as above stated, apply now for an order, that the costs taxed to the prize commissioners, the district attorney, the marshal, and Mr. Upton, the other counsel for the captors in this cause, be rescinded, and that all the costs heretofore taxed be re-examined and re-taxed by the court, and also that costs to them as proctors for the ship's company of the schooner Kittatinny be taxed in their behalf, and be ordered to be paid out of the proceeds of said prize in the treasury.

This motion is resisted, on the part of the district attorney and the counsel for the other captors, because the matter is now out of the authority of the court, the proceedings being terminated in this court, and the moneys raised in this suit having been paid over by the marshal, and being no longer subject to the control of the court. No objection is made by the counsel for the other officers that a re-examination and re-taxation of all the costs awarded them in the case should be made, provided the court now possess any power over the funds. No costs were allowed on the taxation by the court, except upon the express assent of the counsel representing the libellants, and no item forbidden by law was sanctioned by the court; but it is palpable that the aggregate amount is large, and that many charges were allowed upon evidence which the captors, represented by Messrs. Benedict, would be rightfully entitled to discredit, by cross-examination or other testimony, had application been made in time therefor. But it appears to me that the present motion must be denied, inasmuch as all judicial power over the matter by this court is determined, and no effectual relief can be afforded the promovents, unless by revoking the final decrees rendered in this cause, the last of which was signed and re-

corded in October last. Those decrees have definitely passed upon the question of costs recoverable upon the evidence then before the court. Although the prize court is virtually open every day, yet its course of practice, its regular terms for returns of process, and its other judicial action are all in conformity with procedures in the court of admiralty proper, and, after the lapse of the term in which a decree is rendered, all authority to revoke or alter it is extinct in the court which rendered it. The Martha [Case No. 9,144]; U. S. v. The Glamorgan [Id. 15,214]. The power of the court in the case ceases with the term in which its decree is made. U. S. v. Certain Hogsheads of Molasses [Id. 14,766]. Courts of law and equity are governed by the same doctrine (Hudson v. Guestier, 7 Cranch [11 U. S.] 1; Whiting v. Bank of U. S., 13 Pet. [38 U. S.] 6, 13; Washington Bridge Co. v. Stewart, 3 How. [44 U. S.] 424; Bank of U. S. v. Moss, 6 How. [47 U. S.] 31); and in admiralty, the power of the court to set aside defaults is restricted, even during the sitting of the same term, to 10 days after the decree (Supreme Court Rule 40).

The final action of the court in this suit having been perfected in October term last, and, in respect to the allowance of the costs referred to, in terms prior to the present one, the decision cannot be disturbed or reviewed here in the present term of January. The counsel is no doubt entitled to have his costs taxed against his own clients in case he shall pursue his remedy at law against them personally; but I possess no judicial competency to issue any compulsory order which will have effect upon the treasury department, other than such as may go with the final decrees already rendered in this suit. It is proper, however, to observe that the counsel who were joint co-actors with the district attorney and the counsel for the capturing ship named in the libel must necessarily be deemed cognizant of the proceedings common to all parties in progress before the court up to the final termination thereof, and of the legal necessity of having their own costs taxed and embraced within the decree of the court, and also of opposing all improper allowances to other parties previous to the rendition of such decree, and that, accordingly, no error or irregularity was committed, by the court in signing the final decrees without including within them the costs which such counsel could legally charge and claim in their own behalf, or which they might have prevented being allowed to other parties, had they appeared and opposed the sanction of them before the authority of the court in the case had terminated. Had that degree of vigilance been exercised, no doubt the court would have required, in relation to the costs of all parties, that there should have been the fullest practicable opportunity given to all interested in the suit, to secure, on the taxation of costs, the enforcement of every proper allowance, and the exclusion of any not clearly sanctioned by law and justice. But it is not to be overlooked that, since the act and joint resolution passed by congress July 17, 1862, the court has no longer the function of taking charge of prize proceeds or disbursing them, nor affixing the sum of costs payable out of them, except in the special instance of the counsel for the captors, but that, on the contrary, the proceeds go in gross into the treasury, and the costs to the marshal, the district attorney, and the prize commissioners are paid from the treasury under the restriction that these officers shall obtain no more from the entire proceeds for a year's service than the fixed sums therein specified; and no rule is furnished or intimation given by the law by which the court can determine what proportion of the sum of prize proceeds paid into the treasury in the suit ($44,167.76) shall be assigned towards the yearly allowances of the district attorney, marshal, and prize commissioners, or the other expenses of the suit, nor but that the whole amount of proceeds may be required to satisfy such liens for costs.

Enough has been stated in the preceding suggestions to show that the application made on the part of the promovents cannot prevail. The motion to open the decrees of the court and re-tax the costs in this suit, and to tax and enforce the costs of the movers against the fund in the treasury, is accordingly denied.

MAJOR, The LIZZIE. See Case No. 8,422.

MAKEEVER (BARTH v.). See Case No. 1,069.

MAKINS (U. S. v.). See Case No. 15,710.

Case No. 8,985.

The MALAGA.

LOVETT et al. v. BISPHAM.

[2 Amer. Law J. (U. S.) 97; 4 Pa. Law J. Rep. 339.]

District Court, E. D. Pennsylvania. 1849.

ADMIRALTY — LIBEL FOR DAMAGES — UNLAWFUL SEIZURE—PROBABLE CAUSE—DEFENCE—RESTITUTION AND ACCEPTANCE.

1. The ordinary practice of the admiralty court is to entertain the question of damages as well as costs at the same time with the principal question of the legality of the arrest; revenue laws form an exception, however.

2. A certificate of probable cause cannot be granted where there has been neither claim nor trial, nor decree, nor anything to which an appeal could lie, because there is nothing to inform the conscience of the judge as to the propriety of giving or withholding the certificate.

3. Probable cause defined and explained. If there is reasonable ground for a seizure, and this is a question of fact, it is a defence to a libel for damages.

4. An act of restitution and acceptance, as was the case here, is a mutual release, and bars the libelants' claim, had it been never so meritorious.

[This was a libel by Charles J. Lovett, Josiah Lovett, Jr., Elliott Woodbury, and

Seward Lee, captain and owners of the brig Malaga, against John E. Bispham, commander of the United States brig Boxer, to recover damages for an alleged unlawful detention of libellants' brig.]

J. Williams Biddle and Mr. Williams, for libellants.

Mr. Hazelhurst and Mr. Pettit, for respondents.

KANE, District Judge. By the act of congress of March 3, 1819 (3 Stat. 532), the president of the United States is authorized, whenever he shall deem it expedient, to cause any of the armed vessels of the United States to cruise on the coast of Africa and elsewhere, with orders to seize, take, and bring into port all American ships which have taken on board, or which may be intended for the purpose of taking on board, slaves, in violation of the acts of congress prohibiting the slave trade; and by the same act it is made the duty of the commanders of public ships so employed, whenever they shall have "made any capture" of an American vessel contravening those acts, to bring her for adjudication into the state to which the "vessel so captured" belongs. Among the acts thus referred to are that of March 22, 1794 (1 Stat. 347), which denounces the penalty of forfeiture against every ship or vessel sailing from any port of the United States for the purpose of carrying on any trade or traffic in slaves, or of procuring slaves to be transported to any foreign country; that of May 10, 1800 (2 Stat. 70), which subjects to forfeiture the interest of every citizen or resident of the United States in any vessel employed or made use of "in the transportation of slaves from one foreign country to another;" that of April 21, 1818 (3 Stat. 450), the second section of which is almost identical with the provision I have referred to in the act of 1794; and that of May 15, 1840 (3 Stat. 600), which denounces as piracy the crime of seizing a free negro in any foreign country, or decoying, bringing, carrying, or receiving him on board a ship, with intent to make him a slave, or to confine or detain him on board with such intent, or to offer or attempt to sell him as such, or land him with intent to make such a sale, or after such a sale has been made. These acts were followed by the treaty of Washington August, 1842; (8 Stat. 576), by which it was stipulated between the United States and Great Britain "that each nation should prepare, equip, and maintain in service on the coast of Africa a suitable and adequate squadron or naval force, to carry in all not less than eighty guns, to enforce separately and respectively the laws, rights and obligations of each of the two countries for the suppression of the slave trade."

In accordance with the first cited of these acts of congress, and in compliance with the treaty stipulation, the president of the United States, on the 20th December, 1844, ordered Commodore Skinner to proceed with a squadron to the coast of Africa, to cruise there for the suppression of this traffic. In the instructions of the secretary of the navy to this officer, he was told: "The cunning of the slave trader is constantly framing new disguises to elude detection and escape the consequences of his crime. To some of these devices it may be useful to call your attention. It is not to be supposed that the vessels destined for the slave trade will exhibit any of the usual arrangements for that traffic. They take especial care to put on the appearance of honest traders, and to be always prepared as if in pursuit of lawful commerce. It is their practice to run into some river or inlet, where they have reason to believe that slaves may be obtained, make their bargain with the slave factor, deposit their handcuffs and other things calculated to betray them, and then sail on an ostensible trading voyage to some neighboring port. At the appointed time they return, and, as the slaves are then ready to be shipped, they are taken on board without delay, and the vessel proceeds on her voyage. Thus the slavers do not carry within themselves any positive proof of their guilt, except before they reach the coast, and after they leave it with the slaves on board. Nevertheless, there is a variety of signs and indications by which their true character may at all times be conjectured." The secretary then points out some of the marks by which a slaver may be recognized, and some of the artifices by which he generally seeks to mask his character. He adds: "These are a few only of the devices to which the slave trader resorts. In calling your attention to them, I have only in view to impress you with a deep sense of the artful character of the adversaries with whom you will have to deal, and of their reckless disregard of all truth and honor, as well as of law and humanity. Nothing but the utmost vigilance and caution will enable you to detect them. I have no doubt that your own observation and sagacity will soon discover other contrivances for deceiving and escaping you, and I have as little doubt that you will apply promptly and effectually the requisite means of defeating all such attempts."

Lieut. Bispham commanded the brig Boxer, one of the squadron under Commodore Skinner, and was directed to cruise in the vicinity of Kabenda, "where," said his orders, "our flag, it is believed, is frequently employed to cover the designs of slavers." Immediately on his arrival off that port, and before anchoring, Lieut. Bispham was informed by the commander of a British frigate that an American vessel was lying in Kabenda Bay, under suspicious circumstances, and on the following day, the 13th April, 1846, he directed her to be boarded in consequence. On producing her papers at the call of the boarding officers, she proved to be the American brig Malaga, of Beverly, Massachusetts, with

a cargo of farina, rice, rum, gunpowder, &c., from Rio Janeiro bound to Kabenda and St. Thomas, and back to Rio. Her consignee at Kabenda was a noted slave factor, named Da Cuntra; the port was one devoted exclusively to the slave trade and its tributaries; and the cargo was entirely suited to the exigencies of that traffic. A part of her cargo and a number of her passengers (foreigners) had been already landed. Lieut. Bispham, having seized her, called for her charter party; and this, being then presented for the first time, showed that she was under charter to Manuel Pinto de Fonseca, whose name, as the great employer of American vessels in the Brazilian slave trade, is familiar to our political and judicial records. The charter party itself was similar in all respects to that which is ordinarily used to cover these frauds upon our flag; it left the port or ports of destination to be indicated by the charterer's agents; it stipulated for the conveyance of passengers, not negroes; and the rate of charter (1800 milreas, about 1400 dollars a month, paid for the first month in advance, the vessel being of less than 184 tons) implied that the voyage was one of peculiar hazards. The vessel, moreover, when leaving the United States for Rio, had laid in a stock of provisions for a year; her crew had been shipped for 18 months, the voyages beyond Rio to be such as the captain might direct, among which the deposition of one of the crew shows that a voyage to the coast of Africa, though not named, was understood to be included. In addition to all this, the answer, which is not contradicted under oath (as it should have been, unless the facts set forth in it are to be regarded as admitted), avers that in conversations of the captain with the captors "it was not alleged by him that it was his intention to barter her coast goods on shore, or to carry back a return cargo to Rio de Janeiro; but he admitted that the cargo on board was to be exchanged for slaves, and used in that traffic." And this is confirmed by the testimony of Purser Hartwell: "I remarked to Captain Lovett, 'You must know the character of the cargo was such as is generally used on the coast in the slave trade;' and his reply in substance was, that he was not bound to know anything about it, and if that was the only business carried on at Kabenda, it was not necessary for him to be acquainted with it, nor for what purposes his cargo was to be applied."

The Malaga, having arrived in the United States in charge of a prize crew, was libelled by the district attorney of the United States for the district of Massachusetts on the 16th of June, 1846. The libel was of two counts, the first charging that, being the property of American citizens, she was employed in transporting slaves from one foreign country to another; the second, that she was fitted out, &c., and caused to sail from the United States, for the purpose of procuring negroes to be transported from Africa to some port or place, for the purpose of their being sold as slaves; the first count being founded apparently on the act of congress of 1800, and the second on those of 1794 and 1818 (supra). The process was returned on the 3d of July, and appearance was noted on the docket by a proctor of the court, a stipulation was entered into for costs preliminary to a claim by the owners, and depositions were taken before a commissioner, the proctor for the claimants or owners attending him. Subsequently, on motion of the district attorney, it was ordered by the court that "said libel be discontinued, and said brig Malaga be delivered to Charles J. Lovett, captain thereof;" and a warrant of delivery, having issued, was returned by the marshal on the 17th July, that he had "caused to be delivered to C. J. Lovett, and had taken his receipt therefor," which is verified by the receipt itself: "July 17, 1846, received from the U. S. Marshal, in and for the district of Mass., the within named brig Malaga and appurtenances, in the same state as when seized and detained by him. Charles J. Lovett, Master Brig Malaga." No formal claim was ever made of record, and no answer was filed. In June, 1847, Lieut. Bispham returned from the coast invalided; and the 17th July succeeding this proceeding was instituted against him by a monition issued at the instance of the owners and captain of the Malaga. The libel asks damages for the unlawful detention of the vessel, for the use of her stores while under detention, certain injuries done to her sails, rigging, and other appurtenances, and the personal duress of the captain. The answer refers to the instructions of Lieut. Bispham from his commanding officer, admits the seizure and detention of the vessel and the use of the stores by the prize crew, but denies that the vessel or her appurtenances sustained damage, and alleges that the seizure was made in consequence of a reasonable suspicion that the vessel had violated the laws against the slave trade, the grounds of which suspicion it sets forth.

The proofs in the case are few and by no means full. From the libellant in this court I have the register, the charter party, the record of the proceedings in the district court of Massachusetts, the deposition of the mate, taken in February last under a rule of court, and two brief depositions, or, as I would rather term them, affidavits, from seamen, made under the act of congress, without cross-examination or notice. There are wanting the bills of lading, the passenger list, the crew roll, the consular certificate, and, generally, the papers with which the vessel sailed from Rio for the coast. The respondent has presented only the depositions of three officers of the Boxer, taken before a commissioner more than two years after the transaction. According to the view of the libellants, however, much even of the proof that is before me might have been

spared. They contend that the inquiry cannot now be entertained, whether there was reasonable ground for the arrest, or not, inasmuch as the district court of Massachusetts has ordered restitution, without granting a certificate of probable cause. If this be so, the function of this court expends itself in the simple duty of auditing the amount of the libellants' damages. The question, therefore, must be disposed of at the threshold.

In the first place, then, I remark, that, except in cases under the revenue and navigation acts, I have not found either in the English books, or our own, that the certificate of probable cause has ever been given or asked for in the admiralty. By the ordinary practice in instance, as well as prize, causes, the court entertains the question of damages, as well as costs, at the same time with the principal question of the legality of the arrest. The process issues in rem; the claimant comes in, asserts his right, and asks damages, if he deems himself entitled to them; and the court then, upon a full view of the ground, the cause, and the circumstances of the seizure, determines between the parties, each being for the time the actor.

Cases under the revenue laws form the exception in both countries,—in England by force of several statutes, 4 Geo. III. c. 15, p. 46, among the rest; and in the United States, by the provisions of the acts of congress of March 2, 1799 [1 Stat. 696], and February 24, 1807 [2 Stat. 422]. Nothing therefore is to be inferred against the respondent from the absence of such a certificate in the proceedings before the district court of Boston. But were this otherwise, I cannot, upon inspecting the record of that proceeding, perceive that the question of a certificate was, or could have been, brought before that honorable court. There was, in fact, no hearing of the cause, and there could have been nothing, therefore, to inform the conscience of the judge, as to the propriety of giving or withholding the certificate. According to the acts of congress, both of 1799 (1 Stat. 696) and 1807 (2 Stat. 422), there must have been a claim, a trial, and a decree for the claimants, to authorize the making of the certificate. The question whether it shall be given or not arises out of the decree of acquittal; and it is decided by the judge who tried the cause, on the evidence which was before him on the trial. Further evidence is not admitted. Stew. 112. An appeal from the decree carries with it the application for the certificate. Canter v. American Ins. Co., 3 Pet. [28 U. S.] 307, and the other cases. And if on the appeal, the question of forfeiture is decided against the claimant, there is an end to all controversy about probable cause. The officer cannot be held liable for a seizure as tortious after its propriety has been established by a final decree condemning the property. But here there was neither claim, nor trial, nor decree,—nothing to which an appeal could lie. It is a simple discontinuance, which, considered as an act in the cause, terminated it, but did not preclude the institution of new proceedings by the same captors and for the same cause. How can it be said that the captor is estopped by his discontinuance from alleging that he had probable cause for the seizure when that discontinuance left him at full liberty to reassert his title under the forfeiture, and to renew the seizure, if need be, for the purpose of enforcing it.

But it was argued that, independent of these acts of congress, the officer who has made a tortious seizure, has no escape from a decree of compensatory damages. But I need scarcely say that this has never been the law of the admiralty, either in instance or prize cases. The books are full of cases in which the arrest on the high seas has been held unlawful, but the court has refused to allow the claimant his damages or even his costs. I may refer to The Louis, 2 Dod. 210; Shattuck v. Maley [Case No. 12,714], and The Marianna Flora, 11 Wheat. [24 U. S.] 1, as among the marked cases in which this course of adjudication has been pursued. "The common-law doctrine," says Judge Washington in Shattuck v. Maley [supra], "as to torts committed by officers acting under authority of law, is certainly very rigid. They act at their peril; and if they by mistake act wrong, there are but few cases in which they can be excused. But a reason may exist for this severity in cases happening on land, which does not exist where similar cases occur at sea. In the former, the means of obtaining correct information are more within the power of the officer; and the officer may, in most cases, if he doubts as to the fact, insist upon being indemnified by the party. But at sea this cannot be done." "To hold the officer," he adds, "responsible according to the event would be to render the law nugatory, since few men would be found bold enough to ensure the eventual solidity of their judgment, however strong they might suppose the ground of it to be. But to excuse the officer from damages if he should, in the execution of this limited authority, violate the rights of others, he must show such reasons as were sufficient to warrant a prudent, intelligent, and cautious man in drawing the same conclusion. This is what is called probable cause."

"It is a different thing" said Judge Story, delivering the opinion of the supreme court in The Marianna Flora [supra], "to sit in judgment on this case, after full legal investigations, aided by the regular evidence of all parties, and to draw conclusions at sea, with very imperfect means of ascertaining facts and principles, which ought to direct the judgment. It would be a harsh judgment to declare that an officer, charged with high

and responsible duties on the part of his government, should exercise the discretion entrusted to him at the peril of damages, because a court of law might ultimately decide that he might well have exercised that discretion another way. Even in maritime torts, independent of prize, courts of admiralty," he added, "are in the habit of giving or withholding damages upon enlarged principles of justice and equity, and have not circumscribed themselves within the positive boundaries of municipal law. They have exercised a conscientious discretion on the subject."

I am, therefore, not precluded by the action in the district court of Massachusetts from entertaining the question whether there was reasonable ground for the seizure of the Malaga, and if there was such reasonable ground, it is a defence to the present libel. In discussing this question, which is altogether one of fact, I feel very sensibly the imperfection of the proofs before me. I should be well pleased to examine the bills of lading, and shipping roll, appertaining to the voyage from Beverly to Rio, and the letters of instructions under which the captain felt himself authorized to charter her to Fonseca. I need, too, the manifest, the log book, the list of passengers from Rio to the coast, the crew list, the bills of lading, and all the other papers which were or should have been on board of her when she was arrested. These, if produced, might go to relieve my mind of the dark suspicions which now press upon it. If they were ever in the possession of the captors, they were restored with the vessel, and the libellants should have produced them here. In their absence, I can only say that I am by no means satisfied of the innocence of this vessel, and that I think her owners may be well content with her release without asking more. Among the circumstances already adverted to in the narrative part of this opinion, there is one, which standing by itself unexplained, would go far to justify the arrest of the Malaga. According to the mate, "she had on board some three or four hundred bags of farina and rice." The former of these articles is a coarse flour, used almost exclusively for the diet of slaves on the passage to Brazil. It is the cheapest substitute for the African cassada, which is the food of the natives along the coast, and resembles it much. By the British act for the suppression of the slave trade (2 and 3 Vict. c. 73, § 4), it is expressly provided, that "an extraordinary quantity of rice, or of the flour of Brazil, commonly called farina, beyond what might probably be requisite for the use of the crew, found on board of a vessel, and not entered on the manifest as part of the cargo for trade, shall be considered as prima facie evidence of the actual employment of the vessel in the transportation of negroes for the purpose of consigning them to slavery," and as such, shall render her liable to condemnation. The three or four hundred bags of rice and farina, which were on board of the Malaga, were obviously not for the use of the crew, since the vessel was otherwise provisioned fully. If they were entered upon the manifest, the presumption which they raise would be rebutted; but the manifest, as I have already said, is not produced. It would be a severe judgment against an American officer, charged to give effect to the treaty stipulations between his country and Great Britain, to hold that circumstance inadequate as a ground of reasonable suspicion, which in an English court would condemn the ship.

But, independent of this fact, the whole case is pregnant with suspicion. There is scarcely a circumstance wanting, except the final consummation of a guilty purpose, to place it at the side of the Pons [case unreported], whose fate is upon the records of this court, and her associates, the Enterprise and the Kentucky [unreported], as they stand out in the documents of Mr. Wise, that accompanied the president's message of the 3d of March last,—the same charter party, scarcely varied, and the same Messrs. De Fonseca, and Da Cunha figuring as principal and subordinate. Whether she was intended to be used in the actual transport of slaves, or to serve as the tender and accomplice of the slave ship, carrying out the foreign crews, which were to navigate to Rio under the Brazilian flag, and bringing back the American, which had navigated from Rio under that of the United States; whether she merely carried to the coast the goods which were to purchase slaves, and the farina which was to feed them, or whether, after landing part of her supplies at Kabenda, she was, in the words of the secretary of the navy, to "sail on an ostensible trading voyage to some neighboring port, returning when the slaves were ready to be shipped,—and then taking them on board without delay," I need not form an opinion. Nor need I inquire, in the absence of all the appropriate proofs, whether the sailing from Beverly for Rio was altogether free from dishonoring circumstances. It is enough for me to be convinced,—and of that I am convinced most fully,—that Lieut. Bispham acted with intelligent and honorable discretion in arresting the Malaga, and sending her to this country for adjudication. It is wholly immaterial for this defence whether all, or how many, of these circumstances of suspicion were present to his mind at the time of the arrest. If the vessel was guilty, he is excused for bringing her in, even if he mistook her crime. I adopt the language of Judge Story on this point, (La Jeune Eugenie,) [Case No. 15,551]: "In truth, the law looks not to niceties of this sort. If for any cause, precedent or subsequent, known at the beginning or known at the end, the property is condemned, the party is justified; and retroactively, for all purposes, the capture, or seizure, or forcible possession, call it what you may, is deemed rightful and bona fide."

I have thus far followed the learned counsel, in the arguments they have presented to

me, and should be excused perhaps for dismissing the cause without further remark. But there is one view of the closing act in the proceedings, at Boston, which I cannot pass over. That act, it seems to me, was an act of restitution and acceptance, unqualified, unconditional, without reserve or protest on either side. The action of the court was invoked only because the property had passed into its custody, and could not be released except by judicial order. The act was the act of parties, solemnized by record. Such an act of restitution and acceptance is a mutual release, and bars the libellant's claim, had it been never so meritorious.

A case, closely analogous to the present, came before Sir William Scott, in the Maria Powlona, (6 C. Rob. Adm. 236.) The vessel had been captured, and was restored before final adjudication. The owners afterwards presented a demand in the admiralty against the captors, for damages, and they urged that the captain's acceptance of the property was not intended as a waiver of damages,—that it had no other object than to expedite justice, and that it had, moreover, occurred without any consultation with his principals, the owners, and without any opportunity for such consultation. Sir William Scott said: "On the papers being brought in, a proposal was made to the master that he might proceed on his voyage, and it must be understood to have been an absolute and unqualified proposal, and meant as a general acquittal on both sides." If there had been an intention to prosecute a demand for damages, arising from the seizure, the offer should have been accepted sub modo. Instead of that, the restitution was accepted in the manner in which it was proposed, and, as such, must be understood to include an act of amnesty on both sides. It is not for the parties, then, to come again before the court, after all the papers have been withdrawn, and charge the captors with an unjustifiable seizure, when they have, in consequence of the restitution, lost the opportunity of defending themselves. The claimant must take the inconvenience with the convenience of restitution. I am of opinion that the claimant has put himself out of the court, and that the offer of restitution being accepted as it has been, must be considered as a discharge. I need not advert again to the circumstances in the case before me, which give emphasis to Sir William Scott's argument. The libel must be dismissed, with full costs.

Case No. 8,986.

In re MALCOM.

[4 Law Rep. 488.]

District Court, S. D. New York. 1842.

BANKRUPTCY — INFORMALITIES IN PETITION— SIGNATURE—ERASURES—SCHEDULE NOT DEFINITE.

In this case, the application of [Robert] Malcom for a decree of bankruptcy was opposed on the ground of informality in his petition: 1. Because the name of the petitioner was not signed in full. 2. Because there were erasures and interlineations in the petition. 3. Because the schedule was not sufficiently definite.

BETTS, District Judge, said that, by the rule of the court, the petition should be free from erasures, etc., and the name of the petitioner signed in full. If wanting in conformity to these rules, the papers would be sent back. It was not contemplated by the rule to destroy the merits of an application, unless the sense of the paper was ruined by such erasures and interlineations, or if the papers were grossly imperfect. It is intended to have the papers neatly made out, so that they can readily be read over. In this case, he thought the objections not founded in fact. The petitioner first wrote his name with the ordinary abbreviation of "Rob't," and that was erased and the name written in full. So with the interlineations in the papers. They were not such as affected the sense of the document, but in some instances rendered it more definite. The court did not think it an infringement of the rule, that one or two small words were interlined in the body of a paper. Another objection is, that the schedule is not sufficiently definite. The party sets out family stores. It is not necessary that the petitioner should set forth a perfect and complete exhibit of every article. But it must be so explicit that the assignee or his agent may be enabled to find the property if necessary. And so with wearing apparel. It is not necessary that every article of clothing should be set out, only it should be so set forth that the assignee may be enabled to ascertain whether he can claim it or not.

MALEBRAN (UNITED STATES v.). See Case No. 15,711.

Case No. 8,987.

The M. A. LENNOX.

[4 Ben. 190.] [1]

District Court, E. D. New York. May, 1870.

NEGLIGENCE—TOW BOAT AND TOW—DELAY IN CASTING OFF HAWSER.

1. Where a steamtug was employed to tow out a ship, which was lying stern out at pier 37, East river, and, having attached a hawser to her stern, towed her out stern foremost into the river, and then cast off the hawser, and attempted to come alongside and take another hawser from the ship's starboard bow, and the hands on board the ship failed to promptly catch the heaving-lines, and before the hawser could be properly attached, the ship drifted stern foremost against a pier on the opposite side of the river, and received injury, *held*, that the in-

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

jury was occasioned by negligence on the part of the tug, in towing the ship so far out into the river, before casting off the hawser. It should have been cast off as soon as the ship had fairly cleared the New York piers.

[Cited in The Merrimac, Case No. 9,478.]

2. The tug was liable for the damages.

In admiralty.

J. T. McGowan, for libellant.

Goodrich & Wheeler, for respondents.

BENEDICT, District Judge. This is an action brought to recover of the propeller M. A. Lennox the damages alleged to have arisen from her negligence in transporting the ship Corsica in the East river, on the 11th of December, 1849.

The facts proved, so far as they are necessary to disclose what I consider to be the controlling feature of the case, are these: The Corsica was a large ship, lying at pier 37, on the New York side of the East river, with her stern out, and was desirous of being transported thence to Greenpoint. At a proper time of tide, and when there was little or no wind, fog, or other impediment, the propeller M. A. Lennox undertook the transportation of the ship. She accordingly made fast to a hawser, which was put out from the ship's quarter, and so hauled the ship out of the slip stern foremost. The ship was then towed a certain distance out into the river, stern foremost, and then the tug stopped, cast off the hawser, and attempted to get alongside of the ship, to take a second hawser from her starboard bow, in order to tow her upon a hawser to her place of destination. The sternway of the ship, and her distance out in the river at the time the hawser was cast off by the tug, proved to be such that, before the tug got hold of the ship by the second hawser, and acquired headway, the tide, which runs up past the Brooklyn piers at that time and place, carried the ship upon one of the Brooklyn piers, known as Wetmore's dock, whereby her rudder was injured, and the damages sued for sustained.

It is manifest from this statement, that, whatever other negligence there might have been on this occasion, it was negligence to take this large ship so far out into the river with the stern hawser, and that this negligence was a cause of the disaster which followed. Evidence has been introduced to show that the failure of the hands on the ship to promptly catch the heaving-lines which were thrown from the tug after the stern hawser was dropped, by means of which the second hawser was to be taken on board the tug, prevented the tug from getting hold of the ship by the bow hawser, in time to keep her off the piers; but if this be so, still it was negligence to take the ship so near to the Brooklyn side that a failure to catch the heaving-line at the first or second throw would result in her striking the piers. The safety of such a ship should not have been made dependent upon the chance of catching a heaving-line when thrown.

In this view of the case, its determination must depend upon the question whether the tug is responsible for the distance which the ship was towed upon the stern line before it was cast off; and my opinion is that, under the circumstances the tug is so responsible. The manoeuvre which this tug undertook to perform was, to start the ship out by a stern line, and then drop it and make fast to a bow line, and get headway on the ship before she would run across the river. It was a manoeuvre not unattended with risk, but which could have been accomplished by the exercise of care and skill, and it manifestly required for its successful accomplishment that the stern hawser should be cast off at the earliest possible moment. But, instead of dropping the hawser as soon as the ship was clear of the New York piers, the tug kept towing until the ship was two-thirds of the way over to Brooklyn, and where the ordinary mishap of failing to catch a heaving-line resulted in placing her upon the Brooklyn piers. It was the duty of the master of the tug to determine the distance he would require for his manoeuvre, i. e., to stop, drop the stern hawser, turn his boat, and make fast to the bow line.

Ordinary prudence required the hawser to be dropped at the earliest moment after the ship had fairly cleared the New York piers; and I find nothing in the evidence which justifies the tug in holding on, as she did, until the ship was in a position of danger; for a ship cannot be considered as otherwise than in danger when she is drifting towards piers, and so near as to require not only great diligence but good fortune to prevent her from striking. I hold the tug, therefore, to be responsible for lack of proper care in taking the ship so far out into the stream before she dropped the hawser. In arriving at this conclusion, I have not overlooked the defence which has been sought to be rested upon evidence tending to show that the ship was being transported under the direction of her own master, and that, in point of fact, the master of the tug acted under the direction of the master of the ship in determining the distance out to which the ship was taken. A careful consideration of the testimony given by the various witnesses has convinced me that there was nothing in the action of the master of the ship, on this occasion, which can absolve the master of the tug from the responsibility of a negligent performance of the manoeuvre which he undertook. It is true that the master of the ship was on board the ship, and gave some orders in regard to the hauling of the ship, as she was coming out of the dock, but I am satisfied of the correctness of the master's statement, that he told the tug to drop the hawser as soon as the ship was clear of the New York piers, and nothing occurred which

would warrant the captain of the tug in supposing that the master of the ship had undertaken to say how far out the tug should go before turning to take the bow line, or had in any way made himself responsible for the nearness of his ship to the Brooklyn piers at the time the tug stopped towing. The manoeuvre of shifting the position of the tug from that of towing by the stern hawser to that of towing ahead was a manoeuvre which the master of the tug knew he would be obliged to perform when he took hold of the stern line. If not responsible for the mode of taking the ship out upon such a line, which was clearly improper, he is certainly responsible for any want of due care and skill displayed in making the necesssary change of his position, and such want of care is shown in his taking the ship so far out into the stream before he stopped towing. The decree must, accordingly, be for the libellant, with an order of reference, to ascertain the damages.

MALEY (SHATTUCK v.). See Case No. 12,714.

MALL (UNITED STATES v.). See Case No. 15,712.

MALLEC (GOODYEAR v.). See Case No. 5,575.

Case No. 8,988.

MALLETT et al. v. DEXTER.

[1 Curt. 178.] [1]

Circuit Court, D. Rhode Island. June Term, 1852.

COURTS—FIRST TO TAKE JURISDICTION—ADMINISTRATOR—ACCOUNT—FRAUD.

1. When an administrator is in the process of accounting before a probate court, he cannot be compelled to account in this court, by a bill in equity.

[Cited in Board of Foreign Missions of Presbyterian Church v. McMaster, Case No. 1,586.]

2. The circuit court has concurrent jurisdiction with the probate court, to decree an account in favor of distributees.

[Cited in Chapman v. Borer, 1 Fed. 275.]

3. When two courts have concurrent jurisdiction, the one which first has possession of the subject must adjudicate; and neither of the parties can be forced into another court.

[Cited in Riggs v. Johnson Co., 6 Wall. (73 U. S.) 197; Haines v. Carpenter, Case No. 5,905; Blake v. Alabama & C. R. Co., Id. 1,493; Young v. Montgomery & E. R. Co., Id. 18,166; Providence & N. Y. S. S. Co. v. Hill Manuf'g Co., 109 U. S. 578, 3 Sup. Ct. 379, 619; Andrews v. Smith, 5 Fed. 841; Latham v. Chafee, 7 Fed. 524; Pulliam v. Pulliam, 10 Fed. 29; Bruce v. Manchester & K. R. R., 19 Fed. 344; Reinach v. Atlantic & G. W. R. Co., 58 Fed. 44.]

[Cited in brief in Blake v. Butler, 10 R. I. 134; Corey v. Ripley, 57 Me. 70. Cited in Chapin v. James, 11 R. I. 89; Bank of Bellows Falls v. Rutland & B. R. Co., 28 Vt. 478; Hill Manuf'g Co. v. Providence & N. Y. S. S. Co., 113 Mass. 500; Du Vivier v. Hopkins, 116 Mass. 128.]

4. An account of an administrator, though settled by a judicial decree of a court of competent jurisdiction, may be opened for fraud.

[Cited in Griswold v. Central Vermont R. Co., 9 Fed. 800.]

[Cited in Williams v. Herrick (R. I.) 25 Atl. 1100.]

[This was a bill filed by Edward J. Mallett and others against Samuel Dexter, administrator.]

Carpenter & Jenckes, for complainants.

Mr. Ames, for defendant.

CURTIS, Circuit Justice. This is a bill in equity, filed by the next of kin and distributees, according to the law of Rhode Island, against the defendant, as administrator of the intestate estate of the late James Fenner. The cause came on to be heard on the pleadings and evidence; and it appears that the scope of the bill is, to open certain administration accounts which have been settled in the probate court, upon the ground of fraud, and also to require an account of the residue of the administration not embraced in those settled accounts. These are distinct subjects, and must be separately considered. And first, as to so much of the bill as seeks for an account of the residue of the defendant's administration not embraced in the settled accounts. It appears that this bill was filed on the twenty-third day of September, 1850, and that in the month of August preceding, the defendant had filed an account in the municipal court for the city of Providence, which, by the law of Rhode Island, has jurisdiction of the probate of wills, the grant of administrations, and the accounts of executors and administrators; and that all persons interested, including the complainants, had been cited to appear and object to the said account, if they saw fit, on the twenty-fourth day of September, the next day after the bill was filed. That the state court thus had possession of the subject-matter, and complete jurisdiction over it, cannot be doubted. It is certainly competent for each state, under whose laws administration is taken, to confer on either of its tribunals, jurisdiction over the accounts of administrators, and to provide for their being rendered, stated, and settled, judicially, in any court of the state. Vaughn v. Northup, 15 Pet. [40 U. S.] 1 The law of Rhode Island made it the duty of the defendant to render the accounts of his administration to the municipal court; and when he had rendered an account there, and that court had cited the complainants to appear, not merely the items of that account, but every thing which ought justly to be included in it, and consequently the whole unsettled residue of the administration, so far as it was then a subject of account, was regularly pending for judicial examination

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

and settlement before that court. It is true, this court, as a court of equity, has a concurrent jurisdiction over the accounts of executors and administrators, in behalf of distributees as well as creditors, as was held by Mr. Justice Story in Pratt v. Northam [Case No. 11,376]. But no principle is better settled, than that in all cases of concurrent jurisdiction, the court which first has possession of the subject must adjudicate upon it. Smith v. McIver, 9 Wheat. [22 U. S.] 532; Wallace v. McConnell, 13 Pet. [38 U. S.] 136; Shelby v. Bacon, 10 How. [51 U. S.] 56. And neither of the parties can be forced into another concurrent jurisdiction. It follows, that the concurrent jurisdiction of this court cannot be exercised upon this bill, in respect to the unsettled residue of this administration, because that subject-matter was regularly pending between the same parties, before another tribunal, when this bill was filed. It is true that the complainants, some of whom are aliens, and others citizens of states other than Rhode Island, are thus deprived of their resort to the jurisdiction of this court; but so would all such persons have been, when sued in a state court, had not the judiciary act enabled them to remove suits from the state courts to the circuit courts of the United States; and that provision does not include proceedings of this character.

The case of Shelby v. Bacon, 10 How. [51 U. S.] 56, on examination, will be found consistent with the result at which I have arrived. In that case, the complainant had a clear right to come into a court of the United States, to establish his claim as a creditor, and to compel the trustees to pay to him his distributive share of the assets of the bank. The state court had not obtained jurisdiction over either of these subjects; but the court do not decide, that if the plea had contained proper averments to show the state court in possession of jurisdiction over the subject-matter of the accounts of the trustees, with authority to act in rem, the complainant could compel the trustees to come into another jurisdiction to settle the same accounts. Besides, whatever may be the effect of that particular statute of Pennsylvania respecting the accounts of assignees under a voluntary assignment for the benefit of creditors, I should feel great difficulty in holding, that an administrator, who has filed his account in the proper state court, pursuant to the laws from which he derives his authority, and in compliance with his official bond, can be drawn away to another jurisdiction, and proceed to settle the same account there. In Vaughn v. Northup, 15 Pet. [40 U. S.] 1, the supreme court say, the administrator is exclusively bound to account for all the assets he receives, under and by virtue of his administration, to the proper tribunals of the government under which he derives his authority. And although I do not understand the court to mean to exclude altogether the jurisdiction of the courts of the United States, but only the jurisdiction of the courts of other states, yet their language expresses strongly the capacity of the appropriate state tribunal to possess and exercise jurisdiction over this particular subject-matter, and shows the irregularity of attempting to withdraw it from that jurisdiction, when it has once passed under it. If an administrator neglects or refuses to account, I should hold him to do so upon a bill in equity in behalf of distributees, being aliens, or citizens of another state. But if he is in the process of accounting, before the appropriate tribunal, having the parties before it, I am of opinion this court should not compel him also to account here.

The other branch of the case is that part of the bill which seeks to open settled accounts, on the ground of fraud. The only subject necessary to be examined under this head, is the charge contained in the amended bill concerning the money paid to Burrington Anthony. The other matters stated in the bill are either not alleged to be fraudulent, but only as false charges and credits, or the proof is entirely insufficient to support the allegation of fraud, which, wherever it is made in those instances, is met and denied by the answer. The charge respecting the money paid to Anthony is, in substance, that the estate was indebted to him, as assignee of an insolvent debtor, in the sum of nine hundred and thirty-one dollars and fifty cents; and that the defendant agreed with Anthony to pay him eight hundred dollars, and take his receipt for the whole debt, for the purpose of charging the estate as if he had paid the whole, Anthony agreeing to keep it secret. That the receipt was accordingly given; and upon that, as a voucher, supported by the defendant's oath, the whole sum was allowed to the defendant, in an account settled by him in the municipal court, March 13, 1848, the complainants being then ignorant of the facts.

The first question is, whether this matter also was not pending before the municipal court when this amendment was made to the bill, on March 24, 1851. It does not appear that at that time any administration account was pending before the court; though one was filed on May 9, 1851. And if there had been an account then pending, a charge of fraud in a previous account, with a view to obtain a decree to open it, is so far a distinct subject-matter, that I should hesitate to say it was before the municipal court, and within its jurisdiction, because it had another account pending before it. It has been argued, that the municipal court has not jurisdiction to open a settled account on the ground of fraud, because the statute law of Rhode Island (Digest, p. 247, § 31) contains a provision, that "the settlement of the accounts of any executor, administrator, or guardian, by the court of probate, or in case of appeal by the supreme court, shall be final and con-

clusive on all parties concerned therein, and shall not be subject to reëxamination in any way or manner whatsoever." But in Northam v. Pratt [Case No. 11,376], Mr. Justice Story had under consideration this same statute, and decided that it was not intended to give validity to the settlement of an account obtained by fraud. Such a settlement is a nullity, and there would seem to be no reason why a court of probate should not treat it so, and cite the administrator to settle anew. In Massachusetts, at a time when, though there was no positive provision of statute law, there was the principle which makes a judicial decree final, it was repeatedly decided, that the settlement, even of a final probate account, could be opened by a court of probate for fraud; and that a court of equity would not interpose. Jenison v. Hapgood, 7 Pick. 7; Davis v. Cowdin, 20 Pick. 510. I do not proceed, therefore, on the ground that the municipal court has not jurisdiction to open a settled account for fraud, but upon the other ground, that, when the amended bill was filed, it was not in possession of the subject matter, and that this court, having concurrent jurisdiction, and having been appealed to, must adjudicate. And this compels me to examine the merits of this charge. It is certainly a very grave one, being nothing less than a charge of a conspiracy to cheat the estate, by the production of a false voucher, and the execution of that design by means of perjury.

The answer of the defendant to this charge is as follows: "And this defendant, further answering, saith, that the amount due from estate to said Anthony, amounted, with the interest, to the sum of $931.50, in April, 1848; that the consideration in the deed, drawn by said Potter, was $900, conveying said building to said heirs, and was dated on the 5th day of April, 1848. That by an examination of the defendant's personal cash books, that on the 10th day of said April, in the presence of said Anthony, and for the purpose of paying him said sum of $931.50, he obtained a check from his agent for $1,000; that, on the 15th of April, afterwards, he received an instrument of writing, signed by the heirs, authorizing the payment thereof; and on the 21st of said April, he procures the receipt of said Anthony, wherein and whereby he acknowledges himself to have received $931.50, in conformity with said instrument of writing, and on the same day charged by the administrator, in his account with the estate. And this defendant further answering saith, that at the time said Anthony applied to him to pay said sum of money, he offered to make a discount, if this defendant would advance him the money out of his own private funds, which this defendant refused to receive, and told him if he paid him any thing, he would pay him his whole debt. And this defendant verily believes that he did pay said Anthony the sum of $931.50, and not $800 only, as the plaintiffs allege in their said bill of complaint; and that said Anthony's receipt is a true, and not a false, receipt. And this defendant further answering saith, that he was induced to pay said Anthony, out of his private funds, because his wife was owner of one half the property, and owed half the debt, and he did not wish to be further importuned by said Anthony." It was stated, in argument, that this answer was drawn by the defendant himself, without the aid of counsel. Its structure and style render this highly probable. It is certainly less direct, pointed, and explicit, in responding to this charge, than might reasonably have been expected. In answering as to accounts, dates and the like, belief is ordinarily sufficient. 1 Vern. 170; 4 Beav. 41. But in answering a charge of meditated fraud, to be effected by a false voucher, supported by perjury, belief that the sum shown by the voucher was paid, is, to say the least, a feeble response. I do not allow the suggestion, that the defendant drew his own answer, to have any weight. It would be dangerous to permit it to operate at all, to excuse any want of directness in meeting a charge of fraud. If parties, either from false economy or self-conceit, choose to undertake what they cannot perform, in a court of justice, they must suffer the consequences. If they act for themselves, instead of employing others, in order to find shelter for any obliquity under the allowance for their shortcomings, which they presume upon, they will be likely to be disappointed. I take this answer as it stands; and I do not hesitate to say, that if it was met by one witness, whose testimony was open to no exception, I should hold the charge proved. But the difficulty in the complainant's case is, that his witness comes to testify to his own turpitude. He says, in substance, that he was an accomplice in a conspiracy to cheat the estate. An agreement with a trustee, to receive a less sum for a greater, and give a receipt for the greater sum, in order to have it used as a voucher that such greater sum was paid, accompanied by an express promise to keep the real transaction secret, is a matter which no man can testify to, without seriously impairing his credit as a witness. He may tell the truth; but we have not such security in his doing so, as to render it fit to rest a judicial decree on his evidence alone. There is no rule of law which forbids the court to credit the testimony of a particeps criminis; but prudence and sound reason dictate great caution in weighing such evidence, and, in my judgment, it is not sufficient to prove a charge like this. For, whatever may be said of the want of explicitness and force in the answer, it does declare the defendant's belief that he paid the whole sum due, a belief which it would seem he could not entertain if he had been guilty of this fraud. And it is not to be lost sight of, that the bill itself charges that this item was allowed by the court, on the production of the voucher, supported by the oath of the defendant. Considering that this is an

attempt to open an account settled by a judicial decree, after notice to all parties; that the account was supported by the oath of the administrator; that the answer declares the defendant's belief that he paid the whole sum; that the witness comes to testify against his own receipt, in writing, given at the time; and by his testimony shows, that if there was a fraud, he so far participated in it, that the court cannot know how far to rely upon him, I am of opinion the charge is not made out, so as to induce the court to open the account; and the bill must, therefore, be dismissed, with costs. But I think it proper, under the circumstances, that this should be without prejudice, except as to the particular charges of fraud here adjudicated on. As to all items not adjudicated upon, specifically, in some former account, this remedy will be complete, and ought to remain open to the complainants. And as to any other matter embraced in this bill, and not adjudicated on, the complainants should be left at liberty to proceed, in that tribunal, or elsewhere, as they may be advised.

Case No. 8,989.

MALLETT v. FOXCROFT.

[1 Story, 474.] [1]

Circuit Court, D. Maine. May Term, 1841.[2]

WRIT OF RIGHT—JUDGMENT ON PARTITION — RES JUDICATA—UPON THE POINT—BY INFERENCE.

1. It is no bar to a writ of right, that there has been a judgment on a petition for partition between the same parties, in favor of the tenant, upon an issue joined therein on the sole seisin of the demandant.

2. Judgment in a possessory action (and a petition on a writ of partition is but a possessory action) is no bar to a writ of right. The issue, in the latter, is upon the mere right; in the former, it merely binds the right of possession; it does not draw in question the mere right.

3. A verdict, to be a bar or estoppel, must be direct upon the very point of the issue; and not merely so by argument or inference.

4. A verdict in favor of the petitioner in a petition for partition, where the issue is upon the sole seisin of the respondent, establishes only, that he had not a sole seisin at the time of the filing of the petition. Consistently with such a finding, he may have had a sole seisin within the last twenty years, before that time, that is, within the statute limitation of writs of right.

Writ of right for two lots of land (No. 11 in the fourth range, and No. 11 in the fifth range) in Lee, Penobscot county, Maine. The count was on the demandant's own seisin within twenty years. Plea, the general issue. At the trial, it appeared, that the real question between the parties was merely one of title; both parties claiming under an original grant of the commonwealth of Massachusetts to Williams College of a tract of land of 23,040 acres, of which the demanded premises were parcel.

At the trial, Mr. Paine, for the demandant [David Mallett], made out a regular deraignment of title from Williams College of a part of this tract, comprehending the lots now in controversy, through intermediate purchasers to Samuel T. Mallett, who conveyed the lots in controversy to the demandant (his son) on the 12th of August, 1829.

Fessenden & Deblois, for the tenant, claimed title from Williams College, under a mortgage dated the 5th of June, 1827, and made to the college, of 6,000 acres of the original tract of 23,040 acres, by Samuel T. Mallett; upon which mortgage the college recovered a judgment, in October, 1838, which included the demanded premises, and which was duly consummated by a writ of habere facias possessionem in June, 1839. In July, 1839, [Joseph F.] Foxcroft (the tenant) and one Webber filed a petition for partition of these 6,000 acres, before the state court. Upon that petition, the demandant appeared as respondent, and pleaded, that he was sole seised of the two lots. The jury found a verdict upon the petition for the petitioners, and judgment passed accordingly.

Upon this proof, Fessenden & Deblois, for the tenant, contended, as a preliminary ground, that the demandant was estopped by this judgment to re-try the question of seisin, which had been already decided in the suit for partition, and that it was a bar to the present suit. And they cited the statute of Maine, 1820 (chapter 62) and the case upon the partition reported in 4 Shep. [16 Me.] 89.

STORY, Circuit Justice. We are of opinion, that the objection is unmaintainable in point of law. The present suit is a writ of right, and no judgment in a writ or petition for partition will constitute any bar to the maintenance of a writ of right between the same parties. A writ of partition, or a petition for partition, which is but a substitute for the former, is a mere possessory action; and, at most, a judgment in a possessory action, can bar only an action of as high a nature, that is, a possessory action; for the judgment only establishes the right of possession. But a writ of right is in no just sense a possessory action. It is founded upon the mere right, and not upon the possession; and the general issue or mise is but a trial of the mere right. The plea of the demandant of a sole seisin, to the petition of partition, even if it were found against him, would only disprove his sole seisin at the time when the petition was filed. It would not prove, that he was not so seised at any prior time within the last twenty years, which is the statute limitation of writs of right. It could not be pleaded as a bar to a writ of right, or as an estoppel thereof; since it did not, and could not try the same question, who had the better mere right. The most,

[1] [Reported by William W. Story, Esq.]

[2] [Affirmed in 4 How. (45 U. S.) 353.]

that can be said, is, that it is admissible as evidence between the same parties. But of what is it evidence? Certainly only of the very fact of sole seisin put in issue by the pleadings; and that can properly apply only to sole seisin at the time when the partition was filed.

But, in truth, the proceedings upon this petition for partition do not present, when closely examined, any such verdict of the jury, upon the issue joined by the parties, as the argument has supposed. It is wholly irregular and incorrect. The duty of the jury was to find the very point of sole seisin or not, as alleged by the respondent (the present demandant). They have done no such thing. But, instead thereof, they have found a collateral fact, bearing indirectly upon the issue, to wit, that the deed of Samuel T. Mallett to the demandant (his son) was fraudulent. Now, this fact might have been important to be established upon the trial of the issue; nay, might have justified a verdict for the petitioner. But it was by no means necessarily decisive of the merits of the case; or, if it was, it was merely by argument and inference, and not as a matter of direct finding of the issue. And no bar or estoppel can be taken by way of inference or argument.

In truth, it now appears, and is admitted at the bar, that the real question in controversy between the parties in the present suit is (as it probably was upon the petition for partition,) whether the Settlers' Lots, so called (the lots in controversy,) were excepted from the mortgage to Williams College, or not. If they were excepted, then the demandant is entitled to maintain his writ of right. If not excepted, then the tenant is entitled to a verdict on the general issue. In either view, it is wholly immaterial, whether the deed of Samuel T. Mallett to the demandant was merely colorable and fraudulent between the parties, or not; for if the lots were not included in the mortgage, the tenant is a mere stranger, and is not entitled to contest the validity of the deed, since he does not claim under it; and it may be good and binding between the grantor and the grantee, notwithstanding it is but a colorable conveyance meditated by them. If, on the other hand, the mortgage did include the lots, then it is equally plain, that the deed of Samuel T. Mallett to the demandant, even if made bona fide, could convey no title against the tenant, who claims under the paramount title of the mortgage; and he, therefore, would thus have the better right to hold the demanded premises. Therefore, "quâncunque viâ data est," the question of fraud seems not properly before this court upon the present pleadings.

MEMORANDUM. Upon this intimation of the opinion of the court, the tenant moved for a continuance, which was granted by the court.

[A writ of error was sued out in the supreme court, where the judgment of the court below was affirmed. 4 How. (45 U. S.) 353.]

Case No. 8,990.

In re MALLORY.

[4 N. B. R. 153 (Quarto, 38).] [1]

District Court, D. Nevada. 1870.

BANKRUPTCY — ASSIGNEE — MISMANAGEMENT — FRAUDS—MOTION TO REMOVE—GOOD FAITH—COSTS.

Where an assignee, who is clerk of the bankrupt's attorney, is charged with mismanagement of the estate, and that he sold the property for less than its value, and had been guilty of gross frauds, and his removal is asked by the creditors who are unwilling to intrust the exposition of those frauds to such assignee, and a committee is named to conduct the proceedings on the part of the creditors, *held*, it is expedient that there should be another assignee substituted for the present one. At the same time such order will be made as to fully protect the present assignee against the cost of this proceeding, for it appears from the testimony that he has acted throughout with entire good faith and energy. The costs of this proceeding must be paid out of the estate.

[Cited in Re Blodget, Case No. 1,552; Catlin v. Hoffman, Id. 2,521; Citizens' Bank v. Ober, Id. 2,731; Re Wetmore, Id. 17,466.]

In bankruptcy.

HILLYER, District Judge. The petition charges that the assignee has mismanaged the estate; that by connivance with others he has sold property for less than its value; that he has failed to make reasonable efforts to recover the property of the estate; that the present assignee is the confidential clerk of the attorney of the bankrupt; that he favors the bankrupt and his attorney; and that the bankrupt has been guilty of gross frauds, and the creditors petitioning are unwilling to intrust the exposition of those frauds to the present assignee. The petition is signed by three creditors, who, it is alleged, are a committee representing a majority in number and value of the creditors. The answer of the assignee denies specifically all the allegations of the petition except that he is clerk of the bankrupt's attorney. All the charges of fraud on the part of the assignee; or connivance with the bankrupt in the concealment of property, have been most successfully met, and were, as a ground for removal, abandoned on the argument.

Something was alleged in the pleading, and more was said on the argument, imputing unprofessional conduct and bad motives to the counsel for the assignee on one side and of the creditors on the other. I can see no shadow of foundation for this on either side, and I regret that either should have felt it necessary to vindicate his conduct in the proceeding by language so bitter and personal as was employed. The character and ability of both gentlemen are too well established to require any vindication from this court.

[1] [Reprinted by permission.]

and in the conclusion to which I have come, I have laid aside all consideration of these charges, which are entirely unsupported by proof sufficient to found a suspicion upon. There has been more said about fraud in this matter and less proved than in any case I have ever heard.

I shall proceed to decide only such questions as seem to be properly involved in the case. It is admitted by the assignee that he solicited from creditors his appointment; that he has done so in other cases, and makes it in some sort a business to procure his election as assignee in bankruptcy. He claims that it is right and proper to do so. The fact of such solicitation has been held to be good ground upon which to withhold the judge's approval of an assignee's election. The creditors should be left free and unbiased in their choice. Such is the policy of the bankrupt act [of 1867 (14 Stat. 57)]. It might lead to abuses if assignees were permitted to do this. In re Doe [Case No. 3,957]. Whether there has been such an influence exercised by the assignee or not, as to invalidate his election, must be left to depend upon the circumstances of each case. There might be some solicitation on the part of the assignee which would in no way influence the choice of the creditors. The creditors having knowledge of the action of the assignee in soliciting his own election, and permitting him to qualify and act for six months, as in this case, without objection, it is too late to ask his removal on that ground alone. Some little evidence was given tending to show that one of the attorneys of the bankrupt interested himself in procuring the election of this assignee, and voted by proxy a large portion of the votes given for him. Neither the bankrupt nor his solicitors can be permitted to make the proceedings in bankruptcy his proceedings. Ex parte Arrowsmith, 14 Ves. 209.

It is clearly wrong to allow the bankrupt to select his assignee. Such an assignee might favor the bankrupt at the expense of the creditors' interests. In re Bliss [Case No. 1,543]; Eden, Bankr. Law, 221. That the assignee is the confidential clerk of the bankrupt's attorney might be a good reason for withholding the approval of the choice, if objections were made by the creditors before approval, but such objection should be made, if the facts are known to the creditors, immediately after election; and if, with full knowledge of the facts, the assignee is allowed to go on and exercise his duties, something more ought to be shown—some misconduct, or that the relation existing is in some way prejudicial to the rights or interests of the creditors. A relative of the bankrupt has been rejected, in Re Powell [Case No. 11,354], and the reason for disapproving the creditors' choice in that case seems to apply with some force to the clerk of the bankrupt's attorney. But there is no restriction upon the choice of the creditors, in the bankrupt law, except that the assignee shall not be a creditor who has received a preference, and if creditors, without any undue influence, and with knowledge of the facts, choose such an assignee and the judge approves without objection, it is too late to object. The creditors argue that the assignee should have recovered for the benefit of the estate certain property which lawfully belongs thereto. On the eve of bankruptcy the bankrupt mortgaged to the attorney employed to prepare his petition and schedule, a six-mule team as security for a fee of one thousand dollars for such services. The team was afterward sold by the assignee, subject to the mortgage, and not bringing one thousand dollars, the proceeds of the sale were paid to the attorneys of the bankrupt. No question is made as to the good faith of the assignee in this matter. He has done what he thought to be right—if he has erred. This court does not deem it necessary or proper to decide upon the validity of this mortgage in this proceeding. When it is decided, the parties interested in upholding the mortgage will be heard. Judge Duval, in Re Evans [Id. 4,552], held that such a mortgage was clearly invalid, and that the attorneys must prove their debt with other unsecured creditors, but, from the opinion, the point does not seem to have been much discussed, the real question determined appearing to be whether, under the 39th section, the attorneys would even be allowed to prove their debt.

Evidence was introduced in regard to a team transferred to one Hagerman a short time before the filing of the petition in bankruptcy. It seems to be manifestly improper to decide now that this was or was not a valid transfer under the bankrupt law. Mr. Hagerman, the party interested, has not been heard, and this court may be called upon to decide the question upon a fuller hearing, and more complete evidence. The assignee went so far as to ascertain that Mallory was justly indebted to Hagerman, in an amount equal to the value of the team, and there rested. This might all be; and there might be an entire absence of anything like actual fraud, and yet the assignee be entitled to the property as trustee of the creditors, if the transaction came within the provisions of section 35. But the assignee must be allowed some discretion, and if he believe the expense of a suit to recover property will be greater than the benefit to be derived from the suit, if successful, he ought not to proceed. The assignee, in this case, has employed the attorney of the bankrupt as his attorney in some of the proceedings, and the propriety of doing this has been discussed. So far as my research has gone, the courts uniformly disapprove of the same person acting as attorney for the bankrupt and the assignee, not because the duties always are conflicting and adverse, but because they

may be so. The assignee's attorney is a minister of the court, and his duty is to attend to the estate, even to the prejudice of his own claims; and it is considered inconsistent with his duties if he act also as attorney for the bankrupt. Eldon, Bankr. Law, 214. Lord Eldon once said: "It is astonishing that solicitors of great name will engage themselves as solicitors for assignees, the creditors, and the bankrupts also." Ex parte Arrowsmith, 14 Ves. 209. Again he says: "This case is an instance of the mischief arising from the practice of the assignees and the bankrupt acting by the same solicitor. The adverse duties resulting from those conflicting characters cannot be properly sustained by the same person." Ex parte Vaughan, Id. 514.

It was said on the argument that no attorney of respectability would ever aid the bankrupt in concealing a fraud. Every lawyer knows how, almost unconsciously, he identifies his client with himself, and it is not necessary to assert that he would cover up a fraud knowingly; but he would be less apt than the opposing party to believe that his client had done a wrong. Besides, while an attorney would be as culpable as his client, or worse, if he assisted him in the perpetration of a fraud, still this is a very different thing from defending the client for acts past. Every one has a right to make such defense, and to have the aid of counsel. And to my mind the conduct of the attorney would be as praiseworthy in the latter case as unjustifiable in the former.

A document was introduced in evidence, signed by a majority in number and value of the creditors, as claimed by the petitioners, which is an agreement of the creditors with each other to give twenty per cent. of their dividends for the purpose of opposing the bankrupt's discharge, and recovering property asserted by them to have been fraudulently disposed of by the bankrupt. The assignee denies that this document is signed by a majority in number or value of the creditors. A committee of three is also named in the agreement to conduct the proceedings on the part of the creditors. Rosebury, who procured the signatures, says, that he told those who signed that the first step would be an application for the removal of the present assignee, and it appears that at a meeting of these creditors, it was also resolved to petition for the assignee's removal. Section 18 of the bankrupt act gives the court power to remove an assignee for any cause which, in its judgment, renders such removal necessary or expedient. The removal of the assignee is a matter left to the discretion of the court.

In my judgment, it is expedient that there should be another assignee substituted for the present one. At the same time such order will be made as to fully protect the present assignee against the cost of this proceeding, for it appears from the testimony, that he has acted throughout with entire good faith and energy. But there is, unfortunately, an irreconcilable disagreement between the present assignee and a large portion of the creditors, whose interests and wishes the court is bound to regard while protecting the assignee from any injustice. The assignee is a trustee of each and every creditor. He receives a compensation for his services, and is held to strict diligence in watching the interest of creditors. The creditors are the beneficiaries, and have a direct pecuniary interest in the bankruptcy proceedings. Courts of equity sometimes decree a substitution of trustees where there has been no fault on the part of the trustee. Substitution has been made where the trustees would not act together. Here are some of the points of difference between the petitioning creditors and the present assignee: The assignee believes that Mallory has acted honestly—the creditors that he has been guilty of fraud. The assignee is satisfied that Hagerman is entitled to keep the team—the creditors that it belongs to the estate. The assignee considers the mortgage to bankrupt's attorney valid—the creditors desire to test the question. The creditors think there is property which can be recovered to the estate, in Owen's Valley—the assignee thinks not. Creditors think the bankrupt drew a large amount of money from the bank in January, 1870, and paid to John James, and that this was a fraudulent preference—the assignee is of a contrary opinion. The assignee says that he should employ the attorney of the bankrupt as his legal adviser, and the creditors desire some other attorney. The assignee would change his attorney if directed to do so by the court. The assignee is sincere in his opinions, and an equal sincerity must be accorded to the creditors.

It was said on the argument, that the assignee would proceed in any manner directed by the court. But it would seem to be manifestly wrong for the court to constitute itself the legal adviser of the assignee. He has a right to choose his own counsel, and must proceed with his duties according to his best judgment, the court holding him to no more than a just and reasonable accountability. Should the court undertake to direct him when to proceed in a suit, it would find that it had practically decided questions ex parte which ought to have been decided only on a hearing of both parties interested. Upon the questions of cost, I shall allow the assignee to tax his costs against the estate; that is, the cost of this proceeding must be paid out of the estate. Had it not been for the charge of fraud made against the assignee by the creditors, a charge wholly unfounded and abandoned on the argument, the expense of this proceeding would have been comparatively light. But an assignee could not rest under such a charge, feeling himself innocent, and was fully justified in bringing all the witnesses necessary to rebut the charge and

vindicate himself. It is just that the estate should bear these costs.

Upon the whole case it is ordered, that the said R. V. Dey be removed from the trust of the assignee of the estate of said bankrupt, and that the costs of the proceedings for removal be paid out of the estate of said bankrupt subject to prior charges.

[NOTE. The case was subsequently heard upon petition of Henry Vansickle, a judgment creditor of the bankrupt, praying that an injunction, granted upon petition of the bankrupt against the sheriff of Douglas county, who had levied upon property of bankrupt to satisfy execution in favor of Vansickle, the sale of which property was thereby enjoined, be dissolved. The petition was dismissed. Case No. 8,991.]

Case No. 8,991.

In re MALLORY.

[1 Sawy. 88;[1] 6 N. B. R. 22.]

District Court, D. Nevada. April 10, 1871.

BANKRUPTCY — JUDGMENT IN STATE COURT — INJUNCTION TO SHERIFF—UNLAWFUL PREFERENCE—HOW LIQUIDATED.

1. The district courts of the United States, sitting in bankruptcy, have power to restrain, by injunction, the sheriff of a state court from proceeding to sell the property of a voluntary bankrupt, under an execution issued out of a state court upon a judgment obtained before the commencement of proceedings in bankruptcy.

[Cited in Re Brinkman, Case No. 1,884; Re Ulrich, Id. 14,328; Re Hufnagel, Id. 6,837.]

2. It has also the power to declare the lien of a judgment of a state court void, as against the general creditors, if such lien is an unlawful preference under the bankrupt act [of 1867 (14 Stat. 517)].

[Cited in Phelps v. Sellick, Case No. 11,079; Catlin v. Hoffman, Id. 2,521.]

3. The lien of a judgment, like other liens, is to be ascertained and liquidated in the bankruptcy court.

4. Section 1 of the bankrupt act of 1867 construed.

Motion to dissolve injunction restraining the sheriff from selling property of the bankrupt [E. Mallory], under judgment obtained in the state court, before the institution of proceedings in bankruptcy.

[This case was previously heard upon petition of creditors asking for the removal of R. V. Dey, assignee. The prayer of the petition was granted. Case No. 8,990.]

R. M. Clarke, for the motion.

R. S. Mesick, for respondent.

HILLYER, District Judge. On the twenty-third day of October, A. D., 1869, Henry Vansickle obtained a judgment, by confession, against the bankrupt, in the state district court for the county of Douglas. Execution was issued thereon, levied on certain property of the bankrupt, and the sheriff of Douglas county had advertised the property for sale, when, on the fifth day of February, A. D., 1870, Mallory was adjudged a bankrupt in this court, on his own petition. On the same day the bankrupt petitioned this court for an injunction restraining the said sheriff from selling the property levied on, which was granted.

Vansickle now files a petition praying that the injunction may be dissolved. Mallory's assignee answers, alleging that the judgment is not a valid lien, was procured in fraud of the bankrupt act, and prays that the same be declared to be no lien upon the property, and that the property be ordered to be sold by the assignee free from any lien of the said judgment. As a matter of practice, it may be stated that it was unnecessary to file a petition in this case. A motion to dissolve the injunction would have been the correct way of proceeding.

The main question argued was as to the power of this court, sitting in bankruptcy, to enjoin the sheriff of a state court or parties litigant therein, from proceeding to sell property levied upon by virtue of a writ of execution issued out of the state court, upon a judgment obtained therein before the proceedings in bankruptcy were commenced, with the understanding that the injunction should remain in force if the court should be of opinion that such power existed, leaving the question as to the validity of the lien of the judgment to be determined hereafter, in some other proceeding.

The question is one of the utmost importance, involving the propriety of the exercise of a power by a federal court, the effect of which is to restrain proceedings in a state court, and I feel that its decision imposes upon this court a great responsibility.

In September last, this same question was brought before me in the Case of Lady Bryan Min. Co. [Case No. 7,980], and a motion to dissolve the injunction was denied; but as in that case there was no question raised as to the validity of the judgment liens, and the lien of the judgment creditors was transferred to the proceeds of the property, the point was not so fully argued as it has been now, and I was in this case not only willing, but desirous of hearing further argument from the learned counsel who represent the present parties.

Upon this argument, the sections of the bankrupt act relating in any way to this question, have been read and commented on by counsel, for the purpose of ascertaining the policy and object of the act, and the extent of the power conferred to carry out the policy and effect the object; a great mass of authorities was cited and read on the hearing, and the whole, together with a careful examination on my part of the entire subject, has resulted in more firmly confirming me in the correctness of the opinion expressed in the Lady Bryan Case.

Congress, in the enactment of laws upon the subject of bankruptcies, has complete and plenary power, unrestricted save as to uni-

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

formity. It has, in legislating upon this subject, power to take from state courts the administration of remedies for the enforcement of liens. The passage by it of a bankrupt law ipso facto abrogates all state insolvent laws. The bankrupt law is then the supreme law of the land, binding alike upon federal and state tribunals, and wherever by express words or by necessary implication it affects state laws, the power of state courts or the remedies of suitors therein, it is paramount.

The jurisdiction of the courts of the United States in matters of bankruptcy is derived from, and its extent must be determined by reference to the language of the bankrupt act; and before those courts restrain parties litigant in, or officers of state courts from prosecuting their remedies therein, or executing the process of those courts, the power to do so ought to be found either in the express language of the act, or it must result as a necessary means for effecting the powers expressly conferred.

Section 1 of the bankrupt act, constitutes the several district courts of the United States courts of bankruptcy, and gives them original jurisdiction in all matters and proceedings in bankruptcy. This jurisdiction is declared to extend: To all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; to the collection of all the assets of the bankrupt; to the ascertainment and liquidation of the liens and other specific claims thereon; to the adjustment of the various priorities and conflicting interests of all parties; to the marshaling and disposition of the different funds and assets; and to all acts, matters, and things to be done under, and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy.

As reference will be made to the bankrupt act of 1841, I quote that portion of it conferring jurisdiction. It is declared to "extend to all cases and controversies in bankruptcy arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; to all cases and controversies between such creditor or creditors, and the assignee of the estate, whether in office or removed; to all cases and controversies between such assignee and the bankrupt, and to all acts, matters and things to be done under, and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of proceedings in bankruptcy." 5 Stat. 415, § 6. Under this section of the act of 1841, there was much diversity of opinion among courts and lawyers, as to the existence of power to control by injunction upon the parties, the proceedings in state courts. The changes made by the act of 1867, are very noticeable and important. The present law, unlike that of 1841, extends the jurisdiction in plain terms, to the collection of all assets of the bankrupt, the ascertainment and liquidation of liens and other specific claims upon those assets, and to the adjustment of priorities and marshaling of assets so as to secure the rights of all parties, and this jurisdiction is original and exclusive. Now, when congress delegated to the district courts, this equitable jurisdiction in bankruptcy, it must follow, by necessary implication, that it also delegated at the same time the power to administer such remedies known to the law as were absolutely indispensable to the complete exercise of the jurisdiction expressly conferred. One power directly given, is the collection of all the assets. The means by which this result is to be reached are not enumerated, but power to accomplish the result is given, and the right to employ the proper legal process for effecting the result must follow by necessary implication.

The property levied on in this case is part of the assets of the bankrupt. It may be subject to a lien, but the legal title to the property was in the bankrupt when the petition was filed and passed to the assignee. The judgment of Vansickle, if a valid lien by the laws of this state, and not impeachable under the bankrupt law, as a fraud against it, is to be respected and protected by the bankruptcy court. But this statutory lien is neither a right in or to the thing, but is simply a charge thereon.

How now, I ask, could the assets in this case have been collected by the assignee without restraining the sheriff from selling them under his execution? It certainly would complicate the case exceedingly, if the sheriff, after the legal title, by virtue of the bankruptcy, had passed out of Mallory to the assignee, had sold the property as the property of Mallory.

Closely connected with this power of collecting the assets, is that of ascertaining and liquidating the liens, which may be claimed to exist upon those assets.

If the validity of any lien upon the assets of the bankrupt is denied or questioned, in what court is the question to be tried, the validity or invalidity of the lien ascertained, and, if found valid, liquidated? The answer is, that by the express terms of the act, this jurisdiction is given to the bankruptcy court.

Here, as in collecting the assets, a specific result is to be attained, and can it be doubted that the means by which it is to be attained are also given.

The lien is to be ascertained and liquidated in the bankruptcy court, and this would be an idle proceeding if that court has not power to preserve the property, by restraining its sale until the lien is ascertained to be good, or to be void, and of what use is it to say that this court shall liquidate liens, if it cannot restrain parties from liquidating their liens without its intervention. The bankrupt law is highly remedial, and it ought to

have a liberal construction, for the purpose of effecting its aim and policy. The expediency and policy of bringing all the assets into the bankruptcy court, and ascertaining and liquidating there all liens and specific claims thereon, is undeniable.

And while neither the expediency of exercising this power nor the inconvenience of not exercising it, can justify its employment if not found in the statute in direct or necessarily implied terms, these considerations may be, and ought to be looked at in construing the law and arriving at the intention of the law-makers. Let us suppose that two persons each have, or claim to have, a lien by judgment in the state courts, upon the property of the bankrupt at the time of bankruptcy, and that there is a dispute between them as to the priority of their liens or the validity of one of the judgments. One creditor comes into the bankruptcy court, proves his claim and asks to have his lien liquidated. The other proceeds in the state court. If neither court can restrain or control parties before the other, here will be a direct conflict of jurisdiction; decisions as to priorities or validity of the liens may be conflicting, and each court proceeding to take possession of the property through its process and officers, and satisfy the lien of the party before it. Such a state of things would be very much to be deprecated if the bankrupt law were so lame and impotent as to have left the case unprovided for. But the law is not, I conceive, so defective. It gives the bankruptcy court an original and exclusive jurisdiction over all the parties to the bankruptcy proceedings, all the assets and all the liens thereon. Again, a lien may be good by the law of the state and void under the bankrupt law; thus, a lien by attachment is avoided, and the state law creating it is so far abrogated, if the attachment was made within four months next preceding the commencement of proceedings in bankruptcy; so a judgment lien may be void under the bankrupt law, as an unlawful preference to the judgment creditor. Hence, while the judgment might stand in the state court, the lien of that judgment might be avoided in the bankruptcy court; and so it was held under the law of 1841, and that the creditor was liable to refund to the assignee the proceeds of a sale made under the judgment; such creditor having notice of the proceedings in bankruptcy. Shawhan v. Wherritt, 7 How. [48 U. S.] 626.

Let us see now how this question stands upon authority. Where judgment had been obtained in a state court, execution issued and returned unsatisfied, and an order made on proceedings supplementary to execution for the examination of the judgment debtor, Judge Blatchford ordered a stay of all proceedings on the said order until the question of the discharge of the bankrupt should be determined by the bankruptcy court. In re Reed [Case No. 11,637].

In an involuntary proceeding before the same judge, he, under the 40th section of the bankrupt act, enjoined the sheriff of a state court from proceeding to sell property of the alleged bankrupt, and on motion refused to dissolve it until the question whether or not the debtor was to be adjudged a bankrupt was decided. In re Devlin [Case No. 3,841]. The fortieth section of the act gives the district court power by injunction to "restrain the debtor and any other person" from making any transfer or disposition of any part of the debtor's property until the return of the order to show cause why the debtor should not be adjudged a bankrupt. On the hearing it was argued that the express grant of power to enjoin in proceedings in invitum was a denial of any such power in voluntary proceedings upon the maxim expressio unius est exclusio alterius. But it is to be observed that under section 14 it is "in virtue of the adjudication of bankruptcy and the appointment of an assignee" that the property vests in the assignee.

Now, in voluntary cases, the filing of the petition is an act of bankruptcy, and the debtor at the same time surrenders all his estate and effects for the benefit of his creditors and is forthwith adjudged a bankrupt. The district court is thus clothed at once in voluntary cases with jurisdiction over the debtor and his property. But where the proceeding is involuntary the debtor is not adjudged a bankrupt until the return and hearing of the order to show cause, and may not be then if he have a sufficient defense.

There is, therefore, good reason for giving the court power to enjoin between the time of filing the creditor's petition and the return of the order to show cause, as there is in these cases no voluntary surrender of the property and the title cannot vest in the assignee until after adjudication. If the argument of the petitioner is sound the court would have power to enjoin in involuntary cases before adjudication, but must dissolve it immediately after, because the statute in express terms only provides for an injunction until the return of the order to show cause. So that the court might enjoin before it was certain the property of the bankrupt would ever come into its possession, and might not after the property was fully within its jurisdiction.

A bankrupt held under arrest by the sheriff of the city and county of New York, under orders of arrest from the state court, was discharged from arrest and proceedings on actions against the bankrupt in the supreme court of the state were stayed. In re Jacoby [Case No. 7,165].

In a case before Judge Benedict (E. D. New York), where judgment was obtained, execution issued and levied on property of the bankrupt prior to the commencement of proceedings in bankruptcy, that judge enjoined the creditors from enforcing the levy. On motion to dissolve, which was denied, although this question of power was not dis-

cussed, the judge said that the power seemed to be fairly included in the power to collect all the assets, to ascertain and liquidate liens and to adjust priorities. In re Schnepf [Case No. 12,471].

In a voluntary proceeding upon a bill filed to enjoin a sheriff from selling property of the bankrupt under an execution from a state court, Judge Hill, of the Mississippi district, held that the bankrupt himself had a right to file the bill before an assignee was appointed; that if the sheriff had actually levied before the bankruptcy, he would be allowed to proceed without a showing that the sale would be injurious to the general creditors or to some one having a prior lien; that the 20th section, in connection with the 1st and 25th, gave the court jurisdiction of the subject matter; that the commencement of proceedings in bankruptcy transferred to the district court jurisdiction over the bankrupt, his estate, and all parties and questions connected therewith, and operated as a supersedeas of the process in the hands of the sheriff and an injunction against all other proceedings than such as might thereupon be had by authority of the bankruptcy court. Jones v. Leach [Case No. 7,475]. A sheriff was restrained from selling goods under execution by the same judge, in Pennington v. Sale [Id. 10,939].

After judgment in a state court, execution, levy and advertisement for sale, the sheriff was restrained. In re Bernstein [Case No. 1,350]. The jurisdiction of a district court of the United States is superior and exclusive in all matters arising under the statute, and extends to a suspension of proceedings taken for the purpose of subjecting portions of the estate surrendered to a sale under state process. Until a sale is made a bankrupt is not divested of his interest in the property under seizure. In re Barrow [Id. 1,057]. A preliminary injunction was issued restraining the plaintiff in an execution upon a judgment confessed in a state court, and he moved to dissolve it. The question was argued before two judges, Grier and Cadwalader, and the jurisdiction maintained, the court refusing to dissolve the injunction. Irving v. Hughes [Id. 7,076]. Where judgments were rendered after the bankruptcy, Judge Deady held the jurisdiction to restrain the enforcement of the judgments was undoubted. In re Wallace [Id. 17,094]. Parties proceeding, after the bankruptcy, to foreclose a mortgage on the property of the bankrupt, in the state court, were enjoined. In re Kerosene Oil Co. [Id. 7,725]. A landlord was enjoined from distraining the bankrupt's property for rent. Brock v. Terrell [Id. 1,914]. In a case where the bankrupt himself filed a petition to restrain certain persons, who had obtained judgments against him prior to the filing of his petition, from proceeding by execution, Judge Giles, of the Maryland district, in answer to an objection that the district court had no jurisdiction, but that the proceeding must be by bill and in the circuit court, said: "I am clearly of the opinion that the petition was properly filed in this court, and that this court has, by virtue of the 1st section of the bankrupt act, full and adequate jurisdiction over all matters relating to the settlement of the bankrupt's estate, either at law or in equity, by way of petition or bill; and that whenever the relief sought is necessary to the protection of the general creditors, such relief will be granted;" but as in the case before him there was no suggestion of fraud, and the judgments were admitted to be valid liens, he held that the jurisdiction of the bankruptcy courts was not exclusive, and permitted the judgment creditors to proceed in the state court. In re Bowie [Id. 1,728]. Upon the application of parties interested, the district court has jurisdiction to ascertain and liquidate a judgment lien, and while so doing to enjoin the judgment creditor from enforcing the same by execution out of the state court. In re Fuller [Id. 5,148]. If creditors who assert a claim against the bankrupt are not barred by the discharge, are allowed to commence suit in the state court for the purpose of saving the statute of limitations or securing testimony, the suit, after this object is attained, can be stayed to await the decision of the question of the debtor's discharge. In re Ghirardelli [Id. 5,376]. After the bankruptcy, creditors of the bankrupt, having a lien by mortgage, were proceeding to foreclose in a territorial court. The supreme court held, that all the property, choses in action, effects, interests and equities of the bankrupt must be brought into the bankruptcy court for settlement and distribution, and enjoined the creditors from proceeding in the foreclosure suit. In re Snedaker, 3 N. B. R. 155. Judgment was obtained in the state court, execution levied and property advertised for sale before the filing of the petition in bankruptcy. The sheriff was restrained from proceeding with the sale. Beattie v. Gardner [Case No. 1,195]. Under the law of 1841 an injunction was ordered against the assignee, appointed under the state laws, to stop his interference with the property of the bankrupt, and also to prevent certain creditors from proceeding with an execution. Ex parte Eames [Case No. 4,237].

For an instructive statement of the nature and extent of the equitable jurisdiction of courts of bankruptcy, see Ex parte Foster [Case No. 4,960].

In Re Campbell [Case No. 2,349], after property had been sold and the proceeds were in the hands of the sheriff, an injunction to restrain the state courts and their officers from proceeding, for the purpose of bringing the proceeds of the sale into the bankruptcy courts for distribution, was refused. Judge McCandless based his refusal upon the ground that the courts of the United States have no power to enjoin proceedings in the state courts, either directly or by restraining the

officers of such courts, or parties litigant therein.

This is the only opinion, so far as I can discover, directly denying this jurisdiction.

Upon my own convictions as to the proper construction of the bankrupt act, and upon the weight of authority, I hold that the court had jurisdiction to issue the writ. The prayer of the petition is therefore denied with costs.

The decision of the district court in this case was affirmed by the circuit court, on petition for review in the following opinion:

FIELD, Circuit Justice. When counsel closed their argument on the petition of Vansickle, for a review of the order of the district judge, I had no doubt of the correctness of that order, but I thought the case was one of sufficient importance to justify a written opinion, giving at length the views of the court upon the questions raised.. I, therefore, took the papers and reserved my decision. Since then, I have read with care the opinion delivered by the district judge, when the matter was before him on the application of the petitioner to dissolve the injunction, and I find that it covers every question in the case, and presents the law in a very clear and satisfactory manner. It renders any opinion from me entirely unnecessary. I could not add to it nor improve it. I concur both in its reasoning and conclusion. Petition denied.

MALLORY (COOK v.). See Case No. 3,163.

MALLORY (RAFFERTY v.). See Case No. 11,526.

Case No. 8,992.

MALLORY et al. v. RAHMER.

[8 Blatchf. 556, note.] [1]

Circuit Court, S. D. New York. Nov. 3, 1871.

PATENTS—MEN'S HATS—METAL FRAME—INFRINGEMENT.

[This was a suit in the same court, by the same plaintiffs, George Mallory and the Mallory Manufacturing Company, against Charles L. Rahmer, on final hearing, on pleadings and proofs, as in Case No. 8,993. The same decree was accordingly entered in the two cases.]

George Gifford and Solomon J. Gordon, for plaintiffs.

Horace Barnard, for defendant.

BLATCHFORD, District Judge. I have carefully reviewed the proofs and arguments on which this case was heard, and see no reason to change the views which I expressed in the case of the same plaintiffs against George W. White, on the same patent, or to refrain from giving effect to the stipulation of the parties, of May 13th, 1870. Let a decree be entered for the plaintiffs, to the like effect as in the case against White.

[In 8 Blatchf. 556, this case is published as a note to Mallory v. White, Case No. 8,993.]

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

MALLORY (RUSSELL & ERWIN MANUF'G CO. v.). See Case No. 12,166.

MALLORY (TARLETON v.). See Case No. 13,753.

Case No. 8,993.

MALLORY et al. v. WHITE.

[8 Blatchf. 552; 4 Fish. Pat. Cas. 628.] [1]

Circuit Court, S. D. New York. Aug. 30, 1871.

PATENTS—MEN'S HATS—METAL FRAME—INFRINGEMENT.

1. The latters patent granted to Thomas W. Adams and Charles H. Slicer, December 24th, 1861, for an "improvement in men's hats," are valid.

2. The claims of such patent—(1.) In the construction of men's hats, when the brims are of flexible or yielding material, giving the front and side curves to the brim by means of a frame of cane, metal, or other material, confined within, or attached to, the brim at or near its circumference, substantially as and for the purposes set forth. (2.) In combination with a hat brim constructed as claimed in the preceding clause, the head band o, for the purpose of preserving the symmetry of the body of the hat, substantially as described—are infringed by a hat which has the features specified in the claims, although the frame in it is a continuous piece of metal, the ends of which are joined by soldering, while, in the specification of the patent, the frame is described as being inserted in a sleeve, tube or ferrule, and although draw-strings are used in it, in connection with the case for the frame, to effect a result in addition to the result attained by the patented construction.

[This was a bill in equity, filed [by George Mallory and the Mallory Manufacturing Company] to restrain the defendant [George W. White] from infringing letters patent [No. 34,043] for "improvement in men's hats," granted to Thomas W. Adams and Charles H. Slicer, December 24, 1861, as assignees of said Adams, which letters patent were assigned to complainants.

[The claim was as follows:

["What I claim, etc., in the construction of men's hats, when the brims are of flexible or yielding material is, giving the front and side curves to the brim by means of a frame of cane, metal, or other material, confined within or attached to the brim, at or near its circumference, substantially as and for the

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 8 Blatchf. 552; and the statement is from 4 Fish. Pat. Cas. 628.]

purposes set forth. In combination with a hat brim constructed as claimed in the preceding clause, I claim the head-band o, for the purpose of preserving the symmetry of the body of the hat, substantially as described."] [2]

Solomon J. Gordon, for plaintiffs.
The defendant, in pro. per.

BLATCHFORD, District Judge. This bill is brought by the plaintiffs as the owners of letters patent of the United States granted to Thomas W. Adams and Charles H. Slicer, December 24th, 1861, on the invention of said Adams, for an "improvement in men's hats." The specification says: "The nature of my improvement in the manufacture of hats consists in giving such an excess in the length of a reed or other non-extensible flexible article, over that of the outer edge of the brim of the hat formed of an extensible material, that, when said reed is inserted and forced in a case on said outer edge, it shall give not only firmness to the brim, but also a rising curvature thereto, of any desirable configuration. By virtue of this invention or discovery of extra length of reed confined in the fabric of the hat, I am enabled to make them of the lightest material that shall retain their shape, at an inconsiderable cost. Those hats also admit of being folded up in a small space, by simply twisting the reed in the brim into the shape of an 8, making them peculiarly portable, without damage to the shape. In the course of continuous experiments, occupying much time and attention, I have discovered and applied successfully the principle, that each portion of the arch forming the edge of the brim has its chord formed of the breadth of the brim of the hat. Furthermore, I have found that, by employing a band sewed to the lower edge of the body and inner edge of the brim, in conjunction with my reed, I prevent stretching the body and throwing the hat out of shape. As a simple means of joining the reed ends in the reed case, I have employed a short tube or sleeve, which allows the swivelling of the cane reed, in folding the hat, and it also prevents injury to the fabric composing it, in the removal or return of the reed, in washing or doing up the hat. My improvement is applicable to any shape of hat or cap in which a continuous spring or flexible reed can be inserted." The specification then proceeds to give general directions how to make hats or caps on such improved principle, remarking, that there will necessarily be slight changes in different patterns, that will suggest themselves to an intelligent operative. The hat brim is cut on an oval block pattern board, out of any woven or felted material, the former being preferable, as it is cheap and allows the drawing or tension of the reed. The body is cut arched or rising over the ears, having its edges parallel or nearly so. The tip or crown is cut oval or round, as desirable. A bag hat, in which fullness is given to the body, is cut in sections. The crown is sewed to the body, the head band having been sewed or basted thereto. Then the lower edge thereof is joined to the inner edge of the brim. The outer edge of the brim may either have the reed case formed by turning over the edge of the material, or it may be formed of wide binding, forming thus a case. The hat is now ready for the insertion of the spring reed, or its substitute, into the reed case. A small metal tube or ferrule is confined half its length on the end of the reed, the other end of the reed being forced and strained in the remaining half of said ferrule, such an extra length having been given to the reed, as to effect the stretching of the width of the brim, and giving any desirable configuration thereto. The claim is in these words: "What I claim as my invention and desire to secure by letters patent, in the construction of men's hats, when the brims are of flexible or yielding material, is, giving the front and side curves to the brim by means of a frame of cane, metal or other material, confined within, or attached to, the brim at or near its circumference, substantially as and for the purposes set forth. In combination with a hat brim constructed as claimed in the preceding clause, I claim the head band o, for the purpose of preserving the symmetry of the body of the hat, substantially as described."

The bill alleges, that the defendant has infringed the patent, by making and selling hats containing the patented improvements. The defences are non-infringement, and want of novelty in the improvements claimed.

The hat put in evidence as an infringement is the one marked Exhibit G. The record contains an admission by the defendant, that, in the year 1869, and prior to the filing of the bill, he made and sold ten hats like Exhibit G. There can be no doubt that that hat is an infringement of both of the claims of the patent. It has a brim of flexible woven material. A frame of metal is confined in the brim near its outer circumference, the outer edge of the brim being turned over, so as to form a case for the frame. The frame not only strains the brim, but gives to it its front and side curves. The frame effects this result because it has the excess in length over the length of the case in the outer edge of the brim, into which it is inserted, which the specification speaks of as the main feature of the first claim of the patent, and which, it says, not only gives firmness to the brim, but gives a rising curvature thereto. Such rising curvature exists in Exhibit G, and is caused by such extra length of the frame. Such extra length, in Exhibit G, is, by measurement, over an inch, and makes it necessary to insert the frame into its case by forcing, straining, or springing it in. It is true, that, in Exhibit G, the frame is a continuous piece

[2] [From 4 Fish. Pat. Cas. 628.]

of metal, its ends being joined by soldering, and that, in the specification, the ends of the frame are joined by being inserted in a sleeve, tube, or ferrule. But this is an immaterial point, not of the essence of the invention. The one mode of joining the ends is the equivalent of the other, so far as the improvements covered by the claims of the patent are concerned. So, too, the fact, that, in Exhibit G, there are draw strings used in connection with the case for the frame, makes no difference. The draw strings are used to effect a result in addition to the result attained by the plaintiffs' construction; but Exhibit G embodies none the less the plaintiffs' improvements, because it has the draw strings in addition. Exhibit G also has, in combination with such brim and frame, a head band, substantially such as that described in the plaintiffs' specification, and used for the same purpose.

On the question of novelty, the inventor, Adams, is shown to have filed in the patent office, on the 4th of September, 1857, an application for a patent, on a specification, drawings, and model fully showing the improvements covered by the patent sued on. The model was a hat in all respects constructed like the hat described in the specification of the patent sued on. That application was rejected by the commissioner, and by the board of examiners, on appeal. There can be no doubt on the evidence, that Adams invented, as early as September, 1857, the improvements covered by the plaintiffs' patent. The defendant has failed to show that such improvements existed previously. The testimony of Mealio, Knox, and Rahmer does not carry back to a date earlier than 1860, the hats which they knew containing the patented improvements. As to the hats of Rosenswig, the evidence is satisfactory that their date was not earlier than 1858 or 1859. As to the Davis hats, the proof shows that they were made as copies of the hat deposited in the patent office by Adams, in connection with his application of September, 1857, such hat having been used as a pattern from which some hats were made, from one of which Davis made his hats.

Adams, in 1861, assigned to Slicer a half interest in the improvements, and then a new application for a patent was made by Adams and Slicer. No defence is set up that the improvements were in public use or on sale, with the consent and allowance of Adams, for more than two years prior to the application of 1861; and there is no evidence that Adams knew there had been any public use or sale of his hat before such application of 1861.

There must be a decree for the plaintiffs, for a perpetual injunction, and an account of profits, with costs.

MALLORY, The ELIZA. See Case No. 4,365.

Case No. 8,994.

MALONE v. BELL et al.

[1 Pet. Adm. 139.] [1]

District Court, D. Pennsylvania. 1805.

SEAMEN—WAGES — PROOF OF BEING ON BOARD—LOG BOOK—LEFT SICK IN FOREIGN PORT.

1. A seaman left sick in a foreign port, and ordered to stay until the ship returned; but left the port. Ship returned and found he had sailed in another vessel. [In a libel for wages it was held that the] ship's articles [were] prima facie, evidence of the seaman having been on board.

2. By the act of congress [of 1790 (1 Stat. 133)] the log-book entry is made proof of the time of entry on board, &c. Misnomer in the entry in log-book.

3. Receiving a seaman on board after he has neglected to render himself at the time appointed, does not remit the penalty.

4. In cases of desertion the entry on the log-book is necessary, but not incontrovertible.

[Cited in Douglass v. Eyre, Case No. 4,032; The Martha, Id. 9,144; Knagg v. Goldsmith, Id. 7,872; The Sarah Jane, Id. 12,348.]

5. Captain [was made] a party in the libel, but no process [issued] against him. Offered as a witness, and refused.

[Questioned in The Trial, Case No. 14,170. Cited in The William Harris, Id. 17,695; The Fortitude, Id. 4,953.]

This case was heard on a libel [by Andrew Malone against William Bell, owner, and John Daly, master of the brig Mary] for wages during a voyage. The seaman was left, in the Havanna, sick in a hospital, where he was ordered, as the respondent alleged, to stay until the return of the brig Mary from a short voyage, to that port, where she intended to obtain part of her home cargo. The sailor did not stay; but came home in the brig Smilax, which sailed for Philadelphia, previous to the return of the Mary to the Havanna. He claimed wages for the voyage.

In this case several points arose.

1. It was insisted by the respondent that the articles which were produced, with the signature of the sailor by the name of Malone were not sufficient proof that he was actually on board.

THE COURT was of opinion that the articles are prima facie evidence of the fact, and must be taken as such till the contrary appears.

2. A charge of one day's pay for absence each hour, after that appointed at the foot of the articles for rendering on board, was made by the respondent. It appeared that the sailor (whose having gone by different names, was offered to be proved) was entered in the log-book by the name of Miller, as coming on board two days after that in which the hour for rendering was designated. The libellant's counsel contended,

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

that although the act of congress is imperative on the keeper of the log-book, to make an entry of the absence and coming on board of a seaman, yet the fact ought, in addition to the entry, to be proved by other testimony. The copulative "and" shews that it is only part of the proof.

THE COURT was of opinion that the entry in the log-book is made by the act of congress, legal evidence of the time of coming on board, and of the absence occasioning the mulct, on the delinquent seaman, of one day's pay for every hour's omission to render himself on board. He said that it would be highly embarrassing to masters and owners, if this fact required supplementary proof. The compulsion upon the mate, or keeper of the log, to make the entry, was introduced to control the general rule of law, that receiving a seaman on board who had committed an offence, amounts to a release or pardon. This case must be an exception to that general rule: for if the receiving on board is to be construed as a release, the penalty could in no case be exacted. The law would, on that construction, be rendered nugatory. The entry in the log-book is therefore necessary, to shew that no release was intended, as well as to ascertain the fact with greater accuracy. In the case of desertion he said he had always considered the entry in the log-book evidence of the fact; but not conclusive, though indispensably necessary. In this case before me, as well as in that, testimony had been admitted to prove permission to enter on board at an hour or time different from that mentioned at the foot of the articles; and in the other case, leave of absence proved, has controlled the charge of desertion, prima facie proved by the entry. In a penal law strict compliance is required. He thought the entry in the log-book, by the name of Miller, was entitled to further consideration.

3. The captain (who was made a party in the libel, but no process had issued against him) was offered as a witness to prove the facts alleged in the respondent's defence.

THE COURT said that in these cases, he had constantly refused to admit the captain. He is liable for the wages, at the will of the mariner, who has several remedies, though he can have but one satisfaction. Protests had been entered against this opinion; but they had never been prosecuted before the superior court. It was his wish, that the point should be put in a shape, to be determined by the circuit court. The master he conceived was interested in the result; though not immediately. If a decree passes against the seamen in a procedure in rem, or against the owner, it may be given in evidence to repel a suit against the master. The master was rejected as a witness.

The parties in this case compromised, and no final decision was given.

Case No. 8,995.

MALONE et al. v. The PEDRO.[1]

District Court, S. D. Florida. Aug. 1878.

SALVAGE—MASTER — INTENT TO WRECK—REASONABLE PRECAUTIONS—CORRUPT AGREEMENT—BAR TO RECOVERY.

[1. In a salvage case a master's neglect of reasonable precautions to prevent wreck, and of reasonable efforts to remedy the same without help, is evidence that the ship was willfully wrecked by him.]

[2. In a salvage case facts tending to show that the master willfully caused the wreck may be considered, although not introduced by either party, and brought to the court's notice by accident.]

[3. The wrongful act of a master in wrecking his ship does not bar the claim of a salvor not in collusion with him.]

[4. Associates of a salvor with whom a master corruptly agrees to wreck his ship cannot recover salvage.]

[This was a libel for salvage by Samuel Malone and others against the American brig Pedro (S. J. Moulton, claimant). E. M. Stoddard intervened and contested the claim.]

L. W. Bethel, for libelant.

W. C. Maloney, Jr., for respondent.

G. Bowne Patterson, Jr., for intervener.

LOCKE, District Judge. This vessel, bound on a voyage from Nassau, N. P., to Falmouth, went ashore near Sandy Key to the westward of Grand Bahama, at about 20 minutes past 1 on the morning of the 14th of July last, and at daylight was boarded by the libelants; but, as the tide was rising, their services were not accepted, and she soon floated off. A pilot was then employed to pilot her into deep water. The next morning, while being piloted out, at about high water she again struck. The libelant came alongside with his vessel, the Fearless, took out 69 hogsheads and 15 barrels of sugar, carried out an anchor, and got her afloat, and came to Key West with her. So far the case is that of simple salvage service, and, was there nothing else alleged, would require but a few words to dispose of it. But another view of the case has been presented which demands a more thorough and careful examination of the relations existing between the master and Malone, the principal libelant. An intervening petition has been filed, alleging that the running ashore of said brig was in accordance with a corrupt and collusive understanding entered into between them, and, in behalf of parties interested in the cargo, praying that all salvage be denied. This collusion is positively denied by both masters, but the petitioner has been admitted as amicus curiae under a rule of court, and heard.

This view of the case can only be examined through the medium of the connection and

[1] [Not previously reported.]

relation of circumstances, and is, as admitted by the petitioner, at best but a case of circumstantial evidence. Let us examine briefly, but carefully, the circumstances, and see what conclusion we reach. The brig Pedro was lying in the port of Nassau; also, the schooner Fearless. The master of each vessel knew the other by sight, and his position and occupation. The master of the schooner is shown to have been on board the brig twice, at least; apparently at one time examining some lumber that was to be sold, and again at the sale. At one time he met the master of the brig, and went into the cabin, as he says, to get a drink of water. He is also seen in the vicinity of the brig on the dock. On Wednesday morning at about 8 or 9 o'clock, the schooner sailed, ostensibly bound on a freight voyage to Key West, intending to call and get freight at Grand Bahama, as she was cleared for Bimini via Grand Bahama. That was, as the master says, anywhere along the Bahamas that he wished to stop to get freight. She reached Stirrup Key, a distance of about 50 miles, that afternoon, and her master says, the weather being squally, he went into Great Harbor, and anchored. The next morning he went to the lighthouse, and was advised by the light keeper to secure his vessel, as the weather was threatening. This he did, and remained at anchor Thursday, Friday, and Saturday morning. It does not appear that he took any freight at this place. In the meantime the brig Pedro had sailed from Nassau, at about 5 o'clock Friday, p. m., and passed Stirrup Key at a short distance that Saturday morning, at about half past 1. Between 5 and 6 the schooner got under way, and proceeded in the wake of the brig toward Settlement Point, the most westerly point of Grand Bahama, and the nearest to her destination. The vessels sailed within sight of each other during the afternoon and until evening, when the schooner came to anchor at Settlement Point. The brig kept on her course until 10 minutes past 10, when she rounded the point and stood up N. N. W. Captain Moulton, master of the brig, says that at 10 minutes past 10 this point bore due east, distant about 8 miles. Lunn, the first mate, introduced for petitioner, whose watch it was on deck, says it was but four miles distant.

This is the only essential point in the case upon which the testimony of the witnesses does not agree, and in determining the propriety of the course subsequently steered, it becomes a question of some importance. Distances, especially at sea, as well as space of time, unless accurately noted, are very liable to be mistaken and misstated in testimony, even by those the most truthfully disposed, and if there are any well-established circumstances which can be taken as a starting point to assist us in determining the truth, they should be examined. At 5 o'clock Saturday, p. m., before approaching Settlement Point, while running on a N. W. course, the brig was kept off a half point. This is a fact shown by the testimony of the mate and the entries of the logbook, and one which no one could have any object in misstating. The brig was running N. W. with a N. E. wind, bound around Settlement Point, and every mile which could be safely made to the northward and eastward would be so much saved. I am satisfied that only one thing could have induced Capt. Moulton to keep off at this time, especially against an easterly current, as there then was, according to Malone's testimony, and that was a fear of approaching too near the shore. The brig must have been, therefore, at that time, 5 o'clock, approaching the coast of Grand Bahama nearer than he deemed prudent, and kept off, but, if his statement that, at about 10, Settlement Point was 8 miles distant is correct, he must have been running the course she was, with a reasonable allowance for leeway, 6 or 8 miles from the shore, which his changing his course disproves. Again, instead of examining his past course, to see what his position was, let us see what the result shows it to have been. At 20 minutes past 1 the brig struck, about 12 miles to the northward of the point, and, admitting the master's statement to be correct, more than 8 miles to the eastward of the course steered, and this with a northeast wind, which would show she had drifted 8 miles against the wind while making 12 miles headway with a fair breeze, as it appears there was that night. This is unreasonable, even allowing for a strong current setting in over the reef.

Both of these examinations show that the position given by the mate is without doubt correct, and the brig was not far from 4 miles west of Settlement Point when she was put upon a N. N. W. course. This course was as nearly parallel with the trend of the reef as could have been selected, and running on it in 3 hours and 10 minutes she struck. The course steered, together with the force of the current, was undoubtedly the cause of going ashore. The master admits, or rather claims, this, stating that it was the force of the current that put him ashore, and that he knew nothing about the currents but was guided by the charts. Accidents in navigation will constantly happen, and no man can be held accountable for ignorance of facts unless it is shown that he has been criminally negligent in not informing himself of them; and the question as to whether the stranding has been accidental or intentional depends upon, and can only be examined through, the knowledge the master is known to have had of the actual condition of the locality, currents, and winds. If a master has had his vessel swept ashore accidentally, by a current of which he was ignorant, or of which there is no reason to believe him informed, although the result is the same, the presumption is in favor of his innocence; but if the

circumstances are such that the presumption is of his knowledge, it is equally so of his guilt.

At the trial of this case, the master presented, as the chart by which he had been governed at the time of going ashore, a new chart, having no indications, by arrows or otherwise, of the currents; but accidentally a chart, having designated upon it plainly and distinctly a strong current flowing directly on to the reef where this vessel struck, came to the notice of the court, and, upon inquiry, was admitted by Capt. Moulton to be his property, by which he had been sailing previously, but not the one by which he had been sailing that day. This information came to the court incidentally, and the question whether it could properly be considered in this case has been duly weighed. It is true it was not introduced by either party, but it was important in the case, as showing conclusively that the master had in his possession the means of being well-informed of the current which had driven him ashore, and of which he had stated his ignorance. The matter was brought out during the trial, while all parties were present, and Capt. Moulton permitted to make any denial or explanation he saw fit. There is no doubt in my mind of the propriety of accepting the fact thus shown, and giving it due weight. It is probably true that it was not the chart that had been used that day, but the new chart which had been used, only extended to the vicinity of Stirrup Key, and this one must have been in use since leaving Nassau. To any one carefully examining this question there must be a very strong presumption that the master was informed of the currents as shown on that chart. Can it be possible that a capable and intelligent master, as I believe Capt. Moulton to be, a seaman and navigator of experience, could have been ignorant of the currents on a dangerous reef along which his voyage was leading him, when he must have had in use for weeks a chart upon which they were as plainly shown as flying arrows on a chart could portray a current?

The well-known course of the Gulf Stream, a current so generally known among seafaring men, by being shown on all charts, even the one introduced at the trial of this case as having been in use by the master of that day, would have demanded the attention of any careful man, and raised the question whether there was not a current setting in over the banks along whose edge he was sailing. I must again say that the presumption that the master of the brig was informed of this current is so strong as to preclude even a reasonable doubt. But the fact that the master was aware of a current does not necessarily show that he was not deceived in its directions or force, the strength of the wind, or speed of his vessel, and innocent of any intentional wrong in permitting his vessel to run aground. Let us examine his conduct further. At 20 minutes past 1 his vessel struck, with the shoal water to the windward. The wind was favorable. The vessel had been going but about five knots, and the master found that it was about low water. There was a full moon that night, and high tide. The sea was smooth, there being a light breeze from the eastward, and the master had a boat sufficient to carry out an anchor. The mate, who had served in a surveying vessel in the vicinity, and was well acquainted with the locality, says an anchor could have been carried out and she got off into deep water by going half her length. He asked if he should not carry one out, but the master replied, "No," that he did not want to hurt his boat. The sails even, were not used in attempting to float her as the tide rose. What would have been the course of a master sincerely regretting the disaster, and anxious to remedy it at once with the least expense to those whose property was confided to his custody? What could have prevented the carrying out of an anchor, and how promising must have been the prospect of success? No excuse has been offered; no denial of the reply made to the inquiry of the mate. Nothing was done toward relieving the vessel from the bottom. All such idea seems to have been at once abandoned, and the idea that she could not be floated without discharging accepted, as the master told his crew they might all turn in, as probably they would have to discharge the cargo on the next day. Under the circumstances, the fact that the master, instead of making some effort to relieve his vessel, caused signals to be displayed, by putting burning rags dipped in oil in the crosstrees, and accepted the idea that his cargo must be taken out, argues either gross inefficiency or willful neglect of duty. The next morning, as the tide rose, it appeared that the brig would float off without assistance, and nothing was done either to relieve her or control the direction of her coming off. So she was permitted to drift over the shoal upon which she had struck into a position from which the master considered the services of a pilot necessary to extricate her. In the meantime the look out on board of libelant's vessel, the Fearless, lying at anchor 11 or 12 miles distant, saw the signal light, very soon, if not immediately, after it was made, and reported it to Malone. He at once took on board 11 extra men from the shore, got under way, and was at the brig, ready to render assistance, the first thing in the morning; but the vessel was nearly afloat before his arrival, and his services were not accepted. It has been argued that the refusal of Capt. Moulton to employ Malone, or permit him to assist his vessel at this time, is a conclusive answer to the charge of collusion. Had he used every power of his own to rescue his vessel, and taken such precautions as had prevented a further disaster, this would, I grant, have

been so; but he did neither, and the result was apparently much more favorable to Malone, than had his services been accepted in the first instance. The vessel was about floating, and shortly after she drifted off by the force of the current. There was at that time no opportunity to discharge cargo, carry out an anchor, or render any apparently valuable service, so as to deceive the most simple as to its necessity.

A man will seldom if ever commit a crime without a motive. In the present instance what motive, if any, could have actuated Capt. Moulton to have entered into a collusive arrangement for the procuring of an opportunity to assist his vessel but a chance to make money for himself? And this could have been accomplished only by a division of salvage with the master of the vessel assisting him. Had assistance been rendered the first time ashore, no court or board of arbitrators could have given any considerable amount of salvage, and the service would have been as nothing compared with what a subsequent opportunity offered. The result shows that if there was at that time a collusive understanding with Capt. Moulton, the very course was taken to not only enable him to share more largely, but at the same time relieve him in a great degree from responsibility of the disaster by having his vessel in charge of a pilot. After his vessel had been permitted to drift over the shoal upon which she had struck into difficult navigation, Capt. Moulton brought her to anchor and inquired for a pilot, and one Hanna, belonging to another wrecking schooner which had arrived, presented himself, with good recommendations, and was accepted. with the understanding, as Moulton says, that if he got the brig out clear he was to receive $200. The master of the Fearless testifies in the main case that he left the brig just after she floated, and started on his Key West trip, and, in speaking of Hanna, selected as pilot, disclaimed any acquaintance with him, speaking of him contemptuously as if he would scorn the idea of any intimacy; yet we find, upon a further examination of the case, that, after Hanna had been employed as pilot Malone took him on board his vessel, the Fearless, where they remained from an hour to an hour and a half, and upon coming back to the brig both went aft and had a conversation with Capt. Moulton and that, instead of starting on his Key West trip, he remained on board the brig nearly all day, and, upon leaving, anchored his vessel for the night but about four miles from her. Lunn, the mate, states that, while lying at anchor that day, upon his asking the pilot if he thought he could get her out, he pushed up against him and, in reply, asked: "Why; do you want her to come out?" This remark, in view of the surrounding circumstances, convinces me that there was in the mind of the pilot the idea that there were some who did not want her to come out, and that that idea had come to him in such a manner that he had no fear in mentioning it to even the chief mate of the vessel. Had the vessel finally come out safely, we might look upon this as a meaningless remark, but as the result shows she did not come out, it becomes one of no small significance.

It is intimated by the claimant that there may have been collusion between the libelant, the pilot, and the mate. Everything tends to disprove the mate's complicity, and nothing to support it. He could have had nothing to do with first running the vessel ashore, and was the most ready in suggesting means to get her afloat. It is beyond his power to influence the employment of assistance, and there was no need of his aid, or motive for him to engage in such a scheme. Such idea is too unsupported to require a moment's consideration. But is it at all probable that the pilot would have suggested this idea of some one's not wanting the brig to come off to the mate, unless he had reason to believe some one beside Malone and himself were in the plot? This remark of the pilot explains what followed. The next morning the brig got under way with a light, fair wind, she heading N. W. with a S. W. wind. The water was so clear that, as Malone says, you could see anything on the bottom distinctly, and he found no necessity for sounding to ascertain the depth when wanting to carry out an anchor soon afterward. She was drawing less than 10 feet, in charge of a pilot whose home was in the immediate vicinity, and to whom the bottom must have been as familiar as his own dooryard. It was high water. Yet, notwithstanding all these favorable circumstances, no sooner had the tide commenced to fall than she struck again. Libelant Malone, whose vessel was still at anchor, waiting apparently until wanted, was soon on hand ready to assist, and his crew was employed to discharge cargo, carry out an anchor. and get her afloat. This they did during the day, and brought her to anchor for the night. Capt. Moulton's course toward the pilot Hanna, after his vessel is again afloat, appears open to severe criticism, and adds materially to the accumulated presumption of bad faith. Although Hanna had, after his employment as pilot, been on intimate terms with Malone, and, after undertaking to pilot the brig out, had got her aground without, as I can see, the least extenuating circumstances, and given him an opportunity to earn a large salvage, yet Capt. Moulton appears to have had no suspicions of him, but on the contrary says that as he had not then got out from among the shoals he still wanted his assistance. He kept him on board his vessel, and brought him to Key West, a distance of nearly 300 miles. He had come but a short distance from home for an apparently temporary service; had been employed conditionally, and failed in his undertaking, forfeited all compensation, and not only that, but given Capt. Moulton a right

to have any feeling but a kindly one towards him; yet, notwithstanding this, he sets him to taking account of cargo, and permits him to remain on board and do duty in place of his first mate, who had sprained his wrist. In explanation, Capt. Moulton says: "When we passed Settlement Point, where the pilot belonged, we were some 6 or 8 miles distant, and the pilot said it would cost him something for a boat to get ashore. He wanted to go to Key West to see some friends, and asked me if I would take him, which I consented to do, telling him he might have to work, as my mate had sprained his wrist."

Now let us see how this explanation agrees with the facts of the case. Both Capt. Moulton and Malone say they first started for Nassau, until the wind came ahead. Now, if bound towards Nassau, with the current of the Gulf Stream sweeping rapidly to the northward, why was Capt. Moulton 6 or 8 miles distant when passing Settlement Point when the Fearless had anchored within 800 or 900 feet of the same shore? Again, the Fearless had on board 11 men, whom she landed at the Point, and the brig was in company and exchanged passengers, showing conclusively that, while there, there was communication both between the Fearless and the shore and the brig and the Fearless, which offered every opportunity for the pilot's going ashore. If the brig was shorthanded, the Fearless had an overbundant crew, whose interest in her not only permitted but demanded that they should furnish help to work her into port. If the pilot was anxious about the amount he says it would cost him to get ashore from the brig Pedro, how did he contemplate returning from Key West, unless he had such a claim on Malone as would authorize him to demand a gratuitous passage, or he was expecting to receive compensation for some service? Notwithstanding the fact that he had run a vessel ashore with no possible excuse, and lost the $200 he was to have earned, he takes the matter so coolly as to immediately plan a visit to some friends at a distance, and had the audacity to ask a passage for nine days' voyage from the man he had so recently injured. Can it be believed that he considered he had lost his $200, or greatly offended Capt. Moulton? The presumption that his object in coming to Key West was rather to look after interests that he had in the hands of Capt. Moulton or Malone is too strong to be easily overcome. The coming to Key West, a distance of 270 miles, the greater part of the way directly against the current of the Gulf Stream, instead of going to Nassau, but 150 miles, with a favorable current, which is said was on account of head winds, although of but slight importance, yet favors the hypothesis of collusion rather than otherwise, as in all such cases it is desirable to remove the place of examination and settlement as far as possible from the place of agreement, where personal association and intimate relations might be more easily proven, and suspicious circumstances more readily remembered. The same may be said of the discharge of the brig's crew. Yet these are not inconsistent with an hypothesis of innocence, and were it not that they add to the presumption, already so strong, I should not mention them at all.

Reviewing at a glance the entire case, we find that the schooner left Nassau, waited two days and a half at Stirrup Key until the brig had come out and passed her, when she got under way, passed the brig, and is again passed by her, while at anchor at Settlement Point. The brig, while in sight a few miles beyond, is driven ashore by a current shown distinctly on a chart which had been in use by her master within 36 hours, at the furthest, before. Every circumstance promised an easy relief from the difficulty, but not an effort was made, but instead a signal light was displayed, and the crew told they might turn in, with the remark that they would have to discharge cargo the next day. This satisfies me that the master was willing she should remain there until discharged, and that, had he not been willing for her to go ashore, he would not have been so willing for her to remain; that in this he must have had some motive, and that motive must necessarily argue an understanding and agreement with some one by whose assistance money was to be made. The facts of the association of Malone with the pilot Hanna, and the subsequent running ashore of the brig, and that these awoke no suspicion in Capt. Moulton's mind, as well as the fact that the pilot was possessed of the idea that some interested parties were willing that she should not come out, satisfy me that the second grounding was neither accidental nor unintentional.

Wreckers are not responsible for the misconduct of masters in intentionally stranding their vessels, if innocent themselves of any collusion. The fact that Capt. Moulton ran his vessel ashore intentionally, or permitted her to go ashore through criminal neglect does not prove that Malone, by assisting him in relieving her, became a participant in his guilt. The guilt or innocence of Capt. Moulton has nothing to do with the question on trial, unless Malone is shown to have been implicated. Let us see how far he had been connected with the brig before his assisting her, and what will be a reasonable conclusion as to his knowledge of Capt. Moulton's intentions. He was in company with Capt. Moulton in Nassau. He came out, and although bound on a freighting voyage to Key West, stopped at Stirrup Key, where no freight offered, until the brig had passed in plain sight, then steered to the last port nearest his destination and came to anchor, although he had taken in no freight, but had cleared with the declared intention of stopping at the several ports of the Bahamas for cargo. The signal of the brig was seen almost immediately

upon its being made, and so confident was he that there would be something to do that, although he had then a crew of 12 men, coming to anchor as he did about quarter past 8 in the evening, and getting under way at about 2 in the morning, he procured in the meantime 11 men from ashore. His was the first boat at the brig. He was in communication with the pilot and took him on board his vessel. He spent the greater part of the day on board the brig, and he and the pilot were aft in conversation with the master by themselves. He anchored his vessel that night where the brig could be easily reached. There was sufficient wind for the brig to get under way in the morning, but the Fearless, with her extra crew, remained until again needed, and was the first ready to render assistance. If it was the intention of Malone, at the time of clearing from Nassau, to stop at but one point, and he was willing that that should be known, it would naturally be presumed that he would clear for Bimini via Settlement Point; but if he intended to stop at other points, why do we find him leaving all such behind him for the sake of being at Settlement Point at a certain time? The moment we conclude that Capt. Moulton intended to permit his vessel to go ashore, we must also conclude that he had a partner in the arrangement. Nothing could be made without a division of earnings, and he was not going to risk the consequences with no prospect of compensation. The idea of a co-conspirator can point to no one but Malone.

It is not necessary to show the character or extent of the collusion, or whether they entered into any particular agreement in relation to the part which each was to act, or the proportion of the spoils each was to share. It is sufficient to show such a state of facts as induces a reasonable presumption that they understood each other, and understood that the property was to be put in jeopardy, and something could be made by assisting it. I am not unmindful of the importance of the conclusions reached to the parties interested, but I have not arrived at them without a critical examination of the facts in their every bearing, and until satisfied that the circumstances are utterly inconsistent with the idea of innocence. These circumstances, each one perhaps trivial in itself, when united and examined together, form in my mind proof of collusion as nearly positive as the ordinary connection between known and inferred facts may ever permit. No party associated in any way with libelant Malone can receive anything, and the libel must be dismissed.

[NOTE. At a subsequent date, F. Englehard & Co., filed a libel, in this court, against the Pedro, for damages to cargo. In the meantime the vessel had been sold under a decree entered in this cause, and the proceeds brought into court. The damages proven by Englehardt & Co. far exceeded the whole proceeds from the sale of the vessel. So at this hearing it was decreed that the libelant should receive the whole proceeds of the sale, after the payment of all costs, expenses, taxes, wages of the crew, and the costs of the suit then before the court. Case No. 4,489.]

MALONE (UNITED STATES v.). See Case No. 15,713.

Case No. 8,996.

MALONE v. WESTERN TRANSP. CO.

[5 Biss. 315.] [1]

Circuit Court, N. D. Illinois. June, 1873.

MASTER AND SERVANT—NEGLIGENCE—PLEADING NEGLIGENCE—DUTY OF SERVANT—OF SHIP OWNER—FELLOW SERVANTS.

1. In an action by an employe against a corporation for injuries received in falling through a hatchway, it is not a sufficient allegation that the master and mates were negligent in leaving the hatchway open and not placing proper lights or guards around it.

2. As a corporation can only act through agents, the only proper charge of negligence in such case is that the boat was improperly constructed and that the accident happened by reason of such defective construction while the plaintiff was exercising due care.

3. A person employed on a boat to assist in unloading must be presumed to possess the usual knowledge in regard to the construction of the vessel, and unless the hatch was located in an unusual place he is bound to know its location, and it is as much his duty to see that the hatch is closed or properly protected as it is the duty of the captain or mates.

4. A ship owner who provides a sea-worthy vessel, properly equipped, and commanded by competent officers, has discharged his duty towards the subordinates, and cannot be held liable for mere neglect of the officers.

5. Subordinates must be deemed to have entered upon the service with the understanding that they took their chances of negligence or carelessness on the part of others engaged in the common employment.

[Cited in Couillard v. The Victoria, 4 Fed. 160; The Egyptian Monarch, 36 Fed. 776, 777.]

This was an action on the case to recover damages for injuries received by plaintiff [Thomas Malone] in falling through a hatchway while in the employ of defendant. The declaration alleges that defendant was on the 14th of August, 1870, owner of the propeller Chicago, then lying in Chicago river, in this city; that plaintiff was employed as a laborer on board of said propeller to assist in the discharge of a cargo; that it became and was the duty of the master and mates of said vessel to use due care and diligence for the protection of plaintiff from accident or injury, while so employed; that said propeller was removed from her dock, near State-street bridge, in the night-time, to the dock of the Chicago Dock Company, on the South branch, when plaintiff, about four o'clock, a. m., on the 15th of August, while it was yet dark, was ordered to remove certain platforms for threshing machines, which stood

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

in the middle gangway on the starboard side of the boat, to the larboard side of the boat for the purpose of making room to get at some freight to be landed on said dock; that there was a hatchway known as the "middle hatch" in said gangway, which was carelessly and negligently by defendant and the master and mates of said boat left open without any guard or signal-lights around the same, and while engaged in removing said platforms as directed by the officers of said boat, and in the exercise of due care and diligence, plaintiff, by reason of said hatchway being left open and unprotected and without proper lights, fell through said hatchway into the hold of the same, and was greatly injured. Defendant filed a general demurrer.

H. Cummings, for plaintiff, cited the following authorities: Dixon v. Ranken, 1 Am. Ry. Cas. 569; Farwell v. Boston & W. Railroad, 4 Metc. (Mass.) 49; Gallagher v. Piper, cited in Lovegrove v. London, B. & S. C. Ry. Co., 16 C. B. (N. S.) 669; Snow v. Housatonic Railroad, 8 Allen, 441; Curley v. Harris, 11 Allen, 112; Chamberlain v. Milwaukee & M. Railroad, 11 Wis. 238, 252; Chicago & N. W. R. Co. v. Swett, 45 Ill. 197; Perry v. Marsh, 25 Ala. 659; Walker v. Bolling, 22 Ala. 294.

Miller & Frost, for defendant, cited the following authorities: Farwell v. Boston & W. Railroad, 4 Metc. (Mass.) 49; Albro v. Agawam Canal Co., 6 Cush. 75; Illinois Cent. R. Co. v. Cox, 21 Ill. 20; Honner v. Illinois Cent. R. Co., 15 Ill. 550; Chicago & A. R. Co. v. Keefe, 47 Ill. 108; Saund. Neg. 128, 144, and cases there cited; Morgan v. Vale of Neath Ry. Co., 5 Best & S. 570; Gallagher v. Piper, cited in Lovegrove v. London, B. & S. C. Ry. Co., 16 C. B. (N. S.) 669; 1 Redf. Rys. 521.

BLODGETT, District Judge. The only question is whether there is a sufficient cause of action set out in the declaration. Defendant, being a corporation, can only act through agents, and as there is no allegation that the boat was improperly constructed and so made dangerous to plaintiff, or that the accident in question happened by reason of such defective construction while plaintiff was exercising due care, I cannot see that the allegations of negligence by defendant directly are of any weight, and the case must be considered as standing solely on the allegations as to the negligence of the master and mates.

The master, mates and crew of the vessel were all employes of defendant, each with different duties, but all engaged in a common employment, which at this particular time was that of unloading this boat. But the plaintiff claims that he was acting in an inferior capacity and under the orders of the officers of the boat.

I am aware that there are adjudged cases making the distinction insisted upon by plaintiff. Little Miami R. Co. v. Stevens, 20 Ohio, 415; Gillenwater v. Madison & I. R. Co., 5 Ind. 340; Chamberlain v. Milwaukee & M. Railroad, 11 Wis. 238, 252. But the rule is undoubtedly well settled in this state and England, that an employer is not liable to a servant for injuries occasioned by the negligence of a fellow servant. Honner v. Illinois Cent. R. Co., 15 Ill. 550; Farwell v. Boston & W. Railroad, 4 Metc. (Mass.) 49; Illinois Cent. R. Co. v. Cox, 21 Ill. 20; Chicago & A. R. Co. v. Keefe, 47 Ill. 108. I am aware that there is a class of cases in this state holding that a railroad company is liable to an employé for not furnishing safe cars or roadway. Chicago & N. W. R. Co. v. Swett, 45 Ill. 197; Illinois Cent. R. Co. v. Jewell, 46 Ill. 99.

And the same rule, I think, was adopted in this court in the case of Daniel v. C. & R. I. R. R. Co.[2] by Judges Davis and Drummond. But this case contains no substantive allegation of negligence on the part of defendant itself in not providing a safe boat or one constructed in the usual manner, and, as I said before, no such allegations of negligence are made against defendant as bring the case within the rule in Chicago & N. W. R. Co. v. Swett, supra, and the class to which it belongs. The declaration in substance charges that the accident to plaintiff happened by reason of the negligence of the master and mates in leaving the hatch open and not placing proper lights or guards around it.

Plaintiff must be presumed to possess the usual knowledge in regard to the construction of steamboats, and as there is no allegation that this hatch was in an unusual place, he certainly ought to have known that there was a hatch there. His own senses would tell him it was dark, and admonish him to use care. He was passing from one side of the boat to the other, where he should have known, and, I think, must be presumed to have known, there was a hatchway. It was as much his duty to see that the hatch was closed, or properly protected if open, as it was the captain's or mate's. No one, I presume, will claim that it was the duty of the master or mate to close the hatch or hang up a light. They had the general supervision of the boat, and it was their duty to see that each one employed in the work of managing the boat performed the work allotted to him. This is the utmost of their duty, but if they neglected that duty, and the plaintiff was injured by reason of the negligence of a deck hand who should have closed the hatch, or a porter who should have hung up a light, it is but the negligence of a fellow servant, in and about a common business. There is no charge of incompetency on the part of the officers. And it seems to me the ship-owner cannot be held liable for mere neglect of officers to perform their duty. If he provides a seaworthy ship, properly equipped, and commanded by competent officers, he has discharged his duty toward the subordinates. They must be deem-

[2] [Case unreported.]

ed to have entered upon the service with the understanding that they take the chances of the neglect or carelessness of any or all others who are engaged in the common employment and occupation of loading, unloading or running the boat. Demurrer sustained.

NOTE. It is the doctrine of the Illinois supreme court that the employer is not responsible to the employé for injuries occasioned by the negligence of his fellow servant engaged in the same line of employment. Honner v. Illinois Cent. R. Co., 15 Ill. 550; Illinois Cent. R. Co. v. Cox, 21 Ill. 20; Moss v. Johnson, 22 Ill. 633; Chicago & A. R. Co. v. Murphy, 53 Ill. 336; Same v. Keefe, 47 Ill. 108.

But it is nevertheless the duty of the employer to provide safe structures and apparatus, competent employés and all appliances necessary to the safety of the employed. Chicago, B. & Q. R. Co. v. George, 19 Ill. 510; Chicago & N. W. R. Co. v. Swett, 45 Ill. 197; Illinois Cent. R. Co. v. Jewell, 46 Ill. 99; The Norway v. Jensen, 52 Ill. 373; Chicago & N. W. R. Co. v. Jackson, 55 Ill. 492; Perry v. Ricketts, Id. 234; and the recent case of Chicago & N. W. R. Co. v. Taylor [69 Ill. 461].

See, however, an employé of a railroad company may recover damages for personal injuries due to the neglect of agents of the company, whose duty it was to keep engines in proper repair, even though the directors and superintendent had no reason to susupect negligence or incompetency on the part of such agents. Ford v. Fitchburg R. Co., 110 Mass. 240. Nor is he barred from recovering for injuries sustained by a boiler explosion, by the fact that he was acting in intentional violation of the rules of the company, unless the accident was due to such violation; nor by a rule of the company providing that he must be responsible for the condition of his engine. Id.

Case No. 8,997.

MALONEY v. BUTTERLY et al.

[N. Y. Times, April 16, 1864.]

District Court, S. D. New York. 1864.

AFFREIGHTMENT — BILL OF LADING — RECEIPT BY CONSIGNEE—REPRESENTATIONS.

[A bill of lading stating, according to representations by the shipper, the weight of cargo shipped without weighing, binds the consignee, after receipt without weighing, to pay freight for the stated weight.]

This was a libel for freight [by James Maloney against Peter Butterly and others].

The libelant, who was owner of the barge John Maloney, took on board her at Philadelphia a cargo of coal, to be carried to New York. The coal was put on board by the vendor, consigned to the respondents. It was not laden on board by weight, but was received by the libelant on the representation of the shipper, and the libelant signed a bill of lading on those representations, acknowledging the receipt of 209 tons of coal on board, and agreeing to deliver it to the respondents at New York. The vessel arrived in New York, and the assignees of the bill of lading received the coal. They did not exact a measurement or weight of it as delivered from the boat, but carried it across the city to their own yard, where it was weighed, without the supervision of the carrier; and they then declared that it was six tons short, and declined to pay freight on that amount.

Mr. Donovan and Judge Whiting, for libelant.

Mr. Brown, for respondents.

Before BETTS, District Judge.

HELD BY THE COURT: That a rule of greater stringency may prevail as to a purchase and sale of property than is exacted in relation to a mere bailment of it for carriage. That the vendor of the coal acted as agent or factor of the purchaser, and is reasonably bound to satisfy the carriage price to the carrier, if the consignee does not accept the consignment, and pay the agreed price at the place of destination. That the respondents are concluded from taking the defence of short weight. They are to be regarded as the factors of the consignor as well as consignees, and in that capacity to have virtually admitted and liquidated the quantity of the cargo, in relation to the freight payable to the carrier. A difference of quantity on the adjustment of the transaction between consignor and consignee must be adjusted between them. They are both to be regarded as having assented through their acts and acquiescences to the rightfulness of the libelant's demand as an agreed compensation for the services rendered.

Decree for the libelant for his claim, with interest.

MALONEY v. SEARS. See Case No. 7,494.

Case No. 8,998.

MALTBY et al. v. BOBO.

[14 Blatchf. 53; 2 Ban. & A. 459.] [1]

Circuit Court, S. D. New York. Nov. 18, 1876.

PATENTS—INFRINGEMENT—INJUNCTION—NO INTEREST.

The fact that a defendant who has sold an article which infringes on a patent, sold it on behalf of its owner, and had no interest in it, or in its sale, is no ground for refusing to grant an injunction against him.

[Cited in Steiger v. Heidelberger, 4 Fed. 458; Estes v. Worthington, 30 Fed. 465; Armstrong v. Savannah Soap Works, 53 Fed. 126.]

[This was a bill by Douglass F. Maltby and others against Angus L. Bobo for an injunction to restrain certain infringements.]

Francis Forbes, for plaintiffs.

Andrew J. Todd, for defendant.

JOHNSON, Circuit Judge. The plaintiffs' bill of complaint contains all the averments of fact to make out their right and the infringement thereof by the defendant. The facts are verified by the usual oath. The

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 2 Ban. & A. 459; and here republished by permission.]

right of the plaintiffs is further supported by affidavit, showing that the plaintiffs have obtained against another defendant, in this court, an interlocutory injunction, and that, after some litigation, defendant submitted to a decree. Upon this state of the case an injunction is moved for. The defendant presents no denial of any of the alleged facts, by affidavit or otherwise, but only alleges, by way of plea, that, in selling the nail pullers mentioned in the bill, he was acting as salesman for one Dickerman, the owner of the nail-pullers, and that he had no interest in the nail-pullers, or in the sale of them, except as the employee of Dickerman, to dispose of the same. The plea has been set down for argument, but has not yet been heard; but I do not understand, that any absolute rule of practice prevents the granting of an injunction in such a case. It is, of course, necessary to look at the sufficiency of the plea, which I regard as presenting no defence to the bill. A wrong-doer cannot set up that he is doing wrong on account of a third person, as a bar to his own responsibility. The principal, also, may be liable, if the injured party elects to look to him; but the person who is actually doing the wrong cannot escape liability. Inasmuch, therefore, as the case made by the bill is wholly undefended, and as the plea states the fact which is, in law, an infringement, an injunction must be granted.

Case No. 8,999.

MALTBY v. CONVERSE.

[Cited in Maltby v. Graham, 35 Fed. 206, 37 Fed. 691. Nowhere reported; opinion not now accessible.]

Case No. 9,000.

MALTBY v. STEAM DERRICK BOAT.

[3 Hughes, 477.] [1]

District Court, E. D. Virginia. March 29, 1879.

SALVAGE—RAISED FROM BOTTOM OF CHANNEL—DERRICK-BOAT.

A derrick-boat raised from the bottom of the channel of a public navigable river may be the subject of a libel for salvage in admiralty.

[Cited in Cope v. Vallette Dry-Dock Co., 16 Fed. 926; Aitcheson v. Endless Chain Dredge, 40 Fed. 254.]

[This was a libel by E. O. Maltby against a steam derrick-boat for salvage.]

R. M. Hughes, for libellants.

W. B. Martin, for Albemarle & C. Canal Co., intervener and claimant.

HUGHES, District Judge. This is a libel in rem for salvage in raising a sunken steam derrick-boat from the channel of the Blackwater river, near Franklin, Virginia. The libellants sent around from Norfolk to the wreck for the purpose, by way of Currituck and Albemarle sound, a wrecking schooner, furnished with chains, pumps, two divers, and a crew of two or three other men. The work of raising consumed about four days; but the schooner remained somewhat longer by the side of the derrick-boat until the hole in her bottom was made entirely safe and stanch. The schooner was gone from Norfolk in making the trip to and fro, and in executing the job, about fifteen days. The derrick-boat had been in the employment of the United States, on a hire of $250 a month, in removing obstructions to navigation from the channel, when it sprung aleak and sunk in ten feet water. It was owned by the Albemarle & Chesapeake Canal Company, of which Marshall Parks is president. The salving was undertaken by the libellant at the request both of Mr. Parks and of the United States officer in charge of the derrick-boat. The boat had no machinery for propulsion, or sails. It was a boat of two decks, with a mast for hoisting purposes, and a steam-engine and machinery. The United States continued to use the derrick-boat after it was raised from the channel by the libellants, and returned it in good condition to the Albemarle & Chesapeake Canal Company, after having had it in possession, in all, about four months. The vessel was libelled in this cause after its restoration to the possession of the company. The company intervenes in this suit by answer, and objects to the amount of salvage claimed, and also to the jurisdiction of the admiralty court over the case, on the ground that the derrick-boat was not designed for navigation or commerce.

I shall consider in this opinion only the latter objection. It is contended in argument that a derrick-boat is not the subject of this jurisdiction, because it is not used in commerce and navigation. This might be a valid objection if the libel were for contract of affreightment, or for tort by collision, or such cause of action; but it is not a valid objection to a libel for salvage. It has long been held that property, whether it has been an actual instrument or subject of commerce or not, may be the subject of salvage.

In the case of The Emulous [Case No. 4,480], Judge Story held, in 1832, that salvage service extended to all property "saved on the sea or wrecked on the coast of the sea." In the case of The Emblem [Id. 4,434], Judge Ware, one of the most learned and soundest admiralty lawyers, awarded salvage from saving the trunks of a passenger containing silver coin. The coin was property forming no part of the cargo of the vessel. In the case of Hennessey v. The Versailles [Id. 6,365], Mr. Justice Curtis said: "The relief of property from an impending peril of the sea, by the voluntary exertions of those who are under no legal obligations, etc., constituted a technical case of salvage." In the two cases of A Raft of Spars [Cases Nos. 11,528, 11,529], Judge Betts decided in the latter case

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

that such property was a proper subject for a libel for salvage, and in the former case refused to order the salvage suit to be set aside or to be stayed because there was a replevin suit pending in a court of common law for the salvaged property. In Taber v. Jenney [Case No. 13,720], a libel in admiralty was sustained by Judge Sprague to recover the value of the carcass of a whale which had been found floating in whaling waters by the defendants, and taken and converted to their own use. In the case of The Union Express [Id. 11,363], Judge Longyear held that a barge found adrift in Lake St. Clair was subject of salvage. In the case of Fifty Thousand Feet of Timber [Id. 4,783], Judge Lowell held, notwithstanding two or three adverse decisions, hereafter mentioned, which he cited and reviewed, that a raft of timber was a proper subject of a libel for salvage, and defined the law to be that "a salvage service is performed when goods are saved from the peril of the sea, or on other navigable waters; or cast upon the shores thereof." The same judge held the same view in a valuable and learned judgment in the case of The Louisa Jane [Id. 8,532], where he held that a specific "contract for saving property on the sea or in a harbor, did not oust the admiralty court's jurisdiction of a proceeding in rem or in personam, brought by the contractor himself." There is no judge whose decisions carry greater authority with the profession than those of Judge Lowell. In the case of Cheesman v. Two Ferry-boats [Id. 2,633], Judge Leavitt held that two new and never-used ferry-boats, which had been brought down to Cincinnati for the purpose of being put upon one of the ferries there, and moored at high-water mark above the city, on the Ohio side, which had broken loose during a great flood and been saved, not by landsmen on shore, but by a steamboat which encountered perils of the flood by doing so, many miles below on the Ohio river, were the proper subjects of a libel for salvage. There is also the case of The Senator [Id. 12,664], which was that of a scow, loaded with lumber, water-logged and abandoned on Lake Erie, and saved, in which Judge Longyear held that a libel for salvage was proper. I know of but two American admiralty cases which are decidedly adverse to the rulings which have been thus cited. One of them is the case of The Hendrik Hudson [Id. 6,355],—an old steamboat fitted up as a floating hotel,—which is directly against them; and the other is the case of Tome v. Cribs of Lumber [Id. 14,083]. This latter case, however, is not directly adverse. The rafts of lumber were saved on the shore of the Chesapeake bay, below the mouth of the Susquehanna river, where they had been moored, and had broken loose in a high freshet. They were saved by farmers and landsmen, who had incurred no risk and exercised no peculiar skill in saving them; but who had merely taken possession of them when they floated near the shore, and fastened them to trees on the shore. The service was wholly destitute of commercial or maritime attributes. These are the only American cases of which I know where the character of the property saved was made the objection to the admiralty jurisdiction in cases of salvage, and where the decision was adverse and based upon the non-commercial character of the property saved. The weight of the American authorities is, therefore, heavily against these two decisions, and I am constrained to disregard them, and to hold that any valuable property may be the subject of a libel for salvage in admiralty, provided that it shall have been saved under conditions which of themselves give the admiralty jurisdiction.

In the case at bar the saving was done by persons engaged in wrecking service, and furnished with and using a wrecking schooner and other wrecking appliances; and the principal and pivotal question is, was the saving done within the territorial theatre of the admiralty jurisdiction? The property saved was such as could be the subject of a libel for salvage; was the place where it was saved within that jurisdiction? The derrick-boat was sunk in the channel of a navigable river—navigable from the sea. The government of the United States was using the boat at the time in clearing away obstructions to the navigation.

It was formerly held that the admiralty jurisdiction of the courts of the United States, like that of the English courts, extended only to tide-waters. But, since the decision of the supreme court of the United States in The Genesee Chief, 12 How. [53 U. S.] 449 (a decision which has been followed by a series of like decisions, more and more liberal on this point), the test of the admiralty jurisdiction, as to locality, has been the inquiry, was the water in question a public navigable water? And, therefore, the law of those cases which hold that property "saved on the sea or wrecked on the coast of the sea" must be read with the additional words, "or on the public navigable rivers and waters of the United States." The cases to which I have just referred are the following: The Genesee Chief, 12 How. [53 U. S.] 449; Fretz v. Bull, Id. 446; The Magnolia, 20 How. [61 U. S.] 296; The Commerce, 1 Black [66 U. S.] 574; The Hine, 4 Wall. [71 U. S.] 555; The Belfast, 7 Wall. [74 U. S.] 624, and other cases.

Before these cases arose there had been a period in the history of the American law in which our courts had made their rulings in accordance with the rulings of the English courts, which English decisions had been made during a period when, through the jealousy of the high common-law courts, the jurisdiction of the admiralty in England had been much trammelled. But our courts have felt, and acted upon, the necessity of emancipating themselves from these English influences for many years, so that early English

precedents on the subject of the admiralty jurisdiction are not regarded in this country. Indeed, they have ceased to be law even in England, where in May, 1861, parliament interfered, and, by special act in regard to the jurisdiction of the admiralty, struck off the shackles which had bound it for centuries, and gave to admiralty courts in England the broad and liberal jurisdiction which they possess in the world at large. It was during the period of the original rulings of our American admiralty courts, and the subsequent transition period of opinion as to the character of the waters in which the jurisdiction of admiralty could be exercised, that some decisions were rendered by our courts tending to throw doubt on the question of the character of the property which was the subject of libel for salvage in admiralty. But I think the test as to what is the subject of salvage is no longer, whether it is a vessel engaged in commerce or its cargo or furniture, but whether the thing saved is a movable thing, possessing the attributes of property, susceptible of being lost and saved in places within the local jurisdiction of the admiralty. There are cases in the books in which the courts have denied salvage where property other than vessels of navigation or their furniture or cargoes has been saved; but these will nearly all be found to have turned on questions of place, or questions not affecting the character of the thing saved. The Ann Arbor [Case No. 408], decided in 1858, was that of a canal-boat libelled on a contract of affreightment made in Rochester at the west end of the Erie canal, in which it was held that such a contract by a canal-boat made far inland was not within the admiralty jurisdiction, though process of arrest was executed on the Hudson river. But this was not a case of libel for salvage. In Jones v. Coal Barges [Id. 7,458], decided in 1855, the libel was for a collision just below a lock in the Monongahela river in the mountains of Pennsylvania; and the court decided that the case depended upon the act of congress of February, 1845 [5 Stat. 726], giving admiralty jurisdiction upon the great lakes "and the rivers and waters connecting" them. The Monongahela was not such a river, and the court on that ground denied the jurisdiction of the admiralty to entertain a libel for that collision in such a stream. It is plain that that case did not decide that coal-boats were not proper subjects of a libel for salvage. There are several cases in which libels have been filed for injuries to flat-boats and their cargoes, inflicted by steamboats on our Western rivers, which have gone up by appeals to the supreme court of the United States. In none of these cases has a doubt been intimated by the supreme court that they were properly cases within the admiralty cognizance. In the case of Fretz v. Bull, before cited, damages were allowed against the owners of a steamboat for running into and sinking a flat-boat. This was a case of collision, in which the jurisdiction is much more doubtful as to the property concerned than in cases for salvage. The cases of Culbertson v. Shaw, 18 How. [59 U. S.] 585, and Nelson v. Leland, 22 How. [63 U. S.] 48, were of collisions by steamers with flat-boats or barges. Surely if such boats as these could be made the subject of admiralty jurisdiction by libels for collision, a derrick-boat may be held to be a proper subject for a libel for salvage. I so hold in the present case.

As to the merits, the facts seem to be these: the libellant proves an expenditure of money, $600 in cash, in the work of raising the derrick-boat, and that his wrecking schooner was engaged in and about the job some two weeks, which must have been worth $10 a day, at the least, or $150. The derrick-boat, I think from all the evidence in the case, must have been worth, when raised, not less than $2000 or $2500. A decree may be taken for $750 and costs.

Case No. 9,001.

MALTBY v. TOOL CO.

[Cited in Maltby v. Graham, 35 Fed. 206, 37 Fed. 691. Nowhere reported; opinion not now accessible.]

Case No. 9,002.

MALTZ et al. v. AMERICAN EXP. CO.

[1 Flip. 611;[1] 3 Cent. Law J. 784.]

Circuit Court, E. D. Michigan. Nov., 1876.

REMOVAL OF CAUSES — JOINT STOCK ASSOCIATION —CITIZENSHIP.

Where a joint stock association was organized under the laws of New York, having the privilege of perpetual succession and the right of making contracts in the name of such association, and of suing and of being sued in the name of its president or treasurer, it is to be deemed a citizen of that state, at least so far that an action can be maintained against it by a citizen of another state in a federal court, without regard to the citizenship of the individual members composing such association.

[Cited in Baltimore & O. R. Co. v. Adams Exp. Co., 22 Fed. 408; Imperial Refining Co. v. Wyman, 38 Fed. 579.]

This was a motion to remand a case removed from the superior court of Detroit. Petition stated that plaintiffs were citizens of Michigan, and that "the defendant was, at the time said suit was commenced, a joint stock association, organized and existing under the laws of the state of New York, having its principal office in that state, and is within the meaning of the acts of congress, a citizen of the said state of New York." The motion was based upon the ground that the case was not removable, and accordingly this court had no jurisdiction of the parties or matter in suit.

Alfred Russell, for plaintiffs.

Mr. Speed, for defendant.

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

BROWN, District Judge. The earlier construction of the constitution, which regarded the citizenship of a corporation as depending upon that of its individual corporators, was fully overthrown in the case of Louisville R. Co. v. Letson, 2 How. [43 U. S.] 497, and the modern rule there declared, "that a corporation created by, and doing business in, a particular state, is to be deemed, to all intents and purposes as a person, though an artificial person, an inhabitant of the same state, for the purposes of its incorporation, capable of being treated as a citizen of that state, as much as a natural person."

This doctrine has since been strictly adhered to, though the question has been repeatedly called to the attention of the court. Marshall v. Baltimore & O. R. Co., 16 How. [57 U. S.] 314; Covington Drawbridge Co. v. Shepard, 20 How. [61 U. S.] 233; Ohio & M. R. Co. v. Wheeler, 1 Black [66 U. S.] 297; Cowles v. Mercer Co., 7 Wall. [74 U. S.] 118. Indeed, in delivering the opinion in the case of Letson, Mr Justice Swayne, speaking of the early decisions, observes: "By none was the correctness of them more questioned than by the late chief justice, who gave them. It is within the knowledge of several of us, that he repeatedly expressed regret that those decisions had been made, adding, whenever the subject was mentioned, that if the question of jurisdiction was an original one, the conclusion would be different. We think we may safely assert that a majority of the members of this court have at all times partaken of the same regret, and that, whenever a case has occurred on the circuit, involving an application of the case of Bank of U. S. v. Deveaux [5 Cranch (9 U. S.) 61], it was yielded to because the decision had been made, and not because it was thought to be right." The right of a corporation to sue as a citizen of the state creating it is no longer susceptible of argument.

In the present case, the petition avers that the defendant was, at the time suit was commenced, "a joint stock association, organized and existing under the laws of the state of New York, having its principal office in said state, and is, within the meaning of the acts of congress, a citizen of said state of New York." Taking judicial notice, as this court is bound to do, of the laws of the state of New York, I find that joint stock associations are recognized by statute, and endowed with the following attributes of corporations:

1st—They may sue and be sued in the name of their president or treasurer. 3 Rev. St. (Ed. 1875) p. 762. For this purpose the officer is regarded as a corporation sole; he is a representative of the company, distinguished from the individuals composing it, and a suit may be brought against him by other shareholders in the company. Westcott v. Fargo, 61 N. Y. 542; Cross v. Jackson, 5 Hill, 478. No such suit abates by reason of the death, removal or resignation of the officer so sued, but may be continued against his successor. 3 Rev. St. p. 763. The officer so sued is not personally liable. Id.

2d—Its capital is represented by certificates of stock. Id. p. 764.

3d—Neither the death of a stockholder, nor the assignment of his stock, works a dissolution of the company; in other words, they are endowed with perpetual succession, or, as it is termed, the immortality of corporations. Id.

4th—They may take, hold and convey real estate in the name of their president, and in perpetual succession. 2 Rev. St. p. 402; Waterbury v. Merchants' Union Exp. Co., 50 Barb. 160.

Partnerships have none of these attributes. Indeed, except in the want of a common seal, these associations are corporations without the name. The definition of a corporation is quite broad enough to include associations of this character. In the work of Angell & Ames, it is defined as "a body, created by law, composed of individuals united under a common name, the members of which succeed each other, so that the body continues the same, notwithstanding the change of individuals who compose it, and is for certain purposes considered as a natural person."

Though the acts of New York, above cited, provide that joint stock companies shall not have the rights and privileges of corporations, they are expressly endowed with inherent qualities as such; and the constitution of the state (article 8, § 3) provides that the term corporations, as used in this article, shall "be construed to include all associations and joint stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships. And all corporations shall have a right to sue, and shall be subject to be sued, in all courts, in like cases as natural persons." It is true that stockholders are liable individually for the debts of the association. But this liability attaches only after an exhaustion of remedies against the joint property. 3 Rev. St. p. 763. As observed by the supreme court, this individual liability is by no means incompatible with the corporate idea. Liverpool Ins. Co. v. Massachusetts, 10 Wall. [77 U. S.] 566. Indeed, such liability is frequently imposed in favor of creditors of banks and claims for personal labor.

By the constitution of this state, the stockholders of all corporations and joint stock associations are placed upon the same footing, and are individually liable for all labor performed. Article 15, § 7. Nor is it material that its suits are brought in the name of its president, instead of the artificial name by which it contracts. "If it can contract in the artificial name, and sue and be sued in the name of its officers, on those contracts, it is in effect the same, for process would have to be served on some such officer, even if the suit were in the artificial name." Liverpool Ins. Co. v. Massachusetts, 10 Wall. [77 U. S.]

575. But whether a corporation or not, a joint stock association is a distinct legal entity, and so long as this fact exists, and it possesses the attributes of perpetual succession and the capacity of suing and being sued, it is a juridical person, a proper party in this court, and must be regarded as a citizen of the state which created it. I deem it wholly immaterial whether it be termed a corporation, joint stock association or guild.

Though the question here involved has never been decided by the court of last resort, it was held in the case of Liverpool Ins. Co. v. Massachusetts, 10 Wall. [77 U. S.] 566, that a joint stock association, endowed with privileges precisely similar to those possessed by the American Express Company, was a corporation within the meaning of an act of Massachusetts, imposing a tax upon insurance companies incorporated or associated under the laws of a foreign country, doing business in that state, notwithstanding parliament had provided that the act creating it should not be construed to incorporate the company or relieve its members from individual liability. The case of Pennsylvania v. Quicksilver Co., Id. 553, has no bearing upon the question at issue here. It was there held that the corporation was insufficiently described as "a body politic in the law of, and doing business in the state of, California," and the case turned solely upon the form of this allegation. As observed by the court, "it may mean that the defendant is a corporation doing business in that state by its agent; but not that it had been incorporated by the laws of the state. * * * Indeed, it was admitted in the argument that the defendant was a Pennsylvania corporation, and the jurisdiction sought to be sustained by a suit against this agency."

I find more difficulty in reconciling the views here expressed with the opinion of the court in Dinsmore v. Philadelphia & R. R. Co. [Case No. 3,921]. Notwithstanding there are expressions in the opinion which would seem to indicate that the case turned upon the form of the allegation, the reasoning of the court is certainly susceptible of the construction that it regarded a joint stock association as incapable of suing in the federal court. I regret my inability to concur in this view. It is not intended to decide here whether this action is properly brought against the defendant by the name of the American Express Co.

The motion to remand must be denied.

Case No. 9,002a.

MAN v. CHEESEMAN.

[Bank Mag. (3d Series) 556, Jan., 1875.]

District Court, S. D. New York. Nov. 23, 1874.

NATIONAL BANKS — TRANSFER OF STOCK — PURCHASE BY BANK—RIGHTS AND LIABILITIES OF STOCKHOLDERS.

[1. A national bank cannot purchase its own stock.]

[2. To relieve a holder of national bank stock from the obligations imposed by the statute, a transfer by him must be made on the books of the bank to some person capable of succeeding to his obligations; the ordinary method of signing the power of attorney thereon is insufficient.]

[3. Stockholders of an insolvent national bank are bound by the action of the comptroller of the currency in making an assessment against them, and have no right to examine the accounts of the receiver as to the assets or debts of the bank.]

[This was an action by Albon P. Man, receiver of the Eighth National Bank, against G. H. Cheeseman to recover the amount of an assessment made by the comptroller of the currency, from the defendant as a stockholder therein.]

The case against Dr. Cheeseman was a peculiar one. He became an original subscriber in 1865 for 50 shares of stock in the Eighth National Bank. In May, 1867, at a time when the bank was in excellent credit, having a considerable surplus, and when its stock stood at par in the market, he determined to part with his 50 shares. He accidentally mentioned his purpose to the cashier of the bank, and that officer volunteered to dispose of them for him. Shortly after he informed Dr. Cheeseman that he had found a purchaser, and directed him to transfer the certificates by signing the ordinary power of attorney on them in blank. Dr. Cheeseman did so, and gave the certificates to the cashier, who credited his account with the par value of the stock. The cashier was the proper transfer officer of the bank, and Dr. Cheeseman followed his directions as to the manner of transfer. He heard no more of the matter until December, 1871, after the failure of the bank, when he was informed, by the receiver, that his name stood upon the shareholders' list, and that he was liable for his proportionate share of the bank's indebtedness. This suit was brought to enforce that liability. Upon the trial it was shown that this stock was actually purchased by the bank. The shares remained in possession of the bank, which collected all subsequent dividends upon them, and after its failure the shares were turned over to the receiver with the other assets.

BLATCHFORD, District Judge, held, that Dr. Cheeseman was liable for the assessment of 54 per cent. ordered by the comptroller, although he had parted with the shares four years before, on the ground that in order to escape liability a shareholder must see that his stock is transferred upon the books of the bank to some person capable of succeeding to his obligations, and that the bank was not such a person, being prohibited by law from purchasing its own stock. It follows from this that the ordinary method of transfer by signing the blank power of attorney will not protect the shareholder, and that in all cases of sales of such bank stock he remains liable until the transfer is made on the bank's books to his successor.

The measure of liability is also very severe. Two points were made by Dr. Cheeseman's counsel, as follows: First, that the liability was only for the deficiency, and could not be enforced until all the assets of the bank had been converted and applied by the receiver to the payment of the debts; and, second, that the shareholders liable for the deficiency are entitled to notice, and to some opportunity of ascertaining what the deficiency may be which they are called upon to make up. Both these points were overruled, the court holding that the shareholder was absolutely bound by the action of the comptroller in making the assessment, and that when such assessment had once been made the shareholder could interpose no defense against it. Thus shareholders are cut off from any examination of the accounts of the receiver or of the debts allowed against the bank.

Case No. 9,003.

In re MANAHAN.

[19 N. B. R. 65.] [1]

District Court, S. D. New York. July 3, 1878.

BANKRUPTCY — ASSIGNMENT — PROCEEDINGS IN STATE COURT — WARRANT OF POSSESSION TO MARSHAL—MOTION TO VACATE WARRANT.

Prior to the commencement of the proceedings in bankruptcy, the bankrupt made a voluntary assignment for creditors to one R., who thereupon took possession, but failed to give the bond required by the statute. By virtue of a provisional warrant granted in the bankruptcy proceedings, the marshal took possession of the property which had been transferred to R. by the voluntary assignment. Upon proper proceedings subsequently had in the state court, R. was removed, and a new trustee appointed. On motion by the trustee to vacate the warrant, and for an order directing the marshal to deliver the property to him, *held*, that the provisional warrant did not authorize the marshal to take possession of the property the title to which had passed by the state assignment to the voluntary assignee; that pending the question of adjudication and the appointment of an assignee, the court should not allow its process to interfere with the possession by the state assignee of the property; but since the trustee appeals to the bankrupt court for aid, reasonable conditions on granting the relief may be imposed, such as that he shall release the marshal from all damages for taking and keeping the property, pay his fees, and receive said property subject to the condition that he shall not dispose of any part thereof until a reasonable time after the appointment of an assignee, or the termination of the proceedings, except with the approval of the bankrupt court.

[In the matter of Thomas Manahan, a bankrupt.]

G. W. Lockwood, for motion.

P. W. Ostrander, contra.

CHOATE, District Judge. On April 17, 1878, these proceedings were commenced by creditors' petition, and on the 2nd of May, on proof by affidavit that the debtor was endeavoring to conceal his property, a provisional warrant issued. March 14, 1878, the debtor made a voluntary assignment under the state law for the benefit of his creditors to one Robertson, who failed to give the bonds required by the statute of New York. On the 20th of June, upon proper proceedings in the state court, Robertson was removed, and a new trustee was appointed in his place. The trustee moves this court to vacate the provisional warrant and for an order directing the marshal to deliver to him all the property transferred under the voluntary assignment, which it is alleged the marshal has taken possession of under the provisional warrant. There has been no adjudication, the allegations of the petitioning creditors having been put in issue, and the matter is now on trial upon a reference to the clerk. The provisional warrant did not authorize the marshal to take possession of property the title to which passed by the state assignment to the voluntary assignee. Although the petitioning creditors insist that the voluntary assignment gave the assignee no right to hold the property because of the failure to give bond, yet it now appears by their own affidavit that prior to the commencement of these proceedings the state assignee had actually taken possession of the property. The proper course to dispute his title, or that of the trustee appointed in his place, is by a suit in equity to set aside the assignment.

Pending the question of the adjudication and the appointment of an assignee in bankruptcy, who may bring such suit, this court should not allow its process to interfere with the possession by the state assignee of the property, which at least is in his possession under claim of title. But since the trustee appeals to this court for aid, reasonable conditions may be imposed on granting the relief prayed for.

The marshal appears to have acted in good faith. He should not therefore be subjected to damages for taking and keeping the property. And until an assignee is able to bring suit to recover the property, no disposition should be made thereof which will prevent its ultimate distribution under the bankrupt law [of 1867 (14 Stat. 517)], subject, of course, to the lawful charges of the state assignee if the state assignment shall be set aside. Let an order be entered directing the marshal to deliver the property to the trustee upon payment of his proper fees, provided the said trustee shall release the marshal for all damages for taking and keeping the property, and shall receive the said property subject to the condition that no disposition thereof or of any part thereof shall be made until five days after the appointment of an assignee in bankruptcy, or the termination of these proceedings, except with the approval of this court, and in that case let the warrant be vacated. Otherwise, motion denied.

[1] [Reprinted by permission.]

MANCHESTER (BORDEN v.). See Case No. 1,656.

MANCHESTER (ERICSSON v.). See Case No. 4,511.

Case No. 9,004.

MANCHESTER et al. v. HOTCHKISS.

[13 Int. Rev. Rec. 125; 10 Am. Law Reg. (N. S.) 379.]

District Court, D. Rhode Island. April 17, 1871.

PLEADING IN ADMIRALTY — PERSONAL PRIVILEGE —WAIVER— LIBEL IN PERSONAM—CIVIL SUIT—JUDICIARY ACT.

[1. A respondent to a suit in personam, whose vessel is attached because personal service cannot be made in the district, does not waive his right to plead to the jurisdiction by filing a stipulation to secure the release of his vessel.]

[2. A libel in personam is not a "civil suit," within the meaning of the eleventh section of the judiciary act of 1789 (1 Stat. 78), requiring the defendant to be a resident of the district within which suit is brought. Atkins v. Fibre Disintegrating Co., Case No. 600, followed. New England Ins. Co. v. Detroit & C. Nav. Co., Id. 10,154, disapproved.]

In admiralty. Heard April 10, upon plea to jurisdiction.

Browne & Vanslyck, for libellants.

A. Payne and J. C. Pegram, for respondent.

KNOWLES, District Judge. The two questions submitted to the court I would now dispose of at as little expense of time or labor as may be, consistently with approved judicial usage.

The cause is one of contract, civil and maritime, instituted in personam by Manchester, Hopkins & Co., of Providence, in the district of Rhode Island, against George Hotchkiss, of New Haven, in the district of Connecticut. The libellants allege damage to the value of two thousand dollars from a breach of contract to transmit a quantity of coal from Roundout, in the district of New York, to Providence, in July, 1867. The writ prayed for was granted on the 8th of March, 1871, returnable at a special court, to be holden on the 22d day of March, and was served by the marshal as shown by his return, in these words: "R. I. District. Providence, March 8, 1871. For want of the body of the within named George Hotchkiss to be by me found within this district, I have this day, at four o'clock in the afternoon, attached all the right, title, and interest that the said George Hotchkiss had in and to the schooner George Hotchkiss, her tackle, apparel, and furniture. Lyman Upham, Deputy U. S. Marshal."

On the 10th of March, the respondent filed in the clerk's office his claim in these words: "And now, on this 10th day of March, 1871, comes George Hotchkiss, and claims the schooner George Hotchkiss, attached by the marshal upon a warrant of arrest and attachment, as the property of the said respondent, as the owner thereof. George Hotchkiss." On the same day he also filed a stipulation for costs, together with a stipulation in conformity with the fourth rule in admiralty, whereupon the schooner was surrendered to him, and the attachment dissolved by operation of law. On the return day of the warrant (March 22), neither the respondent nor his counsel being present, with consent of the counsel for the libellants the respondent was allowed until the 28th of March to file his answer. Accordingly on the 28th, the respondent's "plea and answer" was filed, to which the libellants replied on the 1st of April, and upon these pleadings arise the questions now submitted to the court.

The respondent in his plea and answer, in the first place avers and insists that the court has no jurisdiction of the cause, because the defendant is not, nor was he at the filing of the libel, a citizen or resident of the district of Rhode Island, and the only service ever made of said libel was by attaching the goods and chattels of the defendant within the district of Rhode Island, the paragraph closing with these words: "Saving and reserving all benefit and advantage from said plea, and if overruled, the said defendant makes answer to said libel, and alleges and articulately propounds," etc. To this the libellants reply, "that the respondent's plea to the jurisdiction of the court ought not to be received and accredited, because, before the offering of said plea, said defendant had submitted himself and the cause to the jurisdiction of the court, by entering into and filing in the clerk's office of the court his stipulation to abide by and perform all the decrees of the court in said cause and had submitted himself and his cause to the jurisdiction of the court by filing an answer in said cause to the merits thereof." And to this the libellants, further replying, add that the plea is bad and insufficient in law.

In passing upon one of the two questions here presented, it seems necessary to say but little. Conceding that a defendant may waive a personal privilege, and estop himself from denying the jurisdiction of a court of admiralty, it still is incumbent on a libellant to show satisfactorily that a waiver was made by the defendant. This is not shown in this case. The filing of a stipulation, in order to release the vessel from attachment, I cannot regard as a waiver of any right or ground of defence to the suit; and as in this "answer and plea," filed on the return day of the writ, the day when and not prior to which he was entitled and bound to appear in court and answer, he sets forth his objections to the jurisdiction, I am constrained to adjudge that objection seasonably presented. The Bee [Case No. 1,219]. In neither text book nor reported case do I find aught inconsistent with this ruling. In regard to

the other of the two questions, though much might properly be said were it now for the first time presented for judicial action, little, as it seems to me, need be said in this connection. That question, it must be agreed, in its last analysis, is simply this: Is a libel suit in personam in admiralty a "civil suit," within the meaning of the eleventh section of the judiciary act of 1789? 1 Stat. 78.

Now, to this question distinctly raised, a negative answer was given in 1867, in an elaborate and exhaustive opinion of Judge Benedict of the Eastern. district of New York, Atkins v. Fibre Disintegrating Co. [Case No. 600]; and an affirmative answer was given in 1870–71 by Judge Sherman of the Northern district of Ohio, in an opinion not less elaborate,—New England Ins. Co. v. Detroit & C. Nav. Co. [Id. 10,154]. There is reason to believe, too, that by the late Justice McLean of Ohio, by Judge Hoffman of California, by Judge Shipman of Connecticut, and by Judge Woodruff of the Second circuit, overruling Atkins v. Fibre Disintegrating Co. [supra], opinions in harmony with that of Justice Sherman have been delivered within the twenty years past. Of these six opinions, however, I have as yet been able to find only those of Judges Benedict and Sherman; but in these, I incline to believe, will be found embodied all the leading arguments and suggestions which give countenance to the conclusions to which, after full argument and deliberation, they respectively arrived. The weight of authority, numerically considered, it is seen, is in favor of the affirmative conclusion. But this, it is contended on behalf of the libellant, is not to be allowed to control my judgment. There are, it is argued, other facts to be considered: 1. That the admiralty rules, Nos. 1, 2, 3, and 4, framed by the supreme court, are consistent only with the rulings of Judge Benedict, and are, "without law and against law," if his construction of the statute of 1789 be not sound. 2. That in all the text-books and manuals of admiralty practice now in daily use by the profession, a service of a writ in admiralty by attachment of goods and chattels merely, irrespective of the residence or presence of the defendant, is treated and prescribed as a legal and sufficient service. 3. That throughout the United States, save in the districts of California, Ohio, Connecticut, and New York, a service by attachment only (irrespective of a defendant's residence) is held to be valid and effectual. 4. That from 1789 down to 1852, so far as can be learned, not even an intimation that such a service was objectionable or questionable, was ever heard from bench or bar; that as early as 1841—Clarke v. New Jersey Steam Nav. Co. [Case No. 2,859]—Justice Story, in his opinion in a Rhode Island cause, said, in ruling upon a cognate question: "Neither has it been doubted that the process of attachment well lies in an admiralty suit against the property of private persons, whose property is found within the district, although their persons may not be found therein, as well to enforce their appearance to the suit, as to apply it in satisfaction of the decree rendered in the suit. Ever since the elaborate examination (in 1825) of the whole subject in the case of Monroe v. Almeida, 10 Wheat. [23 U. S.] 473, this question has been deemed entirely at rest." And that in harmony with this dictum of Justice Story, as a declaration of settled law, has ever been the practice and usage throughout the circuit, whoever at the bar, whoever upon the bench. To the force of the libellant's reasoning on this point, I am constrained to yield. No decision of the supreme court or of the circuit judge of this district, in support of the defendant's plea to jurisdiction is produced, while dicta (if such merely it be), both from 10 Wheat. and Clarke v. New Jersey, etc., Co. [supra], are produced, impliedly overruling such a plea I find a practice and usage established in this district, in harmony with the dicta of judges to whose opinions I should be bound to defer, and in harmony with rules ordained by the supreme court, to which the force of statutes is universally conceded. If this practice and usage is to be abandoned as grounded on a misconception on the part of practitioners, text-writers, and judges, of a statute enacted in 1789, and still in force, I prefer that the decree to that effect shall issue from the supreme or the circuit court rather than from this.

A sufficient ground for a judgment overruling the defendant's "exceptive plea" is found in the usage and practice in this circuit from 1799 downward, and in the acts and declarations of its judges under the rules in admiralty to which I have referred, framed by the supreme court in 1812, and yet in full force. Such a ground, moreover, I do not hesitate to add, is found in the opinion of Judge Benedict in the case cited. That opinion, it is said, has been overruled by the learned judge of the Second circuit (Woodruff) and as we have seen, in certain districts, the adverse doctrine has been promulgated from the bench; but until better informed than I at present am as to the reasons assigned for dissenting from the conclusions of Judge Benedict, I am inclined to concur in and adopt those conclusions—especially these: Says Judge Benedict: "When the district courts were constituted courts of admiralty, they acquired the right to those methods and modes of proceeding which are the life of the admiralty, and among which has from the first been the power to seize property of defendants who cannot be found and to compel an appearance. This power is recognized by the admiralty rules as existing in these courts; it has never been conferred upon any other tribunal, and any intention to place it in abeyance, or to limit its exercise, when entertained by the law-making power, will, it may well be supposed, be clearly expressed, and not left to be inferred

from the use of a general and indefinite phrase. . . . If either form changes in the habits of commerce, or from modifications which are found necessary and become fixed in the practice of admiralty courts of other countries, or from changes in the spirit of our institutions, a limitation of the mode of exercising this power shall become necessary or proper, it is not to be doubted that the supreme court, as the high appellate court of admiralty, and as empowered by the act of 1842 [5 Stat. 516], will effect a change in this particular, as it most properly did in regard to the power of imprisonment."

The defendants' "exceptive allegation or plea" to the jurisdiction of the court is overruled, and the case will stand for hearing upon its merits.

Case No. 9,005.

MANCHESTER v. HOUGH et al.

[5 Mason, 67.] [1]

Circuit Court, D. Rhode Island. June Term, 1828.

REAL PROPERTY — MARRIED WOMAN'S ESTATE — DEED—ACKNOWLEDGMENT—RHODE ISLAND STATUTE OF CONVEYANCES.

1. By the statute of Rhode Island respecting conveyances of real estate, no deed of the wife's estate by the husband and wife, conveys any title but that of the husband, unless the same deed be duly acknowledged by the wife, before a magistrate, in the manner prescribed by the statute.

2. By the customary and ancient law of Rhode Island, a feme covert may pass her estate by a deed, in which her husband is joined, which is duly executed and acknowledged.

Ejectment for certain lands in Providence. Plea, the general issue. The town of Providence, under whom the defendants [John B. Hough and others] claimed, took upon themselves the defence. The facts, as they appeared at the trial, were as follows:—On the 30th of September, 1797, Isaac Manchester (since deceased) and Mary Manchester, his wife (the present plaintiff,) were seized in fee simple, in her right, of the demanded premises. On the same day, they conveyed, by their deed of that date, to Samuel Nightingale, the treasurer of the town of Providence, for the use of the town, one portion of the lands in controversy, to hold to him and his successors in the office forever. This deed was, on the same day, acknowledged by the grantors to be their voluntary deed, before G. T., a justice of peace of the same town. On the 4th of May, 1799, the said Isaac and Mary made a conveyance by deed of that date, of the residue of the demanded premises to the same treasurer, in like manner for the use of the town of Providence; which deed was acknowledged in the same manner. At the time of executing the first deed, there was no statute in Rhode Island authorizing a feme covert to convey her lands by deed, joining her husband therein. The question was, whether the deed of 1797 operated as a legal conveyance of the wife's estate. The acknowledgment of the deed of 1799 was admitted not to be according to the provisions of the statute of Rhode Island of 1798 on this subject.

[The town of Providence filed a bill in equity against the plaintiff to enjoin proceedings in this suit, and for general relief against the plaintiff's assertion of title. The bill was dismissed. Case No. 11,450.]

Richmond & Crapo, for plaintiff.
Bridgham & Searle, for defendants.

STORY, Circuit Justice. This case depends upon the validity of the conveyances made of the wife's estate by herself and her late husband, by the deeds of 1797 and 1799. It is admitted, that the latter deed cannot bind the wife according to the statute of Rhode Island of 1798, § 7 (Dig. 1798, p. 267), because she has not been examined privily and apart from her husband, and made an acknowledgment, that the deed was her voluntary act, and that she did not wish to retract the same, before the magistrate taking the acknowledgment. Without a compliance with these requisites, the statute declares, that the deed shall not operate to convey any greater estate in the premises, than what belongs to the husband. The validity of the other conveyance in 1797 turns upon the question, whether, by the common or customary law of Rhode Island, a feme covert can convey her real estate by deed, her husband joining in the deed. It is not denied, that this was in Rhode Island the usual mode of conveying her estate antecedently to the statute of 1798; and that it had prevailed without objection and without question for a great length of time; and that this is the first time, in which it has been judicially brought into controversy. Conveyances by fine or common recovery of the estates of femes covert may have sometimes been resorted to by very cautious persons; but the general practice in Rhode Island has been, as I have stated. Many titles have passed, and many titles are now held exclusively under such conveyances. And to shake their validity would at this period be productive of incalculable mischiefs. If there ever was a case, in which the doctrine might be fairly applied, that communis error facit jus, the present is that case. In truth, from an early period in the history of New England, the right of a feme covert to convey her real estate by deed with the assent of her husband was recognized, and has been constantly enforced by courts of law. It now constitutes a part of the common law of New England. See Fowler v. Shearer, 7 Mass. 14; Dudley v. Sumner, 5 Mass. 463; Colcord v. Swan, 7 Mass. 291. It probably originated in the necessities of the country at an early period of its settlement, when fines and recoveries were little known;

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

or if known, courts were rarely held, and understood little of the proper mode of proceeding. The same necessity has produced a similar result in other parts of the Union. See Lessee of Lloyd v. Taylor, 1 Dall. [1 U. S.] 17; Davy v. Turner, Id. 11. The act of 1798 can be justly considered in no other light, than as a legislative sanction and recognition of the right and the practice. My opinion accordingly is, that the deed of 1797 is sufficient to pass the estate of the feme covert to the premises described therein.

Verdict accordingly.

Case No. 9,006.

MANCHESTER v. MILNE.

[Abb. Adm. 115.] [1]

District Court, S. D. New York. Jan., 1848.

SHIPPING — DEED OF ASSIGNMENT — PROOF — AFFREIGHTMENT—VARIANCE—MODE OF ASCERTAINING QUANTITY.

1. A deed of assignment executed in another state, and attested by two subscribing witnesses, was offered in evidence, accompanied by proof of the signatures of one of the witnesses, and of both the assignors. *Held*, that the witnesses were presumed to reside at the place of execution and to be without the jurisdiction of the court.

2. The proof of the assignors' signatures was admissible as secondary evidence of the execution.

3. A variance between the amount of a cargo of coal as stated in the bill of lading, and the amount of such cargo as ascertained on delivery at the port of consignment, may be explained by showing that the mode of ascertaining the quantity is such that similar variations are necessarily of frequent occurrence.

[Cited in The Wellington, Case No. 17,384.]

[Compare Manning v. Hoover, Case No. 9,044.]

This was a libel in personam, by Cyrus B. Manchester against George Milne, to recover for freight and primage on a cargo of coal, shipped from Liverpool to New York, on board the ship American. On the hearing, the libellant proved the shipment of the coal, September 30, 1846, at which time the vessel was owned by the Messrs. Arnold. He put in evidence the bill of lading, which was for 200 tons of Orrell coal, at the rate of six shillings sterling per ton freight, and five per cent. primage. To show his right to maintain the action, he also put in evidence an assignment of the vessel and her freight, made November 21, 1846, by the then owners of the ship, to the libellant. The assignment was under seal, and executed in Providence, R. I., having been also acknowledged and there recorded. It was attested by two subscribing witnesses. The libellant proved the signature of one of these witnesses, and that such witness resided in Providence, and also proved the signatures of the assignors; but the residence of the other subscribing witness was not shown, nor his absence accounted for. The respondent objected that the proof of the execution of the assignment was insufficient, the absent witness not being shown to be dead, or to be out of the juristion of the court. The libellant contended that the acknowledgment of the instrument in the place where it was executed, being by the local law competent proof of its due execution, was also sufficient evidence here. The court ruled this point against him, but decided that the proof given established the due execution of the instrument, and that the libellant was entitled upon it to maintain the action. The respondent then gave evidence in defence, tending to show that the vessel made short delivery of the cargo; that out of the two hundred tons mentioned in the bill of lading, less than one hundred and eighty-five were delivered at the port of consignment.

BETTS, District Judge. Where an instrument under seal, attested by a subscribing witness, is to be proved, and the production of the witness himself is excused, the technical rule of evidence requires proof of his signature, even though the execution by the principal party be proved by his most solemn admission out of court. 1 Greenl. Ev. § 569; 1 Phil. Ev. 473. This rule is arbitrary and formal, as it dispenses with direct proof of the identity of the principal party, the essential particular in the question whether the deed is actually his, and admits proof of the handwriting of an absent subscribing witness to the deed to establish that fact; and countenances the further implication that the witness was present and saw the signature, the sealing, and delivery of the deed which he attested.

Where none of the subscribing witnesses to an instrument are capable of being examined, it is only necessary to prove the handwriting of one of them. 1 Greenl. Ev. § 575; 1 Phil. Ev. 473. Where a deed, executed in a foreign state, is offered in evidence, it is to be presumed that the attesting witnesses resided at the place of execution, and secondary proof is admissible. 3 Phil. Ev. (Cow. & H. Notes) 1297. Proof of the handwriting of the assignor is at least equivalent, in the identification of the assignor or grantor, to the secondary evidence of the handwriting of a subscribing witness, if it be not competent as primary and direct. The objection to the admissibility of the assignment, upon the proof given, was therefore correctly overruled.

The contest upon the merits of the case relates to the question whether there was a short delivery of cargo. The proof of the quantity delivered is not very precise or satisfactory. The estimate of the quantity was arrived at by weighing five separate tubs of the coal, and ascertaining the average weight per tub, and the number of tubs which make up by measure a chaldron, and thus from a computation of chaldrons determining the quantity of coal delivered. This method of

[1] [Reported by Abbott Brothers.]

ascertaining quantities of Liverpool coal is proved to be the established usage of the trade in this port. That species of coal is purchased and shipped abroad by weight, and is unladen and sold in this market by the chaldron. There is also clear evidence to show that the computed weight so ascertained is almost invariably short of that stated in the invoices and bills of lading. This variance being so common, is no doubt provided for in the original purchases; but as a means of determining with certainty whether the weight shipped holds out on delivery, this method of measurement cannot be made the basis of any positive or sure determination. It affords an approximation which ordinarily will be found, it would seem, on the proofs, to come within two or three per cent. of uniformity. The state of the weather, whether dry or wet, when the coal is weighed and laden on board, and the quality of the coal, whether coarse or fine, are particulars essentially varying the result, when the cargo comes to be unladen by measure, often reducing the invoice weight from four to nine per cent.

In the present case, the difference was nearly eight per cent. There is evidence that a small quantity was used by the ship during the voyage, but this was done with the knowledge and assent of the agent of the respondent, and was but to a very inconsiderable amount, by no means sufficient to account for the disparity between the bill of lading and the weighmaster's return here. I think the evidence in respect to the waste is not sufficient to subject the vessel to any charge or responsibility for such use; and I am further of opinion that the decided weight of evidence, direct and presumptive, is, that the delivery made acquitted the ship of her liability under the bill of lading.

The decree must accordingly be in favor of the libellant, it being referred to a commissioner to compute the amount of freight due.

[The case was afterwards heard upon an appeal from the clerk's taxation of costs. Case No. 9,007.]

Case No. 9,007.

MANCHESTER v. MILNE.

[Abb. Adm. 158.] [1]

District Court, S. D. New York. Feb., 1848.

COSTS—ADMIRALTY—TAXATION BY CLERK—PROCTOR'S FEES—MOTIONS TO POSTPONE—WRITTEN ARGUMENTS—FINAL DECREE.

1. Since the adoption of the circuit court rules of 1845, rule 96 of the district court of 1838, refusing to a proctor in a suit fees as advocate, is abrogated, in respect to all fees other than those specifically introduced and appointed by the district court; and fees for services as proctor and as advocate are taxable to the same person.

2. In what cases costs may be taxed for motions to postpone the hearing of a cause called in its order on the calendar.

3. Costs are not taxable for the preparation of written arguments, except upon a stipulation in writing, to that effect.

4. In what cases costs may be taxed upon motions to enlarge time to answer, upon motions for final decree, motions for costs, for a reference, &c.

This was a libel in personam, by Cyrus B. Manchester against George Milne, to recover freight upon a cargo of coal. The cause was before the court upon the merits in 1848, when a decree was rendered in favor of the libellant. The proceedings upon that hearing are reported [Case No. 9,006]. The cause now came up upon appeal from a taxation of costs.

BETTS, District Judge. Both parties appeal from the taxation of costs made by the deputy clerk in this case; but the principal exceptions, in number and amount, are taken by the respondent. Two legal points of general application are raised, which are of sufficient importance to demand a formal consideration, and the reasons assigned for this decision will have relation chiefly to those propositions.

The bill rendered and taxed embraces separate charges for advocate's and proctor's fees, the pleadings being signed by Messrs. Burr and Benedict as proctors, and by Mr. Beebe as advocate. The respondent has put in his affidavit, stating that those three gentlemen are copartners in the practice of law in this city, and that, as is generally understood, they practice in copartnership in all the state and United States courts; and he objects to the charge of advocate's fees at all, contending that all the partners in effect act as proctors in the cause.

Mr. Beebe, by affidavit, states that the connection between himself and Messrs. Burr and Benedict, in the admiralty business conducted in their office, is not a copartnership; that he acts as advocate solely, and takes to himself the taxable fees as advocate for his compensation, and has no share of or interest in the fees of the proctors, which belong exclusively to the other two gentlemen.

I do not, however, consider this fact, whichever way it may be, as varying essentially the question; because, in my opinion, the rule of allowance is definitely fixed by law in respect to the greater part of the items in contestation. The rules of the circuit court, adopted June 28, 1845, which also govern the practice and costs of this court, change rule 96 of this court, and regulate the costs of parties, their attorneys, solicitors, and counsel, in private actions, conformably to the grant by the act of congress of May 18, 1842 [5 Stat. 475], of costs to the United States attorneys within this state; and when services are rendered pursuant to the course of practice of this court, for which no fees are specifically appointed under the act, the

[1] [Reported by Abbott Brothers.]

usages of this court and the United States supreme court are to determine the rate of allowance.

The provision in the act of congress limits the fees receivable by the United States attorneys to the fees and compensation allowed by the laws of the state of New York, for like services, according to the nature of the proceedings. These rules accordingly render the statute law of New York in relation to costs, in force May 18, 1842, the rule of taxation in this court, when no specific fee is appointed by congress. The state act of May 14, 1840 (section 4), provides, that when a fee is allowed to an attorney or counsellor, it shall be taxed only for one counsel or attorney, and the same person may be allowed fees both as attorney and counsel in the same cause.

It would accordingly make no difference if the advocate and proctors in this cause were in full partnership in every branch of their business, sharing in common all costs taxable in the cause; for it is plain that a fee appointed to a proctor for a service, and another to an advocate for the same service, would, under those provisions, be both taxable to the same person.

The act of congress comprehends all classes of costs taxable in favor of district attorneys and clerks in this state, within whatever jurisdiction their services are rendered, and the rules of the circuit court have force in respect to private suitors, coextensively with the provisions of the statute relating to those official fees. In my opinion the provisions of the state law so adopted by congress, must be held to supersede all regulations previously in force under the rules or practice of this court or of the circuit court conflicting with the state law; and that the restriction in the tariff of costs, established by this court in 1838, which denies to a proctor the allowance of the same fee taxed to him as advocate, is abrogated.

I accordingly hold that the objection to the taxation of advocate fees in the cause must be overruled. The next objection of a general bearing is that taken to the charges for attendance, for briefs and opposing motions, and for temporary delays asked for and allowed in term, in respect to the trial of the cause.

It seems that when the cause was called in its place on the calendar, excuses were offered on the part of the respondent, and a request was made that the hearing might be postponed to an after day, which was objected to at the time on the part of the libellant. No notice of motion was given, and no proofs were introduced which were the subject of discussion.

I think the party has no right to the fees charged for that proceeding. A formal motion or affidavit to put off a cause for the term stands on a different footing, and the party against whom it is made may rightfully ask to have its hearing deferred until he is prepared to meet it, and if he waives that right, and consents to debate or meet the motion instanter, there would be a reasonable color for allowing him the usual costs attached to the resistance of special motions made on notice given. It is otherwise in incidental, and, as it were, colloquial applications, where from some casualty a party asks that his case may be deferred to a particular day, or be temporarily passed on the calendar. All the costs which would naturally appertain to such arrangement of the business would be the expense of witnesses for the day, and perhaps, on a liberal construction of the fee-bill, the attendance fee of the advocate and proctor in court for the time.

I shall allow charges for opposing motions made on notices given to put the cause off for the term, and disallow them in all cases where the application was without notice, and only to defer the hearing to another day in the same session.

No appointment of a fee in the state law, or under the practice of the United States courts, is shown for written arguments. They are furnished by mutual consent, and for the purpose of expediting the decision of a cause not likely to be heard orally. Neither party can therefore cast upon the other the expense of that mode of proceeding. If the counsel will not waive their right to taxable fees for arguing a cause, they must mutually stipulate in writing, that a written argument shall be regarded, in the taxation of costs, the same as an oral one in court.

It is stated in the bill of costs, that the judge ordered the cause to be submitted in writing. This is undoubtedly a misapprehension. Such direction is never given in our practice. If one party insists on an immediate hearing, and to avoid the delay asked by the other, offers to submit the case on written argument, the court may refuse the delay asked except on condition of furnishing a written argument. This is only to preserve to the diligent and prepared party all his rights and the advantage of a prompt disposition of the case. But that in no way rests on the authority to prescribe to parties this particular method of debating the case. Those charges in this bill must be rejected.

Various items of charge are claimed for attending court, and on motions made in writing, merely formal as for time, to the defendant to answer it, &c. This is mere chamber business. In some of the instances specified, the extension of time was assented to by the libellant, and no special attendance was necessary or required on his part. Where the continuance was allowed on return day of process, the libellant must, according to the due order of practice, be in attendance to receive that return, and is allowed a fee therefor, and he cannot duplicate that fee, because of another step then taken, entirely incidental to the return. So, also, it was needless for him to attend in court at the day allowed the defendant to answer.

He was entitled on return of process to a default nisi, and if the defendant failed to comply with the terms of his indulgence, the decree on that default would become final.

Merely supposititious motions cannot be charged, such as motion for final decree, motion for costs, motion for reference, &c., when the object of the supposed motions are embraced in the decretal order of the court; though there may be foundation for similar charges when they are based upon specific application to the court for the modification, reversal, or enlargement of the final decree as to any of those particulars.

The taxed bill must be rectified according to the directions here given.

MANCHESTER (PROVIDENCE v.). See Case No. 11,450.

MANCHESTER PRINT WORKS (AIKEN v.). See Case No. 113.

MANCIETTE (NORMAN v.). See Case No. 10,300.

MANDELBAUM (KING v.). See Case No. 7,799.

Case No. 9,008.

MANDELL v. PIERCE.

[3 Cliff. 134; 1 Am. Law T. Rep. U. S. Cts. 123; 7 Int. Rev. Rec. 193; 2 Am. Law Rev. 774.][1]

Circuit Court, D. Massachusetts. May Term, 1868.

TAXATION — INCOME TAX — EXECUTOR — DEBT AGAINST ESTATE—RETURN.

1. On May 1, 1866, a tax was assessed upon the income of the plaintiff's testatrix, from the 1st of January, 1865, to July 2, 1865, the day of the testatrix's decease. The amount of the tax was paid under protest, by the plaintiff, as executor, to prevent the distraint of property, and brought suit to recover the amount. *Held*, that the tax was legally assessed against, and collectible from, the plaintiff as executor.

[Cited in U. S. v. Schlesinger, 14 Fed. 684.]

2. The liability in this case accrued in the lifetime of the recipient of the income, at whose death it passes over to the executor or administrator, as a debt against the estate.

3. When the recipient dies within the year, the return must be made by the excutor or administrator.

4. The tax is imposed upon the income of the property of the decedent, and the liability is not discharged because the decease occurs before the time appointed by law for making the return upon which the tax is predicated.

Assumpsit to recover the amount of an internal-revenue tax, paid under protest. Facts agreed. Sylvia Ann Howland, of New Bedford, single woman, died July 2, 1865, and the plaintiff [Thomas Mandell], also of New Bedford, was during said year duly appointed executor of her last will, and was at the time of the suit such executor. The plaintiff, as such executor, was required by the assistant assessor of internal revenue for the First collection district of Massachusetts, in which New Bedford is situate, to make return of the income received by said Sylvia Ann Howland, during that portion of the year 1865, in which said Slyvia Ann was in life, and did make such return under written protest indorsed thereon, not conceding any liability to taxation thereon, and protesting against the same. On May 1, 1866, the assistant assessor assessed a tax on the income of said Sylvia Ann Howland from and including the 1st of January, 1865, up to July 2, 1865, the day of her decease, of $4,512.36, and the plaintiff appealed to the assessor, who sustained and affirmed the taxation, and the plaintiff subsequently appealed to the commissioner of internal revenue, who affirmed the taxation and dismissed the appeal. The tax was transmitted and certified to the collector of internal revenue for said district for collection, and the defendant [Ebenezer W. Pierce], having been appointed collector of internal revenue for said district, passed into his hands, as such collector, for collection; and the defendant, under color of his office, as such collector, through his deputy, demanded of the plaintiff, as such executor, the payment of said tax; the plaintiff declined to pay the same, whereupon the defendant, as collector as aforesaid, through his deputy, threatened to collect said tax by distraint of property, and was proceeding so to collect it by force, when the plaintiff, in order to avoid a distraint of property, on the 6th of September, 1866, paid the defendant said tax of $4,512.36, under written protest.

T. D. Elliot and T. M. Stetson, for plaintiff.

The income-tax law does not authorize the tax in this case. Sylvia Howland died in no default as to taxation, and before any return could be required of her or income tax could be assessed upon her. No debt or liability of hers passed to the plaintiff, and the estate was then in his hands subject only to the laws taxing estates. Ex parte Cooke, 15 Pick. 237. And there is no statute providing such tax as the defendant has collected. The case constantly arises under the state law of Massachusetts, and it was never supposed that an income duty could be assessed unless the party was in life at the date, May 1. No apportionments of income tax are authorized by the statute. The year is the taxable unit.

An income is the result of the transactions of a period. A man may gain one day and lose the next. Some period must be determined by law which shall give the just mean and exhibit of real loss or real gain. Otherwise the government, by a system of comminution, might derive taxes from profitable months or weeks, and not repaying for the unprofitable ones, might gain large income taxes where the citizen had in fact no income. The unit is by the statute the calendar year.

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission. 2 Am. Law Rev. 774, contains only a partial report.]

Act 1864, June 30, § 116, relates to "annual gains, profit, or income," and "income for the year ending December 31, 1865." And it allows deduction "for state, county, or municipal taxes paid within the year." And this last allowance cannot be effected unless the calendar year is for purposes of income tax regarded as one and indivisible. Indeed, in Massachusetts, the assessment of state, county, and municipal taxes is not completed, so that demand or payment can be had, till much later in the year than the date of S. A. Howland's decease. Section 117 instructs how to estimate such "annual income," income "for each year," by instructions entirely inapplicable to lesser periods of time. Section 116 shows who are liable to income tax, and that is only "persons," and of such only "those residing in the United States, or citizens of the United States residing abroad." Which description does not include the dead or the estates formerly theirs. The deduction of $600 is provided to come out of a year's income, and no arrangement exists for apportioning it among the parts of a year, either by time or by actual receipts.

Throughout the statute no "estate" is spoken of in connection with income tax. Section 116 speaks of real-estate purchases and sales, and expressly provides a "year" as the period of realization for the purposes of income tax. Section 117. Deductions also of repairs to an extent not greater than the average of five years is permitted. It is manifest that such a deduction cannot come out of any single day's, but from the balance of a year's fortune. Section 118 is very significant. The income tax is based on a return required, not of deceased people, but "of all persons of lawful age," and who else? Here would be the place to provide for the case of an estate. Such return precedes the assessment and liability which falls on May 1, and therefore if a person is dead before such return, there could be no return, and a fortiori no liability. Besides persons of lawful age, "guardians and trustees are required to make return of the income of the minor or cestui que trust," and no provision whatever requires an executor, as such, to make return of the income received by his principal during any period of his life. The "guardians or trustees" must make return of the income of those for whom they act as guardian or trustee. And if it were possible in a loose sense to style an executor a "trustee," it would still be impossible to style him a trustee for the deceased testatrix. The omission to require a return from executors or administrators is the more marked in section 118, because the section does mention the words "executors and administrators," and does require a return from them, so far as they are guardians or trustees, of the amount of the income of the cestuis que trust, i. e. the heir or legatee. This refers to the frequent case where an executor has, in addition to his proper duties as executor, certain trust duties imposed by a will. Miller v. Congdon, 14 Gray, 114.

A collector of internal revenue is liable to suit if he collects an illegal tax by force; i. e. he cannot justify his tort under the laws. So if he still proceeds after being told in writing of the error and illegality, and the refusal to pay and purpose to recover back. For in such last case he is fully warned, goes on at his choice and peril, and can require indemnity of his principal before paying over. Elliott v. Swartwout, 10 Pet. [35 U. S.] 153.

The above principles are those of common law. Elliott v. Swartwout, 10 Pet. [35 U. S.] 153; Bend v. Hoyt, 13 Pet. [38 U. S.] 263; Curtis's Adm'x v. Fiedler, 2 Black [67 U. S.] 461.

G. S. Hilliard, U. S. Atty., and W. A. Field, Asst. U. S. Atty., for defendant.

The recent statutes of the United States and the sections of the same relating to taxes on income are the following: Sections 49–51, c. 45, 1861 (12 Stat. 309); sections 89–93, c. 119, 1862 (12 Stat. 473); section 1, containing amendment to section 93, ubi supra, and section 11 of chapter 74, 1863 (12 Stat. 718, 723); sections 116–119, c. 173, 1864 (13 Stat. 281); section 1, c. 78, 1865 (13 Stat. 479, 480); section 9, c. 184, 1866 (14 Stat. 138); section 13, c. 169, 1867 (14 Stat. 477–479). The statutes in force at the time of the decease of said Sylvia Ann Howland and of the assessment of the tax in question, are chapter 173, 1864, §§ 116–119; chapter 78, 1865, § 9, containing amendments to sections 116–119, ubi supra. In the statutes of the commonwealth of Massachusetts express provision is made for the assessment of taxes upon the real and personal estate of persons who decease before the 1st of May. Gen. St. Mass. pp 75, 76, c. 11, §§ 10–12, pars. 5, 7.

The construction contended for by the plaintiff must be either that the person upon whose income the tax is levied must be alive on the 1st of May of the succeeding year and on the day on which the tax is actually levied, or that the tax upon incomes can never be levied for a fraction of a year. The provisions of sections 124–150, c. 173, 1864, relating to taxes upon legacies and distributive shares of personal property, and on succession to real estate on the decease of any person, have no special application to this case. The estates of all persons who die are liable to these last-mentioned taxes, without regard to the day of their decease. The question is also to be distinguished from a tax levied upon an executor for income received by him as executor.

There is no legal reason why congress could not, and no legislative reason why congress should not, impose a tax upon the actual income received by any person who dies before the levy; the only point in dispute is, has congress so enacted? It is not pretended that the tax becomes a debt for the satisfaction of

which a suit can be brought or a distraint made until the tax has been actually assessed or levied, but it is contended that on May 1, 1866, the estate of said Sylvia Ann Howland, or the defendant, as the executor of her last will, was liable to the assessment of this tax, and after this assessment the tax was legally collectible out of the estate. Section 116, as amended is, substantially, that the tax shall be levied annually upon the annual income of every person residing in the United States or of any citizens of the United States residing abroad. In terms it purports to be a tax to be levied, not upon a person, but upon the income, to be assessed annually and for the whole calendar year. When a person dies his property is not derelict. On the probate of the will and appointment of the executor, or on the appointment of an administrator, the legal title to the personal property vests by relation, from the time of decease, in the executor or administrator, and these personal representatives continue to receive the income until the estate is administered upon.

If the income received by said Sylvia Ann Howland up to July 2 should have been added to the income received by the defendant, as her executor, up to January 1, 1866, and one tax assessed for the whole year, that only proves that too small a tax has been assessed, and does not render the tax invalid. The facts find that the amount of the tax is correct, if the tax can be assessed at all. The proper deductions have been made. The $600 is not strictly a deduction; the tax is upon the excess of income over $600, and the whole $600 is to be taken out when the tax is for fractions of a year. The deduction of $117 can as well be taken out for fractions of a year as for a whole year, the language being in general, either that certain things shall not be included, or certain amounts actually paid by the person whose income is taxed shall be deducted. Section 118 makes it the duty of all persons of lawful age to render a list, etc., but the tax can be levied even if no list is rendered; besides, the legal representatives must be compellable to perform the duties the law imposes upon the deceased person they represent, if the tax be leviable at all. In section 118 the word "trustee" is meant to include all persons who receive income in any fiduciary capacity, and expressly mentions executors and administrators. All incomes received by any person, the beneficial interest in which belongs to any other person, must be taxed under the section 118. This section means that estates shall pay an income tax.

This income tax is really a tax upon things, to wit, upon income to be paid by persons, but it is independent of the life of any particular person.

CLIFFORD, Circuit Justice. Annual gains, profits, and income of persons residing in the United States or of citizens of the United States residing abroad, whether derived from property, rents, interests, dividends, or salaries, or from any profession, trade, employment, or vocation, carried on in the United States or elsewhere, or from any other source whatever, were subject annually, by the act of the 30th of June, 1864, to a duty of five per centum, on the excess over $600, and not exceeding $5,000; and by the amendatory act of the 3d of March, 1865, it was provided that such annual gains, profits, and income are subject annually to a duty of ten per centum, on the excess over $5,000. 13 Stat. 281–479.

Rules are therein enacted prescribing the mode to be adopted in ascertaining the income of any person liable to an income tax. Such of those rules as are material to the present investigation may be stated as follows: 1. That the duty should be assessed, collected, and paid upon the gains, profits, and income for the year ending the 31st of December next preceding the time for levying, collecting, and paying the same. 2. Duties on incomes as therein imposed are required to be levied on the 1st of May in each year, and they were therein declared to be due and payable on or before the 30th of June in the same year. 13 Stat. 283. 3. Incomes received from institutions whose officers are required by law to withhold a per centum of their dividends, and pay the same to the commissioner or other officer authorized to receive the same, and income derived from notes, bonds, and other securities of the United States, and also all premiums on gold and coupons, were required to be included in the estimate; but the provision was, that the amount so withheld by such institutions should be deducted from the tax which would otherwise be assessed. 13 Stat. 479. 4. One deduction only of the $600 could be made from the aggregate income of all members of any family composed of parents and minor children or husband and wife. 5. Net profits realized by sales of real estate purchased within that period were required to be deducted from the income of that year, [and were chargeable as income, but losses on sales of real estate purchased within that period were required to be deducted from the income of such year.] [2] 6. Taxes paid within the year, whether state, national, county, or municipal, were required from the gains, profits, or income of the person paying the same, whether owner, tenant, or mortgagor.

Other deductions were also required to be made as specified in the substitute for the 117th section, as enacted the succeeding year. 13 Stat. 479.

Plaintiff's testatrix died on the 2d of July, 1865, and the agreed statement shows that the plaintiff was duly appointed the executor of her last will and testament.

The residence of the decedent, during the year preceding her death, was at New Bed-

[2] [From 7 Int. Rev. Rec. 193.]

ford, which is included in the First district in this state for the collection of internal revenue. Pursuant to the requirement of the assistant assessor for that district, the plaintiff made return of the income made by his testatrix during that portion of the year which had elapsed at the time of her decease; but he denied the power of the officer to require any such return, and made it under protest. Despite the objections and protest of the plaintiff, the assistant assessor, on the 1st of May, 1866, assessed a tax on the gains, profits, or income of the decedent, as returned for that portion of the year preceding her death, of $4,512.36. Appeals were regularly taken by the plaintiff, first to the assessor of the district, and subsequently to the commissioner, and those officers respectively affirmed the taxation. Payment was subsequently demanded by the collector, and the plaintiff, on the 6th of September, 1866, paid the amount, under a written protest, to avoid a distraint of his property.

Technical forms are waived by the parties on both sides, as appears by the agreed statement. They agree that if the income received by the decedent for that portion of the year prior to her death was liable to taxation as income, under the internal-revenue laws, then the tax was legally assessed, and that the amount is correct, and that the defendant acted in accordance with law. On the other hand, it is also agreed that the appeals and protests were sufficient in matter and form, and that the suit was seasonably brought, after due demand.

Viewed in the light of those admissions, doubt could not be entertained as to the liability of the income of the decedent to taxation, under the internal-revenue laws, if she had lived through the entire income year, and had been in life when the tax was assessed. Assessment, in that event, undoubtedly would have been made for the gains, profits, and income for the entire year; but it is equally certain that the amount received prior to the 2d of July would have been equally liable to taxation, at the time appointed by law for the assessment, even if it appeared that she had ceased on that day to be the owner of any property, and had never afterwards, during the remainder of that income year, received any gains, profits, or income. Beyond question, her liability to taxation would have been the same in that event, except as to amount, as if she had continued to be the owner of property, and the recipient of gains, profits, and income, during the remainder of the income year. Equal distribution of the gains, profits, and income over every portion of the income year is not a condition precedent to the liability to taxation, under the internal-revenue laws.

On the contrary, gains, profits, and income received within the income year are annual gains, profits, and income within the meaning of those laws, although the whole amount of the same in a given case may be received within the first month or the last month of the year. Such liability attaches to all gains, profits, and income received within the income year, although the property from which such gains, profits, or income are derived is acquired within the year or is conveyed away before the year closes; and the same rule will apply, although it appears that the gains, profits, or income were derived from a business or avocation which from its nature could not be pursued, or was not pursued, only for a part of the income year.

Great inequality would flow from the opposite rule of construction, as all persons who changed their business within the income year, and all those engaged in avocations which from their nature cannot be pursued throughout the year, would escape all such taxation. Obviously such a construction would defeat, instead of carrying into effect, the intention of congress, and therefore it cannot be admitted. When ascertained as required by law, the intention of congress was, that gains, profits, and income received within the income year, from the sources therein defined, should be subject to the prescribed taxation, whether such gains, profits, or income were derived from any kind of property, rents, interest, dividends, salaries, or from any trade, profession, employment, vocation, owned, collected, pursued, or followed for the whole or any part of the income year.

All such gains, profits, or income received within that year prior to the 2d of July were liable to taxation, under the internal-revenue laws, subject to the deductions which those laws allowed in ascertaining the aggregate amount as the basis for the computation of the tax. In ascertaining the aggregate amount of the gains, profits, or income liable to such taxation, the same deductions were required to be made, as would have been if the testatrix, instead of having deceased, had ceased on that day to be the owner of any property, and for the residue of the income year had received nothing as gains, profits, or income within the meaning of those laws.

Argument is unnecessary to show that all the gains, profits, or income received by the decedent, within that income year, are those which accrued prior to July 2, and that it would be absurd to suppose that she continued to own property after that day, or that she sustained any subsequent loss, within the meaning of those laws. The principal objection to this theory is, that the death of the testatrix occurred before the time appointed for making the required return; and the argument is, that in that state of the case no return can be required by her legal representatives. All guardians and trustees, whether as executors, administrators, or in any other fiduciary capacity, are required under the law then in force to make and render a list or return, in such form and manner as the commissioner should prescribe, to the

assistant assessor of their district, of the amount of gains, profits, or income of any minor or person for whom they acted as guardian or trustee. 13 Stat. 480.

Taxes or duties on incomes thereby imposed are required to be levied on the 1st of May, and the provision is, as before explained, that they shall be due or payable on or before the 30th of June in each year. 13 Stat. 283. Guardians are required to make return for their wards, trustees for their cestuis que trust, and executors or administrators for whom they act. Suggestion is made that the testatrix, after her decease, was not a person residing in the United States, but the suggestion is quite too technical to be entitled to weight, as the executor in the case of a will is the legal representative of the deceased, and by virtue of his appointment, and the probate of the will, is bound to execute the trust reposed in him, by the terms of the will and the testamentary laws of the state.

He is bound to collect all debts which are due, or which fall due to the decedent, and to pay all debts due from the decedent, or which fall due after his decease, unless the assets of the estate are insufficient. Such taxes as accrued before the decease of the testator or testatrix are a debt against the estate, and as such must be paid by the executor out of the assets of the estate. Liability to taxation arises, and in some sense it may be said that the taxes accrue, at the time the gains, profits, and income pass into the hands of the recipient. Return is required in every case before the day of levy, so that it is clear that the tax is due, that is, the recipient of the gains, profits, and income is liable for it before it is assessed, as the return is only to ascertain whether the liability exists, and its extent. 13 Stat. 225.

Evidently such liability, in a case like the present, accrues in the lifetime of the recipient of the gains, profits, and income, and at his or her decease it passes over to the executor or administrator as a debt against the estate. Where the recipient dies within the year, he or she cannot make any return, and the duty of making it in that event devolves on the executor or administrator, as the legal representative of the deceased. The requirement of the law is, that the return shall be made in the collection district where the person resides upon whom the duty of making it is imposed; and it seems but a reasonable construction of that provision, to hold that in cases like the present, it may include the executor or administrator, as no return can be made by the actual recipient of the gains, profits, or income. Concede that an executor or administrator under that provision may be regarded as a trustee, still the argument is, that it is impossible to regard him as the trustee for the decedent, which perhaps is a sound proposition as a technical rule; but he is the legal representative of the deceased, and as such is bound to collect the dues and pay the debts, and administer the estate, which is a sufficient answer to the proposition as applied to the case before the court. Internal-revenue taxes are also levied on persons having in charge or trust as executors, administrators, or trustees any legacies or distributive shares arising from personal property, where the whole amount shall exceed $1,000 in actual value; and the argument is, that those taxes in case of deceased persons, dying within the income year, are a substitute for the income taxes required to be paid by persons in full life; but it is impossible to adopt the proposition, as the legacy and succession taxes are entirely distinct from the taxes on gains, profits, and incomes. 13 Stat. 287.

Income taxes accrue on gains, profits, or income received by the testator or intestate in his lifetime; but legacy and succession taxes accrue subsequent to the death of such testator or intestate. A suit may be maintained against a collector of internal revenue, to recover back taxes illegally exacted, if the payment was made under written protest to prevent a distraint of the plaintiff's property; but the taxes in this case, under the agreement of the parties, were in judgment of law legally assessed against the plaintiff as executor of Sylvia Ann Howland, deceased.

Judgment for the defendant for the costs of suit.

MANDELL (ROBINSON v.). See Case No. 11,959.

MANDEVILLE (ALEXANDRIA v.). See Case No. 184.

MANDEVILLE (AULD v.). See Case No. 653.

MANDEVILLE (BANK OF ALEXANDRIA v.). See Cases Nos. 850 and 851.

MANDEVILLE (BAYARD v.). See Case No. 1,132.

Case No. 9,009.

MANDEVILLE et al. v. COOKENDERFER.

[3 Cranch, C. C. 257.] [1]

Circuit Court, District of Columbia. Dec. Term, 1827.

SLAVERY—ACTION FOR ESCAPE—PRESUMPTION AS TO NEGRO — PRIMA FACIE CASE — GENERAL VERDICT — JUDGMENT ARRESTED — VENIRE DE NOVO.

1. The keeper of a stage-office is liable to the owner of a colored slave, for damages sustained by the running away of the slave, if he suffers him to take passage and depart in the stage-coach, without the consent of the owner.

2. Color is prima facie evidence of slavery.

3. Every person, who undertakes a business in which the public is concerned, is bound by the general law of the land, to conduct that business with reasonable care; and if, for want

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

of such care in such business, another person suffer damage, the conductor of such business is liable to make good such damage.

[Cited in Lowe v. Stockton, Case No. 8,567.]

4. Every negro is, by a rule of evidence well established in this part of the country, prima facie, to be considered as a slave, and the property of somebody; and he who acts, in respect to him, as if he were a free man, acts at his peril; and the burden of proof is on him to show that the negro is not a slave; or at least to show such circumstances as will rebut the presumption arising from color.

5. If the keeper of a public stage-office send a negro away in the stage-coach, it is prima facie evidence of carelessness.

6. In such a case it is not necessary to aver in the declaration, any special law or custom, to raise a duty in the office-keeper, not to send away a negro slave without the leave of his master or owner.

7. Where it is necessary to set forth the duty, the averment must relate to the time of doing the act which is supposed to be a violation of that duty.

8. The words "wrongfully and improperly" are not alone sufficient to show, that the act to which they are applied, was unlawful or actionable; but the facts and circumstances, which make the act unlawful or actionable, must be set forth.

9. If there be a general verdict for the plaintiff, and one of the counts in the declaration be bad, the judgment must be arrested; but, if there be a good count in the declaration, a venire facias de novo, may be awarded.

This was an action upon the case against [Thomas Cookenderfer] the keeper of a public stage-office in Washington, for suffering the plaintiffs' slave to take passage in the stage-coach from Washington to Baltimore, whereby the slave escaped; and the plaintiffs [Mandeville and Larmour] were put to great trouble and expense in recovering him. At the trial, in May term, 1827, THE COURT (nem. con.) at the prayer of the plaintiffs, instructed the jury in effect, that color was prima facie evidence of slavery; and that if they should be satisfied by the evidence that the plaintiffs' slave was a colored man; and that the defendant, without authority of the plaintiffs, suffered him to take a seat in the stage-coach for Baltimore, and that he went off in the coach, and thereby escaped, the defendant is liable to the plaintiffs in this action for the damages which the plaintiffs may have sustained by reason of such escape. The jury found a general verdict for the plaintiffs for $200 damages.

The defendant's counsel moved in arrest of judgment, and contended that the second count was bad.

1. The first count states that the plaintiffs were owners of a negro man, a slave for life, called Richard Bunbury; and that the defendant, on the 28th of September, 1825, was the "keeper and superintendent, and had the management and control of a stage-office, for the entry of lawful passengers, traveling from the city of Washington, in the said county, to Baltimore," &c., "and whereas by the law and the custom of the county aforesaid, superintendents, keepers, and managers of stage-offices, are bound not to take any slave for life, belonging to any citizen or citizens of said county, out of the same, or to take any such slave or slaves, out of the district aforesaid, in any stage, carriage, or other vehicle, or in any wise to suffer or permit, or aid in suffering or permitting any such slave or slaves, to have passage or conveyance in any line of stages, coach, stage or other conveyance under their or his control, management or superintendence, by or through which any such slave or slaves, may be carried out of the district aforesaid, without proper permission or authority from the owner of such slave or slaves; yet the said Thomas Cookenderfer," (the defendant) "not regarding his duty in that behalf," &c. "took so little and such bad care of, and conducted himself so carelessly and improperly in the management of the said line" "of stages," "and the office of such stage line, in the said county, that the said" "slave" was by and through the carelessness, misdirection, mismanagement, and improper conduct of said defendant, permitted, suffered, and allowed, and by him unjustly authorized and enabled to take a seat and passage in the said line of stages, or one of the stages of the said line on the 28th of September, in the year 1825, at the county aforesaid, and the said "slave" "to be therein and thereby carried, and taken out of, and beyond the county and district of Columbia, aforesaid, and out of, and from the control of the said plaintiffs, and thereby caused the said plaintiffs to pay" &c., a large sum of money, namely, $500, for recovering him, and to lose his services, &c.

2. The second count, "and whereas the said defendant Thomas Cookenderfer, was, on the 28th day of September, in the year 1825, at the county aforesaid, the keeper of the stage-office, for the line of stages which runs to and between, and on the route to and between, the city of Baltimore in the state of Maryland, from the city of Washington, in the county of Washington, and had, on the day and year aforesaid, and at the county aforesaid, the control and management of the same, and the superintendence of passages taken and entered on the books and way-bill, for and in the said line, route, and stages, from said city of Washington, and it is his duty as such superintendent, not to permit or suffer, or in any wise aid any slave for life, owned by any citizen or citizens, in said county and district, or any such slave owned by any citizen or citizens within said district, to make and effect his escape from the ownership, control of, or servitude to his lawful master or masters, by means of, or through the said stage-line, or stage-office, or by, or in any manner or mode of conveyance under and within his control, as superintendent of such line of stages, or stage, belonging or connected to, or with the said line or route, or office. Nevertheless the said Thomas not regarding his duty aforesaid, wrongfully and improperly, did, on the 28th day of Septem-

ber, in the year 1825, at the county of Washington aforesaid, suffer and allow, and give permission to, and aid the said negro slave, Richard Bunbury, the property, before and at that time, of said plaintiffs, to take passage and conveyance in the said line or route of stages, or one of the stages of the said line or route, from Washington city, in the county of Washington, to, or on the route to Baltimore, in the state of Maryland, and to be therein conveyed and carried out of the district and county aforesaid, and out of the reach and control of said plaintiffs, whereby the said plaintiffs lost, and were deprived of the use, labor, services, and profits of the said slave," &c., "and also caused the said plaintiffs to pay" &c., "money for the recovery of said slave," &c.

Morfit & Swann, for plaintiffs.
Mr. Key, for defendant.

CRANCH, Chief Judge (THRUSTON, Circuit Judge, absent). It is moved in arrest of judgment, that one, if not both counts of the declaration are bad; and as the verdict is general, if either count be bad, the judgment must be arrested.

The first count sets forth the law and custom of the county of Washington, in relation only to the slaves of citizens of that county; and as the count does not aver the plaintiffs to be citizens of that county, the case is not within the law and custom set forth; and therefore the plaintiffs' case derives no support from that allegation. But the averment of the law and custom of the county may be considered as surplusage; and if, without that averment, there be enough left in the count to make the defendant liable, the count may be good.

The count avers that the defendant was, at the time, &c., the keeper, and had the management and control of the stage-office of a line of stages for passengers passing in such stages from Washington to Baltimore; that the defendant, not regarding his duty in that behalf, took so little care of, and conducted himself so carelessly and improperly in the management of his said office that the plaintiffs' negro slave, the property of the plaintiffs, was by the carelessness, misdirection, and mismanagement of the defendant, permitted, suffered, and allowed, and unlawfully and unjustly authorized, and enabled to take a seat in one of the stages of that line, and to be thereby carried and taken out of the District of Columbia, and out of the control of the plaintiffs, whereby they sustained damage.

Every person who undertakes a business, in which the public is concerned, is bound, by the general law of the land, to conduct that business with reasonable care; and if, for want of such care in such business, another person suffer damage, the conductor of such business is liable to make good such damage. If the keeper of a stage-office carelessly send away my goods, without my authority, or send them in a wrong direction, so that I suffer damage through his carelessness, he is liable to make compensation for my loss, although he did not know the goods to be my property. Every negro is, by a rule of evidence well established in this part of the country, primâ facie to be considered as a slave, and the property of somebody; and he, who acts in regard to him as if he were a free man, acts at his peril, and the burden of proof is upon him, to show that the negro is not a slave, or, at least, to show such circumstances as will rebut the presumption arising from color. If the keeper of a stage-office, therefore, send a negro away in the stage-coach, it is primâ facie evidence of carelessness. In such a case, I do not think it necessary that the plaintiff should, in his declaration, aver any special law or custom, to raise a duty in the office-keeper not to send away a negro slave, without the leave of his master or owner. After striking out of the present count, the averment of the special law and custom of the county of Washington, I think there is enough left in the count to maintain the action.

In the second count, the duty of the defendant, the violation of which is the subject of complaint, is averred to be a duty existing at the time of the complaint, not at the time of the act of sending away the slave. The plaintiffs' case is, therefore, not aided by that averment; and if there be not enough left in the count to show a duty on the part of the defendant, the plaintiffs cannot recover on that count. If that averment be stricken out, the substance of the count is. That the defendant was, on the 28th of September, 1825, the keeper of the stage-office, &c., and had the control and management of the same, and of the passages taken, &c. Nevertheless, the said Thomas Cookenderfer (the defendant) wrongfully and improperly did, on the 28th of September, 1825, at, &c., "suffer and allow, and give permission to, and aid the said negro slave, Richard Bunbury, the property, before and at that time, of the plaintiffs, to take passage in one of the stages," &c., "and to be therein conveyed and carried out of the district aforesaid, and out of the reach and control of the plaintiffs, whereby the plaintiffs lost the service of the said slave," &c., "and sustained damage," &c.

This count does not aver negligence, or carelessness of the defendant, in his office or business; nor that the aid given to the slave, was knowingly, or unlawfully given, nor without the consent of the owners; nor does it show any cause of action, unless the words "wrongfully and improperly" can be considered as a sufficient averment of the wrong. But these epithets have never been considered of themselves as sufficient to show an act to be unlawful, or actionable, which would not appear to be so without those epithets. All the circumstances must be shown, that cause the act to be unlawful, so that the court may judge whether it be unlawful or not.

I am therefore of opinion, that the 2d count

is bad, and not aided by the verdict; and, therefore, that the judgment must be arrested.

MORSELL, Circuit Judge, concurred.

After this opinion was given, Mr. Morfit, for plaintiffs, as there was one good count, moved for a venire de novo. Mr. Key objected, and questioned the power of the court to grant it after judgment arrested. If it be a matter of discretion, the court will not grant it in so hard a case. The suit ought to have been brought against the stage-owners, not against their office-keeper.

Mr. Morfit cited the case of Semmes v. Sherburne [Case No. 12,655], in this court, at December term, 1824, and December term, 1825 [Id. 12,656], and Turner v. Foxall [Id. 14,255], in this court at June term, 1819, in which cases, he says, this court ordered a venire facias de novo; but it does not appear in the report. Mr. Morfit also cited Eddowes v. Hopkins, 1 Doug. 376, and Grant v. Astle, 2 Doug. 730, 2 Tidd, Prac. 831, and Harwood v. Goodright, Cowp. 89. But see Trevor v. Wall, 1 Term R. 151; a court of error cannot award a venire de novo; Holt v. Scholefield, 6 Term R. 694, 695, where the court refused a venire de novo, in slander, and Lawrence, J., said "that the plaintiff ought not to be at liberty to award by this judge's notes in the case, because the evidence applied as well to the bad as to the good counts." Harrison v. King, 1 Barn. & Ald. 161; Holloway v. Bennet, 3 Term R. 448; Lee v. Muggeridge, 5 Taunt. 36; 1 Archb. K. B. Prac. 195; Anger v. Wilkins, Barnes, Notes Cas. 478; Smith v. Haward, Id. 480; Williams v. Breedon, 1 Bos. & P. 329; Spencer v. Goter, 1 H. Bl. 78.

CRANCH, Chief Judge. The judgment in this case having been arrested because one of the counts was bad, and the jury rendered a general verdict for the plaintiffs for $200 damages, Mr. Morfit moved for a venire de novo; evidence having been offered upon both counts, and cited Eddowes v. Hopkins, 1 Doug. 376, and Grant v. Astle, 2 Doug. 722, 730.

Mr. Key, contra, cited Chit. Pl. 394; 2 Saund. 171b; Starkie, Sland. & L. 418, 419; Hopkins v. Beedle, 1 Caines, 347; Lyle v. Clason, Id. 581; Livingston v. Rogers, Id. 588; Queen v. Corporation of Helston, 10 Mod. 202, 203; Bebee v. Bank of New York, 1 Johns. 535, 555, 576; Morgan v. Bliss, 2 Mass. 112; and contended, that the general rule is, that a venire de novo cannot be granted on account of a general verdict for the plaintiff, where some counts are good, and others bad; and that the case of slander is an exception to that general rule.

Chitty, in the page cited (namely volume 1, p. 394), says that in such a case, "the judgment will be arrested in toto, and no venire de novo awarded;" and for this he cites Onslow v. Horne, 3 Wils. 185; 2 Saund. 171d; and Grant v. Astle, Doug. 722, 730.

In the case of Onslow v. Horne, which was an action of slander, no question was made respecting a venire de novo; and the court expressly waived the question whether either of the counts was good. The only question was, whether one of the two counts upon which the verdict was given, was a bad count; for if so, it was admitted that the judgment must be arrested. The court, being of opinion that one of the counts was bad, arrested the judgment. No motion was made for a venire de novo. Why it was not made does not appear; perhaps it was because the counsel for the plaintiff doubted whether either event was good; or it might be, that, with Mr. Starkie, he thought the action of slander was an exception to the general rule that where judgment is arrested because the verdict is general, and some counts are bad, and some good, and evidence has been given upon any of the good counts, a venire facias de novo will be awarded. The case however is not authority to show that in such case the general principle is, that a venire facias de novo cannot be awarded in any form of action. It may be observed, however, that Mr. Chitty does not say that the court cannot, but that it will not, grant a venire de novo in such a case; evidently alluding to the will or discretion of the court, and not to its power.

The next authority to which Mr. Chitty refers is 2 Wms. Saund. 171b, in the notes, where Sergeant Williams says, that in such case the judgment shall be arrested and no venire de novo awarded; for which he cites Trevor v. Wall, 1 Term R. 151; Hancock v. Haywood, 3 Term R. 435; and Holt v. Scholefield, 6 Term R. 691. He admits, however, that where evidence has been given only on the good counts, the court has permitted the verdict to be amended by the judge's notes; for which he cites Eddowes v. Hopkins, 1 Doug. 376; Williams v. Breedon, 1 Bos. & P. 329; and Spencer v. Goter, 1 H. Bl. 78.

The case of Trevor v. Wall, 1 Term R. 151, was error on a judgment of an inferior court, in Shropshire, in an action of assumpsit. The judgment was reversed because one of the counts, (namely, for money had and received,) did not state that the money was had and received within the jurisdiction of that court. The defendant in error contended, that if the judgment should be reversed for that error, the court would award a venire de novo; but the court said, there is no instance of a court of error granting a venire de novo, when the proceedings originated in an inferior court; and the reason for that decision is very strong; for the judgment was reversed, because it did not appear that the court had jurisdiction of one of the causes of action for which the damages were given; and it would be absurd to direct the court below to try again a cause of which they had not jurisdiction. However that may be, the reason given for refusing it,

shows that the case was an exception to the general rule, and that if it had not been a judgment of an inferior court, a venire de novo might have been granted. So far is that case from supporting the principle which it is adduced to support, that it is a strong case in opposition to it.

The case of Hancock v. Haywood, 3 Term R. 435, was an action of assumpsit, and is cited by Mr. Chitty, only for the dictum of Judge Buller, that, "on a writ of error, where one count appears bad, and the verdict is entered generally on all the counts, the court must reverse the judgment in toto, since they cannot see on which of the counts the damages were given." No question was made as to a venire de novo. The case of Holt v. Scholefield, 6 Term R. 691, was an action of slander, and does not fix any general principle, unless it be that in actions of slander, the court has a discretion to grant or refuse a venire de novo where one count is bad, and the verdict for the plaintiff is general. The words of the reporter are, "The court were of opinion that there should not be a venire de novo; and that, as the damages were entire, the judgment must be arrested in toto." And the reason stated by Lawrence, J., why the plaintiff was not permitted to amend the verdict by the judge's notes, was, that the evidence applied as well to the bad counts, as to the good counts. If this case is to be considered as deciding that the court cannot grant a venire de novo in an action of slander, where there is a bad count, and a general verdict for the plaintiff, still it does not establish a general principle, but an exception to a general principle. If it is to be considered only as a particular instance of the exercise of the discretion of the court, it is an admission of the power of the court to grant the writ in such a case.

The case of Eddowes v. Hopkins, 1 Doug. 376, was an action of assumpsit, and is cited by Mr. Chitty, to show that the verdict may be amended by the judge's notes, where some of the counts are bad, or inconsistent, and the verdict for the plaintiff has been general. In that case, Buller, J., said, there was this distinction: that if there was evidence, at the trial, upon such of the counts as were good and consistent, a general verdict might be altered from the notes of the judge, and entered only on those counts; but that if there was any evidence which applied to the other bad or inconsistent counts (as, for instance, in an action for words, where some actionable words are laid, and some not actionable, and evidence given of both sets of words, and a general verdict,) there the postea could not be amended because it would be impossible for the judge to say on which of the counts the jury had found the damages, or how they had apportioned them: That in such a case the only remedy is by awarding a venire de novo. He mentioned a case where Sir Fletcher Norton had moved for and obtained a venire de novo in a case of that sort. "The rule for amending the verdict was made absolute, and the rule to arrest judgment was discharged."

The report refers to the case of Anger v. Wilkins, Barnes, Notes Cas. 478, in which a venire de novo was granted, "according to an ancient rule of court," "that plaintiff might sever his damages." The same point was also decided in the next year, in the case of Smith v. Haward, Id. 480.

The case of Williams v. Breedon, 1 Bos. & P. 329, was an action of trespass. A general verdict was given for the plaintiff upon two counts, one of which was bad; but the verdict was amended by the judge's notes, it appearing that the damages were calculated upon the evidence applicable only to the good count, although some evidence was given on the bad count.

The case of Spencer v. Goter, 1 H. Bl. 79, was an action for slander. The court said they could not alter a verdict unless it clearly appeared upon the face of it, that the alteration would be agreeable to the intention of the jury, and that the proper remedy in that case was a new trial. The verdict in that case was contrary to the instruction of the judge.

These are all the cases cited by Sergeant Williams, in support of the position, that "no venire de novo will be awarded."

Mr. Chitty also refers to the case of Grant v. Astle, 2 Doug. 722, which was error from the common pleas, on a judgment in an action of assumpsit. Lord Mansfield, after lamenting the rule that judgment must be arrested upon a general verdict for the plaintiff, if one of the counts be bad, said, "But in civil cases, the rule is now settled, and we have gone as far as we can, by allowing verdicts in such cases, to be amended by the judge's notes. That might have been done, in this instance, in an earlier stage of the proceeding, but cannot now after judgment." Buller, J.: "The court may grant a venire de novo; a good cause of action is shown in the first count, and that it is true, appears by the verdict; but the plaintiff has also had damages assessed to him on a count in which he has not shown any cause of action. The court, under these circumstances, may send the case back to have damages assessed only on that count on which, in point of law, he is entitled to recover." "The court there said, there was no doubt but a venire de novo might be granted by a court of error; that it had been done by the house of lords, and was not a new practice; for upon inquiry made by this court, in a late case from Ireland, a great many instances had been found." A venire de novo was awarded.

These are all the cases cited by Mr. Chitty, in support of the position that a venire de novo shall not be granted where the verdict for the plaintiff is general, and one of the counts is bad and the others are good.

The next authority cited by Mr. Key is Starkie on Slander and Libel (sections 418,

419), where, after having stated that judgment will be arrested upon a general verdict for the plaintiff, in an action of slander, if there be one bad count, he says:—"It is said to be the practice in the court of common pleas, to award a venire de novo where judgment is arrested in such a case, upon payment of costs, in order that the plaintiff may sever his damages. But in the case of Holt v. Scholefield, in the king's bench, a venire de novo was refused. In the case of Beavor v. Hides, 2 Wils. 300, Bathurst, J., expressed an opinion, that where the words in one count were not actionable, yet the postea might be amended, and a verdict, as to those words, entered for the defendant, upon the judge's certificate that no evidence was given of them at the trial. But Lord Camden said it would be very dangerous, after a verdict of twelve men recorded by the court, to refer to the judge's notes in order to alter it; and he thought there was no precedent of such a case, and that the verdict could not be varied. The general practice, however, is where general damages have been given, and it appears that the plaintiff is entitled to recover upon one count, though not upon others, either to amend the postea, which is done where it clearly appears that no evidence was given upon the defective counts, or by awarding a venire facias de novo where such evidence has been given, in order that the plaintiff may ascertain to what damages he is entitled, for so much of his cause of complaint as will support damages. It does not distinctly appear upon what principle actions for slander form an exception to the general rule."

The counsel for the defendant, in the present case, has supposed that the general rule, to which actions for slander form an exception in the opinion of Mr. Starkie, is, that a venire de novo will not be awarded where judgment is arrested upon a general verdict for the plaintiff, where one of the counts is bad and others are good. But it is impossible that that should be the general rule alluded to by Mr. Starkie; because the only case in which a venire de novo has been refused, under such circumstances, is a case of slander, namely, the case of Holt v. Scholefield, 6 Term R. 691. If that case established a general rule, it was that a venire de novo should not be awarded in actions of slander; it is impossible, therefore, that actions of slander should form an exception to that rule. But the rule, to which Mr. Starkie thought actions of slander formed an exception, was the "general practice" which he had just mentioned in the preceding sentence, namely, to amend the postea, or to award a venire de novo. The word "however," in the first line of that sentence, shows that what he is about to say is in opposition to what he had just before related, which was the dictum of Lord Camden, that it would be dangerous to alter verdicts by the judge's notes; and the case of Holt v. Scholefield, in which a new venire was refused in an action of slander, which case, it is clear, Mr. Starkie thought excepted actions of slander from the general rule, notwithstanding the practice which, in such cases of slander, prevailed in the common pleas, as stated in the two cases cited from Barnes's Notes, 478, 480. The authority of Starkie, therefore, does not support the doctrine of the defendant's counsel, but is very strong against it.

The cases of Hopkins v. Beedle, 1 Caines, 347, Lyle v. Clason, Id. 583, and Livingston v. Rogers, Id. 588, were also cited by the defendant's counsel, to show that the rule for granting a new venire is confined to cases of slander; but there is nothing in those cases to justify such an inference. The two first, it is true, were cases of slander; but the third was an action upon assumpsit, in which Judge Kent, in delivering the opinion of the court, said:—"As there is one good count in the declaration, the plaintiff may, if he choose, on the first ground sue out a venire de novo." In neither of the cases is there the least intimation that the rule is confined to actions for slander.

The cases of Queen v. Corporation of Helston, 10 Mod. 202, Bebee v. Bank of New York, 1 Johns. 535, 555, 576, and Morgan v. Bliss, 2 Mass. 112, were cited by the counsel of the defendant, to show that a new trial will not be granted for mistake of counsel. But it does not appear to be a mistake of counsel in this case, but an error of the jury, in giving a general verdict. This they had a right to do; and it was not in the power of the plaintiff's counsel to prevent it, unless by withdrawing the bad count, or entering a nolle prosequi upon it. A motion for a venire de novo is a motion for a new trial upon matter appearing in the record, and was anciently the only form of moving for a new trial. It is a motion to the discretion of the court, who will not grant it unless they see that the plaintiff has a good cause of action upon the record, and supported by evidence at the trial.

Upon consideration of all the cases cited, we think the general practice is, (as stated by Mr. Starkie,) in all the forms of action, (not excepting the action for slander,) "that where general damages have been given, and it appears that the plaintiff is entitled to recover upon one count though not upon others, either to amend the postea, where no evidence was given on the defective counts, or by awarding a venire facias de novo where such evidence has been given." In all the cases the motion is to the discretion of the court, and we see no reason for excluding the action of slander from that discretion; but upon this point it is not necessary, in the present case, to decide.

It has been said in argument that this is a hard case, because brought against the office-keeper, and not against the owners of the coach, who received the benefit of the fare; and therefore the court, in its discretion, ought not to award a new venire. But if the

suit had been brought against the owners, and judgment recovered against them, they might bring their action against the office-keeper, by whose negligence the damage arose; so that a judgment in the present case may prevent circuity of action.

The court, therefore, will award a new venire, upon payment of all costs up to this time. Venire de novo awarded.

[Upon the new trial the jury awarded $200 damages to the plaintiff, subject to the opinion of the court whether the action would lie against the office-keeper, the agent of the coach owners. The court decided that the action would not lie, and directed the entry of a non pros. Case No. 9,010.]

Case No. 9,010.

MANDEVILLE et al. v. COOKENDORFER.

[3 Cranch, C. C. 397.] [1]

Circuit Court, District of Columbia. Dec. Term, 1828.[2]

PRINCIPAL AND AGENT — ACTION FOR DAMAGES FROM NEGLIGENCE—WHO LIABLE—SLAVERY—ESCAPE.

1. For negligence of an agent, his principal only is liable.

2. It is negligence in a stage-office keeper to suffer a slave to go off in the coach by means of a false certificate of freedom; and the stage owners only are liable for the damages.

Action on the case, for negligence of a stage-office keeper, in suffering the plaintiff's slave to escape, by permitting him to go in the stage coach to Baltimore under a false pass. This cause having been tried upon the new venire issued by order of the court at December term, 1827 [Case No. 9,009], the jury found a verdict for the plaintiffs, with $200 damages, subject to the opinion of the court, whether the action would lie against the office-keeper, the agent of the owners of the coach.

Mr. Swann, for plaintiffs.
Mr. Key, for defendant.

CRANCH, Chief Judge (THRUSTON, Circuit Judge, dissenting). The declaration consists of two counts. The first count charges that the plaintiffs were owners of the slave Richard Bunbury; that the defendant was "the keeper and superintendent, and had the management and control of a stage-office for the entry of lawful passengers traveling from the city of Washington to Baltimore," "and had the management, superintendence, and direction of that part of said line of stages which leaves Washington city for and on the route to said Baltimore; and the said Cookendorfer, not regarding his duty in that behalf, took so little and such bad care of, and conducted himself so negligently, carelessly, improperly, and unlawfully, in the management of the said line, or part of line, of stages, and the office for such stages, line, or part of line of stages, in the said county, that the said" slave, the property of the plaintiffs, "was by and through the carelessness, misdirection, mismanagement, negligence, and unlawful conduct of said defendant, permitted, suffered, and allowed, and by him unlawfully, carelessly, and negligently authorized and enabled to take a seat and passage in the said line of stages, or one of the stages of the said line," "and to be therein and thereby carried and taken out of and beyond the county and District of Columbia aforesaid, and out of and from the control of the said plaintiffs, and thereby caused" them to expend a large sum of money in recovering him, and to lose his services for eighteen months, &c. The second count charges that the defendant was "the keeper of the stage-office for the line of stages which runs to and between and on the route to and between the city of Baltimore in the state of Maryland, from the city of Washington in the said county of Washington," "and had the control and management of the same, and the superintendence of all passages taken and entered on the books and way-bill for and in the said line and route of stages for said city of Washington; and it was then and there his duty as such superintendent, not to furnish or suffer, or in anywise aid any slave for life to make and effect his escape from the ownership, control of, or servitude to his lawful master or masters, by means of, or through the said stage-line, or stage-office, or by, or in any manner or mode of conveyance under or within his control, as superintendent of such line of stages or stage, belonging or connected to or with the said line or route or office. Nevertheless, the said Thomas Cookendorfer, not regarding his duty aforesaid, wrongfully, negligently, carelessly, and unlawfully, did, on the 28th of September, in the year 1825, at," &c., "without the consent of the plaintiffs, or either of them, suffer, allow, and give permission to and aid the said negro, and carelessly, negligently, and unlawfully permitted and aided him, the said negro R. B., the property of said plaintiffs, to take passage and conveyance in the said line or route of stages, or one of the stages of the said line or route from Washington city to, and on the route to Baltimore," "and to be therein conveyed and carried out of the county and district aforesaid, and out of the reach and control of the said plaintiffs," whereby they lost his services, &c., and were forced to expend a large sum of money in recovering him, &c.

The case stated is, that the said slave eloped from the plaintiff's service in Alexandria and went to Washington City, and there called himself Seymore Cunningham; and showed a certificate from a notary-public, which had been granted to Seymore Cunningham, stating that he, the said S. C., was a free man of color; and that the said slave,

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

[2] [Affirmed by supreme court, case not reported.]

Richard Bunbury, stated that he was, in fact, the said Seymore Cunningham. Evidence was offered to prove that "the person described in the said certificate did not correspond with the person of the said R. B.; that he was taller than the person described in the certificate, and was a very bright mulatto, whereas Cunningham, the person described in the certificate, was a dark mulatto," and "that the least attention on the part of the defendant would have detected the difference, as the witnesses thought." That the slave went to the stage-office in Washington City, which office was of the line of stages mentioned in the declaration, kept and managed by the defendant, and represented himself to the defendant as Seymore Cunningham, and showed his said certificate of freedom; and the defendant thereupon permitted him to take his seat in the book of the said stage-office, kept and managed as aforesaid by the defendant, and permitted him to take passage in the stage of the said stage-line mentioned in the declaration, and the said slave went off in the said stage to Baltimore, and from thence to Boston. That the instructions given by the stage-line owners to the clerks in the said stage-office, and the practice and usage in relation to allowing seats to be taken in the stages of the said line, by colored persons, were these:—"That the clerks were to allow free persons of color to take seats, and not slaves, except with their owner's permission; and that, in order to determine whether the persons of color, offering to take seats, were free or slaves, the said clerks were required to demand that they should produce certificates of freedom; and upon so producing such certificates, purporting to prove the freedom of the persons presenting themselves, they were to permit such persons to take seats as free persons, and were not required to ascertain in any other way than by production of such certificates, whether the said colored persons were free or slaves."

The declaration charges the defendant, as keeper and superintendent of a stage-office. These expressions imply an agency, not an ownership; and the case stated admits that there were owners of the stage-line, other than the keeper of the office. The defendant, therefore, is to be considered as the agent of the owners of the stage-line; and the question arises whether the defendant, who, it appears by the statement of facts, obeyed the instructions of his superiors, is liable to the plaintiffs in an action upon the case for negligence. The negligence upon which the action is founded consisted in not sufficiently examining the certificate of freedom produced, and comparing the description it contained with the person of the slave who brought it.

The authorities cited by the plaintiff's counsel, to show that the action for negligence will lie against the agent, or servant, are Bush v. Steinman, 1 Bos. & P. 404; Stone v. Cartwright, 6 Term R. 411; Stephens v. Elwall, 4 Maule & S. 259; Little v. Barreme, 2 Cranch [6 U. S.] 179; and 1 Chit. Pl. 67. The case of Bush v. Steinman, was an action against the master; and the question did not arise, whether the servant was liable for laying the lime in the road, by which the plaintiff's carriage was overturned. But Mr. Justice Rook said: "The plaintiff may bring his action either against the person from whom the authority flows, and for whose benefit the work is carried on, or against the person by whom the injury was actually committed." This is but a dictum, and it is evident that the judge was not contemplating the distinction between actions for negligence and actions for misfeasance, and the case before him was rather a case of misfeasance than of negligence; the laying of the lime in the highway being in itself a nuisance. That dictum, therefore, may and ought to be considered as applicable only to the case of misfeasance. The next case cited is Stone v. Cartwright, 6 Term R. 411. That was an action against a "middle-man." It was neither against the person by whom the injury was actually committed, nor the person from whom the authority flowed, and for whose benefit the work was carried on. But Lord Kenyon said: "In all these cases I have ever understood that the action must either be brought against the hand committing the injury, or against the owner, for whom the act was done." The act complained of in that case was the digging under the plaintiff's house, in a mine or coal-pit, so negligently as to injure the building. The reporter states that, at the trial, "Lord Kenyon was of opinion that the action could not be maintained against the defendant, who was the middle-man, but that it ought to have been brought either against the person who actually committed the trespass, or concurred therein; or against the superior, the owner of the colliery, for whose benefit the work was carried on." In this case the attention of the judge was not drawn to the distinction between cases of negligence and cases of misfeasance; but it is evident that he was contemplating the case of misfeasance. The next case is Stephens v. Elwall, 4 Maule & S. 259. That was a case of trover for the plaintiff's goods, received and disposed of by the defendant, for the benefit of his master. The court held it to be a conversion, and the defendant to be a tortfeasor, a wrongdoer. This, therefore, was not a case of negligence, but of misfeasance. So, also, was the case of Little v. Barreme, cited from 2 Cranch [6 U. S.] 179, in which C. J. Marshall says: "The instructions cannot change the nature of the transaction, or legalize an act, which, without those instructions, would have been a plain trespass." Chit. Pl. in page 67, only says, that all natural persons are liable to be sued for their own tortious acts. None of the authorities cited supports the doctrine, that the servant is personally liable to a third person for his negligence, in transacting the business of his master; and that he is not so liable is

clearly shown by the following authorities. 1 Chitty on Pleading (volume 1, p. 75) says: "A servant or deputy cannot, in general, be sued for a mere nonfeasance; but the action must be against the principal. But, for misfeasance or malfeasance, an action may, in some cases, be supported against a servant or deputy"; and cites 12 Mod. 483; Cowp. 403. The same principle is cited by Paley on Agency (page 313, c. 6, § 2), who says: "Servants are responsible for tortious acts, whether done by authority of their masters or not; but for mere nonfeasance, or non-performance of duty, servants are not liable to third persons, but only to their masters. For there is no privity of consideration between the servant and the person who employs his master; and nonfeasance alone will not support an action, without consideration, though misfeasance will."

We find the principle thus stated by Lord C. J. Holt, 12 Mod. 488: "A servant or deputy, as such, cannot be charged for neglect, but the principal only shall be charged for it; but, for misfeasance, an action will lie against a servant or deputy, but not as a deputy or servant, but as a wrongdoer." This doctrine has been repeated and ratified in a subsequent case, Sayer, 41. "The case of masters of ships, who, though in some respects servants of the ship-owners, are liable to the owners of goods put on board, for negligence, rather admits than contradicts the principle of this rule; for, in the case which decided that point (Morse v. Slue, 1 Vent. 190, 238), to the objection that the master was but a servant to the owner, it was answered, that the law takes notice of him as more than a servant. He may impawn the ship, and sell bona peritura; he is rather an officer than a servant." So in the case of Rowning v. Goodchild ([2 W. Bl. 907;] cited in 5 Burrows, 2716), a deputy-postmaster, the same general principle is admitted; and that case is taken out of it, by saying that postmasters "are subsisting, substantial officers, and answerable for their own misfeasances and nonfeasances. They have original offices under the postmaster-general." So Blackstone, in his Commentaries (Book 1, p. 431), says: "If a servant, by his negligence, does any damage to a stranger, the master shall answer for his neglect; if a smith's servant lames a horse while he is shoeing him, an action lies against the master and not against the servant." And Chitty, in his note to this passage of Blackstone, says: "A servant cannot, in general, be sued by a third person for any neglect or nonfeasance which he is guilty of, when it is committed in behalf of, and under the express or implied authority of his master." So also Starkie on Evidence (part 4, p. 332) says: "An action for negligence of this nature must be brought against the principal, and not against the agent, although the loss has resulted from the negligence of the latter." Other cases might be cited to the same effect; but these are deemed sufficient to establish the principle, that the servant is not liable for the injury done to a third person, by his negligence in his master's employment. This principle, coincides with the maxim, respondeat superior, and is reasonable in itself; for the servant could not, to an action by the injured person against him, plead the orders of his master in justification; nor could the servant maintain an action against his master for indemnity, even if what he did was in obedience to his master's orders. But if the injured person recover against the master, and he brings his action against his servant, the latter could plead his master's orders in bar of the action. If, then, the principle be established, that the servant is not liable for his negligence or nonfeasance, but is liable for his misfeasance, the next question is, whether the case stated be a case of misfeasance or of negligence.

The case, as I understand it, is, that the defendant was imposed upon by the slave, who produced a false pass. If the defendant had been more cautious, he might not have been deceived. The fault of the defendant was his negligence. But, according to the facts stated, he was not bound, by his orders, to be more vigilant than he was. By those orders, he was to permit every colored person to pass who could produce a certificate purporting to prove the freedom of the person presenting it. The negligence, therefore, was not so much the negligence of the defendant as of his employers, in not giving orders for a stricter examination. There is no tortious act of the defendant's stated in the case. His suffering a man to take a seat in the stage-coach was a lawful act if he was a free man; and his certificate was prima facie evidence of his freedom. Negligence, therefore, is the only ground upon which the action could be sustained. But, for such negligence, we find that the defendant is not liable; and are, therefore, of opinion that the verdict should be set aside, and judgment of non-pros entered.

When this court, in a prior stage of this cause, decided that one of the counts was good, the fact did not appear, (or was not relied upon,) that the defendant was only an agent, or servant; and the attention of the court was not drawn to the distinction between the liability of a servant, in cases of negligence and in cases of misfeasance. If, upon the motion in arrest of judgment, that fact had clearly appeared upon the face of the count, and the attention of the court had been drawn to it, it must have adjudged that count to be bad also.

Affirmed by supreme court of United States, February 26, 1830, but not reported. (See the mandate No. 317, trial-docket of this court, at May term, 1830.)

MANDEVILLE (DADE v.). See Case No. 3,533.

Case No. 9,011.

MANDEVILLE v. JAMESSON.

[1 Cranch, C. C. 509.] [1]

Circuit Court, District of Columbia. July Term, 1808.

INSOLVENCY—BENEFIT OF ACT—PETITION OF CREDITOR.

Upon the petition of a creditor of an insolvent debtor to deprive him of the benefit of the insolvent act [2 Stat. 239], the defendant may show that the petitioner is not his creditor.

This was a petition to deprive the defendant of the benefit of the insolvent law, filed under the seventh section, upon an allegation that the defendant had given a preference to one of his creditors in a deed to La Mar, in trust to pay a debt due Margaret Jamesson in Ireland.

Mr. Jones, for defendant. Upon the insolvency of the defendant, this property was all given up to his trustee. If the deed be void, there was no preference given. An abortive attempt to give a preference is not within the meaning of the law. The words are, "assigned or conveyed any part of his property to give a preference to any creditor or creditors;" "or of having given any preference as aforesaid." 2 Stat. 239. There must be a disposition, or lessening of his property. A conveyance means a legal and valid conveyance, whereby the property passes.

CRANCH, Chief Judge, suggested a doubt whether the defendant should be permitted to go into proof that the petitioner is not a creditor, supposing it to be a matter to be decided ex parte at the time of the insolvent's application, and that prima facie evidence is sufficient.

THE COURT, however, (DUCKETT, Circuit Judge, absent,) went into an examination of the evidence, and was of opinion that the petitioner was a creditor, and that the deed was made with intent to give a preference.

But THE COURT, by the consent of the parties, continued the cause to the next term.

MANDEVILLE (JANNEY v.). See Case No. 7,213.

MANDEVILLE (LEWIS v.). See Case No. 8,326.

Case No. 9,012.

MANDEVILLE v. LOVE.

[2 Cranch, C. C. 249.] [1]

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

JUDGMENT—SUPERSEDEAS—SURETIES.

A judgment of the circuit court cannot be superseded without two sureties.

[Cited in Chesapeake & Ohio Canal Co. v. Bancroft, Case No. 2,644.]

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

Mr. Wallach, for defendant, moved the court to quash an execution which had issued upon a supersedeas of a judgment of this court, acknowledged by the original defendant and one surety only; whereas the act of Maryland of 1791, c. 67, requires two.

Mr. Lear, for plaintiff.

THE COURT (nem. con.) quashed the execution.

Case No. 9,013.

MANDEVILLE v. McDONALD et al.

[3 Cranch, C. C. 631.] [1]

Circuit Court, District of Columbia. May Term, 1829.

JUDGMENT — DECEASE OF DEFENDANT — SCIRE FACIAS AGAINST TERRE-TENANTS — DEFECTIVE RETURN — MOTION TO QUASH RETURN—PLEA OF OTHER TERRE-TENANTS.

1. The remedy for a defective return of a scire facias against terre-tenants is not a plea in abatement, nor a motion by the defendants to quash the writ, but a motion to quash the return; but the return may be amended. The defendants may lay a rule on the plaintiff to declare; and the marshal's return of the scire facias will make part of the declaration, and the defendants will have time to plead.

2. The terre-tenants warned may plead, in delay of execution, that there are other terre-tenants, in the same county, not summoned.

Scire facias against the administrator, trustees, and terre-tenants of S. Eliot, deceased.

After stating that a judgment, in favor of the plaintiff, was rendered against the said S. Eliot on the 25th of January, 1820, it commanded the marshal: "That you make known to the heirs of the said S. Eliot, deceased, and the terre-tenant or terre-tenants of all the lands, lots, squares, and tenements in your bailiwick, whereof the said S. Eliot on the 25th of January, 1820, (on which day the judgment aforesaid was rendered.) or ever afterwards was seized, and to William Brent, John G. McDonald, and Frederick May, trustees, and to John G. McDonald, administrator of the said S. Eliot, that they and all of them be and appear," &c., "to show cause, if any they have, why the damages, costs, and charges aforesaid ought not to be levied on those lots, squares, lands, and tenements, and paid to the said James Mandeville, according to the force, form, and effect of the recovery aforesaid, if he the said James Mandeville shall think fit," &c.

The return of the marshal is as follows: "Scire feci William Brent, one of the trustees, November 13, 1827, in presence of J. H. B. and E. M., of the lots below mentioned; scire feci John G. McDonald, one of the trustees and administrator of the same lots, November 19th, 1827, in presence of J. H. B. and E. M. Also scire feci Catharine Mary Eliot, terre-tenant and heir of said lots, and Wallace Eliot, terre-tenant and heir of said lots, November 19, 1827, in presence of R. B. and A. S. W. Also scire feci William Henry Eliot,

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

another terre-tenant and heir, November 19, 1827, in presence of H. M. M. and S. L. D. Also scire feci Johnson Eliot, another terre-tenant and heir of said lots and squares, November 19, 1827, in presence of R. K. and Z. D. B. Also scire feci, November 20, 1827, Frederick May, trustee, in presence of S. M. and H. C., lots 9, 10, 11, 12, 13, 15, 16, in square 299 in the city of Washington, all square 354," (&c., &c., designating 110 lots and 10 whole squares,) "all the above lots and squares lying in the city of Washington; also scire feci James Greenleaf and William A. Bradley, terre-tenants of square 473, lying in the said city—James Greenleaf, November 19, 1827, in presence of J. H. B. and E. M., and William A. Bradley in presence of A. B. T. and J. H. B. Tench Ringgold, Marshal."

The above return was afterwards amended by adding these words: "The above named persons being all the terre-tenants in my bailiwick."

Mr. Bradley, for defendants, moved to quash the scire facias. 1st. Because it does not state that the land was the property of Mr. Eliot. 2d. Because the return does not state that the terre-tenants summoned were all the terre-tenants of the lands. 3d. Because there ought to have been a previous scire facias against the personal representatives of Eliot; and cited 1 Strange, 401; Carth. 105, 107; 2 Saund. 72r; Tidd, Prac. Append. 337, No. 71; 2 Saund. 7, notes 7, 8, 10; Tidd, Prac. 1037; 1 Salk. 52; 2 Salk. 601, and 2 Saund. 9, 23. Tidd, Prac. 1043, and 2 Har. Ent. 534, and Baker v. French [Case No. 767], in this court, December term, 1824, were cited for the plaintiff by Mr. Morfit, who contended that the defendants should have pleaded in abatement.

Mr. Bradley, in reply, observed that the case of Baker v. French [supra], was a special scire facias, naming the terre-tenants in the writ, whereas the present scire facias was general.

CRANCH, Chief Judge (nem. con.). The question is, whether the motion to quash the scire facias is the proper remedy. After looking at all the cases cited, and many more, I think it is not. The only case which seemed to justify that course is Hillier v. Frost, 1 Strange, 401, but that case has been misunderstood. It was not a rule to amend the sheriff's return of the writ, but to amend the writ of scire facias itself, by making it returnable on Saturday instead of Friday, which was the feast of St. Martin. The motion was made by the plaintiff; but Sir John Strange, who was the plaintiff's counsel, remarks that "he had little to say for it," "so it was discharged; and he moved to quash the writ, which was ordered accordingly." I have seen no case in which a scire facias has been quashed, on motion of the defendant, for a defective return of the sheriff, there being no fault in the writ itself. The defendants may lay a rule on the plaintiff to declare. The marshal's return will make part of the declaration, and the defendants will have time to plead such pleas as they may be advised to plead.

The other judges assented.

In this cause, at the last term, the court decided that W. A. Bradley, one of the tenants summoned, had a right to plead in delay of execution, that there were other terre-tenants, of other lands, not summoned; and that the plea offered by him, when put into proper form, should be received.

At the present term, Mr. Morfit, for plaintiff, moved for judgment by default against all the terre-tenants summoned, and against "John G. McDonald, one of the trustees, and administrator of the same lots," and against "Wm. Brent, one of the trustees," and against "Frederick May, one of the trustees."

W. A. Bradley now offered his amended plea; and W. Brent, F. May, and John G. McDonald offered to plead.

After considering the cases and authorities cited in the note below, THE COURT received the plea offered by Mr. Bradley, and permitted the defendants to plead, and overruled the motion of Mr. Morfit for judgment by default.

The cause was then continued, to make up the issues, and was continued from term to term until ——— term, when it was placed by consent upon what is called the "stet" docket, where it has remained ever since.[2]

[2] The plea of Mr. Bradley, it is understood, was in this form: And the said Wm. A. Bradley by ———, his attorney, comes and prays a hearing of the writ of scire facias aforesaid and of the return thereof, and they are read to him in these words, namely, (here insert them,) which being read and heard, the said William A. Bradley saith that he ought not now to be put to answer the declaration of the said James Mandeville, nor to the writ and return aforesaid; because he says that there were, at the time of the said return of the said writ of scire facias, and yet are, other tenants of certain lots, squares, pieces, and parcels, lying and being in the city of Washington, in the county of Washington aforesaid, who are not named in the said writ, or in the said return, and who have not been returned summoned; of which said lots, squares, pieces, and parcels of land the said Samuel Eliot was seized on his demesne as of fee, on and after the time of the rendition of the said judgment against him as aforesaid, that is to say—that the president, directors, and company of the Bank of Washington, were at the said time of the said return, and now are, tenants of the lots numbered ——— in the said city, of which said lots the said Samuel Eliot was seized in his demesne as of fee at the time of the said rendition of the said judgment. And that one Anthony Preston was, and yet is, tenant of lot ——— in the said city, of which said lot the said Samuel Eliot was seized in his demesne as of fee, at the said time of the said rendition of the said judgment. And that one Peter Lenox was and is tenant of, &c. And that one Lewis H. Machem was and is, &c. And that one William Douglass was and is, &c. And that one Tobias Simpson was and is, &c. And the said Wm. A. Bradley further says that no writ of scire facias, issued out of this court, has been served upon the said president, directors, and company of the Bank of Washington, nor upon the said Anthony Preston, nor upon

Upon the subject of scire facias against terre-tenants, and the lien of a judgment upon the lands of the debtor, see the following cases and authorities: Hillier v. Frost, 1 Strange, 401; Panton v. Terre-tenants of Hall, Carth. 105; Reg. Jud. 57; Bricknold v. Owen, 2 Dyer, 207b, case 15; Smarte v. Edsun, 1 Lev. 30; Adams v. Terre-tenants of Savage, 2 Salk. 601; 6 Mod. 199, 226; Tidd, Prac. 1032; 2 Saund. 7, note 4; Berisford v. Cole, Comb. 282; Jeffreson v. Morton, 2 Saund. 7; Gwin v. Lloyd, 1 Keb. 54, 351; Michel v. Croft, Cro. Jac. 506; Phelps v. Lewis, 2 Saund. 210e, note 1; Harbert's Case, 3 Coke, 14b; Dyer, 331b, pls. 23, 24; Clerk v. Hardwick, Moore, 524; 2 Har. Entries, 174, 257, 444, 496, 534, 583, 749, 763, 765; Co. Entries, 619–624; St. 5 Geo. II. c. 7; Chancellor Kilty's Report on the English Statutes, 29 Car. II. p. 241, c. 3, § 16, and 5 Geo. II. p. 249, c. 7, § 4; Ridgely v. Gartrell, 3 Har. & McH. 449; 2 Inst. 396; Palmer's Case, 4 Coke, 74; Heath, Max. 3; 2 Hawk. pp. 153, 253, §§ 119, 123, 126; Barnes, Notes Cas. 207, 210, 213, 214, 218, 221; Cro. Jac. 119; Dyer, 208; Nicholson v. Sligh, 1 Har. & McH. 434; Arnott v. Nicholls, 1 Har. & J. 471, 473; Hindman v. Ringgold, Id. note a; McElderry v. Smith, 2 Har. & J. 72; Tidd, Prac. 1046; Eyres v. Taunton, Cro. Car. 295, 312; Baker v. French [Case No. 767], in this court, December term, 1824; 2 Saund. 8, note 10; Tidd, Prac. 1003, 1021; Tidd, App. 437; Steph. Pl. 63, 126, 128, 239, 430; Owings v. Norwood, 2 Har. & J. 101; Beatty v. Chapline, Id. 26.

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the said Peter Lenox, nor upon the said Lewis H. Machem, nor upon the said William Douglass, nor upon the said Tobias Simpson, to show cause why the damages, costs, and charges, so as aforesaid recovered against the said Samuel Eliot, should not be levied on the said several lots, squares, pieces, and parcels of land, of which the said president, directors, and company of the Bank of Washington, and the said Anthony Preston, Peter Lenox, Lewis H. Machem, William Douglass, and Tobias Simpson were and are, respectively, tenants as aforesaid. And this the said Wm. A. Bradley is ready to verify; wherefore he prays judgment whether he shall be put to answer to the said declaration of the said plaintiff, or to the said writ and return, until the said president, directors, and company of the Bank of Washington, and the said Anthony Preston, and the said Peter Lenox, and the said Lewis H. Machem, and the said William Douglass, and the said Tobias Simpson, respectively, tenants as aforesaid, shall have been warned to show cause as aforesaid.

The defendants W. Brent, F. May, and J. G. McDonald, after oyer of the writ of scire facias and the return thereof, say, that the said writ of scire facias, and the said return thereof, and the declaration of the said James Mandeville thereupon, are not sufficient in law for the said James to have execution of the said damages, costs, and charges in the said writ and declaration mentioned against them, the said W. Brent, F. May, and J. G. McDonald, of or upon the aforesaid lots, parcels, and squares of land set forth in the said return, or of any part thereof to be levied; and that the said W. B., F. M., and J. G. McD. are not bound by the law of the land to answer thereunto, and this they are ready to verify; wherefore, for that the same are insufficient in law as aforesaid they pray judgment, and that the said James may be precluded from having his execution aforesaid against them in manner and form as in and by his said declaration he has prayed.

And for cause of demurrer in this behalf they show the following, to wit:

1. That they ought not to be impleaded jointly with the heirs, administrator, and terre-tenants of the said Eliot.

2. That it does not appear by the said writ of scire facias or return, or by the declaration thereupon, that any writ of scire facias against the administrator of the goods, chattels, rights, and credits of the said Eliot had been previously issued at the suit of the said James. Tidd, Prac. 1032.

3. That the said W. B., F. M., and J. G. McD. are not liable, in any manner, as trustees, to contribute with the heirs and terre-tenants of the said Eliot, in the payment of the damages, costs, and charges, in the said writ mentioned; nor are liable in any manner to the execution therefor, they not being returned as terre-tenants.

4. That in and by the said writ of scire facias, the said W. Brent, F. May, and J. G. McDonald are only permitted to show cause, &c., "if the said James Mandeville shall think fit."

5. That it is not stated in the said writ that they, the said W. B., F. M., and J. G. McD. are trustees of, or in any manner interested in, any part of the lands of which the said S. Eliot was seized in fee, at the time of, or at any time after the rendition of the said judgment.

6. That the said marshal, in his said return, has not stated that any of the lots, parcels, or squares therein mentioned, were or are lots, parcels, or squares of land or lands and tenements of which the said S. Eliot was seized in fee at the time of the rendition of the said judgment, or at any time thereafter.

Case No. 9,014.

MANDEVILLE et al. v. MACKENZIE.

[1 Cranch, C. C. 23.] [1]

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

NOTES—INDORSER—SUIT AGAINST MAKER — INEFFECTUAL RETURN.

In order to charge an indorser in Virginia, it is necessary for the plaintiff to show that he instituted his suit against the maker in due time, and prosecuted it diligently to an ineffectual execution.

Assumpsit by the indorsee against the indorser of a promissory note made by John McIver, payable to the defendant [Alexander Mackenzie], and by him indorsed to the plaintiffs [Mandeville & Jamieson]. The note was payable on the 19th of February, 1797, and protested for non-payment on the 20th. The jury found a special verdict in these words, namely: "We find the note in the declaration mentioned in these words, namely: We find the indorsement, &c. We find that the plaintiffs instituted a suit in the court of hustings in the town of Alexandria, against the said John McIver, and obtained a judgment thereon against him. We find that the said judgment has not been paid, or any way satisfied. We find, that before the commencement of this suit, the said John McIver

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

became insolvent, and took the oath of an insolvent debtor, according to law. We find, that after the protest of the said note, and before the plaintiffs commenced suit against the said McIver, the plaintiffs received from said McIver, in part payment of said note, the following sums, namely: March 9th, 1797, $100; March 10th, $73.34; June 30th, $30. If the law be for the plaintiffs, we find for the plaintiffs $82.13 damages; if the law be for the defendant, we find for the defendant."

CRANCH, Circuit Judge. The contract of the assignor is to this effect, that he will repay the money to the assignee if the assignee cannot obtain the money from the promissor, having used due diligence therefor. The plaintiff, to entitle himself to recover, must make out his case; that is, he must show that he has not obtained the money from the maker of the note, and that he has used due diligence. It is admitted that a suit, prosecuted to judgment and execution, is, in Virginia, a necessary part of that diligence, (unless, perhaps, it can be shown that the maker was insolvent, or had run away,) but it is not the whole of due diligence. The plaintiff must show further that he prosecuted his suit in a reasonable time, that the execution has been delivered to the proper officer to be served, and that it has been ineffectual. This I take to be as necessary a part of the plaintiff's case, as it is to show that he brought a suit; for the defendant's engagement is only conditional, and the condition is precedent. The jury have not found at what time the suit was brought against McIver, but they have found that it was not brought before the 30th June, 1797. They have not found that any execution was taken out upon that judgment, nor have they stated whether McIver became insolvent before or after the judgment was rendered against him. They have only found that he became insolvent before the suit was brought against the present defendant, McKenzie.

The fact of due diligence must have been necessarily in issue, as part of the plaintiff's cause of action, and the jury not having expressly found that due diligence was used, and not having found facts enough for the court to decide whether such diligence was used or not, I think a venire facias de novo ought to be awarded.

KILTY, Chief Judge, and MARSHALL, Circuit Judge, assented.

The authorities cited were, Lee v. Love, MS. (since reported in 1 Call, 497); Kyd, 208; Strange, 745; 1 Wils. 48; 1 Term R. 167; 1 Salk. 132; Mackie v. Davis, 2 Wash. [Va.] 219; 2 Ld. Raym. 758; 3 Burrows, 1522; Kyd, 165; Bull. N. P. 271; 2 Strange, 1145.

MANDEVILLE (MUNROE v.). See Case No. 9,929.

MANDEVILLE (OLIVE v.). See Case No. 10,488.

MANDEVILLE (RIDDLE v.). See Case No. 11,807.

Case No. 9,015.

MANDEVILLE v. RINGGOLD.

[Cited in Addison v. Duckett Case No. 77. Nowhere reported; opinion not now accessible.]

Case No. 9,016.

MANDEVILLE v. RUMNEY.

[3 Cranch, C. C. 424.] [1]

Circuit Court, District of Columbia. April Term, 1829.

NOTES—DAYS OF GRACE—PROTEST—SUIT BROUGHT.

If Sunday be the last day of grace, the demand, protest, and notice may be on Saturday, and if the protest be after bank hours on Saturday, the suit may be brought the same evening.

Debt, against the maker of a promissory note. Sunday was the third day of grace, payment was demanded, and the note protested on Saturday after bank hours. The suit was brought the same evening, after protest.

Verdict for the plaintiff, subject to the opinion of the court whether the suit was not brought too soon.

THE COURT (MORSELL, Circuit Judge, doubting), was of opinion, that it was not. See Story, Chit. Bills, and the cases cited there in the notes.

THE COURT was of the same opinion, in the action of the same plaintiff against Runels, the indorser of the same note.

MANDEVILLE (SHEEHY v.). See Case No. 12,740.

MANDEVILLE (SUTTON v.). See Cases Nos. 13,648–13,651.

Case No. 9,017.

MANDEVILLE et al. v. WASHINGTON.

[1 Cranch, C. C. 4.] [1]

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

PRACTICE AT LAW — WRIT OF INQUIRY — PLAINTIFFS' OATH.

On a writ of inquiry the plaintiff's oath may be given in evidence of the amount of his claim.

On writ of inquiry. [Suit by Mandeville & Jamieson against Nathaniel Washington.]

THE COURT admitted an account supported by the plaintiffs' affidavit to be given in evidence to the jury, it having been stated

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

by some of the bar and admitted by all, that such has been the practice in the district courts of the commonwealth of Virginia.

MANDEVILLE (WELCH v.). See Cases Nos. 17,370 and 17,371.

MANDEVILLE (WILSON v.). See Cases Nos. 17,820 and 17,821.

MANDEVILLE (YOUNG v.). See Case No. 18,161.

Case No. 9,018.

M. & M. NATIONAL BANK OF PITTSBURGH v. BRADY'S BEND IRON CO.

[5 N. B. R. 491;[1] 19 Pittsb. Leg. J. 5; 3 Chi. Leg. News, 402; 28 Leg. Int. 317; 4 Am. Law T. 168; 8 Phila. 171; 3 Pittsb. Rep. 326; 1 Leg. Op. 202; 1 Am. Law T. Rep. Bankr. 272.]

District Court, W. D. Pennsylvania. 1871.

BANKRUPTCY — PROVISIONAL ASSIGNEE — BENEFIT TO CREDITORS—REMOVAL OF GOODS—FRAUD.

1. A provisional assignee should not be appointed unless the court is satisfied that it is necessary for the protection of the property, and that it will enure to the benefit of all the creditors.

[Cited in Re Carrier, 47 Fed. 441.]

2. The removal of a debtor's goods in fulfillment of an existing contract made long before the commencement of bankruptcy proceedings, is not fraudulent within the meaning of the bankrupt act [of 1867 (14 Stat. 517)], and not sufficient grounds for the appointment of a provisional assignee.

In bankruptcy.

C. B. M. Smith, Mr. Veech, and David Watson, for creditors.

Mr. Golden, for respondents.

McCANDLESS, District Judge. The M. & M. National Bank of Pittsburgh present their petition to this court, praying that the Brady's Bend Iron Co. may be declared bankrupts. To this an answer has been filed denying the acts of bankruptcy charged, and demanding a trial by jury, which has been ordered. They also allege that the company is removing its goods and chattels, the produce of its works, from its place of business at Brady's Bend; that such disposition of its property is fraudulent, and intended to defeat the provisions of the bankrupt law; and they pray the court to issue their warrant to the marshal, commanding him to take possession, provisionally, of all the property of the company. To this a sworn denial has been filed, and assigning grave reasons why the prayer of the petition should not be granted.

The exercise of this power—appointing a provisional assignee—is one of great delicacy, and should not be called into action unless the court is satisfied that it is necessary for the protection of the property, and that it will enure to the benefit of the creditors. It is discretionary, but it is a legal discretion, to be used with the best lights before us. We must be satisfied that the disposition of the property is fraudulent, with the design to remove the same to the prejudice of the general creditors, and to defeat the provisions of the bankrupt law. It is not charged, in the adversary petition, that the stoppage of payment of the commercial paper was fraudulent; but in the application for the appointment of a provisional assignee, the removal of the railroad iron, in fulfillment of a contract long since made, is declared to be so. Fraudulently means knowingly and without just excuse, as applicable to the paper itself. If a man or a corporation declines to pay, because he is not liable to pay, or because he has a valid claim against the paper, or a set off, that is not a stoppage or suspension within the bankrupt law. In re Sutherland [Case No. 13,639]; Bump, 500.

Take the case of a forgery. An honest defence to the particular paper unpaid would take the case out of the statute. If this be so, how can the removal of the goods of the debtor in the performance of an existing contract be deemed fraudulent. It is but the exercise of the legitimate functions of the corporation in carrying on their business, and for all the goods shipped they receive an equivalent in bills of exchange or money, which is for the benefit of all the creditors. To appoint a provisional assignee, pending the issue to be tried by a jury, would be to arrest the operation of the machinery, stop these extensive and valuable works, and throw hundreds of workmen out of employment. For we cannot order the marshal to do more than to take possession of and guard the property of the corporation until the trial by jury is had, or until the further order of the court. This would be ruinous to both debtor and creditor, and would impair the security which the latter has for the payment of his debt.

It is proper to add, that since the argument I have conferred with my Brother McKENNAN, and we concur in the principles upon which this case should be decided.

The rule is discharged, and the appointment of a provisional assignee is refused.

[1] [Reprinted from 5 N. B. R. 491, by permission.]

Case No. 9,019.

The MANHASSET.

The HIRAM PERRY.

[6 Ben. 301.][1]

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

COLLISION — EAST RIVER — TUG-BOAT AND TOW — STEAMERS CROSSING—WILFUL TORT—JOINT NEGLIGENCE.

1. A tug, having several boats in tow, coming down the East river, on an ebb tide, rounded to

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

to pick up another boat on the New York side, just above the Fulton ferry slip. A Fulton ferry-boat, coming out of that slip, came in collision with the stern boat on the port side. The ferry-boat claimed that, when she came out of the slip, the tug was going down the river, and that, after the ferry-boat got headed up the river against the tide, the tug turned around across her course. Her pilot stated that, as soon as he saw her sheer, he rang a bell to slow the engine, and then to stop and back; and the engineer testified that he made four or five turns of the engine ahead, under the bell to slow, before he stopped and backed. The speed of the ferry-boat was nearly done at the collision, and she struck the boat about twenty-five feet from her stern. The owner of the boat filed a libel against both the tug and the ferry-boat, but the tug was not seized under the process. On the trial, a motion was made, on behalf of the ferry-boat, that the libellant be compelled to bring in the tug, or the libel be dismissed. The motion was denied, but the libel was directed to be amended by striking out the prayer for process against the tug. On the trial, one of the libellant's witnesses testified, that it looked to him as if the ferry-boat hit the boat intentionally. The owners of the ferry-boat claimed that she was not liable for the wilful tort of her pilot: *Held*, that, on the story of the ferry-boat, when the tug had turned so as to be heading across the river, the courses were crossing, and the ferry-boat, having the tug on her starboard hand, was bound to avoid her and her tow, and when the tug had turned so as to head up the river, the ferry-boat was the following boat, and was still bound to avoid them.

2. The ferry-boat was in fault in not stopping and backing at once, as soon as her pilot saw the tug turn, instead of keeping on under a slow bell.

3. The act of the pilot of the ferry-boat was not wilful, in such sense as to relieve the ferry-boat from liability for the result of it.

4. Although the libel was filed against both tug and ferry-boat, the libellant could recover against the ferry-boat alone, because there was independent fault on her part, and any fault in the tug in sheering was not a fault which contributed to the collision.

In admiralty.

Beebe, Donohue & Cooke, for libellant.

B. D. Silliman, for claimants.

BLATCHFORD, District Judge. The libellant, as owner of an empty coal barge or chunker, which was in tow of the steam-tug Hiram Perry, on the 13th of January, 1869, seeks to recover, in this suit, the damages sustained by him, by means of a collision which took place, about noon on that day, between the ferry-boat Manhasset, then on a trip from her slip at the foot of Catherine street, in New York, to her slip at the foot of Main street, in Brooklyn. The tug had six boats in tow, namely, two on each side of her, alongside, and two astern, the libellant's boat being one of the two astern, and being tailed on to the stern of the boat which was next to the tug on the port side of the latter. This chunker was a boat in two parts, divided crosswise. The stem of the ferry-boat struck the port side of the after half of the chunker, at about the middle of its length, and it soon afterwards sank. The tug, with her tows, was bound from the Wallabout, in Brooklyn, to South Amboy, and was about to pick up another empty boat, on the New York shore, at a point above the New York slip of the ferry-boat. The tide was strong ebb.

The story of the libel is, that the tug, when nearing the point where she desired to pick up the additional boat, rounded towards the New York shore, with the view of heading up to the tide; that, while she was heading in towards the New York shore, and gradually turning towards the east, the boats following in her wake, the ferry-boat came out of her slip, and, as she came out, gradually turned, so as to head to the east, and, keeping on, struck the chunker; that the approach of the ferry-boat was not noticed by those on the tug, until just as she was striking the chunker; that the collision was caused by the joint negligence of the two steam vessels, the ferry-boat being in fault in not going under the stern of the chunker, and the tug in not keeping a look-out; and that the chunker was entirely helpless and without fault. The libel prays for process against both the ferry-boat and the tug, and that they may both be condemned. Process was issued against both vessels, but was not served on the tug, and she has not appeared or answered. The ferry-boat was served with process, and appeared and answered. At the trial, a motion was made on the part of the ferry-boat, that the libellant be compelled to bring in the tug, or the libel be dismissed. The motion was denied, except so far as to direct the libel to be amended by striking out the prayer for process against the tug.

The answer of the ferry-boat denies the allegation of the libel, that the tug is within this district. It sets up, that, on the coming out of the ferry-boat from her slip into the river, her pilot saw the tug and her tows in the middle of the river, heading down; that there was nothing to indicate any intended change in their course; that their position and the rate of the tide were such, that the ferry-boat could not have crossed the river in front of them without great danger of collision with them, and could not have made her proper and necessary course, at that state of the tide, if she had crossed in front of them; that, therefore, and thereupon, she was headed up the river, against the tide, in order that she might safely pass between them and the New York shore, as prudence and good navigation required her to do, and as was the obvious and proper and usual course, under such circumstances, and as there was plenty of room for her to do; that the course on which the ferry-boat was thus placed was such, that, but for the misconduct of the tug, or the tug and chunker, or the tow, or those managing and having charge of the same, she would easily have gone clear of the tow and of the chunker, and between the same and the New York shore; that, while the ferry-boat was thus proceeding on her course, and on a line widely clear of, and parallel to, the line on

which the tow, including the tug, was moving, the tug and tow suddenly sheered in rankly towards the New York shore, across the course and track of the ferry-boat; that, perceiving that such action of the tug and tow would render a collision probable, the ferry-boat at once stopped her engines, and reversed her wheels, and backed, and did everything in her power to avoid collision with the tug, or her tow, or any part thereof, but, as the tug sheered across the tide, and changed her heading against it, the chunker was swung down, by the strong ebb tide, upon and against the bow of the ferry-boat; that, at the time of the collision, the ferry-boat had no headway whatever, and did not run into, or against, the chunker; that the approach of the ferry-boat was not noticed by those on the tug until just at the time of the collision; that the tug had no lookout at the time; that, if the chunker had been properly managed at the time, the collision might have been avoided; that it resulted, in part, from such mismanagement of the tug, and also from the omission of the chunker seasonably to shift her lines, and to be so steered as to aid the ferry-boat in avoiding the collision; that the ferry-boat, during the whole of her trip, was navigated with skill, care and caution, and everything that could be done to avoid the collision, or to lessen its violence, when it became inevitable, was done by those in charge of the ferry-boat; and that the collision was caused wholly by the carelessness, negligence, and want of skill and prudence, and bad management, and bad and improper navigation, of the tug, or of the chunker, or of both, and of the persons then in charge of the same, or some of them.

Three witnesses have been examined on behalf of each party—the libellant himself, on his own behalf; and, on his part, the master of the tug, and her pilot. The libellant was on his own boat, at the time of the collision. The master of the tug was in her pilot house, steering her. Her pilot was on one of the boats on her starboard side. The witnesses for the ferry-boat are three persons from her—her pilot, who was in her pilot house, steering; a deck hand, who was standing at the king post, on her port side, at her bow; and her engineer, who was in her engine room, below deck.

It is impossible to conceive of stories more diametrically opposite than those which these witnesses tell. The libellant, and Conlon, the pilot of the tug, assert that the tug had turned and got headed pretty well around towards up the river, and angling upwards towards the New York shore, before the ferry-boat left her slip. Both of them say that they saw the ferry-boat as she was coming out of her slip. Parisen, the master of the tug, says that he did not see the ferry-boat leave her slip; that she had not left her slip when he began to round; that he did not see her until he had got headed about two-thirds up the river; and that, when he first saw her, she was about thirty or forty feet off from the chunker.

Kershaw, the pilot of the ferry-boat, says, that, as he started to go out of his slip, he saw the tug heading down the river; that she was so heading when he went out of the slip; that he headed up the river, and would have passed one hundred feet or more to the New York side of her, but, after he got straightened up the river, the tug changed her course, and turned short across the bow of the ferry-boat, without making any signal before sheering; that he rang to slow, stop and back, when the tug sheered; that the tug went one hundred feet clear of the ferry-boat, across her bow, but the strong tide swept the chunker down against the ferry-boat; and that the tug was heading very nearly straight up the river, the same way with the ferry-boat, at the time of the blow. Boyd, the deck hand on the ferry-boat, says, that, as the ferry-boat went out of the slip, he saw the tug heading down the river; that the ferry-boat turned up, and, after she got straightened up, the tug, without making any signal, rounded to across the bow of the ferry-boat; and that, at the collision, the tug was the length of two boats away, and headed up the river about the same way with the ferry-boat.

Although positively testified to by the witnesses for the ferry-boat, it requires great faith to believe it possible that in the short space of time which elapsed between the time the ferry-boat left her slip and the collision, the tug could have left a straight course down the river and rounded to and described a complete half circle, and come to head directly up the river, the same way with the ferry-boat. The story on the part of the libellant is much the more probable one, in view of all the circumstances surrounding the occurrence. But it is not necessary to solve this question, for, even assuming that the tug did not begin to turn till after the ferry-boat was coming out of her slip, the evidence on the part of the ferry-boat shows that she ought to have avoided the collision, and might have done so. From the time the tug, in turning, got so far around as to head so towards the New York shore, that her course was crossing that of the ferry-boat, the ferry-boat, having her on the starboard side, was bound to avoid her and her tow. So, from the time the tug, in turning, got so far around that the ferry-boat became the following boat, the ferry-boat was bound to avoid the tug and her tow. The pilot of the ferry-boat says, that he rang his bell to slow when the tug sheered, as soon as he saw her sheer; that he then immediately rang the bells to stop and back; and that the way of his boat was about done, when the collision took place. The engineer of the ferry-boat says, that, on starting from the slip, he received one bell, to go ahead; that, while running under that bell he received another

bell; and that, on receiving this last bell, he shut his engine off. That was a bell to slow. To shut off, is to slow, not to stop. The bell to slow was the bell which the pilot says he rang as soon as he saw the tug sheer. The engineer says, that he made four or five turns ahead, while so running slowed down, and then received two bells to back; that he had made about four or five turns back before he felt the blow of the collision; and that, with such a strong ebb tide as there then was, four or five turns back would pretty much kill the headway of the boat. As it was, the ferry-boat almost avoided the collision. She did not strike a point further forward on the chunker than twenty-five feet forward from the extreme rear. I cannot resist the conclusion that, if the ferry-boat, instead of continuing to run ahead four or five turns, under the slow bell, had stopped and backed sooner than she did, the collision would have been avoided, and she would have passed under the stern of the chunker. The pilot of the ferry-boat says, that the way of his boat was about done when she struck the chunker. If this was so, and if the four or five turns back effected that result, more turns back, instead of the four or five turns ahead, under the slow bell, would, undoubtedly, with the strong ebb tide, as the tug was going ahead, have enabled the ferry-boat to clear the tow.

One of the witnesses for the libellant stated, in his testimony, that, in his judgment, the ferry-boat did not try to avoid the chunker; and that it looked to him as if the ferry-boat hit her intentionally. The claimants, assuming this as a fact proved, urge, that the ferry-boat is not liable for a collision caused by the wilful fault of her pilot. But, the wilful character of the act is not set up in the libel, nor is it averred in the answer, and it is very far from being established by the above-mentioned remark of the witness. There is nothing to show that the act was wilful, in the sense of being malicious, or that the ferry-boat ran against the chunker because of an intention to do so on the part of her pilot. The act was wilful in one sense, because the acts of the pilot were the voluntary emanations of his will, but there is nothing to show that his intention was to cause a collision.

It is also urged, for the claimants, that, as the libel alleges joint negligence in the tug and the ferry-boat, as the cause of the collision, the tug ought to have been brought in by process, she having been made a party by the libel. But this point is disposed of by the amendment referred to. The suit stands, and was tried, as one against the ferry-boat alone. The only question is, as to whether the ferry-boat was guilty of independent fault or negligence which caused the collision. The chunker was helpless, and did nothing to cause the collision. The fact that the tug may also have been in fault, in some particular, is of no consequence, as respects fault on the part of the ferry-boat, provided the fault of the ferry-boat is one distinct from, and independent of, any alleged fault on the part of the tug. The only fault set up, on the part of the ferry-boat, as a fault in the tug, is, that the tug suddenly sheered across the course of the ferry-boat. But notwithstanding the tug may have sheered, to turn, after the ferry-boat left her slip, there was the separate and independent fault, on the part of the ferry-boat, which has been pointed out. The allegation of her answer, that she at once stopped her engines and reversed her wheels and backed, on perceiving the sheer of the tug and tow, and that it would render a collision probable, is disproved by the testimony of her engineer. For the fault of the ferry-boat, the libellant is entitled to recover his full damages against the ferry-boat alone, because, in the view I take of the case, any fault there may have been on the part of the tug, in sheering, was not a fault which contributed to the collision which the fault of the ferry-boat caused. The ferry-boat ought to have, and could have, avoided the chunker, in the actual predicament, whether the chunker was brought to her position by a sheer before, or a sheer after, the ferry-boat left her slip.

There must be a decree for the libellant, with costs, with a reference to a commissioner to ascertain the damages sustained by the libellant.

MANHASSET, The (EDWARDS v.). See Case No. 4,295.

Case No. 9,020.

The MANHATTAN.

[2 Ben. 88;[1] 7 Int. Rev. Rec. 28; 1 Am. Law T. Rep. Bankr. 11.]

District Court, S. D. New York. Jan., 1868.[2]

SHIPPING—PASSENGER ACT—STEAMSHIPS.

The provisions of the second section of the passenger act of March 3d, 1855 (10 Stat. 715), do not apply to steamships.

[Cited in The Devonshire, 13 Fed. 41; U. S. v. The Strathairly, 124 U. S. 577, 8 Sup. Ct. 615.]

At law.

T. Simons, Ass't U. S. Atty., for libellants.

T. C. T. Buckley, S. P. Nash, and J. Larocque, for claimants.

BLATCHFORD, District Judge. This is a libel filed by the United States against the steamship Manhattan, a foreign vessel, owned in Great Britain, founded on the act passed March 3d, 1855, entitled "An act to regulate the carriage of passengers in steamships and other vessels." 10 Stat. 715. The libel alleges, in substance, that the steamship heretofore took on board, at Liverpool, in Eng-

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

[2] [Affirmed in Case No. 15,715.]

land, sundry passengers, with the intent to bring them to the United States, and left Liverpool, and brought such passengers to the port of New York, and within the jurisdiction of the United States. It then charges that the vessel, on such voyage, did not have the berths for her passengers constructed, arranged, and occupied as required by the second section of the act, and avers violations of various provisions of that section, and claims that thereby the master of the vessel forfeited five dollars for each passenger on board on the voyage, and the owners of the vessel also forfeited five dollars for each passenger on board on the voyage, and that an action has accrued to the United States to recover such penalties, and that a lien on the vessel exists for the amount of them.

The first section of the act provides, that no master of any vessel, owned in whole or in part by a citizen of the United States, or by a citizen of any foreign country, shall take on board such vessel, at any foreign port other than foreign contiguous territory to the United States, a greater number of passengers than in the proportion of certain specified numbers to the tonnage of the vessel; that the "spaces appropriated for the use of such passengers, and which shall not be occupied by stores or other goods not the personal baggage of such passengers," shall be in certain specified proportions, namely, so many passengers to so many clear superficial feet of deck; that, if it is necessary, for safety or convenience, to store any articles "in any of the decks, cabins, or other places appropriated to the use of passengers," such places of storage shall not "be deemed to be a part of the space allowable for the use of passengers, but the same shall be deducted therefrom;" and that one hundred superficial feet of deck for a hospital "may be included in the space allowable for passengers."

The second section provides, that "no such vessel" shall have more than two tiers of berths, and prescribes what interval there shall be between the lowest part thereof and the deck, and that the berths shall be well constructed, parallel with the sides of the vessel, and be separated from each other in a certain manner, and be of such length and such width, and be occupied each by no more than one passenger, with a provision for larger berths, and for their occupation, under certain circumstances. The section then provides, that, if there shall be any violation of it in any of its provisions, the master of the vessel and the owners thereof shall severally forfeit and pay the sum of five dollars for each passenger on board of said vessel on such voyage, to be recovered by the United States in any port where such vessel may arrive.

The fifteenth section of the act provides, that "the amount of the several penalties imposed by the foregoing provisions regulating the carriage of passengers in merchant vessels, shall be liens on the vessel or vessels violating those provisions, and such vessel or vessels shall be libelled therefor in any circuit or district court of the United States where such vessel or vessels shall arrive."

Relying on the provisions thus found in the first, second, and fifteenth sections of the act, the United States have filed this libel. The libel does not allege any violation of the first section of the act, or any overcrowding of passengers, or any carrying of a disproportionate and unlawful number of passengers, or any improper occupation of the space required to be appropriated to the use of passengers, but alleges only violations of provisions of the second section of the act.

The claimants have filed eleven exceptions to the libel, only one of which, the third, is important to be considered, in the view I take of the statute. The other exceptions involve important questions relating to the admiralty jurisdiction of the court in the suit, and to the power of congress to impose on a foreign vessel a lien for the penalties prescribed by the second section of the act, and to other matters, some of substance and some of form. The third exception sets up that the requirements of the second section of the act do not apply to steamships, and that, therefore, the Manhattan is not liable for the penalties claimed in the libel.

The first, second, and fifteenth sections of the act employ only the word "vessel," without limiting the description of vessel to a merchant vessel, or a sailing vessel, or a steam vessel. The provisions of those sections would, therefore, be broad enough, were there nothing else in the act, to include a steam vessel under the words "any vessel," for, a steam vessel is none the less a vessel, in respect to her being water-borne, because she is propelled in whole or in part by steam. But the tenth section of the act provides as follows: "The provisions, requisitions, penalties, and liens of this act relating to the space in vessels appropriated to the use of passengers, are hereby extended and made applicable to all spaces appropriated to the use of steerage passengers in vessels propelled in whole or in part by steam, and navigating from, to, and between the ports, and in manner as in this act named, and to such vessels and to the masters thereof; and so much of the act entitled 'An act to amend an act entitled "An act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam, and for other purposes," approved August thirtieth, eighteen hundred and fifty-two,' as conflicts with this act, is hereby repealed; and the space appropriated to the use of steerage passengers, in vessels so as above propelled and navigated, is hereby made subject to the supervision and inspection of the collector of the customs at any port of the United States at which any such vessel shall arrive, and the same shall be examined and reported in the same manner and by the same officers by the next preced-

ing section directed to examine and report." The "next preceding section," the ninth, provides as follows: "The collector of customs at any port of the United States at which any vessel so employed shall arrive, shall appoint and direct one or more of the inspectors of the customs for such port to examine such vessel, and report in writing to such collector whether the requirements of law have been complied with in respect to such vessel; and if such report shall state such compliance, and shall be approved by such collector, it shall be deemed and held as primâ facie evidence thereof."

If the provisions of the first section, relating to the space appropriated to the use of passengers, apply to steam vessels, under the designation, in the first section, of "any vessel," then the provision of the tenth section, extending such provisions, with the penalties and liens arising therefrom, "to all spaces appropriated to the use of steerage passengers in vessels propelled in whole or in part by steam," is useless and of no effect. So, also, if the provision of the ninth section relating to the inspection of "any vessel," with a view to see "whether the requirements of law have been complied with in respect to such vessel," applies to the inspection of steam vessels, then the provision of the tenth section, subjecting "the space appropriated to the use of steerage passengers" in steam vessels to like inspection, is utterly nugatory. All the affirmative and substantial provisions of the tenth section must be held to be meaningless, if the first and ninth sections are held to apply to steam vessels. And, if the first section does not apply to steam vessels, the second does not, for, the only designation, in the second section, of any vessel to which its provisions are to apply, is by the description, "such vessel,"—that is, such a vessel, and such a vessel only, as the first section applies to and designates.

But there is something more. The first section relates solely to the space appropriated to the use of passengers. The tenth section extends the provisions, requisitions, and penalties found in the first section, and the liens which arise therefrom by virtue of the fifteenth section, and makes them applicable to something to which, by virtue merely of the first and fifteenth sections, and but for the tenth section, they would not extend and be applicable. This must be the meaning of the tenth section, or there is no force in language. If those provisions, requisitions, penalties, and liens extend and apply without the tenth section, just as far and as widely as they do with and by means of the tenth section, then the tenth section may be obliterated from the act. But the proper rule of construction in regard to statutes is, that they must be so construed as to give force and effect and meaning and consistency to all their provisions. By construing the first and ninth sections as not applying to steam vessels, the tenth section has a meaning and operation in all its parts. It extends and applies the first and fifteenth sections, so far as they relate to the space in vessels appropriated to the use of passengers, "to all spaces appropriated to the use of steerage passengers in vessels propelled in whole or in part by steam, and navigating from, to, and between the ports, and in manner as in this act named, and to such vessels and to the masters thereof;" and it extends and applies the inspection provided for by the ninth section to the space appropriated to the use of steerage passengers in the steam vessels named in the tenth section. But the tenth section is very limited in its provisions. It extends to steam vessels only those provisions of the act which relate to the space "appropriated to the use of passengers." Those provisions are found in the first section, and nowhere else. The first section contains in various places the words, "the spaces appropriated for the use of such passengers," "the space aforesaid," "places appropriated to the use of passengers," "space allowable for the use of passengers," "spaces appropriated to passengers," "space allowable for passengers." Similar expressions are not found in any other section of the act except the tenth; and the first section is wholly taken up with prescribing the superficial deck space to be appropriated to each passenger of the number which, by its tonnage, the vessel is authorized by the first section to carry. Again, these provisions of the first section in regard to such space are, by the tenth section, extended and made applicable only to the spaces appropriated to the use of steerage passengers in steam vessels. The tenth section draws a clear distinction between the vessels referred to in the first section, navigating between the ports named in the first section, and steam vessels navigating between the same ports, and indicates, in a manner not to be mistaken, that, as the vessels over which, in certain respects, the tenth section causes the provisions of the first section to be extended, are steam vessels, the vessels to which the first section applies proprio vigore do not include steam vessels. Nor do the vessels to which the second section applies include steam vessels; and the tenth section does not extend the second section to steam vessels. In no proper sense can the provisions of the second section be said to relate to the space appropriated to the use of passengers. That "space" means the superficies of clear and unobstructed deck-room to which each passenger is entitled by the first section. The second section relates wholly to the arrangement of the sleeping accommodations.

It was urged, on the part of the government, that the fact that the tenth section repeals so much of the act of August 30th, 1852 (10 Stat. 61), as conflicts with the act of 1855, taken in connection with the fact that certain provisions of the act of 1852 related substantially to the space appropriated to the use of passengers in vessels propelled in whole or

in part by steam, and were materially different from those found in the act of 1855, shows that the act of 1855, while substituting, by the tenth section, the provisions of the act of 1855, relating to such space, for those of the act of 1852, so far as concerns steamships, was not intended to exempt steamships from the other provisions of the act of 1855. There would be force in this argument if there were found in the tenth section only an isolated clause repealing so much of the act of 1852 as conflicts with the act of 1855. Then the argument would be a good one, that the word "vessel," in the first and second sections, includes steamships, because otherwise there could be nothing in the act of 1852, which relates exclusively to steamships, in conflict with anything in the act of 1855. But this argument fails in view of the other clauses found in the tenth section. That section alone, in the act of 1855, relates to steamships, and as there might be something in the provisions which the tenth section applies to the spaces appropriated to the use of steerage passengers in steam vessels, which would conflict with provisions in the act of 1852, it was proper to repeal the earlier conflicting provisions.

It is well known that the mischiefs which congress was endeavoring to correct when this law was enacted, were those which had arisen in sailing vessels. But, whether this were so or not, congress has, by the statute, drawn a plain distinction in respect to steamships, and has made only certain specified and limited provisions, not including those of the second section, applicable to steamships.

This libel cannot be sustained without obliterating the tenth section from the act. I therefore allow the third exception, and dismiss the libel, without passing on any of the other exceptions in the case.

This decision was affirmed by the circuit court, in October, 1868. [Case No. 15,715.]

MANHATTAN, The (UNITED STATES v.). See Cases Nos. 15,714 and 15,715.

MANHATTAN BRASS CO (UNITED NICKEL CO. v.). See Cases Nos. 14,409, and 14,410.

MANHATTAN ELEVATOR & GRAIN-DRYING CO. (SYKES v.). See Case No. 13,710.

Case No. 9,021.

MANHATTAN FIRE INS. CO. v. The C. L. BREED.

[1 Flip. 655;[1] 9 Chi. Leg. News, 385; 2 Cin. Law Bul. 190.]

District Court, N. D. Ohio. April, 1877.

ADMIRALTY—PROCEEDINGS IN REM—UNDIVIDED INTEREST.

Proceedings in rem in admiralty, cannot be instituted by a party against an undivided interest of an owner in a vessel.

In admiralty.

H. D. Goulder, for libellant.
Willey, Terrell & Sherman, for defendant.

WELKER, District Judge. This is a libel filed by the Manhattan Insurance Company to recover a premium note for an insurance upon five-sixteenths of the schooner C. L. Breed, obtained by the owner of that interest in the schooner. An exception was filed by the defendant, which raises the question whether proceedings in rem in admiralty can be instituted by a party against an undivided interest of an owner in a vessel. There is no controversy at all, but that the Manhattan Fire Insurance Company might proceed in personam against the party who had taken out the insurance, and after obtaining a judgment, might levy upon his interest and sell it for the payment of the decree of this court, founded upon the premium note, or the unpaid premium of the insurance.

But the difficulty in this case arises as to the operation of the machinery that is required in admiralty courts to proceed in rem against vessels. A proceeding in rem always requires that the seizure shall be under the process of the court. The marshal must get possession of the vessel (of the res) before an admiralty court gets jurisdiction in rem; and the difficulty about this sort of a case is, that there is no process by which the marshal has the right, at the instance of this Fire Insurance Company, having a claim against five-sixteenths of the vessel, to seize the whole vessel.

The fact is, that in this case, the marshal did not seize the vessel, but it is agreed by counsel for the purpose of having a decision in relation to this matter, that the proceedings may be treated as though the marshal had seized the vessel. In the first place, I can find no case in which any admiralty court has held, for a hundred years, in the practice of admiralty in this country, that an undivided interest in a vessel might be seized in rem for the satisfaction of a claim against the owner of that interest.

It is replied by counsel on the other side, that that is no reason why the case might not come up as a new question. The fact that in the extensive admiralty practice by so many lawyers, that seems to have prevailed in all the courts of the United States, such a case has never before been attempted, is a strong argument to show that no such law or authority exists.

The process of seizing a vessel and bonding her is entirely different from that of levying an execution upon an undivided interest in real estate or personal property. I am cited by counsel to authorities, which justify and authorize a levy on a joint interest in property to pay a judgment against a joint owner. That is a very common process in all the courts, but the case is not analogous to that of a seizure of a vessel;

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

for where an execution is levied upon a joint interest, the owners of the balance of the interest in the property may give a bond to re-deliver the property at the day of sale, and the sale can go on, and in the meantime the property will be in the hands of the other owners, and be used for its particular purposes, and when the day of sale comes around, to deliver it to the purchaser in any necessary form that may be required in order to make a valid sale; but when a vessel is seized by the marshal, it can only be released upon the claimants of the vessel making a stipulation that they will pay the amount of the decree that may be rendered in the proceedings in rem against the vessel. There is no process for the return of the vessel. The proceeding would have to be against the stipulator in the stipulation, and it is not against the vessel at all after it is bonded. This view of the matter makes a levy on a judgment entirely different from the seizure of a vessel itself.

In the next place, if these joint owners would enter into a stipulation to pay the amount of the decree, they would be compelled to pay the debt of the other joint owners, and in every view that can be taken of the machinery which is necessary to be used in proceedings in rem against vessels it will be found that it cannot be put into operation practically, so as to work out right and justice between the joint owners. That is the reason, no doubt, that in all the law and practice of admiralty, no such case has ever occurred in which a joint owner's interest of this kind was seized in rem.

For these reasons I am clearly of the opinion that these proceedings are not authorized in the admiralty law.

The exceptions will be sustained and the bill will be dismissed.

Case No. 9,022.

MANHATTAN FIRE INS. CO. v. WEILL.

[See 28 Grat. 389.]

Case No. 9,023.

MANHATTAN GAS-LIGHT CO. v. MAXWELL.

[2 Blatchf. 405.] [1]

Circuit Court, S. D. New York. July 1, 1852.

CUSTOMS DUTIES — APPRAISEMENT — EXCESS OF QUANTITY—PENALTY—FEES OF WEIGHER.

1. A quantity of coal was invoiced and entered at a certain weight and price per ton. On appraisement, the price per ton was reported to be correct, but the quantity was reported as so much greater as to make the entire valuation greater by 10 per cent. than the entry valuation. The collector exacted a penalty of 20 per cent., under section 8 of the act of July 30, 1846 (9 Stat. 43). *Held*, that this was illegal.

2. The importer was not liable, in such case, under section 4 of the act of July 30, 1846 (9 Stat. 43), to pay the fees of the weigher and measurer.

This suit was commenced in the supreme court of New York, and removed by certiorari, on the petition of the defendant [Hugh Maxwell], into this court, under the provisions of the 3d section of the act of congress of March 2, 1833 (4 Stat. 633). The plaintiffs imported from Liverpool a quantity of cannel coal, invoiced and entered as of the weight of 150 tons. It was measured by the custom-house measurers, who returned the quantity to be 167 tons. No appeal was taken by the plaintiffs from that return, and duty was accordingly imposed on 167 tons, and was paid by the importers. The value of the increased quantity of the coal was greater, by more than ten per cent., than the entry valuation, and a penalty of 20 per cent., amounting to $99.60, was imposed by the collector because of such undervaluation. The measurers' fees, $49.50, were also charged to the plaintiffs. Payment of the two last mentioned sums was exacted by the collector, and was made by the plaintiffs under protest. To recover these amounts, $149.10, with interest, this action was brought. The plaintiffs endorsed on the entry a protest in writing "against the payment of the within named penalty of $99.60, and of $49.50 for measuring, as being both illegal and contrary to the former practice in this collection district."

The case was tried in November, 1851, before BETTS, J., and the jury rendered a verdict for the plaintiffs for $150, subject to the opinion of the court on a case to be made and to adjustment or correction at the custom-house.

John S. McCulloh, for plaintiffs.

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

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

BETTS, District Judge. The defendant takes no exception to the sufficiency of the protest in this case, and the decision must turn on the points whether the undervaluation reported by the appraisers in respect to the coal subjects it to the penalty of 20 per cent. imposed, and whether the importers were liable to pay the measurers' fees charged against them.

The price per ton of the coal, as stated in the invoice, was reported to be correct. The difference between the valuation in the entry and that reported by the appraisers arose from the greater weight returned by the custom-house weighers.

Cannel coal is sold in England by actual weight, the weight being taken with great care. In the United States, it is delivered from the ship, and sold by the chaldron, and the custom house method of determining the weight of a cargo is to reduce the measured chaldron to tons and pounds, by taking the

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

average weight of two or three tubs full, and multiplying that average by the number of tubs composing a chaldron. The evidence in this case proves that this mode of weighing, or rather measuring, leads to inaccuracy and error, and generally gives, as a result, a nominal weight beyond the real weight of the coal. The official weight must, however, be taken in this case to be the true dutiable weight.

The claim to the penalty exacted is not placed upon any culpable conduct in the importers, nor does their innocence of blame exonerate them from liability to pay the penalty, if the collector brings the case within the provisions of the act. The authority invoked for imposing the penalty is given by the last proviso to the 17th section of the act of August 30th, 1842 (5 Stat. 564), which is in these words: "Provided, also, that in all cases where the actual value to be appraised, estimated and ascertained, as hereinbefore stated, of any goods, wares and merchandise imported into the United States, and subject to any ad valorem duty, or whenever the duty is regulated by or directed to be imposed or levied on the value of the square yard, or other parcel or quantity thereof, shall exceed, by ten per centum or more, the invoice value, then, in addition to the duty imposed by law on the same, there shall be levied and collected on the same goods, wares and merchandise fifty per centum of the duty imposed on the same when fairly invoiced:" and by the eighth section of the act of July 30th, 1846 (9 Stat. 43), which alters the penalty to twenty per cent. ad valorem on the appraised value, in case the goods have been actually purchased, and their invoice value has been raised by the importer to what he deems to be their market value in the country from which they were exported.

The argument for the United States is, that quantity is a component part of the value of this importation, and that, as the amount of the entry or the invoice lies in the quantity and price, a mis-statement of quantity on the invoice and the entry, exhibiting the gross amount (consisting of price and weight) at ten per cent. below the appraisement, becomes necessarily a reason for imposing the penalty, because the dutiable sum is thus entered at more than ten per cent. less than the sum on which the United States are entitled to charge duties.

Two considerations, in our judgment, countervail this argument. The language of the statute makes the value of the goods entered the subject of comparison with the appraisement, and the term "value" is used in the revenue laws to express the "price" of the dutiable goods—that is, their cost price or market price abroad, increased by the addition of specified charges. 5 Stat. pp. 563, 564, §§ 16, 17. The custom-house officers can, therefore, only look at the relative valuations of the commodity upon the invoice and the appraisal, in determining whether the latter exceeds the former by more than ten per cent. The ad valorem to which the tariff acts have reference, is the price or market worth of a dutiable article and its charges, in whatever way it is the subject of purchase and sale, whether the price is estimated on the square yard or other parcel or quantity. An aggregation of parcels (tons, in this instance) does not affect the value or price of a particular ton. It is only a repetition of that price as many times as the parcel or quantity is named. The general summation, therefore, being no more than the footing up of the specific values reiterated, cannot be regarded as the valuation which is called for by the statute, and which is the subject of appraisement and of penal duties.

That this interpretation of the revenue laws is correct, is manifest from the powers conferred on appraisers and the duties they are required to perform in determining the dutiable value of imported goods. An examination of the duty acts from 1799 to 1846, shows that appraisers are called upon solely to fix the price or value of the imported commodity by gauge, yard, weight or measure, by the denomination or description usually applied to it on purchase and sale. Officers other than appraisers ascertain what is the measure or weight of goods entered. Their report furnishes the multiple by which the particular valuation of the appraisers may be brought to the dutiable amount of the importation.

Upon this view of the subject, it is manifest that congress has not imposed the increased duty of twenty or fifty per cent. upon a misstatement in the invoice of the quantity of articles imported, but upon an undervaluation of prices. Because, such increase or penalty depends upon and follows the judgment of the appraisers, and their office is limited to fixing the wholesale price or market value, and in no way extends to ascertaining the amount, in weight, gauge or measure, of imported goods.

We think that the defendant committed an error, after the appraisers had reported the invoice price of the coal to be correct, in imposing twenty per cent. additional duty because the weighers or measurers returned a greater quantity than was invoiced. The appraisement must be restricted to determining the price or value of the parcel or quantity by which the purchase and sale of the article are made, and has rightfully no reference to the totality of the purchase. Marriott v. Brune, 9 How. [50 U. S.] 619.

The remaining question is as to whether the importers, in this case, are chargeable with the fees of the weighers and measurers. The directions of the acts of congress prior to 1846 are not explicit as to the cases in which it shall be the duty of the collector to have imported goods weighed or measured, unless when they are stored for want of an invoice or entry, or have been detained for inspection under circumstances of suspicion. The mat-

ter appears to have been left to his discretion. The weighers and gaugers were paid for their services by the collector, out of moneys in the custom-house, and the payment was charged to the treasury (Act March 2, 1799, § 2; 1 Stat. 707), the amount of the compensation being limited by various acts. These officers were not directed, in the forms of returns prescribed by statute, to make any return of fees. Act March 2, 1799 (1 Stat. p. 678, § 72).

We have not deemed it important to search through the tariff acts, to ascertain whether any authority was given to the collector, prior to 1846, to charge fees for weighing and measuring, against the importer or the goods, or whether they were estimated and collected as duties, because we consider the whole subject to be definitively regulated by the 4th section of the act of July 30, 1846 (9 Stat. 43), which enacts, "that in all cases in which the invoice or entry shall not contain the weight or quantity or measure of goods, wares or merchandize now weighed or measured or gauged, the same shall be weighed, gauged or measured at the expense of the owner, agent or consignee."

In the present case, the invoice did contain a specific statement of the weight of the coal, and, admitting that coal was before subject to weight or measure at the custom-house, this act necessarily imports that the owner, in a case like this, shall not be subject to the cost of re-weighing it. The right to weigh at the expense of the owner depends upon the omission to give the weight in the invoice, and that omission affords the only justification for exacting costs and fees from the owner for weighing it.

We do not take into consideration the interpretation put upon this section of the act by the secretary of the treasury, in his circular of December 31st, 1849, nor decide whether the cases enumerated by him are those which justify the exaction of fees from importers, because no one of them contemplates or is based upon the state of facts presented by this case.

In our opinion, the plaintiffs are entitled to judgment, the amount of which is to be adjusted in the manner named in the verdict.

MANHATTAN LIFE INS. CO. (AMES v.). See Case No. 328.

Case No. 9,024.

MANHATTAN LIFE INS. CO. v. FARMERS' & CITIZENS' NAT. BANK et al.

[10 Blatchf. 344.] [1]

Circuit Court, E. D. New York. Jan. 6, 1873.

BANKS—STOCKS—SECURITY—REISSUE—INSOLVENCY OF BANK—FRAUD—RIGHT TO SHARE IN PROCEEDS.

B., the president of a bank, borrowed money of M., for his own use, on the security of 550 shares in the capital stock of the bank. At the time, B. stood on the books of the bank as the owner of more than 550 of its shares, certificates for which, issued to him, were outstanding, but had been passed away by him to bona fide holders. In anticipation of, but without, their surrender, B. caused to be issued to himself certificates for 550 shares, and gave them, with power of attorney to transfer, to M., as security for the loan. They were signed by B., as president, and by R., as cashier, they being the transfer officers. R. knew, as well as B., of the irregularity in their issue. At the time, B. held certificates for 535 shares of the stock of the bank, and the bank had certificates, unissued, for other shares, which had been subscribed for, but were not yet paid for. The certificates given to M. were intended to represent only the shares represented by the certificates the surrender of which was anticipated. M. made the loan in a check, on the faith of the certificates. B. passed the check to the bank, without consideration, and the bank collected it, and placed the money among its assets, B. and R. knowing all the facts. The outstanding certificates were not surrendered or cancelled, nor was any stock transferred on the books. The bank failed and a receiver of it was appointed. M. demanded back his money, and tendered the certificates for surrender, which was refused. The receiver being about to exclude M. from sharing, as a creditor, in the distribution of the assets of the bank, M. brought suit to restrain the receiver from doing so: *Held*, that a fraud was committed by B. on M.; that M. was entitled, on discovering the fraud, to rescind the contract; that the bank received the money to the use of M. and was liable for it to M.; and that M., on surrendering the certificates, was entitled to share, as a creditor of the bank, in the distribution of its assets.

Bill in equity by the Manhattan Life Insurance Company against the Farmers' & Citizens' National Bank, of Brooklyn, and Frederick A. Platt, receiver.]

Richard C. Fellows, for plaintiffs.
Tracy, Catlin & Van Cott, for defendants.

BENEDICT, District Judge. This is a suit in equity brought to obtain a decree declaring the plaintiffs entitled to share, as creditors, in the distribution of the assets of an insolvent national bank, and enjoining any distribution of such assets otherwise than pro rata between the other creditors, and the plaintiffs as creditors to the amount of $10,000 and interest.

The facts upon which the claim to this relief is based appear in the evidence as follows: On the 8th of August, 1867, one Beach, the president of the Farmers' & Citizens' National Bank, a corporation then, to all appearances, solvent, borrowed of the plaintiffs, for his own use, the sum of $10,000, upon the security of 550 shares in the capital stock of the bank. This bank had formerly been a state bank, with a capital of $160,000; but it had been changed into a national bank, as authorized by the national banking act, and its capital increased, or supposed to have been increased, to $300,000. The stock of the state bank held by each stockholder therein had been changed into stock in the national bank, to an equal amount, and the outstanding certificates of stock in the state bank were treat-

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

ed by all as representing the same shares in the national bank, until surrender and other certificates issued in their place. At the time Beach effected the loan in question, he stood on the books of the Farmers' & Citizens' National Bank as the owner of shares of its stock exceeding 550 in number, which were formerly shares in the state bank, now shares in the national bank. Certificates in the usual form, representing these shares, had, prior to the change to a national bank, been given to one Crawford, and were still outstanding, held by bona fide holders, as security for loans. These certificates, Beach says, he anticipated were to be surrendered by Crawford, on the 8th of August, 1867, and, in anticipation of such a surrender during the day, as he says, he, on that day, caused to be issued and delivered to himself certificates representing 550 of these shares of the stock of the bank, no surrender of the outstanding certificates having been made. The certificates so issued, with a power of attorney to transfer and sell, he, on the same day, gave to the plaintiffs, as security for their loan to him. The certificates so passed to the plaintiffs were in the ordinary form, and certified that Beach was entitled to 550 shares in the capital stock of the Farmers' & Citizens' National Bank, transferable only on the books of the company, in person, or by attorney, on the surrender of the certificates. They were signed by Beach, as president, and Redfield, as cashier, and these officers were the transfer officers of the bank. The certificates were, in all respects, regular upon their face, but Redfield, the cashier, as well as Beach, the president, of the bank, knew that they were irregularly issued, because certificates for the same stock were then outstanding in the hands of bona fide holders, and beyond the control of the bank or of Beach. At the same time Beach did hold certificates for 535 shares of the capital stock of the bank, and there were, also, in the possession of the bank, certificates duly made out and executed for a much larger number of shares of stock, which had been subscribed for as part of increased capital of the bank, for which notes had been taken, and to which the subscribers named in the certificates, and who stood on the books of the bank as stockholders to the amount, were entitled, upon payment of the notes; but, as the evidence shows, the certificates for 550 shares, issued on the 8th of August, 1867, and delivered to the plaintiffs, were not intended to represent any of these other shares, but represented 550 of the shares certificates for which had been given to Crawford, and the return whereof was then anticipated. Upon the faith of the certificates so issued on August 8th, Beach obtained of the plaintiffs their check for $10,000, and this check he at once passed into the possession of the bank, without any consideration, apparently with the intention of retiring the new certificates in case the old ones given to Crawford were not surrendered and cancelled. The bank collected the check, the president and the cashier both knowing the circumstances under which it had been obtained from the plaintiffs, and the money of the plaintiffs thus passed into the assets of the bank. None of the certificates given to Crawford were ever surrendered or cancelled, nor was any transfer of the stock upon the books of the bank attempted, either by Crawford, or by the plaintiffs, or by any other person, and such transfer, doubtless, became impossible when, shortly after, the bank failed and its affairs passed into the hands of the defendant Platt, as receiver, appointed by the comptroller, under the national banking act [13 Stat. 99]. Upon ascertaining, after the failure of the bank, the character of the certificates delivered to them, the plaintiffs at once offered to surrender them and demanded back their money, which being refused, and the receiver announcing his intention to exclude them from sharing, as creditors, in the distribution of the assets of the bank, this action was brought.

It will be seen, from the facts above stated, that the transaction of the 8th of August, on the part of the bank officers, was a duplication of certificates for 550 shares of actual and valid stock of the bank then, as now, standing in the name of Beach, the president, upon the transfer books of the bank, but of which Beach was not then the owner, he having already passed away his title.

The main question in the case then arises—whether a fraud upon the plaintiffs was committed by Beach, when he passed to them, as regular and valid, such certificates as those of August 8th. Clearly, there was fraud. By necessary implication, Beach, when he delivered the certificates to the plaintiffs, represented that he was then the owner of the stock referred to therein; that no other person than the holder of those certificates was entitled to that stock; and that the stock could not be transferred upon the books of the bank except upon a surrender of those certificates. Whereas, Beach was not the owner of the stock, the holder of other certificates for the same shares was entitled, upon a surrender thereof, to become the stockholder thereof on the books of the bank, and, although a transfer of the shares, if actually made by the bank, upon a surrender of these certificates, would cut off the equitable rights of other parties to the shares, still, such a transfer would be rendered impossible by a prior surrender of the old certificates and a transfer of the shares to the holders thereof, and could not be compelled, as against such holders, theirs being the prior of two equal equities. Herein lay the fraud upon the plaintiffs, and, by reason of that fraud, the plaintiffs became entitled, upon discovering it, to rescind the contract, give up the certificates, and demand their money. This they elected to do, and their demand is good

against the bank, because of the conceded fact, that their check, obtained by fraud, was delivered to the bank without consideration, and with full notice of the circumstances under which it was obtained, not only through Beach, its president, but through Redfield, its cashier, who received it; and the bank, after such notice, collected the check and now has the money. Money so collected is money had and received to the use of the plaintiffs.

It is no answer to this view of the case, to say, that the certificates of August 8th were valid to give the plaintiffs a right of action against the bank in the event of a failure to obtain a transfer of the shares represented thereby. Whether the certificates, passed to the plaintiffs, were or were not sufficient security, is immaterial. They were not the kind of security that was agreed for, but of a different character; and the false representation of their character, which Beach, by necessary implication, made, when he signed and delivered them to the plaintiffs, gave the plaintiffs the right, on discovering that fact, to reject them and sue for their money.

It has been contended, on the part of the defendants, that the act of Beach, in issuing the certificates of August 8th, in legal effect, cancelled the certificates of the shares of stock which he then had, and thereby rendered the certificates given to the plaintiffs regular and valid. But, the testimony is plain, that the certificates of August 8th were not intended to represent any of the shares certificates for which Beach then had. Beach expressly says, that he told Redfield, that those certificates were not to be cancelled, nor those shares transferred. None of those certificates ever were cancelled or surrendered, nor was any of that stock transferred. Besides, Beach had only 535 shares, and some of those were not in his name, while the certificates passed to the plaintiffs call for 550 shares standing in his name.

Equally unavailing is the suggestion, that the bank itself, when the certificates of August 8th were issued, owned a large number of its shares, being those of new subscribers, held as above described, and that these are to be deemed represented by the certificates issued to the plaintiffs, thus rendering them valid. As I understand the evidence, the bank had no shares whatever applicable to such a purpose; but, if it had the power so to deal with the shares referred to, none of them were ever placed in the name of Beach upon the books. The bank never authorized a transfer of any of them to Beach or to the plaintiffs, and it was never intended that the certificates of August 8th should represent any of those shares, but only shares the certificates of which had been given to Crawford, and were then outstanding. The fact, that the bank, in case of a surrender by the plaintiffs of the certificates of August 8th, might be able, if then so minded, either by the appropriation of Beach's shares, or by a resort to shares of its own, to place in the name of the plaintiffs some other 550 shares would not constitute the certificates of August 8th lawful instruments, valid to enable the plaintiffs, at their option, to be placed on the books of the bank, as owners of the shares of stock which the certificates represented, nor would it make true the representation that Beach owned those shares, and that they were transferable upon a surrender of those certificates, and not otherwise; and it would have no effect to impair the right of the plaintiffs to reject those certificates because of the fraud, and to demand back their money.

My opinion, therefore, is, that, upon the view of this case above expressed, the plaintiffs are entitled to the relief demanded. I am, also, of the further opinion, that, when the bank took and, without consideration, applied to its own use the money obtained by its president by means of the certificates of August 8th, and with full knowledge, not only through Beach, its president, but Redfield, its cashier, that the money had been obtained upon the faith of duplicate certificates of stock issued by the bank to a person not then the owner of the stock, the bank became directly liable to the plaintiffs for the money, as the borrower thereof, and cannot be permitted to say that Beach was not authorized so to obtain the money for the bank.

My conclusion, therefore, is, that, upon surrendering, for cancellation, the certificates of August 8th, according to the tender made, the plaintiffs are entitled to be treated as creditors of the Farmers' & Citizens' National Bank, to the amount of $10,000, with interest from August 9th, 1867, and that any distribution of the assets of that bank, otherwise than pro rata, among the other creditors and the plaintiffs, as such creditors, must be enjoined.

Case No. 9,025.

MANHATTAN LIFE INS. CO. v. HOELZLE.

[7 Reporter, 484.] [1]

Circuit Court, E. D. Missouri. 1879.

LIFE INSURANCE—DIVIDEND SCRIP IN PAYMENT OF PREMIUMS.

The dividend due a policy-holder, which is sufficient to pay a premium due, should be applied to the payment of such premium upon the request of the policy-holder, where the practice of the company has been to apply dividend scrip either to secure a bonus policy or to reduce the amount of premiums payable at any given time, upon the request of the policy-holder.

Action on a life policy of insurance. The premiums were payable one half by note, the other half in instalments in July and October. The premiums were so paid until

[1] [Reprinted by permission.]

July, 1873, when the insured requested that the dividend which had been allotted should be applied to the portion of the premium then due, which was refused. No other premiums were paid, and in November following the insured died. There was judgment for plaintiff for the full amount of the policy. The case was brought to the United States supreme court, which affirmed the judgment by a divided vote (October term, 1877), no opinion being written. The material parts of the charge on the trial below are here given:

TREAT, District Judge. Under the charter of the defendant, its board of directors had the power to regulate the amount of premium, and the mode and manner of payment of the same. By other provisions of its charter, dividend scrip was issuable to policy-holders, after certain requirements had been complied with, annually, for the profits of each year. It appears from the testimony that annual issues of scrip were made after 1866, and, therefore, by the terms of the charter the dividend scrip for 1872 was issuable on the 1st day of January, 1873, or within 30 days thereafter. If the practice of the company was to apply such dividend scrip, at the election of the policy-holder, to a bonus policy, or toward the payment of premiums and interest on premium notes outstanding; and if on the policy in question the premiums were paid by him during the latter part of its existence, quarterly, or for a less period than a year, and application was made at the agency here in St. Louis, in July, 1873, the same having been the custom with respect to this policy, to make a quarter-yearly payment by applying thereto the dividend scrip to which the policy-holder was entitled as early as the previous February, and the amount of said dividend scrip was sought to be applied to the payment of the required premium, and the agent of the defendant refused to receive the premium by such application of dividend scrip, then the defendant cannot set up as a defense the non-payment of the July premium. But whether such are the facts the jury must determine for themselves from the evidence. The jury will also consider whether dividend scrip issued could be applied by the policy-holder at his election, either to secure a bonus policy or to reduce the amount of premiums payable at any given time. Hence if the custom of the company was to apply the dividend scrip, if the policy-holder so requested, to the payment of the next premium, and in this case such application was made and refused, then the failure to pay the premium in dispute is no defence to the right of recovery.

MANHATTAN LIFE INS. CO. (RINKER v.). See Case No. 11,851.

MANHATTAN LIFE INS. CO. (SCHUMACHER v.). See Case No. 12,490.

Case No. 9,026.

MANHATTAN MEDICINE CO. v. WOOD et al.

[4 Cliff. 461; 14 O. G. 519; Cox, Manual Trade-Mark Cas. 359.] [1]

Circuit Court, D. Maine. Sept. 21, 1878.[2]

TRADE-MARKS—ENTIRETY — SPURIOUS ARTICLE—LACHES — TERRITORIAL LIMITS — RELINQUISHMENT — RESEMBLANCE — FUTURE INFRINGEMENT.

1. Trade-marks are an entirety, and are incapable of exclusive use at different places by more than one independent proprietor; for, in seeking redress, in order to establish an exclusive right to the mark, the party must show an exclusive right to the commodity to which it is attached.

2. Rights to a trade-mark may be forfeited if the mark is deceptively used to designate a spurious article, and a party thus affected can convey no valid title in the mark to another.

3. Equity will not decree for an account of past gains and profits where there has been laches in bringing suit and long acquiescence in the adverse use of the mark by others.

4. Disregard of territorial limits allotted by license of proprietor and misuse of the trade-mark, are a forfeiture of right, and a defeat to any valid conveyance by the wrong-doers.

5. Voluntary relinquishment of the original mark of the proprietor for another, devised by the grantees themselves, is a forfeiture of right to the old mark no less than its misuse to designate a spurious article.

6. Equity gives relief for the infringement of a trade-mark, upon the ground that one man is not allowed to offer his goods for sale, representing the goods to be the manufacture of another in the same commodity.

7. Two trade-marks are substantially the same, in legal contemplation, if the resemblance is such as to deceive ordinary purchasers, giving such attention to the same as purchasers usually give, and to cause them to purchase the one manufacture supposing it to be the other.

8. Cases arise where the title is complete, when a party, though not entitled to a decree for an account, may still be entitled to a decree to prevent future infringements. But if the defendant has the genuine article, and manufactures it, and it is not protected by a patent, and the complainant has no exclusive right to the trade-mark, then the complainant can have no relief.

9. If several alleged owners of a trade-mark, whose rights are determined by territorial limits, for years disregard each other's rights, and mutually violate each other's territorial privileges, and make no efforts to uphold the same, they cannot set up as valid what they themselves have destroyed, nor assign any exclusive valid claim therein to others.

This was a bill in equity [by the Manhattan Medicine Company] praying for an account and an injunction against the respondents [Nathan Wood and John S. Wood] for the violation of the complainants' right of property in alleged trade-mark on Atwood's Vegetable Physical Jaundice Bitters. It was claimed that the complainants derived

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission. Cox, Manual Trade-Mark Cas. 359, contains only a partial report.]

[2] [Affirmed in 108 U. S. 218, 2 Sup. Ct. 436.]

title through mesne assignments from one Atwood, who had adopted and used the designation on the article named, of which he was the inventor and at one time proprietor. There was no patent on the compound, and no registry or patent of the trade-mark.

Chase, Bestow & Holt, for complainants.

Brief of Philo Chase.

Some forty years ago, one Moses Atwood, then of Georgetown, Mass., first prepared and sold the plaintiffs' bitters under the name of "Atwood's Vegetable Physical Jaundice Bitters." About the year 1852, Atwood sold an interest in his said business to Carter & Dodge of said Georgetown, a firm composed of Moses Carter and Benjamin F. Dodge. Thereafter Atwood carried on said business in conjunction with said Carter & Dodge until 1855, when he sold out to them his remaining interest in the business, including his stock on hand, debts due, the right to use his name in the manufacture and sale of said medicines, all the labels, trade-marks, good-will, and all the other rights pertaining to said business, for which Dodge & Carter paid him some four or five thousand dollars. About this time, Charles L. Carter, a son of Moses Carter, was taken into the firm of Carter & Dodge, constituting the new firm of Carter, Dodge & Co. This new firm, having succeeded to all the rights of Carter & Dodge in said business, carried on the same for some three years, using Atwood's name, recipes, trade-marks, &c., as theretofore done by Atwood and Carter & Dodge. Then the firm of Carter, Dodge & Co. was dissolved by mutual consent and agreement that the several partners should thereafter own and use the Atwood recipes, trade-marks, &c., in common, each selling on certain prescribed territory. After the dissolution of the partnership of Carter, Dodge & Co., the business was carried on in accordance with the terms of the dissolution agreement as to the common use of the Atwood name, recipes, labels, trade-marks, &c., by the several parties in interest. Then the Carter branch of the business was carried on for about five years by Moses Carter and his son, Charles L., under the style of Carter & Son; then Charles sold out his interest, and his brothers, Luther F. and Moses F., took his place in the firm, it then becoming M. Carter & Sons. Then Moses Carter died, his interest going to his two sons and partners, Luther and Moses. Thereafter, Luther F. Carter carried on the business until the sale of the Carter interest to the plaintiffs. Dodge carried on his branch of the business for some time after the dissolution of Carter, Dodge & Co., and then sold his interest to Noyes & Manning and Will. B. Dorman; Noyes & Manning and Dorman then carried on the Dodge branch of the business until their conveyance thereof to the plaintiffs. Lewis H. Bateman, of Georgetown, also had or claimed to have an interest in Atwood's medicine business, by virtue of some partnership or other relation with Atwood. Carter, Dodge & Co. at first denied his claim, and attempted to stop him by a suit, but failed to prosecute it to a successful issue; and thereafter Bateman used the Moses Atwood name, label, and the fluted bottle in common with Carter, Dodge & Co. and their successors until his decease. Thus the plaintiffs acquired the entire ownership of the Atwood medicine business, together with all of its accompanying rights of trade-marks, good-will, &c. From abundant caution rather than from any necessity, the plaintiffs also took conveyances from all of the Carter heirs, and from Dodge, of all their respective right, title and interest in said business, trade-marks, &c. From the time Moses Atwood first put up and sold said bitters, about forty years ago, he and all of his successors have always used the same name and label for their said bitters.

Moses Atwood having first adopted and used the name, label, &c., in question, to distinguish his article of bitters, acquired the exclusive right to the same. Amoskeag Manuf'g Co. v. Spear, 2 Sandf. 599, Cox, Trade-Mark Cas. 87; Davis v. Kendall, 2 R. I. 566; Williams v. Johnson, 2 Bosw. 1; Boardman v. Meriden Britannia Co., 35 Conn. 402; Chappell v. Sheard, 2 Kay & J. 117; Upton, Trade-Marks, 47; Curtis v. Bryan, 36 How. Prac. 33; Filley v. Fassett, 44 Mo. 168. "Every person who uses a trade-mark, be it the label on a bottle, or the name or title of a periodical or magazine, by his appropriation and use of the name, acquires a property in that name, and has a right to restrain any other person from using the same name in such a manner as would lead, or be calculated to lead the public to believe that they are purchasing one thing when in truth they are purchasing another." Bradbury v. Beeton, 39 Law J. Ch. (N. S.) 57.

The name "Atwood's Vegetable Physical Jaundice Bitters" was first devised, adopted, and used by Moses Atwood to designate and distinguish his bitters; it was used by him for that purpose for about fifteen years, until he sold out his business to Carter, Dodge & Co. in 1855; it served to distinguish his bitters from all other bitters. Generally, the use of the two words "Atwood's Bitters" is sufficient to distinguish them, and the words "Atwood's Jaundice Bitters" are always sufficient. The name and label of the article were its distinguishing marks; the marks by which it became known to the public; the marks by which it was bought and sold; the marks by which it achieved its high reputation. These, as marks for this make of bitters, were exceedingly valu-

able. Moses Atwood had made the marks valuable by his skill, industry, and enterprise in making and selling an article the public was glad to purchase. These marks constituted the principal value of the article, because, it being known to the public by these marks, it could not be sold without them. As such marks in connection with such use, they constituted valuable property: this property belonged to Moses Atwood; he had created it. The marks, when he first adopted them, had no more value than various other marks he might have chosen instead; but by their long use to designate and distinguish his article they had become endowed with value. The plainest justice demands that a person having so created such value should be protected in the enjoyment of it, and reap the reward of his merit. The highest public policy also demands such protection, because the hope of such reward is the encouragement of labor, integrity, and excellence. By such protection, the maker and seller is stimulated to make and sell an article which by its goodness shall commend itself to public favor; and the public are correspondently benefited by knowing where to purchase a good article.

The courts of every civilized state in the world have long recognized trade-marks as property, and given them the fullest protection as such. Amoskeag Manuf'g Co. v. Spear, supra.

Atwood's trade-marks, &c., in connection with the business of making or selling the article to which they belonged, were transferable. Eden, Inj. (1st Am. Ed.) 226; Edelsten v. Vick, 11 Hare, 78; Walton v. Crowley [Case No. 17,133]; Joseph Dixon Crucible Co. v. Guggenheim, 2 Brewst. 321; Gillis v. Hall, Id. 342; Congress & Empire Spring Co. v. High Rock Congress Spring Co., 45 N. Y. 291; Filkins v. Blackman [Case No. 4,786]; Winsor v. Clyde, 9 Phila. 513; Upton, Trade-Marks, 52,—where the author says: "Property in trade-marks may be obtained from him who has made the primary acquisition."

Moses Atwood, by his transfer to Carter & Dodge, and Carter, Dodge & Co., vested this property in them. Carter, Dodge & Co., being the owners of the trade-marks, &c., could hold or own them jointly or in common. As long as the partnership lasted, they held them in joint ownership; but after the dissolution of the partnership they held them in common. There was nothing to prevent this. Each party had the recipe; one could make the article as well as the other. Whichever party made it, the public was supplied with the genuine article. The name and label indicated the genuine article, whether it was made by one of the Carters or by Dodge, just the same as they did when it was made by Carter, Dodge & Co. as a firm, or when made by Atwood himself. It is well settled that trade-marks, like other property, may be owned in common by different parties. Dent v. Turpin, 7 Jur. (N. S.) 673; Cod. Trade-Marks, 269, and cases.

On the dissolution of a partnership, each partner is, in the absence of any special agreement, entitled to trade under the name, or style of the old firm. Banks v. Gibson, 34 Beav. 566. Luther E. Carter succeeded to all the rights of Moses Carter and Charles L. Carter. It will be remembered that the two latter were members of the firm of Carter, Dodge & Co.; that, upon the dissolution of Carter, Dodge & Co., the Carter branch of the business was carried on by the two Carters, under the name of Carter & Son; that Charles L. sold out his interest in Carter & Son to his brothers, Luther F. and Moses F., and the Carter firm became Carter & Sons, which continued up to the time of the eldest Carter's decease, in 1870; and that Luther F. and Moses F. succeeded to the business of Carter & Sons. They would so succeed as surviving partners; besides, Moses Atwood devised to them his interest in the business, and Luther F. Carter then purchased the interest of his partner, Moses F., and thus became the sole owner of the Carter interest.

Trade-marks being property, and transferable like other property, and ownable jointly or in common, a legal title to an interest in the business, trade-marks, labels, &c., passed to Luther F. Carter. Cases supra.

Trade-marks pass by operation of law. Hine v. Lart, 10 Jur. 106. The Dodge interest in the business, trade-marks, &c., were legally transferable to Dorman and Noyes & Manning, according to the principles before stated. The interest of Dorman, and Noyes & Manning, and Carter, and Bateman were likewise transferable to the plaintiffs.

The rule is that the court will enjoin any imitation calculated to deceive ordinary purchasers. Cases supra; Crawshay v. Thompson, 4 Man. & G. 385; Davis v. Kendall, 2 R. I. 566; Holmes v. Holmes, Booth & Atwood Manuf'g Co., 37 Conn. 278; Wotherspoon v. Currie, 22 Law T. (N. S.) 260; Hookham v. Pottage, 26 Law T. (N. S.) 755. To be enjoinable, it is not necessary that the imitation should be complete; the imitation may be limited and partial, and still enjoinable. Lockwood v. Bostwick, 2 Daly, 521; Franks v. Weaver, 10 Beav. 297; Coffeen v. Brunton [Case No. 2,946]; Amoskeag Manuf'g Co. v. Spear, supra; Shrimpton v. Laight, 18 Beav. 164; Walton v. Crowley, supra; Clark v. Clark, 25 Barb. 76; Brooklyn White Lead Co. v. Masury, Id. 416; Hostetter v. Vowinkle [Case No. 6,714]. To be enjoinable, it is not requisite that the imitation should be intentionally deceptive. Millington v. Fox, 3 Mylne & C. 338; Dale v. Smithson, 12 Abb. Prac. 237.

It is no defence that the imitator informs purchasers of the imitation. It is no answer for the defendants to say that they sold the

bitters as theirs. Coats v. Holbrook, 2 Sandf. Ch. 586; Chappell v. Davidson, 2 Kay & J. 123. It is sufficient, to establish a case for relief, to show that the imitation has led or is likely to lead to mistakes. Clement v. Maddick, 5 Jur. (N. S.) 592. It is proved, as before shown, by the leading druggists and medicine men of New York and Boston, that purchasers are likely to be deceived into purchasing the defendant's round-bottle style for plaintiffs'. The plaintiff, in trade-mark cases, is entitled to relief, though the respondent did not know that the mark used was a trade-mark. Kinahan v. Bolton, 15 Ir. Ch. 75; Harrison v. Taylor, 11 Jur. (N. S.) 408; Hall v. Barrows, 10 Jur. (N. S.) 55; Ainsworth v. Walmsley, 12 Jur. (N. S.) 205. But the defendants must have known that they were using trade-marks which belonged to the successors of Moses Atwood. The Moses Atwood's Bitters was a well-known article in the medicine trade. It is well known by its name and labels, which constitute its trade-marks—goodwill marks they might be called.

The defendants' position, that plaintiffs' trade-marks have become common property by common use, is not tenable. The fact that the trade-marks were used in common by the common owners thereof did not make them common property as to all the world. But if other parties had, in fact, infringed the plaintiffs' trade-marks, that is no excuse for the defendants' infringement. Taylor v. Carpenter [Case No. 13,784]; Coats v. Holbrook, supra. There never was any abandonment of plaintiffs' trade-marks. For more than forty years they have been constantly used by Moses Atwood and his successors, who have always openly and notoriously claimed to be the exclusive owners thereof. A party claiming property against the real owner, on the ground of the latter's abandonment thereof, must establish the fact of abandonment by the strongest proof. There is no proof in this case of any abandonment of the trade-marks by their owners. The proof is all to the contrary. The use of a trade-mark by different parties will not operate as an abandonment by the rightful owner. Sohl v. Geisendorf, Wils. (Ind.) 60.

There has been no such consent or acquiescence as to deprive the plaintiff of protection against continuing infringement. Neither Moses Atwood nor any of his successors ever consented to the defendants' use of their trade-marks, expressly or impliedly. There were no dealings between them, or other circumstances from which a consent could be implied. All the circumstances of the case negative all inference of any such consent. There is no evidence in the case that the owners of the trade-marks ever had the legal evidence to establish a case of infringement against the defendants. The defendants were out of the jurisdiction of the courts of the state in which the trade-mark owners resided. Were they obliged to go into a foreign jurisdiction to prosecute the defendants, in order to prevent an implied acquiescence in the use of their trade-marks by the defendants? Besides, if there had been any such consent or acquiescence, it was merely gratuitous, and revocable at the pleasure of the owners. Amoskeag Manuf'g Co. v. Spear, 2 Sandf. 599; McCardel v. Peck, 28 How. Prac. 120; Gillott v. Esterbrook, 47 Barb. 455.

Laches cannot be imputed to the owners. There is no case where relief has been refused on the ground of laches under circumstances like those in this case. Wherever relief has been refused on the ground of laches, the circumstances have been such as made it a case of great hardship for the party to be enjoined, as where the right to the trade-marks has been in great doubt, or the dealings and relations between the parties have been such as to show consent of the one and good faith of the other, and probable loss to an innocent party. No statute of limitations bars the plaintiffs of protection of their trade-marks. Taylor v. Carpenter [Case No. 13,784]. Such a defence is an abhorrent one, even in an action at law. Taylor v. Carpenter [Id. 13,785].

The plaintiffs seek protection against future wrong, as well as indemnity for past wrong. The defendants persist in selling their imitation, and threaten to continue such imitation in future unless they are restrained therefrom. There is no pretence that the defendants mean to desist from using their trade-marks unless restrained. No question of statute of limitations can arise as to such protection in the future. As to the past, each infringement has been a separate trespass. Possibly, the plaintiffs may not have the right to recover damages for infringements committed more than six years before the commencement of the action.

It cannot be said that the defendants have acquired any prescriptive title. The unlawful use of a trade-mark for twenty years held no bar. Gillott v. Esterbrook, 48 N. Y. 374. Ten years held no bar in Wolfe v. Barnett, 24 La. Ann. 97. Nine years held no bar in Lazenby v. White, 41 Law J. Ch. (N. S.) 354. The fact that Luther F. Carter for a while made his bitters of less than the usual strength is no defence to the plaintiffs' relief against the defendants' imitation. These bitters were precisely the same as the full-strength bitters, except in the matter of strength; the medical ingredients were the same; the only difference was in the quantity of water; to produce as much and the same effect it was only necessary to increase the dose. But this is wholly an immaterial fact. The selling of an article inferior in some respects to its accustomed goodness does not destroy its trade-marks, though it may affect their value by diminishing the reputation of the article. Besides, the plaintiffs are not selling, and have never sold, the weakened bitters. How then can its trade-mark rights be affected by the fact that Luther F. Carter sold an inferior article? Did that fact destroy the trade-

marks, not as to himself, not also as to his co-owners? There is no such rule of law as that.

A party is sometimes denied relief on the ground of his misrepresentation of his article, and consequent deception of the public. If Luther F. Carter was the plaintiff seeking protection for his article, and it appeared that it was a fraud, the court would not protect it, as the court will not protect fraud. But that is not the case. Plaintiffs are not asking the court to protect a fraudulent article. There is no pretence that the plaintiffs' article is a fraudulent one. There is no misrepresentation or deception by plaintiffs' labels in respect to the actual manufacture. The words, "manufactured by Moses Atwood, Georgetown, Mass.," &c., is a part of the old label as originally adopted. The label has never been changed. It is important that the labels of an article should not be changed, as a change produces doubt and confusion as to the genuineness. Medicine proprietors never change their labels when they can possibly avoid it. The name of the original maker is retained on the label or appears upon the article. Take, for instance, the article of "Day & Martin's Blacking," or "Rodgers & Sons' Cutlery," "Wade & Butcher's Razors," and many others. It is like retaining the business name of an old firm long after such firm has ceased to exist. People go to such a house, not because they expect to meet the old firm, but from habit and good will, and the old name indicates the old place. So of an article of medicine, or any other,—people buy it because they have been accustomed to and because they like it. They do not suppose that the original maker, whose name appears on it, is still the maker, but that his name is a mark of genuineness merely.

But in this case, if it were a matter of any importance, it has always been known to the public who were the actual makers of the article in question. When Carter, Dodge & Co. made it, they advertised and sold it as the makers; so of all the successors. The plaintiffs are accustomed to enclose each bottle of their bitters in a printed wrapper, showing that they are prepared and sold by the plaintiffs at the city of New York. There is no misrepresentation or concealment on the part of the plaintiffs. But this is a matter of no consequence. The bitters sold by the plaintiffs are compounded according to the same recipe as the bitters sold by Moses Atwood. Purchasers buy the plaintiffs' bitters because they suppose they are the same; they get just what they intend to buy, so there is no deception. But such a defense comes with poor grace from fraudulent imitators like the defendants.

Nathan Webb and W. H. Clifford, for respondents.

Brief of W. H. Clifford.

The complainants claim title through certain assignments, and allege, as to the origin of the property in the said trade-mark, as follows: "That your orator is informed and believes, and alleges that said medicine was first invented and put up for sale, about twenty-five years ago, by one Dr. Moses Atwood, formerly of Georgetown, Massachusetts, by whom, his assigns and successors, the same has been ever since made and sold, by the name, in the manner, and with the trade-marks, labels, and description, the same or substantially the same as aforesaid." The "assigns and successors" of Moses Atwood sold the right, whatever it was, to the complainants. What did the "assigns and successors" of Moses Atwood really take from him, and were in consequence able to grant these complainants? The "assigns and successors" are, in the first place and degree, L. H. Bateman and his heirs, Moses Carter and his heirs and successors and assigns.

On page 43 of the printed record is found the deed to the Manhattan Medicine Company from the heirs of L. H. Bateman. Now this deed claims no right at all as derived from Moses Atwood, and makes no mention of any such right. It seems, from the deed itself, to be a right which began and ended with the Bateman family. This piece of documentary evidence has no tendency to support any allegation of the bill, but flatly contradicts it. This contradicts the fundamental allegation of the bill; viz., the one showing the title of the complainants to the alleged property. If Moses Atwood had the exclusive right to this trade-mark at the outset, and never transferred a right to Bateman, then Bateman's right must have been derived from some other man, or else obtained by trespass upon, and in violation of, Moses Atwood's rights. The right of property in a trade-mark is an exclusive right. If such right is assumed by another, and the assumption acquiesced in, the exclusive right of the original owner is necessarily gone. If that be so, then no after-coming person can claim the exclusive right to the alleged trade-mark, both from the person who first had it, and the person who destroyed it, and used it by virtue of having destroyed the legal rights of the first owner.

The contract of September 29, 1852, states, "Said Carter and Dodge are to have the right to use said Atwood's name on the labels and circulars, and to manufacture and sell the following medicines, viz., Atwood's Vegetable Jaundice Bitters, Atwood's Compound Extract of Sarsaparilla, Atwood's Dysentery Drops, Atwood's Rheumatic and Spinal Elixir," &c. Extracts from the testimony will show that the proposition of the respondents is correct, viz., that no trade-mark at all was ever sold by Moses Atwood to anybody.

The complainants allege in their bill that Moses Atwood was the originator of a certain trade-mark that he assigned to certain others, and that they, the complainants, bought of those assignees of Atwood. All the evidence they have introduced on this

point is an effort to sustain that allegation. But the evidence fails to show that Atwood had any fixed and established trade-mark for his medicine. It fails to show that his successors put up the medicine in the same manner as he did, and it not only fails to show that the complainants have acquired whatever bottle, label, &c., that Atwood used, but shows clearly that they acquired something quite different, if they acquired anything. The deed from Atwood was simply of the right to use his name. What was this right thus to use his name? It could not be a license to publish the falsehood which they did,—"prepared by Moses Atwood, Georgetown, Mass.,"—for that would have been a contract wholly invalid. It meant simply that they should be called Atwood's medicines, as recited in the contract. The contract could not and did not contemplate that they should say that Moses Atwood prepared the bitters, when he did not. The contract merely said that those new manufacturers should advertise to the world that the medicines were Atwood medicines, prepared according to his recipes, which he sold to these men.

Upon this point the cases are clear. "Whenever the question arises whether any particular name or mark, can be appropriated as property, or rather whether one who adopts such name, &c., is entitled to the protection of the law in its exclusive use . . . the answer must depend upon the determination of the question, whether such name, &c., is used to designate and does in fact designate the article to which it is affixed as the production of the manufacturer who has adopted it, . . . to furnish to the public the assurance of origin and ownership of the article, &c." Upton, Trade-Marks, p. 98. "All who use trade-marks indicating that the articles were originally manufactured or owned by others are practising an imposition on the public. Every assignee and purchaser who has the trade-mark of the original proprietor, without indicating that he is the assignee or purchaser, is in this position." Sherwood v. Andrews, 5 Am. Law Reg. (N. S.) 588; Partridge v. Menck, 1 How. Cas. 547.

If any celebrity had attached to the particular medicine in question, it had so attached by reason of the name of Atwood. It could not be by reason of the word "bitters," for that is a common word. It could not be by virtue of the words "vegetable, physical, jaundice," for they are descriptive words and cannot form a trade-mark or part of the same. Amoskeag Manuf'g Co. v. Spear, 2 Sandf. 599; Stokes v. Landgraff, 17 Barb. 608; Bininger v. Wattles, 28 How. Prac. 206. Therefore the only title or trade-mark which could be attached to these bitters was the words "Atwood's Bitters," or "Moses Atwood's Bitters." Such a trade-mark the assignors of the plaintiffs could not lawfully use without adding thereto the statement that they were the successors of Moses Atwood, Georgetown, Mass., and as such were making the bitters. Here the allegation of the bill is that they have prepared these bitters, and asserted on the labels that they were made by Moses Atwood. Not only this, but while representing them as made at Georgetown, Mass., where they were originally made, and where they acquired their reputation, they are now admitted to be put up in New York City.

Misrepresentation by the user of the trade-mark invalidates it. Leather Cloth Co. v. American Leather Cloth Co., 11 Jur. (N. S.) 513, Cox, Trade Mark Cas. 699; Palmer v. Harris, 60 Pa. St. 156. By all complainants' testimony it is admitted that nothing passed as a trade-mark but Atwood's name. For twenty years before the assignment, in 1875, to the Manhattan Medicine Co., the assignors of the complainants had been making and selling this article, and all representing that the bitters were prepared by Moses Atwood, Georgetown, Mass., when it is in evidence that Atwood sold out to Carter & Dodge in 1855, and went to the state of Iowa, where he has ever since lived. Now all the sales of these bitters made since 1852 have been made to the public upon the false representation that they were "manufactured by Moses Atwood," with some exceptions to be named hereafter in connection with another point. I apply to this, and the continued sales of the bitters by the present complainants, the rule that "assignees of trade-marks have no special privileges of sailing under false colors, and if they will persist in so doing, prudence would dictate that they give courts of equity a wide berth." Sherwood v. Andrews, before cited. Thus Moses Atwood could not assign to the assignors of the complainants what they claim to have owned, nor could said "successors and assigns" assign the same to the present complainants.

A trade-mark upon an article of manufacture is to, and must, denote the origin and manufacture of the article. It is upon this that the public relies when purchasing. The reputation of the manufacture is what gives assurance of the quality of the goods. Therefore no purchaser of the secret of that manufacture can use the name of the original proprietor without at the same time giving notice on the label, or circular, or trade-mark, that he is a successor of the originator whose name constitutes part, and the essential part, of the trade-mark. Leather Cloth Co. v. American Leather Cloth Co., 11 Jur. (N. S.) 513, Cox, Trade Mark Cas. 699. The right obtained by Carter & Dodge was a limited territorial one, and did not include the state of Maine, or New Hampshire. The first requisite of an exclusive property in a trade-mark is the exclusive right to manufacture or sell the specific article to which it applies. Upton, Trade-Marks, 23; Canham v. Jones, 2 Ves. & B. 218. It is plain that no such right ex-

ists in this case, for the grantor, Moses Atwood, reserved certain territory to himself, and excepted Maine (where the respondents do business) and New Hampshire. Now, under these circumstances, it is plain that no exclusive right to the use of the words "Atwood's Bitters" could be claimed by Carter & Dodge, and consequently none could be assigned to the complainants. Not having the exclusive right to the medicine, neither the complainants nor their assignors can have an exclusive right to the name of the same. There is no such thing as the sale of a trade-mark, or indeed the existence of one in the abstract, unconnected with a specific property or article of merchandise to which it is affixed. Upton, Trade-Marks, 22; Leather Cloth Co. v. American Leather Cloth Co., Cox, Trade Mark Cas. 698. Thus the right to the trade-mark of an article is dependent upon and follows the nature and extent of the ownership of such article.

The allegation of the bill, of the exclusive ownership of the alleged trade-mark, is, therefore, not sustained. But the rights of the assignors of the complainants, if any, were forfeited long before the attempted transfer: 1. By the use of the alleged trade-mark as a means of misrepresentation and deception upon the public, in the sale of a spurious article under the same. 2. By laches, and long acquiescence in the use of the alleged trade-mark by the respondents and by others. 3. By a disregard, among themselves, of their several allotted rights under the said trade-mark, and of the limitations put upon the same, and the grant of the same by Moses Atwood. 4. By the voluntary relinquishment of the bottle, label, &c., as used by Moses Atwood, and conveyed to Carter & Dodge, in 1852, and the adoption of new trade-marks of their own invention.

Under the original label a deceit was practised upon the public. While Carter's agents were only sent out with his new label and genuine manufacture, great quantities were secretly by him put upon the market, of an article which would not keep, which fermented and soured, and which could not stand exposure to the sun. These were often returned to dealers on account of their imperfection. The question upon this point is, could Carter himself have maintained his right to the exclusive use of a trade-mark which he had prostituted to such uses? Had he not forfeited any right of property in it by these practices?

A trade-mark, as has been shown, is only recognized by a court of equity when connected with some article of merchandise to which the skill and enterprise of the manufacturer or seller has given a reputation. It is then, and then only, property. It is a source of profit to the proprietor, and a guaranty to the public of the good quality of the article to which it is affixed. But if used as a means of misrepresentation or deceit, it is property no longer, and he who uses it for such purpose can claim no property rights under it. Upon this point the authorities are numerous and clear. Hobbs v. Francais, 19 How. Prac. 567; Phalon v. Wright, Cox, Trade Mark Cas. 311; Pidding v. How, Id. 640; Perry v. Truefitt, 6 Beav. 66; Upton, Trade-Marks, 30, 31. "When a person seeks, by representations which are untrue, to mislead the public into the belief that his commodities . . . are compounded or produced in a manner not in accordance with the truth, . . . he places himself beyond the pale of the protection of the law, and, acquiring no exclusive right in the trade-mark he uses, is entitled to no relief against any one who may see fit to appropriate it." Carter & Dodge both say they never acknowledged Bateman's claim of right. From this we can only conclude that Bateman disputed their right to the bottle and label, and maintained his position in the courts. From 1861 to 1875, after this, Bateman continued to use the bottle and label, his right to which the assignors of the complainants never conceded, but simply acquiesced in. In 1875, the complainants step in and buy up both these opposing rights, Bateman's and the Carters'. This might do if it were to quiet title to a piece of real estate. But with respect to this class of property,—trade-marks,—the law is different. A man can buy up all the conflicting titles to real estate, and so obtain a valid ownership. But in the case of property in trade-marks, the adverse claim of any one, if successfully maintained, as Bateman's was, destroys that exclusiveness which is the essential quality to the preventing of others from using the same mark on the same goods.

Where long acquiescence in the usurpations of another party is proved, still an injunction will be granted when the party resumes his original right. Here no resumption was pretended, but continued acquiescence is shown from the fact that Bateman's right was bought by the complainants, thereby acknowledging it. McLean v. Fleming, 96 U. S. 245; Amoskeag Manuf'g Co. v. Garner, 55 Barb. 151; Beard v. Turner, 13 Law T. [N. S.] 747. This case was different from those of acquiescence usually found in the reports. Simple acquiescence may affect the question of costs or damages, but will not, on a resumption by the person originally entitled to the trade-mark, work any forfeiture. Here, however, was an ineffectual attempt to enforce the rights of the assignors of the complainants and a judgment of a court of equity adverse to them, and a dismissal of an action at law, and then an acquiescence of nearly fifteen years, and no attempt, either by the complainants or their assignors, to resume the right.

The right to the exclusive use of the bottle and label was also forfeited by the assignors of the complainants, before the assignment, by a division of the right among themselves, by a disregard by all of them of the terri-

torial limits assigned to each in the division, and of the limits set to all of their united territorial rights, by Moses Atwood, the original grantor. This presents a question of a peculiar character. Here were three or four persons or firms who at some time had had territorial grants of rights under a supposed trade-mark on a certain manufacture. After a time they divide up that territory among themselves. Then shortly they each and all deliberately go to work to trample down and violate each other's rights under their division, and wholly disregard the trade-mark privileges of each other. Not only this, but they all also transgress the territorial limits fixed upon all their rights put together, and wholly disregard the original grant from the first grantor, and all trespass on territory which he had reserved to others. This state of things continued for fourteen or fifteen years. They were separate, distinct, and competing firms. They had no common business interests, and they were all concerned in disregarding each other's rights, if any, under this trade-mark, set up by these complainants, and in violating the rights of other assignees. The firms thus continued down to the very moment of the assignments to the complainants, and were the sole assignors (including Bateman, who was also selling anywhere he pleased all the time) of the complainants. Previous to the assignment to the complainants, could these parties, Dodge, Carter, Noyes & Manning, and Bateman, have successfully set up any right in a court of equity, founded upon an alleged trade-mark in the disregard and violation of which they had been engaged for years; not only as against each other, but also as against all persons; could they say that that was valid which they, the owners, had been proving was worthless and invalid; could they thus disregard and violate a right inter sese, and as to others, and then claim relief under it at the same time? If the assignors could not, how could their assignees, who take the alleged right in the midst of these violations of it at the hands of its owners? The trade-mark right, if any, was given up and others substituted for it by its owners, and so, never having been resumed, was forfeited and lost. Each manufacturer designated his goods by his own name. The words Atwood's Bitters was thereafter simply and only a genuine term denoting simply a class of goods, not an especial manufacture by any one person or firm. Browne, Trade-Mark, §§ 131–137, 180, 181; Singleton v. Bolton, 3 Doug. 293. Precisely the same result was produced with Carter.

Mr. Webb argued orally, but filed no brief.

CLIFFORD, Circuit Justice. Equity gives relief for the infringement of a trade-mark, upon the ground that one man is not allowed to offer his goods for sale, representing the goods to be the manufacture of another in the same commodity. Seixo v. Provezende, 1 Ch. App. 195. What degree of resemblance is necessary to constitute an infringement is incapable of exact definition; but the rule is, that no trader can adopt a trade-mark so resembling that of another as that ordinary purchasers, buying with ordinary caution, are likely to be misled. McLean v. Fleming, 96 U. S. 245. Two trade-marks are substantially the same in legal contemplation if the resemblance is such as to deceive ordinary purchasers, giving such attention to the same as such purchasers usually give, and to cause them to purchase the one manufacture, supposing it to be the other. Gorham Co. v. White, 14 Wall. [81 U. S.] 528.

Relief is claimed in this case upon the special grounds set forth in the bill of complaint. They are, in substance and effect, as follows:

1. That the corporation complainants for a long time have been and now are the manufacturers and vendors of an article of medicine called and known as "Atwood's Vegetable Physical Jaundice Bitters," taken internally, for the cure of jaundice and other diseases; that during all the time they have been engaged in making and selling the article, it has been put up and sold in the same manner, and with the same trade-marks, labels, and wrappers affixed thereto, in glass bottles, with twelve panel-shaped sides, having on five of the sides the raised words and letters, "Atwood's Genuine Physical Jaundice Bitters, Georgetown, Mass.," blown in the glass on each bottle, each bottle containing about a pint of the medicine in liquid form, labelled with a light-yellow printed label, pasted on the outside, as fully set forth in the bill of complaint.

2. That the said medicine was first invented and put up for sale about twenty-five years ago by one Dr. Moses Atwood, formerly of Georgetown, Mass., by whom, his assigns and successors, the same has been ever since made and sold by the same name, in the same manner, and with the same trade-marks and description.

3. That the complainants, long prior to the alleged infringement, became the lawful, sole, and exclusive owners of the formula or recipe for making said medicine, and of the sole and exclusive right to use said name or designation therefor, together with all said trade-marks, labels, and goodwill of the business of making and selling said medicine.

4. That the respondents, prior to the filing of the bill of complaint, at Portland, and at divers other places unknown to the complainants, have manufactured and sold, and are still manufacturing and selling, large quantities of medicine, of an inferior quality, in imitation of the article manufactured and sold by the complainants, and without their consent.

5. That during all that time the respondents have made, put up, and sold, and still make, put up, and sell their said imitation and counterfeit article as and for the genu-

ine article of the complainants, so put up, marked, and labelled, that it is very difficult to be distinguished from the complainants' genuine article.

6. Based on these allegations, the complainants pray for an account and for an injunction, restraining the respondents from affixing or applying to any article of medicine manufactured, sold, shipped or supplied by them, or to the bottles or packages in which the same is put up, the complainants' trade-mark words, to wit, "Atwood's Vegetable Physical Jaundice Bitters," or either of said words, or any imitation thereof.

Service was made, and the respondents appeared and filed an answer, setting up several defences to the following effect:

1. They admit that complainants purchased all the right, which the parties named in the answer owned, to prepare the Atwood Bitters, but they deny that those parties held or possessed the exclusive right to manufacture the same, or any exclusive right whatever to the same, or any exclusive right to any trade-mark, label, or wrapper, consisting of a glass bottle with panel-shaped sides, and with the raised words and letters, "Atwoods's Genuine Physical Jaundice Bitters, Georgetown, Mass.," blown in the glass; nor did they possess any exclusive right to the preparation of the medicine in a liquid form, or to the light-yellow printed label pasted to said bottle, upon which were the words, "Atwood's Vegetable Physical Jaundice Bitters." Nor did they possess any exclusive right to the residue of what is printed upon the label, and set forth in the bill of complaint.

2. That the twelve-panel bottle, the yellow label, the words "Atwood's Bitters," together with the other words alleged to be printed on said label, were in public and common use by a large number of manufacturers.

3. That the complainants did not purchase and do not now own the exclusive right, nor the entire right, to said bottle, label, and words, or either of them, as alleged, because their said assignors were not the exclusive proprietors of the same, and therefore could not sell and dispose of what they did not own.

4. They deny that Moses Atwood first invented and put up the said medicine for sale, and allege that it was first put up by Moses F. Atwood, of Georgetown, Mass., in connection with L. H. Bateman, not in a panelled bottle, but in a smooth, round bottle, without panels; that the round bottle used by Bateman had no words blown in the glass, and that the bottles which contained words blown in the glass were rectangular in form and without panels, and that Moses Atwood first used a white label and a round bottle having no panels or blown letters.

5. That Moses F. Atwood, and not Moses Atwood, first obtained the formula for the medicine from some physician to these respondents unknown, and prepared the same according to the formula, and not according to any invention of himself or of said Moses Atwood; and that, subsequently thereto, the medicine put up by him and Bateman began to be called "Atwood's Bitters."

6. That the respondent first named, in May, 1861, purchased the recipe for the medicine, and the right of using the bottle and label, that he has a right to use the same, and that no person has ever pretended to interrupt him in such use prior to the present suit.

7. That L. F. Atwood, the brother of Moses Atwood, also had a right to use the said label and bottle, and that he sold such a right to H. H. Hay, of Portland, who uses the same on the bottles containing the medicine.

8. That they have been in the practice of preparing the medicine, under the recipe bought of Moses F. Atwood, for the period of fourteen years, and that they have spent large sums of money in advertising the medicine, and in creating a market for the same.

Proofs were taken on both sides, and the evidence is voluminous and somewhat conflicting. Any discussion of the legal questions arising in the case would not be of much advantage until the facts are ascertained, which will be best accomplished by distinct findings.

Pursuant to that view, the court finds as follows:

1. That Moses Atwood, Georgetown, Mass., commenced preparing the medicine in question nearly forty years ago; that for a time the formula of the ingredients was a secret, and that he soon began to designate the preparation as his medicine more frequently than otherwise, designating it as Moses Atwood's Bitters or as Moses Atwood's Jaundice Bitters, and sometimes as Atwood's Vegetable Jaundice Bitters. There is no direct proof that he ever adopted any distinct trade-mark, but the evidence of use is such as to warrant the conclusion that he considered the latter designation as representing the article which he manufactured and put up for sale. For a time no other person had any interest in the business, and throughout all that period he put the article up in round, smooth bottles without panels or raised words or letters of any kind. Others subsequently acquired an interest in the business with him, among whom were his brother and L. H. Bateman, and the person who subsequently joined with him in the conveyance to Carter and Dodge. His son, Moses F. Atwood, had worked with him and Bateman at Georgetown in preparing the medicine under the recipe, and knew the ingredients of which it was compounded. He, the son, went to work with Bateman in 1860, and he states that they used a fluted bottle containing the name of the medicine and that of his father, and his place of residence blown into it.

2. That large rights in respect to the business remained in Moses Atwood, notwithstanding the interest in the same acquired by others; that Jan. 1, 1848, he entered into a

written contract with Moses Carter, by which he sold to the latter bills against local agents in many places in Massachusetts, Rhode Island, Connecticut and New York, and the right to sell the medicine in those places, under the terms and conditions following: that he, the manufacturer, should not sell the medicine in those places so long as the other party supplied customers there; that he, the proprietor, agreed to make the bitters during ten years for seventeen dollars per barrel, to be delivered in the state where the same were made, three-quarters of the money to be advanced by the other contracting party.

3. Carter and Benjamin S. Dodge, Feb. 2, 1852, formed a copartnership, which, of course, consisted of two parts; but they subsequently took into the firm C. L. Carter, and by interlineations made the articles consist of three parts. They formed the copartnership for making and vending Atwood's vegetable medicines and essences. Enough appears to afford an inference that a prior agreement between Moses Carter and Dodge of the one part. and Moses Atwood of the other, had been made, as the record shows that Atwood and Bingham and Carter and Dodge, Sept. 29, 1852, entered into a contract to settle doubts and supply omissions in the supposed antecedent agreement, which was not introduced in evidence.

4. By the contract introduced, Moses Atwood and his partner conveyed to Carter & Dodge the right to use said Atwood's name on the labels and circulars, and to manufacture and sell "Atwood's Vegetable Jaundice Bitters," and certain other articles, on the ground hereinafter described, and not to sell by themselves or their agents in any other portion of the world, or sell to others to sell, except on the ground hereinafter described. Massachusetts is named, with numerous excepted towns and parts of towns. Towns and places are also excepted from New York. Seven towns are also excepted from New Hampshire; and all of the state of Maine, except the towns of Kittery, South Berwick and Lebanon. Other exceptions are made in the same instrument, not necessary to be noticed in this investigation. Attempt was made to prove by parol the prior agreement referred to in the contract, and with that view reference was made in argument to the cross-examination of Luther F. Carter, who states that there were papers executed to Carter & Dodge, giving them the right to manufacture the bitters, using Moses Atwood's name, but that he knew nothing about the bottle. When asked if those papers came into his possession he answered that he didn't know that they ever did. He was then asked, "If they were ever in your hands, to whom did you deliver them?" and his answer was, "If they were ever in my hands I delivered them to Eli B. Johnson," the record showing that the person named was the agent of the complainants. Taken as a whole, the court is of the opinion that the evidence was not sufficient to admit parol testimony of the contents of the instrument, nor would it benefit the complainants if the rule was otherwise, as the witness states that he does not know that the paper or papers conveyed any thing more to Carter & Dodge than the right to put up the medicine and use Atwood's name; nor does the record contain any evidence tending to show that the original proprietor ever gave them the right to sell the medicines in any of the places excepted out of the contract introduced in evidence.

5. That parol evidence was introduced, tending to show that Carter & Dodge owned, at the time of their dissolution of copartnership, all the right in Atwood's Bitters to manufacture and sell the same, except what Atwood had reserved; but there is no evidence that he ever conveyed to them any right to put up or sell the same in the places reserved, nor is there any evidence tending to show how, if ever, he acquired the interest in the same at one time held by his brother and Bateman.

6. Suggestions were made in argument that Moses Atwood, in the year 1855, conveyed to Carter & Dodge, or Carter, Dodge & Co., his entire interest in the business, except his right to sell the medicine beyond Illinois. What a party does not own of course he cannot sell and that is a sufficient answer to the proposition, so far as respects the interests which had become vested in others; but the supposed sale might apply to some of the excepted places, not to all, as the same witness admits that Carter & Dodge did not own what Mr. Atwood had reserved, but he says that he once saw the agreement last referred to, and, when asked if he had made search for it, stated that he had made diligent search for it among his father's old papers. It was about the time that Carter, Dodge, & Co. brought the suit against Bateman that he saw the paper, and he says he has not seen it since that time. According to his statement the paper was from Moses Atwood to Carter, Dodge, & Co. Carter & Dodge sued Bateman for putting up and selling the medicine and using the trade-mark, and he prevailed in the suit; and yet no search was made among the papers of Mr. Dodge. For aught that appears to the contrary, it may be among his papers, or in the hands of the attorneys in that suit, or in the files of the clerk's office.

Two objections are taken to the evidence, both of which may be sustained: First. That sufficient search is not shown to admit it. Second. That, if it is admitted, it has no tendency to show that the conveyance included Maine, or any other of the excepted places; nor does it appear that the grantor reacquired the interests previously vested in other persons. Localities almost without number were excepted out of the general grant, and the uncontradicted proof is that the original proprietor made reservations in favor of his father, Levi Atwood, and his brother, Levi

F. Atwood, of Maine and part of New Hampshire.

7. Viewed in the light of these suggestions, the court finds that Carter & Dodge never acquired the right to put up and sell the medicine in Maine, or in any of the places excepted out of the grant from the original proprietor, nor did they ever acquire the right or title to any of the same reservations in favor of other parties. Trade-marks are an entirety, and are incapable of exclusive use at different places by more than one independent proprietor, for the reason that the party seeking redress, in order to establish an exclusive right to the trade-mark, must show that he had an exclusive right in the commodity to which it is attached. Upton, Trade-Marks, 24; Canham v. Jones, 2 Ves. & B. 218. Throughout the largest portion of the period since 1842, Bateman, or his son, who succeeded him, put up and sold Atwood's Bitters in the same town with the original proprietor, and the proofs show that he put the medicine up in half pint glass bottles, with the words, "Atwood's Jaundice Bitters, Moses Atwood, Georgetown, Mass.," blown upon the bottles; that when the proprietor removed, in 1855, he left with Bateman his original recipe for the manufacture of Atwood's Bitters, with all the medicines which he manufactured and sold. Little or nothing was made in the business during the lifetime of Bateman; and when he died, his son succeeded to and continued in the business until the heirs transferred the same to the complainants. For a few years, Carter & Dodge put up and sold the medicine, in accordance with the course pursued by the original proprietor, when they took into the firm the son of the senior partner, C. L. Carter, and continued to transact the business under the name of Carter, Dodge & Co, two or three years longer. When they dissolved and Dodge went out, the new firm, called Carter & Son, consisting of Moses Carter and C. L. Carter, took control of the business, and they continued the same for about five years. Subsequently, another son of the senior partner joined the firm, and they continued the business for two or three years under the firm name of Carter & Sons. Lastly, the father and the elder son went out, and Luther F. Carter took the firm name of Carter & Son, and continued the business until he sold to the complainants. After Carter & Dodge dissolved in 1855, Dodge went to Rowley, and put up and sold the medicine there for five years, using the Atwood labels. On the 4th of September, 1867, he sold and conveyed the right to manufacture and sell Atwood's Bitters to William B. Dorman for the term of five years from the date of the agreement, with the right to use the trade-marks he had previously used in the sale of the same. Before that period expired, the same party sold the same right to Noyes & Manning, now of Mystic, Conn., with authority to use the same labels.

8. That Carter & Son had two kinds of labels used on the bottles which they put up for sale. On the top of one of the labels the words "Carter's are the only genuine" were printed, and below the directions, the words "Manufactured by M. Carter & Son, successors to Moses Atwood, Georgetown, Mass.," were also printed. At the bottom of the label were also printed the words "Caution.—Observe that our name is blown in the bottle and on the revenue stamp. None others are genuine." The label also bore the words "Atwood's Vegetable Physical Jaundice Bitters." Two kinds of bitters were put up at their place. One kind, under the label described, which was the genuine "Atwood's Vegetable Physical Jaundice Bitters," sold in the market, at wholesale, for twenty-seven dollars per gross; the other kind was an inferior article, an imitation of the genuine, sold in the market at fifteen dollars per gross, bearing the genuine original label of Atwood's Bitters, with the "e" left out in the word "the" preceding the words United States. Carter's traveling agents never sold any but the genuine article, the imitation being disposed of by Carter alone. In most instances the two kinds were retailed at the same price; but when both kinds were known, the genuine brought a higher price.

9. That Bateman had the original recipe, and that Moses F. Atwood, the son of the original proprietor, when in the employment of Bateman as a selling agent, sold the recipe for compounding and preparing the Atwood Bitters in the state of Maine to Nathan Wood, in 1861. When asked whether the conveyance was in writing, he said it was, and that each party had a copy, and that he sold to the respondent the right to manufacture the bitters and sell the same in the state of Maine and elsewhere. Proof that the grantor had authority from the actual proprietor to execute the conveyance is not shown in the record; but it is shown that the purchaser, with his partner, has continued to prepare, put up, and sell the medicine, from the date of the purchase of the recipe to the date of the bill of complaint, without hindrance or interruption, with the exception of the two instances mentioned in the second answer, since the organization of the complainant corporation. None of the grantors of the complainants ever disputed their right to compound, put up, and sell the bitters in question, nor is there any evidence tending to show that the bitters which they sold were not the genuine Atwood Bitters. Their grantor possessed the genuine recipe, and the proofs are full to the point that it was the genuine recipe which he sold to the respondent, Nathan Wood. Beyond all doubt the respondent, Nathan Wood, acquired the recipe, which, not being the subject of a patent, might lawfully be used by any one who possessed the secret; and it is equally certain that he supposed that he had acquired the right to use the labels, as he pur-

chased the right to use the same of the son of the original proprietor, and of the selling agent of Bateman, whose title to put up the medicine and use the labels was subsequently established by judicial determination.

10. Unlike what is usual in controversies respecting trade-marks the complainants in this case, instead of using a trade-mark of their own adoption, allege and attempt to prove that the trade-mark in question was adopted by the original proprietor of the medicine, and that they have acquired the title to the same by certain mesne conveyances set forth in the record, and the court finds upon that subject as follows: 1. That they, or their predecessors, Jan. 1, 1875, acquired, by assignment, whatever right in the same belonged to the heirs and representatives of L. H. Bateman. 2. Also, March 18, in the same year, whatever right belonged to the firm of Noyes & Manning. 3. Also, March 30, in the same year, whatever right belonged to Benjamin C. Dodge. 4. Also, March 30, in the same year, whatever right belonged to William B. Dorman. 5. Also, April 12 and 19, in the same year, whatever right belonged to the Carters in the said trade-mark.

None of these instruments of conveyance, however, convey, or profess to convey, any greater rights to the complainants than those which were previously held by Carter & Dodge; and it is clear that Carter & Dodge never acquired from the original proprietor any right to put up or sell the medicine in Maine, or to use the labels of the original proprietor in that state, out of the three towns specified in the written agreement, which constitutes the evidence of their title.

Nothing remains to be done in the case of much importance, except to state the conclusions of law and fact resulting from the findings of the court:

1. Examined in the light of the findings, as the case must be, it is clear to a demonstration that the complainants have no exclusive right to put up and sell the medicine, nor any exclusive right or title to the labels, which belonged to the original proprietor.

2. That all they claim in respect either to the medicine or the labels is the right to the same which was held by Carter & Dodge, who never possessed the right to put up the medicine or to use the labels in any part of Maine, except the three towns named in the said written agreement.

3. That the rights of certain of the assignors of the complainants, if any they ever had, were forfeited long before the supposed transfer under which the complainants claim, by the use of the trade-mark as a means of misrepresentation and deception to the public, by putting up a spurious article, and using the genuine trade-mark to promote the sale of the spurious article. Misrepresentation and deceit of the kind divest the guilty party of all title to the same, and it follows that a party who has forfeited his property in the same cannot convey any title to another. Phalon v. Wright, Cox, Trade Mark Cas. 311, 5 Phila. 464; Perry v. Truefitt, 6 Beav. 66; Pidding v. How, 8 Sim. 477; Hobbs v. Francais, 19 How. Prac. 567; Partridge v. Menck, 1 How. Cas. 547; Fetridge v. Wells, 4 Abb. Prac. 144; Flavell v. Harrison, 19 Eng. Law & Eq. 15. Equity will not decree for an account of past gains and profits where there has been laches in bringing the suit and long acquiescence in the use of the trade-mark by others, and especially not where the acquiescence covers a period of fourteen years. McLean v. Fleming, 96 U. S. 245; Harrison v. Taylor, 11 Jur. (N. S.) 408; Moet v. Couston, 10 Law T. (N. S.) 395; Edelsten v. Edelsten, 1 De Gex, J. & S. 185; Estcourt v. Estcourt Hop Essence Co., 10 Ch. App. 276; [Molt v. Couston, 33 Beav. 580.] [3]

4. That the assignors of the complainants forfeited all their property, if any, in the trade-mark belonging to the original proprietor, by a disregard, among themselves, of their several allotted districts, after the grant or license from the original proprietor, by trespassing upon each other, and misuse of the trade-mark.

5. That the grantees or licensees of the original proprietor, and their successors, forfeited the right to the original trade-mark of their grantor or licensor by the voluntary relinquishment of the bottle, label, and directions, which he used before the transfer, and by the adoption of new and different labels, &c., of their own substitution, one or more of whom put up and sold a spurious article of medicine under the genuine label, and used a different label of his own invention on bottles containing the genuine medicine. Cases arise where the title is complete, when a party, though not entitled to a decree for an account, may still be entitled to a decree to prevent future infringements; but the difficulty in the way of the complainants in this case is incurable, as the evidence shows that the respondents have the genuine recipe, which is not protected by any patent, and the complainants have not any exclusive right to the use of the label, and no right at all to the use of it in the state of Maine.

Bill of complaint dismissed, with costs.

[The case was taken by the complainants, on appeal, to the supreme court, where, Justice Field delivering the opinion, the decree of the circuit court dismissing the bill was affirmed. 108 U. S. 213, 2 Sup. Ct. 436.]

MANHEIM, In re. See Case No. 9,038.

MANIERRE (MOHR v.). See Case No. 9,695.

MANIN (POMEROY v.). See Case No. 11,260.

[3] [From 14 O. G. 519.]

Case No. 9,027.

The MANISTEE.

[5 Biss. 381;[1] 6 Chi. Leg. News, 126; 3 Ins. Law J. 153.]

District Court, E. D. Wisconsin. Aug., 1873.[2]

COLLISION—LIBEL BY INSURER — LOSS NOT ACTUALLY PAID—POLICY ISSUED IN DISREGARD OF STATUTORY REQUIREMENTS.

1. In case of a total loss of a cargo by collision, a libel may be brought by the insurer against the colliding vessel, after notice and proof of the loss and demand of payment, though without actual payment.

2. The insured having been fully satisfied for the loss, and not intervening or opposing the prosecution of the libel of the insurer, the carrier can not be permitted to raise the objection of non-payment of the loss before libel brought.

3. Where the statutes of a state require foreign insurance companies to comply with certain requirements, and declare penalties for doing business in disregard of these requirements, in case of a loss on a policy issued in disregard of such requirements, a carrier can not be permitted to make this a defense to a libel, the loss having been paid by the company.

[Cited in Amazon Ins. Co. v. The Iron Mountain, Case No. 270.]

This was a libel by the Traders' Insurance Company of Chicago and the Orient Mutual Insurance Company of New York, against the propeller Manistee, to recover the amount of $10,700 insurance paid by them on the cargo of the schooner S. Robinson, which was sunk by collision with the Manistee.

Emmons & Markham, for libellants.

Finches, Lynde & Miller, for respondent.

MILLER, District Judge. On the 23d of May, 1872, at Chicago, there was shipped on board the schooner S. Robinson sixteen thousand and five bushels of corn, of the value of ten thousand and seven hundred dollars, to be transported on board of said schooner to Kingston, Canada. The Traders' Insurance Company made and delivered to the shipper a policy on said cargo, in the sum of five thousand seven hundred dollars, and the Orient Mutual Insurance Company in the sum of five thousand dollars, against the risks of collision and of the perils of the lakes.

The schooner, while on her trip down the lakes with the cargo on board, was damaged by collision with the propeller Manistee, on the 24th of May, 1872, so that she sunk, and her cargo became a total loss, rendering thereby the libellants liable to pay therefor.

Proof of loss was made May 28, 1872. May 30, notice of the loss was given these insurance companies, and of an abandonment to them, with claim for a total loss. This libel was filed and monition issued May 31. June 12, 1872, the Orient Mutual Insurance Company paid five thousand dollars, the amount of their policy. In case of loss, by a condition of the policy issued by this company, the loss is payable in thirty days after proof of interest in the property insured.

The libel alleges that payment of the loss had been made by these libellants, which is a mistake as to the Orient Mutual Insurance Company, but it had been made by this company within thirty days after the loss, according to the proofs in support of the libel. The policy of the Orient Mutual Insurance Company was issued by an agent in Chicago. There is no evidence that the agent of this company who issued the policy had authority to do the business under the laws of the state of Illinois.

It was contended by counsel at the hearing that the policy is void for having been issued in disregard of the requirements of the laws of that state. The statute laws of Illinois on this subject were read at the argument, from pages 595–599, 1 Stat. 1858 (Cook Ed.). These laws require that insurance companies incorporated and located in states other than the state of Illinois, produce certain statements respecting their liability and condition, and procure from the auditor of the state authority to transact business within the state. And it is further declared that it shall be unlawful for an agent to do business without having first complied with those laws. And upon conviction for violating these requirements, punishment by fine or imprisonment, or both, may be imposed.

Those statute laws do not declare void policies issued by foreign companies through a local agent in disregard or violation of them. The object of these statutes was for the security of citizens doing business with such companies, by bringing them as near as possible to local corporations, and also as a provision for revenue. Where a statute prohibits or annexes a penalty to its commission, the act is made unlawful, but it does not follow that the unlawfulness of the act was meant by the legislature to avoid a contract made in contravention of it. Where a statute is silent, and contains nothing from which the contrary can properly be inferred, a contract in contravention of it is void. But the whole statute must be examined in order to decide whether or not it does contain anything from which the contrary can be properly inferred. Harris v. Runnels, 12 How. [53 U. S.] 79; Ocean Ins. Co. v. Polleys, 13 Pet. [38 U. S.] 157. There is no penalty pronounced against a person for obtaining a policy from, or doing business with, the company that has not complied with the requirements of those statutes. The insured in this case obtained the policy upon the payment of the premium, and has received from this company full satisfaction for the loss.

If the owner of the cargo had not taken a policy from the agent of this company, but had shipped without insurance, he would be entitled to recover of the carrier for the loss, the value of the cargo. In my opinion, the carrier should not be permitted to make this

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

[2] [Affirmed in Case No. 9,028.]

defense. The shipper might have brought a libel for the use of the company, and if the use were not expressed in the record, the court would protect the company, even after a decree in favor of the libellant.

This brings me to the consideration of the second objection to a decree for the Orient Mutual Insurance Company in this libel. The point presented is the non-payment of the loss prior to bringing the libel. Notice of a total loss of the cargo insured was given by the insured to the insurance company prior to the bringing of the libel, and demand of payment made. Where there is a total loss there is no necessity for a formal instrument of abandonment. A total loss, with notice and demand of payment, is equivalent to an abandonment and acceptance. The insured renounces and yields up to the insurers all the right, title and claim to what may be saved. The insurer then stands in the place of the insured, and becomes legally entitled to all that can be rescued from destruction. "Where the thing insured, and every part of it, is completely gone out of the power of the insured, it is just and proper that he should receive at once as for a total loss, and leave the jus recuperandi to the insurer." Marsh. Ins. B. I. A. 14.

"The insured has a right to call upon the underwriter for a total loss, and of course to abandon as soon as he hears of such a calamity having happened. his claim to an indemnity not being at all suspended by the chance of a future recovery of part of the property, but because of the abandonment that chance belongs to the underwriters." Park, Ins. 9; Comegys v. Vasse, 1 Pet. [26 U. S.] 193.

The payment of a total loss by the insurers, or their liability to pay such a loss, in consequence of an abandonment, gives them an equitable right to the property, or what remains of it, so far as it was covered by the policy. And the abandonment, considered as an assignment of property, must have reference to the time of the loss. 2 Phil. Ins. § 1707.

It is a universal rule that all rights, claims and interests which are indispensably connected with the property insured, pass to the insurer by an abandonment of the property, so far as the same belonged to the insured, and to the extent of the interest covered by the policy; as a right to contribution for general average, all claims for negligence or any misconduct causing injury to the property, as for collision or for injury to goods, or for an indemnity from a foreign government. Arnould, Ins. (4th Ed., by Maclachlan) 863.

Under the 34th admiralty rule, an insurer who has accepted an abandonment, which divests the original claimant of all interest, may be admitted to intervene, and become the dominus litis. The Ann C. Pratt [Case No. 409]: In this case it does not appear that the insurance company had satisfied the insured for the loss. "And the insurer may be allowed to intervene and become the dominus litis, when he can show an abandonment which divests the original claimant of all interest. But with this the respondent has no concern, nor can he defend himself by setting up these equities of others, unless he can show that he has made satisfaction to the party justly entitled to receive the damages." The Monticello v. Mollison, 17 How. [58 U. S.] 152, 156; Rogers v. Holly, 18 Wend. 349.

The owner and insurer in respect to the property and the risks incident thereto may be considered as one person, having the beneficial right to indemnity from the carrier. The notice of the total loss, with demand of payment according to the terms of the policy, vested in the insurance company the exclusive title to the insured property, and fixed the liability of the insurer to pay the amount of the policy within thirty days. And upon the equitable principles of admiralty, the insurer being considered in the nature of a surety should not be required to satisfy the insured prior to instituting a libel against the carrier, when the insured does not object, nor intervene for his interest. In this case the insured was fully satisfied for the loss, and the carrier should not be permitted to oppose the prosecution of this libel on the part of the Orient Mutual Insurance Company.

Decree for libellants.

[This decree was affirmed by the circuit court. Case No. 9,028.]

Case No. 9,028.

The MANISTEE.

[7 Biss. 35.] [1]

Circuit Court, E. D. Wisconsin. Jan., 1874.[2]

COLLISION — RUNNING IN A FOG — CONTRIBUTORY NEGLIGENCE—PAYMENT BY INSURER BEFORE FILING LIBEL.

1. When a steamer is running in a fog surrounded by sail vessels, and in close proximity to them, she ought to materially decrease her usual rate of speed. Seven miles an hour is entirely too fast under such circumstances.

[Cited in The Leland, 19 Fed. 775; Clare v. Providence & S. S. Co., 20 Fed. 536, 538.]

2. In a collision where a fault is charged against one vessel, in relation to which the testimony is doubtful, and it appears by undisputed testimony that the fault of another is flagrant, the latter only will be held responsible, and the doctrine of contributory negligence will not apply.

3. Where a libel is brought by the underwriters for the loss of a vessel, they having paid the loss and claiming to be subrogated to the rights of the insured it is not material whether or no the money has actually been paid by them before the filing of the libel, if it was the bona fide intention of the owner to abandon.

In admiralty.

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

[2] [Affirming Case No. 9,027.]

H. H. & G. C. Markham, for libellants.
Finches, Lynde & Miller, for claimant.

DRUMMOND, Circuit Judge. In this case I shall affirm the decree of the district court [Case No. 9,027]. The circumstances connected with the collision which gave rise to this case are briefly: That the propeller Manistee was coming across the lake on the morning of the 24th of May, 1872, bound for Milwaukee, and the schooner S. Robinson was bound down the lake. The morning was very foggy, with a light wind from the south and west. It was so foggy that a vessel could be seen but a short distance. The Robinson had her port tacks aboard and was going free on her course, one point east of north. The vessels did not see each other until they were so near that a collision was very difficult to avoid; at any rate it could not be avoided I think, by the schooner. Whether or not it might have been prevented by the propeller after the Robinson was seen admits perhaps of more question.

The district judge thought it could have been, but I do not think it is so clear. The propeller blew her whistle from time to time as she kept on her course. The evidence is quite satisfactory I think also that there was a horn blown on board the schooner. It is denied by those on board of the propeller that the proper blasts of the horn were heard, namely, three blasts of the horn, indicating what course the Robinson was on. There was a slight breeze, the schooner not going more than three or four miles an hour, three and a half, perhaps. What indicates how much the propeller is in fault is the fact that the fog was very thick; so thick that a vessel could be seen but a very short distance, perhaps not over one or two hundred feet. Although some of those on board of the propeller say it was not so, more of them say they saw the schooner a quarter of a mile. I doubt whether that is true. Of course, if it is true, the obligation on the part of the propeller to avoid the schooner was absolute. Now, admitting that they saw the schooner a quarter of a mile off, they necessarily admit that they were in fault by running afoul of her, and it would have the effect to relieve the schooner of all responsibility. But I think that they did not see the schooner a quarter of a mile off. The fog being so thick, and the inability to see vessels except when they came very close together, fog horns being heard from various vessels in the immediate vicinity, it was a flagrant fault for the steamer to keep on her course as she did without abating her speed and without checking it until the collision was probably unavoidable.

Now without laying down any absolute rule as to the speed at which a steamer should run in a fog on these lakes, there can be no question but that when a steamer is running in the fog, surrounded by sail vessels, as this steamer knew that she was, and in close proximity, that to run at the rate of speed that this propeller was running was a gross wrong, a great risk which she had no right to incur to the sailing vessels that were near.

I know what steamboat-men say; that they must make their time; that they must run in the fog. But they cannot be permitted to run with their usual speed in a fog, surrounded by sail vessels, against which they are liable to collide at any moment.

The district judge thought the speed of this propeller was seven miles an hour. I think perhaps that the weight of evidence is that she was running faster than that. But, suppose it was only seven miles an hour; it was too great a speed under the circumstances. They knowing, as they ought to have known, that they were surrounded by vessels, they should have checked up so as to have had only reasonable steerage-way upon the propeller.

Then as to the fault of the schooner: I cannot see that there was any fault on the part of the schooner that contributed to this collision. The weight of the evidence is that she kept her course, as she had a right to do. After seeing the propeller it was impossible to avoid a collision—impossible at any rate on the part of the schooner. If there was a fault then, there was no fault on the part of the schooner that contributed to the collision. And where there is charged a fault against a vessel, as there is in this case by the defense, in relation to which the testimony leaves it doubtful whether it exists or not, and it appears by the undisputed testimony that the fault of the propeller is flagrant, a court will not find the other party in fault upon doubtful evidence when it can lay its hand upon a flagrant wrong and say that that, at any rate, was mainly the cause of the injury sustained.

Now as to the blowing of the horns; the lookout; or the manner in which the schooner was steered: The testimony certainly is not satisfactory that there was a fault in any of those particulars, or any other, which contributed to the collision. Steamers must learn that they cannot rush through a fleet of sail vessels, on a public highway much frequented, in a dense fog, and in excuse say: "We must make our time; they must keep out of our way." They must not say that and expect if they sink a vessel as this propeller sunk this vessel, to escape paying for the loss. It is as clear a case as I have ever had before me. The schooner that was sunk was loaded with 16,000 bushels of corn, and it was lost. She was stove almost right through amidships, and the men on board had hardly time or opportunity to escape, and in fact they lost a large part of their effects, clothing, &c. The underwriters paid the loss on this corn, and they have come in and asked that they shall be repaid and subrogated for the owners in all their rights.

An objection is made to the libel. One of the underwriters paid for the loss which had been sustained a few days after the libel was

filed, and it is claimed that the rights of the parties must have been consummated at the time the libel was filed. The only question is whether, if there was an abandonment on the part of the owner of the corn to the underwriter, it was in such a way as to indicate that he intended to clothe the underwriter with all his rights. It is not material, I think, whether or not the money had been actually paid. And the proof is abundant, in this case, that it was the intention of the owner of the corn to abandon all his rights and interests to the company, and it within a few days paid the loss, thus removing all doubt upon the subject as to the intention of the parties. I decide the case therefore upon the ground that, the owner having made an absolute abandonment, under circumstances showing that he did not intend to make any claim for the corn in any way, that it was absolute; that it was not necessary in order to file a libel that the money should be actually paid. Of course, there need not have been an abandonment in the strict sense of the term here, because the thing abandoned was in the bottom of the lake and never recovered. And that illustrates the view which the court has taken; so that the libel, which is a libel by the underwriters, was properly sustained by the district court, and the decree will be affirmed.

The cross libel filed by the owners of the propeller for the damages sustained by it because of the collision, was properly dismissed by the district court, there being no cause for filing a libel against the Robinson or its owners. The district court seemed to think the schooner was seen a sufficient distance off to have avoided the collision if the proper precautions had been taken. I doubt that. I think the weight of the evidence is that the schooner loomed up all at once before the propeller so that neither could really have avoided the collision.

Decree for libellants.

Case No. 9,029.

The MANITOBA.

[2 Flip. 241;[1] 11 Chi. Leg. News, 25; 3 Cin. Law Bul. 809.]

District Court, E. D. Michigan. Oct., 1878.[2]

COLLISION—DUE DILIGENCE—MEETING END ON—SPEED.

1. The collision act of 1864 [13 Stat. 58] provides that when steamers are meeting end on or nearly end on, they shall port—each one—and go to the right, but this applies to cases in which each steamer is, at night, in such position as to see both of the colored lights of the other. Where the red light is opposite the red light of the other it does not apply, and if the green light of one of the steamers is opposite the green light of the other, or if in any case each vessel shows to the other a single colored light directly ahead, or where both lights are anywhere but ahead, the rule does not apply.

[Cited in The M. M. Chase, Case No. 9,684; The New York, 53 Fed. 559; The Decatur H. Miller, 10 C. C. A. 284, 62 Fed. 95.]

2. There is no general obligation to slacken speed, although two steamers are found approaching each other in such a way as that it is necessary to change the helm in order to avoid a collision, yet such an obligation arises in case of continuous approach or when the approaching light is found to be closing in instead of opening out.

[Cited in The Jay Gould, 19 Fed. 769.]

3. If the question be whether there was promptness in giving and executing orders upon a steamer immediately before a collision, the fact that the master left the deck after the lights of the approaching vessel had been seen, and did not return until after a collision had become inevitable, may be looked to, as also the further fact that the engineer for two or three times left his post to observe the approaching lights. The court may properly consider such facts as indicating a want of due diligence.

The Comet was bound from Grand Island, Lake Superior, to Cleveland. Having rounded Whitefish Point at about 8 p. m. she saw the red light of the Manitoba when about one-fourth to one-half a point upon her port bow. The Comet immediately ported her wheel half a point and steadied. After running on a short time and finding that the Manitoba failed to open out, she ported again half a point, blew her whistle, which was not answered, and failing to shake off the Manitoba, which seemed to be swinging under her starboard wheel, the Comet again was put hard a-port, the Manitoba now shutting in her red and opening her green light. Then the engines of the Comet were stopped and reversed, but it was too late. She was struck on the port bow by the Manitoba and cut nearly in two, and sunk in less than two minutes. Eleven on board were lost. The Manitoba was charged with having brought about the result, because of starboarding her wheel instead of porting as she ought to have done, as the vessels meeting were end on, or nearly end on. The Manitoba claimed that, having passed St. Mary's canal, she made the bright light of the Comet when about half way between Round Island and Iroquois Point—that the Comet was coming on from the direction of Whitefish Point, and, if not heading on a course almost parallel opposite to that held by the Manitoba, was nearly doing so. The steamer, running at a moderate speed, was going about N. W. ½ N., and as the Comet was approaching she showed her bright and green light, which bore from one-half to three-fourths of a point upon the starboard bow of the Manitoba; that the latter vessel endeavored, if possible, to avoid collision and to that end starboarded half a point and steadied, but the propeller still came on, now exhibiting her green and white lights, and as though she would fairly pass to the starboard of the Manitoba. In fact she seemed to be off a little, but on a sudden she swung to starboard and across the bows of the Mani-

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

[2] [Affirmed by circuit court; case unreported. Decree of circuit court affirmed by supreme court in 122 U. S. 97, 7 Sup. Ct. 1158.]

toba as though she were under a port wheel. The Manitoba at once was put hard a-starboard, the engines were stopped and reversed, but the propeller had approached so near that the collision was inevitable. The Comet, it was averred, had committed a fault in not starboarding instead of porting. The question raised and argued was: Whether these vessels on approaching each other had exhibited to each other a green or red light.

H. L. Tyrrell, for libellants.

W. A. Moore and F. H. Canfield, for claimants.

BROWN, District Judge. Before entering upon a discussion of the testimony, there is a legal proposition, to which the attention of the court was challenged at the outset of the argument, and which libellants claim is decisive of the case. Admitting the theory of the Manitoba to be true, that she made first the bright and then the green light of the Comet, three-quarters of a point on her starboard bow, it was insisted that the steamers were still meeting "nearly end on" within the 13th article, and that it was incumbent upon the Manitoba to port, instead of starboarding, as she did. The words "nearly end on" used in the 13th article, are susceptible of two entirely distinct interpretations. On behalf of the Comet, it is urged, that if vessels are approaching so nearly end on, that prudence will suggest a change of the helm to avoid a misapprehension or chance of collision, such change should always be made by porting, notwithstanding the approaching vessel may exhibit a green light upon the starboard bow. Under the other definition, if the two vessels are each exhibiting to the other lights of the same color, there is no risk of collision within the meaning of the article, and each vessel is bound to keep its own side and may pursue its course with unabated speed, or, as formulated in the lines of Mr. Gray: "Green to green or red to red, perfect safety, go ahead."

The earlier decisions, both English and American, no doubt go far to sustain the position of the libellants upon this point. The merchant shipping act, which in England preceded the present law, under which the vessels of all civilized nations are now navigated, provided that: "Whenever any ship, whether a steam or sailing ship, proceeding in one direction, meets any other ship, whether a steam or sailing ship, proceeding in another direction, so that if both ships were to continue their respective courses they would pass so near as to involve any risk of a collision, the helms of both ships shall be put to port, so as to pass on the port side of the other" (14 & 15 Vict. c. 79)—a rule substantially like the 13th article, except that it imposes upon the sailing vessel an obligation to port when meeting a steamer. In construing this rule in the case of The Mangerton, Swab. 120, a ship which was running free was held to be in fault, because seeing a steamer's green or starboard light three or four points on her starboard bow, she held on her course, the master believing that, if the steamer did likewise, the vessel would have gone clear. He ought, it was said, to have expected that the steamer, on seeing his light, would have followed the rule and have ported; and should, therefore, have ported his own helm. See, also, The Admiral Boxer, Id. 193. In The Cleopatra, Id. 135, a steamer was condemned for having starboarded on making the bright and green lights of an approaching vessel three points on her starboard bow, distant about three miles. So, too, in the case of The Stork, Holt, Adm. Cas. 151, decided after the present law had taken effect, Dr. Lushington held, that in order to excuse the Stork from porting, "it must be quite clear there were three points difference and not less, for surely it would never do to contend, where they were so nearly meeting end on, that if the evidence should be it was one or two points only in the direction they were meeting, that that would be sufficient to dispense with the observance of this rule." On appeal to the privy council, the court refused to adopt the language of Dr. Lushington, but observed it was not necessary to lay down any rule if it were competent for them to do so. "It is sufficient to say, that, whether the vessels were in such a relative position as to involve the risk of a collision, must be always a question of fact to be determined upon the circumstances." The court, however, found that the vessels were in such a relative position that their course, if pursued, would have involved risk of a collision, and dismissed the appeal. In the case of The City of Paris, Id. 21, the question was put to the assessors: "When the steamer first saw the steam tug moving toward her, and two points on her starboard bow, taking into consideration these vessels being on opposite courses, was there danger of their meeting end on, or nearly end on, so as to involve a risk of collision?" and they answered, "that the vessels were coming nearly end on, and the duty of each was to have ported." In the case of The Fingal, Id. 160, the court considered that if vessels were within two points of meeting end on, they would fall within the latter part of the statement, "nearly end on." In the case of The Artemas, Id. 75, a difference of two points was held not to exempt the vessels from the regulation of the 11th article. See, also, The Mexican, Id. 130. A similar want of definiteness is apparent in the American authorities. See The Milwaukee [Case No. 9,626]; The Nichols, 7 Wall. [74 U. S.] 656.

These varying constructions of the act naturally led to a want of uniformity in the practice, ship masters as well as courts disagreeing among themselves as to how great a variance from dead ahead would still meet the requirements of nearly end on. There was a further difficulty involved in the fact that the exhibition of a green light or green and white lights directly ahead, or on the

starboard bow is consistent not only with vessels approaching upon a parallel course, but upon a course across that of the other vessel, in which case porting the helm would bring about the very disaster it was designed to avoid; in other words, the light may be dead ahead or nearly dead ahead, and yet the two ships may not be meeting end on. To justify porting under article 13, not only must the ship carrying the light be end on, but the two ships must be meeting each other in that position, and the exhibition of a single colored light directly ahead by no means justifies that inference.

To put an end to this uncertainty, and to define with the utmost practicable exactness the meaning of the words "nearly end on," on the 30th of July, 1868, an order in council was issued to the following effect: "The said two articles, numbered 11 and 13 respectively, only apply to cases where ships are meeting end on or nearly end on, in such a manner as to involve risk of collision. They consequently do not apply to two ships which must, if both keep on their respective courses, pass clear of each other. The only cases in which the said two articles apply are when each of the two ships is end on or nearly end on to the other; in other words, to cases in which, by day, each ship sees the mast of the other in a line or nearly in a line with her own, and, by night, to cases where each ship is in such a condition as to see both of the side lights of the other. The said two articles do not apply by day to cases in which the ship sees another ahead crossing her own course or, by night, to cases where the red light of one ship is opposed to the red light of the other, or where the green light of one ship is opposed to the green light of the other, or where a red light without a green light or a green light without a red light is seen ahead, or where both red and green lights are seen anywhere but ahead." While this order has never been formally accepted by the supreme court as the correct interpretation of the 13th article, it has received the sanction of the district courts for the Southern and Eastern districts of New York, and has not, so far as I can gather, been repudiated anywhere. It was adopted verbatim by Judge Blatchford in the case of The America [Case No. 281], and was approved by Judge Benedict in The Sylvester Hale [Id. 13,712]. By an imperial decree promulgated May 26, 1869, it was incorporated in the law of France (De Fresquet, Des Abordages, p. 107). It appears also to have been adopted by Hamburg, Russia and Sweden, in 1868. While in some cases, where a colored light is made very nearly dead ahead, it may lead vessels to approach each other in a dangerous proximity, it is quite evident that so long as each exhibits to the other a light of the same color, there can be no collision, and any liability to error or confusion can be obviated by porting from a red, or starboarding from a green light. As it is very desirable that the construction given to this law should be as uniform as the law itself is general, particularly upon waters where British and American vessels are constantly meeting each other, I deem it the safer and better plan to adopt the order in council as the law of this court, at least until overruled by a higher authority. I hold, therefore, that under her theory of the facts, the Manitoba was not in fault for starboarding as she did.

What the exact facts of the collision are it is certainly difficult to determine. Not only is the testimony upon either side in direct and irreconcilable conflict with that upon the other, but the witnesses upon one, if not upon both sides, swear to appearances utterly inconsistent with the movements of their own vessels as stated by them. The theory of the Comet that she made the red light of the Manitoba and kept it constantly on her port bow is not only sworn to directly by her master, her second mate, and her wheelsman, but it is claimed to be verified, and in fact demonstrated, by two subordinate circumstances, proved by uncontradicted testimony.

First. That the Comet, in rounding Whitefish Point, hugged as close to land as possible, expecting heavy seas, and, hence, when she straightened up on her course to Point Iroquois, she was further to the westward than the usual course of vessels intending to round that point would take them; while the Manitoba, intending to make Michipicoten, on the northeast shore, would naturally have been further to the eastward than the usual course of vessels rounding the point would take them.

The testimony of the Comet's crew does tend to show that she passed a little nearer to the point than usual, although there was a heavy wind from the southeast blowing on to the point, and it is a little difficult to see why she should wish to hug it so close; but in that regard, it appears to be contracted by that of the master and mate of the Havana, a steamer bound up, which passed the Comet a short distance below Whitefish Point and some seven or eight hundred feet upon her port side. These witnesses swear they passed Whitefish Point themselves at the usual distance of a mile or a mile and a quarter, indicating that the Comet was probably about a mile out from the Point when she passed it. In this connection, they also swear they saw the Manitoba's light astern and upon their port quarter. While it is true the Manitoba was intending to stop at Michipicoten, the direct course to which would lead her a considerable distance off Whitefish Point, yet as her crew unite in swearing that they were steering for the light upon the Point, keeping it a little off their port bow, and intending to pass it at the usual distance, I do not feel at liberty to say that they are not to be believed in this particular.

Second. Shortly after rounding Whitefish Point, the Comet made the lights of the barge Havana, a little to port, and to give her an

easy berth she ported half a point and ran from five to fifteen minutes under this port wheel, before resuming her southeast course down the lake. Whatever weight is given to this testimony is counterbalanced by the fact, that the general course of the Comet down to the lake was half a point further to the eastward than it would have been if she had been sailing in a course directly opposite to that of the Manitoba. The course of the Manitoba was northwest half north, while that of the Comet was directly southeast. The tendency of this divergence would be, assuming that the compasses of each were exactly alike, to display the green light of the Comet to the Manitoba. A change of half a point from a course parallel to that of the Manitoba, would, in a distance of six miles, carry the Comet about half a mile to the eastward of the Manitoba's course, assuming that the Manitoba was pursuing the usual course from Point Iroquois to Whitefish Point. While there is nothing showing that the Comet did deviate to that extent, it seems to me to offset any inference, which might be derived from the fact of the Comet porting to pass the Havana, that she was westward of the Manitoba's course.

Third. It is claimed to be a physical impossibility that these vessels should have collided as they did, from the positions in which the evidence of the Manitoba places them, at the time the Comet's wheel was put hard a-port, and the Manitoba's hard a-starboard. At the time the Comet put her wheel hard a-port, and exhibited her red light, the witnesses on board the Manitoba claim that she was from 350 to 400 feet ahead of her, and about the same distance to starboard. The speed of the Manitoba being considerably greater than that of the Comet, it would seem to follow that if the helm of the Manitoba had been put to starboard at the same time that that of the Comet was put to port, the Manitoba would have passed the point of intersection first; and hence, the inference is, that the relative positions were not as stated by the Manitoba, but that the Comet was to the port instead of to the starboard.

Assuming that the helms of both vessels were put hard over at the same moment, and adding to this the fact that the Manitoba was the faster vessel, it would necessarily follow that she would have passed the point of intersection first. But the theory of the Manitoba is not inconsistent with a sudden prior porting on the part of the Comet, and a failure on the part of the Manitoba to swing as rapidly to starboard as the Comet did to port. If the Comet ported her wheel before the Manitoba starboarded (and this is the Manitoba's theory) she would have the advantage of the Manitoba, and might pass the point of intersection first; it would naturally take some little time for the Manitoba to get her wheel hard over, and to deviate from her course. There is another inference, however, to be deduced from this theory of the Manitoba, to which allusion will be made hereafter.

The case made by the Comet is manifestly inconsistent with itself and untrue. If she made the Manitoba's red light on her port bow, and ported half a point and again another half point, and still she could not open out the approaching vessel, it shows conclusively they must have been approaching on converging lines, and the Manitoba must have displayed a green and not a red light. I am more inclined to think, however, that she made the red light of the Manitoba on her starboard bow; that her first porting brought her on a course exactly parallel to that of the Manitoba, and that her green light was displayed at a considerable greater distance than the Comet's testimony would seem to indicate, and that the collision was brought about by a persistent effort to apply the 13th rule, and to pass the Manitoba under a port helm. This is corroborated to a certain extent by the statement of Rafferty, the wheelsman, on cross-examination, that he judged the Manitoba was half a mile off when she showed her green light. I feel compelled to say, too, that considerable doubt is thrown upon the Comet's case by the testimony of Mr. Hathaway, the reporter of the Free Press, who swears that Captain Dugot told him that he had been on deck about half an hour, and leaving the boat in charge of the mate went below, but was not gone more than five minutes before returning. Hathaway being entirely disinterested, I am disposed to credit his testimony, notwithstanding Dugot's denial.

The case of the Manitoba is supported by the testimony of her master, mate, wheelsman, engineer and cabin boy, whose statements are also corroborated by those of four passengers. While in an ordinary collision case, the court will pay very little regard to a mere superiority in the number of the crew sworn, and will seek to determine the question of fault by the uncontradicted testimony, and by the probabilities of the case, I do not feel at liberty to treat so lightly the testimony of disinterested and intelligent passengers, provided they are so located as to be able to observe the bearing and color of approaching lights. The testimony of the Manitoba's passengers has aided me greatly in solving the difficult problem of the relative bearing of these vessels.

George Bisset, a merchant of Kinkarden, who was standing forward on the promenade deck, for twenty minutes before the collision, noticed the Manitoba steering between the white light of the Comet and the light upon Whitefish Point. Captain Symes came back and spoke to him; showed him the green light, and said: "We have to pass on the green side with our green side, and if a red light was shown we have to pass on the red side;" was then standing right at the center of the promenade deck; stood there until four or five minutes before the collision, then

going for a moment into the cabin to light a cigar, returned to the deck and stood leaning against the railing on the starboard side, about twenty feet from the stern. The Comet was still displaying a green light; looked over his left shoulder to see her pass, and not seeing her, looked ahead and saw her cross the bows of the Manitoba. George W. Barry, a druggist and insurance agent of Lucknow, was standing on the bow of the boat on the promenade deck, fifteen minutes before the collision; saw the bright light of the Comet on the starboard bow, and Whitefish light on the port bow, but did not notice the colored light. Noticed Bisset and Captain Symes talking together; saw the sudden sheer of the Comet across the bow. John S. Tenant, a physician of Lucknow, was standing on the promenade deck, at the foot of the ladder to the right of the pilot house; saw the white and green lights of the Comet on the starboard bow; the Manitoba seemed to be steering between the Comet and Whitefish Point light; suddenly saw her sheer and show a red light so near that he thought he could throw a stone aboard of her. Angus Bethune, paymaster on the railroad, from Fort William to Red river, had been to Ottawa on government business, and was returning on the Manitoba. Was sitting at the door of the engine room, taking a smoke; got up and walked to the forward right hand gangway of the steamer to look for Whitefish Point light; saw a steamer ahead; called the engineer and remained there, and soon discovered the steamer was coming towards us; said to him, there was a steamer coming, and that she was on the wrong side. The engineer came up and said there was plenty of room to pass on that side. Soon saw the Comet down upon us, her broadside crossing our bow. The engineer looked and ran back to his engine. She would have passed on our right hand side if she kept her course; seemed to be a couple of lengths or more off when she changed her course.

Now conceding, what unfortunately is too often true of sailors, that they place a higher value on fidelity to their vessel than upon fidelity to truth, and esteem their allegiance more sacred than their oath, I cannot assume that mere passengers are actuated by any such motives. These four men have sworn to a state of facts entirely inconsistent with the theory of the Comet, and strongly corroborative of that of the Manitoba. They were in a position to see, and they can hardly have been mistaken. They have sworn to the truth, or they have been guilty of a perjury which has not even the excuse of self-interest to palliate its heinousness.

I do not overlook in this connection the statements said to have been made by the master and engineer of the Manitoba after the collision. They are sworn to by the master and second mate of the Comet, and denied by the parties who are said to have made them. As the witnesses on both sides are equally interested, and the words are very likely to have been misunderstood, I must hold that they are not proven.

Upon careful perusal of this testimony, I am forced to the conclusion that these vessels were mutually displaying their green lights, and that the collision was brought about primarily by the unauthorized porting of the Comet.

It only remains to consider whether the Manitoba be not also in fault for not slackening speed. The testimony is uncontradicted that the engineer did not receive the order to stop and back until just as the vessels came together. That there is no general obligation to slacken speed, notwithstanding two steamers are approaching each other in such a manner that a change of helm is necessary to avoid risk of collision, is undisputed. The Earl of Elgin, L. R. 4 P. C. 8; The Free State, 91 U. S. 200.

It is equally clear that this obligation does arise, whenever there is any uncertainty as to the position or movements of the approaching vessel, or when she appears to be violating the rules of navigation. In the case of The Earl of Elgin, an exception is made of cases of a "continuous approach" by which we are to understand, not merely where the two colored lights continue to be visible, but a single light appears to be closing in in such a manner as to indicate that the courses of the two vessels are converging. So in the case of The Scotia, 14 Wall. [81 U. S.] 181, the court remarked, "We have already said that she was not bound to take any steps to avoid a collision until danger of collision should have been apprehended, and we think there was no reason for apprehension until the ship light was seen closing in upon her." [Case No. 12,513.] See, also, The Mary Sanford [Id. 9,225].

In the case of Dyer v. National Steam Nav. Co. [Case No. 4,224], the steamer was condemned for not slackening speed under similar circumstances. The court observed, "It was the duty of the steamer, as soon as it was noticed that she was not shaking off the light by porting her helm, to have slackened her speed, and ascertained the direction in which the ship was sailing, and acted accordingly; instead of which she kept up her full speed until the collision was inevitable."

I see no reason to doubt that the Comet continued to show her green light until within a short distance of the Manitoba. Her course diverged a half point to the eastward of the Manitoba, consequently her first porting brought her upon an exactly parallel course, and as she was to the starboard of the Manitoba she would continue to display her green light, and as the Manitoba starboarded and opened out this light, she might port another half point without shutting it in or showing the red; but approaching the Comet so nearly end on as she did, she was bound to watch her lights with the utmost

vigilance, and to ease her engines the moment she perceived the Comet was failing in her duty. There could be no collision so long as the Comet continued to exhibit a green light, but there might be such an approach of this light as to show that the Comet had ported, a manoeuvre which, if persisted in, would inevitably throw her across the path of the Manitoba, and bring about a collision. That such continuous approach took place and was observed, is evident from the testimony of the master and mate. Captain Symes says that he made the green light three-fourths of a point on his starboard bow; that he remained on deck five or six minutes, and the green light then bore at least half a point on his starboard bow, showing, at least, that he was not opening it out. The mate, who remained in charge of the Manitoba up to the moment of the collision, says, that when they were one and a half or two miles apart, the green light bore three-fourths of a point on his starboard bow; that he then starboarded half a point, making the green light one and a fourth points off his starboard bow, but that when the Comet began to swing, the lights had closed in, so that it was not more than half a point or a point off. This shows that from the time the Manitoba starboarded, the Comet was steadily drawing in under a port wheel. If the two steamers were approaching upon an exactly parallel course, the light of the Comet would naturally open out, and the starboarding of the Manitoba would increase this tendency, so that if the Comet had kept her course, the angle of the green light with the course of the Manitoba would constantly approximate to a right angle. Instead of that, the light kept steadily closing in. There could be but one inference from this—the Comet had ported. This was manifest some time before she shut in her green light and displayed her red light, and the Manitoba should at least have eased her engines or blown a whistle, as required by the universal custom upon the lakes.

Nor am I satisfied that the order to stop and reverse was given as promptly as it should have been. According to the Manitoba's theory, the Comet was from 350 to 400 feet to the starboard, and about the same distance ahead of her before her change of light was observed. The entire testimony on the part of the Manitoba tends to show that the Comet would have passed from 300 to 400 feet from her if she had kept her course. Admitting that distances are deceptive, and that the Comet might have been much further ahead of the Manitoba than 400 feet, yet it seems to me, if the engines of the Manitoba had been promptly stopped and reversed, a collision might have been avoided. Obviously, this was the first and instant duty of the Manitoba, upon discovering the change of lights. A change of wheel was a matter of secondary consideration, but the obligation to stop and reverse was imperative. In this respect the case is much like that of The Comet [Case No. 3,051], where the injured vessel in this case was libelled for sinking the steamer Silver Spray in Lake Huron. The observations of Judge Woodruff in that case are pertinent here. He condemned the Silver Spray, not only for starboarding, but for failure to slacken speed after the red light was disclosed upon her starboard bow. While I make no criticism upon the action of the Manitoba here in putting her helm hard a-starboard, although I think this was an error, I am of the opinion that she should have stopped and reversed. If she had ported or slowed and backed, and perhaps if she had done nothing, the collision would not have taken place. After a collision has become imminent, almost any error on the part of the steamer will be pardonable except that of not stopping and reversing; and for this error, which is rendered more probable by the fact that the engineer left his post and ran to the starboard gangway, after the Comet put her helm hard a-port, I think the Manitoba must be condemned. The Great Republic, 23 Wall. [90 U. S.] 20. I think, too, the conduct of the master in leaving the deck after the Comet's light had been visible for some time, and not returning till the collision had become inevitable, is open to criticism. Such changes in command are likely to lead to confusion, and are looked upon with great disfavor by the courts. Hazlett v. Conrad [Case No. 6,288].

A decree will be entered apportioning the damages and referring it to a commissioner to ascertain and compute the same.

[NOTE. On March 15, 1882, the commissioner's report as to the amount of damages was confirmed by the district court. The owners of the Manitoba then appealed to the circuit court from so much of the final decree of the district court as adjudged the Manitoba to be in fault. The circuit court heard the case on pleadings and proofs, and affirmed the decree of the court below (case unreported).

[The claimants of the Manitoba then took the case, on appeal, to the supreme court. Justice Blatchford delivered the opinion, affirming the decree of the circuit court. 122 U. S 97, 7 Sup. Ct. 1158.]

MANITOWOC COUNTY (GOEDGEN v.). See Case No. 5,501.

MANITOWOC DOCK CO. v. The CHRISTOPHER NORTH. See Case No. 2,707.

Case No. 9,030.

MANKIN v. CHANDLER et al.

[2 Brock. 125.] [1]

Circuit Court, E. D. Virginia. Nov. Term, 1823.

JUDGMENT—RES JUDICATA—ESTOPPEL—ATTACHMENT—NONRESIDENT DEBTOR.

Where process is to be served on the thing itself which is the subject of controversy, and

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

where the mere possession of the thing itself by the service of that process, and making proclamation, authorizes the court to decide upon it without notice to any individual whatever, it is a proceeding in rem, to which all the world are parties, and in every such case, the decree is conclusive evidence against all parties interested, though not brought before the court by process. But a foreign attachment (under the law of Virginia, see Rev. Code 1819, c. 123, p. 474), is not a proceeding in rem. It is a suit by a plaintiff against defendants, and a decree in such a case is conclusive evidence only against parties and privies. Thus, C. being indebted to W., gave his note for the amount, and W. assigned the note to M., and W. afterwards left the country. R., a creditor of W., attached the effects of W. in the hands of C. C. had notice of the assignment of his note to M. A decree was rendered in favour of R. M. subsequently brought suit upon the note against C., but the decree was satisfied before service of the process in the second suit. C. pleaded the decree in favour of R., in bar of M.'s right of action, and to this plea, M. demurred. The court sustained the demurrer, on the ground, that a decree rendered in a suit between two parties, is not admissible evidence in a suit between one of those parties and a third party. But the court *held*, that if M. had been a party to the first suit, the decree would have operated a bar, and the demurrer would have been overruled.

[Cited in Cole v. Brandt, Case No. 2,978; Smith v. Miln, Id. 13,081; Miller v. U. S., 11 Wall. (78 U. S.) 328; Alabama & C. R. Co. v. Jones, Case No. 127; Michaels v. Post, 21 Wall. (88 U. S.) 428.]

[Cited in Smith v. Blatchford, 2 Ind. 186, 52 Am. Dec. 506; Bruff v. Thompson (W. Va.) 6 S. E. 359; Street v. Augusta Ins. & B. Co., 12 Rich. Law, 13; 75 Am. Dec. 715. Cited in brief in Burtners v. Keran, 24 Grat. 51. Cited in Holly River Coal Co. v. Howell, 36 W. Va. 503, 15 S. E. 218; Brown v. Smart, 69 Md. 333, 14 Atl. 472, and 17 Atl. 1101; Rigney v. Rigney, 127 N. Y. 412, 28 N. E. 406.]

At law.

MARSHALL, Circuit Justice. This is an action of debt, brought by the plaintiff, as assignee of —— Walsh, on a note given by the defendants to Walsh on the 10th of October, 1818. The defendants plead in bar, a decree made by the county court of Westmoreland, sitting in chancery, in a suit brought by Thomas Rowand, a creditor of the said Walsh, against the said Walsh and the defendant John Chandler, to attach the effects of the said Walsh in the hands of the said Chandler, and subject them to the payment of the debt due from Walsh to Rowand. The record of the proceedings in that suit, forms a part of the plea, and shows that the note was assigned anterior to the answer of the defendant, and that he had notice of the assignment. The decree directs the defendant, John Chandler, to pay to Thomas Rowand, out of the note given by John Chandler & Co. to Walsh, the sum which was shown to be due from Walsh to Rowand; and the decree was enforced before the service of process in this cause.

To this plea the plaintiff has demurred, and the defendants have joined in demurrer.

It is admitted that the decree of the county court of Westmoreland is erroneous, and would, unquestionably, be reversed if carried before a superior tribunal. But this court can take no notice of its errors. While it remains in force, it binds the subject as conclusively as it would do, had it been affirmed in the highest court in the country. The question is, can it affect the rights of the plaintiff in this cause? for if it can, it concludes them.

In support of the demurrer, it is argued, that this decree cannot be given in evidence in this cause, as the plaintiff is neither a party nor a privy, it not being alleged that the assignment, or notice of it, was subsequent to the attachment.

The rule relied on by the plaintiff is familiar to every gentleman of the profession, and has not been controverted; but the defendant's counsel insists that this is a case to which that rule does not apply, because it is not within the ordinary jurisdiction of a court of chancery, but a case of which that court takes cognizance, by virtue of a statute, and is, in its nature, a proceeding in rem, and not in personam. It is, he says, a sentence on the thing itself, and not a decree against the person, and that in all cases of this description, the subject matter is bound by the sentence, and the title of those who are not particularly before the court, is as entirely decided, as the title of those who are. In support of this rule, he referred to the effect of decisions in the courts of admiralty, and in the court of exchequer, in England, which courts entertain suits in rem, to which all the world are said to be parties.

The principle on which the defendant relies, is as little to be questioned as that asserted by the plaintiff. The whole inquiry is, to which class of cases does that under consideration belong? What is the nature of a proceeding in rem? And in what does its specific difference from an ordinary action consist? Is every action in which a specific article is demanded a proceeding in rem? If it were, a writ of right which demands lands, of detinue which demands a personal chattel, would be a proceeding in rem, to which all the world would be parties, and by which the rights of all the world would be bound. But this, all know, is not the law. What, then, is the rule by which cases of this description are to be ascertained?

I have always understood that where the process is to be served on the thing itself, and where the mere possession of the thing itself, by the service of the process and making proclamation, authorizes the court to decide upon it without notice to any individual whatever, it is a proceeding in rem, to which all the world are parties. The rule is one of convenience and of necessity. In cases to which it applies, it would often be impossible to ascertain the person whose property is proceeded against, and it is presumable that the person whose property is seized, is either himself attentive to it, or has placed it in the care of some person who has the power, and

whose duty it is, to represent him and assert his claim. Such claim may be asserted; but the jurisdiction of the court does not depend on its assertion. The claimant is a party, whether he speaks or is silent; whether he asserts his claim or abandons it.

Thus, in the case of Scott v. Shearman, 2 W. Bl. 977, which was an action of trespass against the officer who had seized goods which were condemned in the court of exchequer, Judge Blackstone says, "the sentence of condemnation is conclusive evidence in a case in which no notice was given to the owner in person, who was not a party to the suit, because the seizure itself is notice to the owner, who is presumed to know whatever becomes of his own goods. He knew they were seized by a revenue officer. He knew they were carried to the king's warehouse. He knew, or might have known, that by the course of law, the validity of that seizure would come on to be examined in the court of exchequer, and could be examined nowhere else. He had notice by the two proclamations, according to the course of that court. He had notice by the writ of appraisement, which must be publicly executed on the spot where the goods were detained. And having neglected this opportunity of putting in his claim and trying the point of forfeiture, it was his own laches, and he shall for ever be concluded by it." But in every case where parties are necessary to give the court cognizance of the cause, the decree, the judgment, or the sentence, binds those only (with some few exceptions standing on particular principles), who are parties or privies to it. If a party is necessary, it follows that the party should be one who has the real interest; and to secure this, the interest of persons who are not parties cannot be affected. This is understood to be as true with respect to cases in the courts of admiralty and of the exchequer, as in courts of common law and chancery. If a case be cognizable in either of those courts, in consequence of the seizure which vests the possession, and of a general proclamation of that fact, every person is a party to the proceeding, and his interest is bound by the sentence; but in a case in which the law requires that parties should be brought before the court, the sentence binds those only who are parties.

If this be the rule, it remains only to examine the act of assembly which gives this remedy, in order to ascertain its character. The law enacts,[2] that "if in any case which hath been or shall hereafter be commenced, for relief in equity in any superior court of chancery, or in any other court, against any defendant or defendants, who are out of this country and others within the same, having in their hands effects of, or otherwise indebted to, such absent defendant or defendants, or against any such absent defendant or defendants, having lands or tenements within the commonwealth, and the appearance of such absentees be not entered, &c.," "in all such cases the court may make any order, &c." The act then proceeds to make publication equivalent to service of the process, so far as is necessary to enable the court to decree in the cause.

The process, then, given by the act of assembly in the particular case, is not against the thing, but the person. It is in a suit brought against a defendant not residing in the country, and having effects within it, that this proceeding is allowed; and of course, the foreign defendant must be named in the subpoena and in the bill. The questions to be decided by the court in every such case are—is the foreign defendant indebted to the plaintiff, and are the attached effects his property? The plaintiff must establish both of these facts, and the defendants may controvert them. It is, then, a case which, by the very words of the law, is a suit between parties by which the rights of the individuals before the court are to be examined and determined. The law substitutes publication for service of process on the absent defendant, which shall give the court jurisdiction over the cause, and enable it to make a decree for the payment of the debt, which is chargeable on his effects in the hands of the garnishee. No reason can be assigned why this decree should bind a person who is not a party nor privy to it, which does not apply to every case. No reason can be given for the rule which does not apply to this case.

It is, we are told, excessive oppression that a court of justice should decree a man to pay a sum of money, and after enforcing its decree, compel him to pay the money a second time to another person. This is admitted; but it is also oppression to decree the money of A. to B.; every illegal and unrighteous judgment of a court is oppression. The law presumes no such judgment to be given; but if it be given, the law deems it more reasonable that the loss should fall on a person who was a party to the suit, who could assert his rights and controvert the decision, than on him who was not a party to it, and who had no opportunity of controverting it. Had Mankin been a party to the suit in Westmoreland county court, the decree would have bound him, had it been as iniquitous as it now appears to be; but not being a party, the rule of law protects him from its operation.

It has been truly said, that our law respecting foreign attachments, is founded on the same proceeding in London, which is established by custom. Some inconsiderable difference exists as to the manner of proceeding against the absent defendants, which has no bearing on the question arising in this case; as to that question, the law is the same. The case of M'Daniel v. Hughes, 3 East, 367, goes fully into the law on this subject; in that case, as in this, a decree of the court was pleaded in bar to an action brought

[2] See Rev. Code Va. 1819, c. 123, p. 474.

by the foreign defendant himself against his debtor, and in that case, too, a demurrer was filed to the plea. It was contended in argument, "that three parties are necessary in a foreign attachment—the plaintiff, the defendant, and a garnishee. The plaintiff must prove his debt, the defendant must have due notice of the process against him, and the garnishee must be in actual possession of the defendant's property which is to be attached." The law, as laid down for the plaintiff, was not controverted; but it was insisted that, according to the custom, the return of nihil authorized the attachment; and of this opinion was the court, and for this reason the demurrer was overruled. The person who claimed the property was in that case a party to the suit, and such proceedings were had against him as, according to the custom, authorized the court to pronounce judgment in the case. He was precisely in the same situation as the plaintiff in this case would have been, had he been named as a defendant in the subpoena, and been included in the publication. Had this essential circumstance been wanting in the case of M'Daniel v. Hughes, it is apparent from the whole report, that the demurrer must have been sustained.

Upon the best examination I have been able to make of the cases which have been cited, as well as upon principle, I am perfectly satisfied. that a foreign attachment is not to be considered as a proceeding in rem, but as a suit by the plaintiff against defendants, and that a decree in such cases is within the general rule of being conclusive evidence only against parties and privies. The demurrer, therefore, is sustained.

NOTE. In Kelso v. Blackburn, 3 Leigh, 306, Carr, J., said, that "the proceeding by foreign attachment, against absentees, was an innovation upon the common law; a proceeding in rem founded on the necessity of the case, lest there should be an absolute failure of justice, and like all ex parte proceedings, it was liable to great abuse, unless carefully watched and strictly confined to the ground covered by the law. It was not under their general jurisdiction that courts of equity took cognizance of those cases, but under particular statutes; and these, it would be found, had, with special care, marked out the extent and described the manner of the proceeding." It is very apparent, from an examination of the case of Kelso v. Blackburn, that Judge Carr did not intend to say, that the proceeding by foreign attachment, in Virginia, was, in the strictest sense of the term, and to all intents, a proceeding in rem, but simply that it was in the nature of a proceeding in rem. The question in that case was, whether the essential circumstance of the non-residence of the debtor was set forth with sufficient distinctness in the complainant's bill, the foundation of the jurisdiction of the court being the non-residence of the debtor, and his having effects in Virginia. If, because cognizance of the proceeding in foreign attachment was not taken by courts of equity, by virtue of their "general jurisdiction," but under "particular statutes," and because it was "liable to great abuse," the proceeding should be "carefully watched and strictly confined to the ground covered by the law," it is clear that the judge did not intend to lay down the general proposition in a sense which would abolish the familiar rule of evidence, that judgments or decrees are only evidence against parties and privies, in a sense which would give a decree in a proceeding by foreign attachment, a more extended operation against third persons than an ordinary decree of a court of equity. It is most obvious, that the learned judge, in speaking of the liability to abuse, in the proceedings by foreign attachment under an act of assembly, "like all other ex parte proceedings," had reference to the absent defendant himself (and to none other), against whom, from the very necessity of the case, the law was compelled to substitute the formal and constructive notice by publication, for the actual service of process required in the case of home defendants.

Case No. 9,031.

In re MANLY.

[2 Bond, 261;[1] 3 N. B. R. 291 (Quarto, 75); 2 Am. Law T. Rep. Bankr. 89.]

District Court, S. D. Ohio. April Term, 1869.

CHATTEL MORTGAGE—STOCK IN TRADE—POSSESSION BY MORTGAGOR—IDENTIFICATION—BANKRUPTCY—RIGHTS OF MORTGAGEE.

1. Where a chattel mortgage was given, to secure the payment of a promissory note, payable one day after date, and the mortgaged property, being books, stationery, etc., remains in possession of the mortgagor, who carries on his business, as a retail bookseller, as before the mortgage, selling the stock mortgaged, and replacing it by the purchase of other stock, until there can be no identification of the articles specified in the mortgage, and the mortgagee assents, for years, to this course, such mortgagee, when proceedings in bankruptcy are commenced against the mortgagor, has no right, under the mortgage, to the possession of the stock in his possession at the time of the bankruptcy.

[Cited in Catlin v. Currier, Case No. 2,518; Robinson v. Elliott, 22 Wall. (89 U. S.) 526; Johnson v. Patterson, Case No. 7,403.]

2. Under the facts stated, the mortgagee has no lien on the stock, and can only share, pro rata, with other creditors, in the proceeds of the sale of the stock.

In bankruptcy.

H. C. Whitman, for petitioner.

O. H. Temple and Woodruff, Tilden & Maxwell, for creditors.

LEAVITT, District Judge. The question before the court is on a motion, by the counsel of Ellen M. Manly, for an order to the marshal to deliver to her a lot of books, stationery, etc., seized by the marshal as the property of the said Thomas M. Manly, against whom there has been an adjudication of bankruptcy, on the petition of Stanage, Saunders & Co., creditors of the said Thomas M. Manly. The property in dispute is claimed by Ellen M. Manly, the sister of the bankrupt, under a chattel mortgage given to secure a debt due her from her brother. The question to be decided on this motion is, whether this mortgage vested a title to the property in Ellen M. Manly, or whether it was the property of the bankrupt, subject to the claim of his creditor and passed to the assignee of said Thomas M. Manly.

[1] [Reported by Lewis H. Bond, Esq., and here reprinted by permission.]

The facts necessary to notice are briefly these: The said Thomas M. Manly, under the name of Thomas M. Manly & Co., had been in business for some years, in Cincinnati, as a retail bookseller and stationer, prior to the institution of the proceedings in bankruptcy. His sister, the said Ellen M. Manly, had, from time to time, advanced money to assist her brother in his business, until October 16, 1868, when these advances amounted to $1,500, and on that day Thomas M. Manly gave his note to his sister for that sum, payable one day after date, and at the same time executed the chattel mortgage to secure the payment of the note, including all his stock in trade and the furniture and fixtures pertaining to his place of business. The mortgage was duly filed in the office of the recorder of Hamilton county, pursuant to the statute of Ohio. On February 12, 1869, the firm of Stanage, Saunders & Co. filed their petition in bankruptcy against Thomas M. Manly, praying, for the cause assigned, that a decree of bankruptcy might be entered; and such proceedings were had that a decree in bankruptcy was entered in this court, on the 19th day of February, in the year aforesaid. A warrant issued to the marshal, requiring him to take possession of the property of the bankrupt pursuant to the requirement of the statute. A restraining order, prohibiting Manly and all others from interfering with or disposing of the property, had been issued on the 15th of February, and was duly served and returned. After the commencement of the proceedings in bankruptcy, but before the service of the restraining order, and before the decree in bankruptcy—that is to say, between the 15th and 19th days of February—Ellen Manly proceeded to the store of Thomas M. Manly and demanded payment of the note for $1,500, which was refused. She then demanded possession of the goods or merchandise included in her mortgage, and goods and merchandise valued at $1,100 were delivered to her and she caused them to be removed from the store, and they were taken to, and deposited at, another place in the city. Subsequently, upon the application of the petitioning creditors, the marshal was ordered to take possession of the property thus removed, and now holds it in custody. As before stated, the object of the pending motion is, that this property may be restored to Ellen M. Manly, as the owner, under the mortgage executed on October 16, 1868.

This motion has been argued at great length by counsel, and is now submitted for the decision of the court. The only question is, whether Ellen M. Manly has the legal title to the property in controversy, under the chattel mortgage which has been referred to. No question arises as to the validity or invalidity of the sale or transfer of the property, under section 35 or any other provision of the bankrupt statute [of 1867 (14 Stat. 534)]. From the facts before the court, presented by the affidavits and other proofs, it does not appear that Thomas M. Manly was insolvent on October 16, 1868, when he executed the mortgage to his sister, or that she had reasonable cause to believe her brother was then in a state of insolvency or contemplated bankruptcy. The question, therefore, as to the validity of the chattel mortgage, and the title or claim of Ellen M. Manly to the property included in it, must depend on the general principles of law applicable to such mortgages and to the facts in connection with it. I regret that the pressure of other duties will not allow me to attempt, at length, to investigate this question and refer to and analyze the various authorities cited by counsel. I am relieved, in some measure, from the necessity of doing so by the consideration that the decision of the question, in this summary way upon the pending motion, will not be conclusive upon the parties or bar them from pursuing other proceedings to test the legal title to the property in controversy. I will state, therefore, very briefly, the conclusions which I have reached in the consideration of the question. And I may remark, in the first place, that from the facts before the court, there is no reason to doubt that at the date of the execution of the mortgage Thomas M. Manly was justly indebted to his sister, the mortgagee, in the sum named in the mortgage, and for which the note was given. The transaction may have been in good faith, as between the brother and the sister, but that consideration will not give validity to the mortgage if the after-conduct of the parties was such as that, upon principles of public policy and settled law, the rights of other creditors must be deemed paramount to the claim asserted under the mortgage.

There is no controversy as to the legal principle that any sale or conveyance of chattel property, with a provision expressed or clearly implied, that the vendee or mortgagee, as the case may be, is to continue in possession, with the right to sell or exercise other acts of ownership over it, is, prima facie, fraudulent and void, as against the creditors of the vendor or mortgagor. The doctrine in England and in this country was, until a comparatively late period, that such a sale or transfer was per se fraudulent and void. But it has been modified by the decision of the courts, so that now it is presumptive only of fraud, and such presumption may be rebutted and overcome by explanatory proof that there was neither actual nor constructive fraud in the transaction. But I am not aware that it ever has been held that where the sale or transfer has been made, without any change of possession or apparent change of ownership, and the vendor or mortgagor has held himself out to the world as the owner, and obtains credit as such owner, that any state of facts can be made out of sufficient force to repel the inference of fraud. And it seems to the court that a stronger case, warranting the legal

presumption of fraud, could not be more clearly made out than in the case of the mortgage in question. Manly was a retail dealer in books and stationery. On October 16, 1868, he executed the mortgage to his sister. It covered his entire stock in trade, including the furniture of his store. It was given to secure the payment of a note due one day after date. He was permitted to hold the possession of the mortgaged property and carry on business precisely as before the mortgage was given; and it is proved that he not only sold articles mortgaged, but that he made purchases of additional stock. This was done, with the knowledge and consent of Miss Manly, from October until the following month of February. And it was not till after the petition in bankruptcy was filed against her brother that she made any claim to the possession of the property. When claimed, without any inventory being made, and without any effort to identify the specific articles covered by the mortgage, the books were, in a very loose and hurried manner, taken from the store of her brother and transferred to another place in the city. It is true, in reference to the mortgage, that it contained no express provision that the mortgagor should continue in possession, with the right to dispose of the mortgaged property. But the understanding and intent of the parties are to be inferred from their acts. It is in evidence that the mortgagor was permitted to retain possession. It is so set forth in the affidavit of Miss Manly; and, by the clearest implication, there was a power in the mortgagor to sell or dispose of the property. The mortgagor so understood it, and continued to make sales until the store was closed in February, 1869. As a necessary result, it was impossible that the identical property mortgaged could be restored to the mortgagee. As there was no provision in the mortgage that articles sold might be replaced by others of the same description, the identification of the mortgaged articles was an impossibility. It could not operate, therefore, as a lien on the specific property mortgaged; and, in the language of the supreme court of Ohio, in the case of Collins v. Myers, 16 Ohio, 547, could have no other effect than to "ward off creditors."

I have looked into the cases, especially the Ohio cases, which have been cited by the counsel on both sides. As I understand these cases, there is not one that sustains the principle that a chattel mortgage, with the right in the mortgagor to retain possession of the mortgaged property, and to sell or dispose of the same, is not fraudulent as to creditors. It is strenuously insisted, that under the law of Ohio requiring chattel mortgages to be filed in the office of the county recorder, when so filed there is notice to the world of the lien created on the mortgaged property, and every one deals with the mortgagor at his peril. I do not propose to make any comment upon this statute or analyze its provisions. It is most obvious that the construction insisted on by the counsel would most seriously embarrass commercial operations. If a dealer, knowing that another is carrying on his business in his own name, with every outward indication that he is the owner of the property of which he is in possession, and apparently prospering in business, is obliged to search the files of the recorder's office to ascertain if there is a mortgage on the property thus held out to the world as his own, it would be a serious drawback to all trading operations. In regard especially to dealers in distant cities or places, of whom credit was asked by an Ohio merchant, it would be exceedingly embarrassing if, before he could respond to the request for credit, he were obliged to search the files of chattel mortgages to ascertain whether he could safely give credit to the party requiring it. I can not suppose such was the intention of the law, and do not feel called on to give it a construction leading to such results. In deciding that Miss Manly has no title to the property in question, under her chattel mortgage, paramount to that of other creditors of Thomas M. Manly, I think I am fully sustained by the following authorities: Collins v. Myers, 16 Ohio, 547; Freeman v. Rawson, 5 Ohio St. 1; Harman v. Abbey, 7 Ohio St. 219.

The counsel for Miss Manly has eloquently referred to the great hardship which she will suffer if her claim to the property in question is set aside. The answer is, if she is a sufferer it is her own fault. She had a perfect right, under her mortgage, to take full possession of the mortgaged property when her brother's note, payable one day after date, became due. The note not being paid then, the forfeiture under the mortgage could have been enforced, and her debt secured. If, from a desire to aid him, or a misplaced confidence in the pecuniary ability of her brother, she permitted him to retain possession of the property, and carry on business as before, whereby honest dealers were induced to give him credit, she has no just grounds for complaint. She stands upon the same ground as other creditors of Manly, and must be content to share a pro rata dividend with them of the proceeds of his property.

Motion is therefore denied.

Case No. 9,032.

Ex parte MANN.

[3 App. Com'r Pat. 367.]

Circuit Court, District of Columbia. 1860.

PATENTS—HOOP-SKIRTS—PROCESS—MACHINE—USED FOR OTHER PURPOSES.

[A new and useful process for the making of hoop-skirts is patentable, although effected by the use of a "former" previously known and used for other purposes.]

Appeal from the commissioner of patents.

[Application by Robert J. Mann for letters patent for an improved method of making

hoop-skirts. A patent was refused by the commissioner. Applicant appeals.]

MORSELL, Circuit Judge. He states his claim thus: "What I claim as my invention, and desire to secure by letters patent is the method of forming hoop-skirts by applying the hoops and tapes, or their equivalents, to each other, while they are supported in the relative positions which they are to occupy in the finished skirt, substantially as set forth in my specification." He says: "The object of my invention is to avoid the marking (which had been before necessary, as particularly stated) and at the same time to afford a convenient means for supporting the hoops at the time the connection between the hoops and tapes is being effected, and it consists in applying the tapes to the hoops, while the number of each series is supported in the relative positions which they are to occupy with respect to the other members of both series in the finished skirt." He then describes the form particularly, and afterwards further says: "By the method of forming skirts above described, the labor of marking the tapes and hoops is dispensed with, and the frame supports the hoops and tapes in convenient position for the connection of the two. By it moreover a symmetrical form in the skirt, and the uniformity of the size and shape of a multitude of skirts made by different operatives, is ensured. It is of course necessary to provide a former for each shape of skirt, but the same former will answer for skirts of the same shape with different numbers of hoops."

The decision of the commissioner is dated the 31st of December, 1859, and adopts the report of a majority of the board of directors dated the 28th of December, 1859, the substance of which is, after reciting the examiner's opinion, that, "as formers for a great variety of purposes have long been in common use, it is not patentable to adapt a former to the especial purpose of making hooped skirts and to exemplify," etc. The commissioner says: "In other words, the examiner assumes, as we understand him, that there is no invention, in the sense in which the patent laws use the word, in such an adaptation, although it might result in very greatly cheapening the manufacture of the article, the result alone being insufficient, under our statute, to authorize the grant of a patent in the absence of any novelty in the means to produce it."

Against this reasoning the counsel for applicant urges, etc, and cites adjudications for his position. The commissioner, in his notice of these authorities, says: "These English adjudications, to the extent, probably, of deciding that the result alone, where the effects produced are shown to be more economical, useful, and beneficial to the public, in the manufacture of a better article, are of themselves conclusive tests of the invention and novelty. On the other hand, the preponderance of American authorities is to the effect that the result alone will not be sufficient for that purpose, but that it must also appear that the result was produced by some new process, device, mode, or by some new machinery, and that a patent can in no case be granted for an effect only. But," says the commissioner, "we need not go into an extended or detailed examination of the authorities, either English or American, which counsel has cited, with a view of determining whether his legal proposition be correctly taken or not, because, if, upon enquiry, in point of fact, applicant claims the 'former,' his application is concluded by a prior report of ours in a case presenting substantially the same invention he presents."

Is the "former" the thing claimed? The proposition that it is not amounts, when subjected to analysis, to the assertion that, because all formers are embraced by the claim, when used under certain conditions of formation, therefore no former is claimed. The idea involves a metaphysical distinction quite too refined and subtle, as we think, to bear the test of a rigid examination. To our minds, insomuch as the method which is claimed necessarily involves the use of a former to carry it into execution, the claim practically goes to the former itself, whenever it assumes the specific conditions of formation or construction presented, and is made susceptible of use in the manufacture of skeleton skirts. Any other interpretation involves the glaring absurdity of an interdiction of the use by the public of something which is not claimed. In the event of a patent going out, we shall therefore give this interpretation to it, and regard it as really being a claim to the use of formers for the specified purpose of making hoop-skirts. And inasmuch as the case, to which we have alluded as having been acted upon heretofore by us, presented, we may say, the identical invention, and the claim in that case being substantially the same also as that presented by applicant, construed as we construe it, to this report is appended the decision and reasons of the board in the case of Datus E. Rugg, which the board thinks shows the claim in this case to be inadmissible.

This decision is dated October 13, 1859, rejecting the claim for want of patentability. The description given of the claim by the board has some resemblance to that of the appellants as to the former, and the references appear to be of the same character with those in the present report. But there are depositions filed in this case and laid before the commissioner to show that the claim of appellants was for an invention of a prior date. A learned dissenting opinion, written by one of the board of appeal, with references to a number of pertinent decisions, is also appended.

The appellant filed three reasons of appeal: 1st. Because the applicant's invention is an improvement on an art, viz.: a new method

of making ladies' hoop-skirts, and the commissioner in said decision has not distinguished between an improvement in an art and an improvement in a machine used in practicing an art. 2nd. Because it has not been shown by the commissioner that the same invention or discovery had been invented or discovered by any other person in this country prior to the alleged discovery thereof by the applicant, or that it had been patented or described in any printed publication in this or any foreign country, or had been in public use or on sale with the applicant's consent or allowance two years prior to the application for a patent. 3rd. Because the statute of 1836 [5 Stat. 117] authorizes the grant of a patent for any new and useful improvement in any art, and it is not denied that the invention of the applicant is a new and useful improvement in the art of making ladies' hoop-skirts, as distinguished from other useful arts.

In this state of the case all the original papers, documents, and references, with the opinion and report of the commissioner and reasons of appeal, were laid before me, according to previous notice, duly given, of the time and place of hearing this appeal, when the appellant appeared by his counsel and filed a written argument and submitted the case. Before entering upon the investigation of the merits of the questions presented it will be necessary to ascertain what really is the invention claimed. The substance of it, as contended for by the appellant, is: "A new and useful improvement in the art of making ladies' hoop-skirts." The commissioner says it is practically for "the former," and that it is identical with the claim of Datus E. Rugg, which is for a patent for a block or frame on which to construct skeleton skirts, decided on by the office October 13, 1859. In other words, as above stated, that the present is a claim for an improvement of "the former," in as much as the method as claimed necessarily involves the use of a former to carry it into execution. The appellant denies claiming an invention for a former.

To understand, then, what the claim precisely is, and its object and purpose, the specification must be resorted to, the whole of which may be taken together. In the petition part, appellant states: "That he has invented a new and useful method of manufacturing ladies' hoop-skirts which he verily believes has not been known or used prior to the invention thereof by him. He therefore prays that letters patent may be granted to him therefor, vesting in him and his legal representatives the exclusive right to the same," etc. It is true that in the summary, as before recited, and in the part to which he refers, the new method or process consists in producing the skirt by a series of operations effected by the aid of a frame called a former, having a special adaptation to the purpose in view; but he claims it and its equivalents merely as incidental to the attainment of the object and purpose of his invention,—that of saving much labor and expense, and the result a much cheaper article to the public than that produced before by the old method.

To the aforegoing effect is the rule laid down in Burt. Pat. § 229, that, "whenever the real subject covered by the patent is the application of a principle in arts or manufactures, * * * the question on infringement will be as to the substantial identity of the principle, and of the application of the principle; and consequently the means, machinery, forms, or modifications of matter made use of will be material only so far as they affect the identity of the application." The case shows that all the prerequisites of the statute have been complied with, and it is in proof that by the new method pursued in this case, the separate measuring of the hoops and tapes necessary in practicing the old method is dispensed with, and a great saving of hard labor is the useful result of the applicant's method, the hand labor in the two methods being in the proportion of 36 to 3 on plain skirts and 36 to 2 on trail skirts. On comparison, it appears that the two are substantially different in the mechanical operations involved in each, and in the means used for performing those mechanical operations. The statement of Mr. Examiner Toll, who was the examiner in the first instance in this case, proves that the appellant was the first who devised this method of proceeding, or practical application of the principle, as described by the appellant. He also says, "that it is not known that a frame such as is described in the appellant's specification, and called a 'former,' fitted with proper appliances for determining the relative positions of the hoops and tapes of a skirt was made before the date of the invention of the appellant for any purpose whatever," and it is conceded that a skirt was never made so before. Thus it seems to me to be a strong case upon the facts as presented. How is it as to the application of the law upon the subject?

The report of a majority of the board states that the examiner refused to allow this claim on the ground that, inasmuch as formers for a great variety of purposes have long been in common use, it is not patentable to adapt a former to the especial purpose of making hoop-skirts, etc. This certainly was laying down the principle of patent laws much broader than has been done by any decision I have ever seen, and for that reason, perhaps, the board, in the following part of the report, modifies it thus: "In other words, the examiner assumes, as we understand him, that there is no invention, in the sense in which the patent laws use the word, in such an adaptation, although it results in very greatly cheapening the manufacture of the article; the result alone not being sufficient, under our statute, to authorize the grant of a patent, in the absence of any novelty in the means to produce it." But even with this

modification if intended to be applied to this case, I cannot agree. The learned research and judicious application of the true principles of the law on this subject by the dissenting member of the board are so full and clear, to show the incorrect view of the majority, that scarcely anything is left for me to say.

With a view, however, to show that the American decisions are in strict accordance with the English, I will state a little more fully the case of Boulton v. Bull, 2 H. Bl. 463–500. Among other things it is stated by Tindal, C. J., on delivering the judgment of the court, after stating the facts, thus: "We are of the opinion that, if the result produced by such a combination is either a new article, or a cheaper article to the public, than that produced before by the old method, such combination or manufacture was intended by the statute, and may well become the subject of a patent." He then cites the opinion of Abbat, C. J., that a patent may be had for a new process, to be carried on by known implements or elements, acting upon known substances, ultimately producing some other known substances, or producing it in a cheaper or more expeditious manner, or more useful kind. And the decision of Lord Eldon that there may be a valid patent for a useful combination of materials previously in use for the same purpose, or even for a useful method of applying such materials and continues: "There are numerous instances of patents which have been granted where the invention consisted of no more than in the use of things already known, and acting with them in a manner already known, and producing effects already known, but producing those effects so as to be more economical or beneficially enjoyed by the public."

American authorities: Kneass v. Schuylkill Bank [Case No. 7,875], Judge Washington: "Is this a discovery of an art, machine, &c., or of an improvement in any art, machine, &c.? If it be either, it is the subject of a patent by the express words of the act of congress." Gray v. James [Id. 5,718], by the same judge: "The patent is supposed to be for the machine, which is composed of parts that long have been public property. This is not the fact. The patent is for an improvement in the art of making nails by means of a machine which cuts and heads nails at one operation. It is therefore not the grant of an abstract principle, nor is it the grant of the different parts of any machine, but of an improvement applied to a practical use effected by a combination of various mechanical powers to produce a new result." So in the case Kneass v. Schuylkill Bank [supra]: The art of printing with both letter-press and copper-plate was not the invention of the plaintiff. He made use of old materials and processes in a new manner for the purpose of producing a new effect, namely a new security against counterfeiting. His patent, therefore, was for the new application of the process of printing by copper plate and letter press, by printing on both sides of the note, &c., held to be an art within the terms of the statute.

And such, so far as I can ascertain, have been the rulings in all the federal courts in which the subject has been brought before the court. I shall only particularly mention one other case, Le Roy v. Tatham decided in Judge Nelson's circuit court and brought up by appeal, and to be found in [Le Roy v. Tatham] 14 How. [55 U. S.] 156. The court charged the jury that "the result is a new manufacture, and even if the mere combination of machinery, in the abstract, is not new, still, if used and applied in the connection of a practical development of a principle newly discovered, producing a new and useful result, the subject is patentable." In his further charge to the jury, he says that "it was not material whether the mere combinations of machinery referred to were similar to the combination used by the Hansons, because the originality was not considered in the novelty of the machinery, but in bringing a newly-discovered principle into practical application, by which a useful article of manufacture is produced, and wrought pipe made as distinguished from cast pipe."

It is true the supreme court reversed this case, but it was upon the ground that the specification was not sufficiently precise. The court says: "It would seem that where a patent is obtained without a claim to the invention of the machinery through which a valuable result is produced, a precise specification is required, and the test of infringement is whether the defendants have used substantially the same process to produce the same result." And, further, the supreme court says: "The other rulings of the court (circuit court) are substantially correct." Now the decision of the circuit court was principally based upon the English authority reported in H. Blackstone (Boulton v. Bull, 2 H. Bl. 13, 31, 463, 496, 493, 495, and 213, & Ald 340, 350; Webst. Pat. Cas. 147, 342, 377, 310, 683, 684, 698, 717). I think therefore, that it must appear clearly to any one who will give himself the trouble carefully to examine, that there is the strictest harmony between the American and English authorities on this subject. That although the appellant disclaims the apparatus as a part of his invention, he has a right to claim the use of it as incidental and subsidiary to the practical purpose of the new and leading idea constituting the invention. What is claimed is that it never had been before applied or used in the way and for the purpose he has used it and applied it, namely, as a very great labor-saving, expeditious, less expensive, and much cheaper method of producing the article. It would, therefore, be immaterial, even if it were proved that the apparatus were old. It is not claimed as a merely abstract principle or result, but as being clothed as pointed out in a concrete

device. This distinction, not properly understood, seems to be the ground of confusion indicated in the reasons stated in the decision.

I have carefully considered the case, and am satisfied that there is error in the commissioner's decision, and therefore do hereby reverse and annul the same, and do hereby direct that a patent be issued as prayed.

Case No. 9,033.

In re MANN.

[13 Blatchf. 401;[1] 14 N. B. R. 572.]

Circuit Court, N. D. New York. June 7, 1876.

BANKRUPTCY — REQUISITE NUMBER OF CREDITORS —PETITION—BELIEF —OATH.

1. In a petition in involuntary bankruptcy, under section 39 of the act of March 2d, 1867 (14 Stat. 536), as amended by section 12 of the act of June 22d, 1874 (18 Stat. 180), it is sufficient to state upon belief, without averring either knowledge or information, that the petitioning creditors constitute the required number, and that their debts constitute the required amount.

[Cited in Re Roberts, 71 Me. 392.]

2. Where the petition is in such form, the oath to it is not insufficient, if it is the form of oath prescribed in form No. 54 of the forms in bankruptcy, although such form of oath purports to cover only matters which are stated on knowledge and matters which are stated on information and belief.

[In review of the action of the district court for the Northern district of New York.]

[In the matter of Henry A. Mann, an alleged bankrupt.]

E. F. Bullard, for petitioners.

JOHNSON, Circuit Judge. The petition of review brings up for consideration the decision of the district judge upon a demurrer to a petition in involuntary bankruptcy. The alleged defect in the petition consists in this, that the creditor's petition states upon belief, without alleging either knowledge or information, that she constitutes one-fourth in number of the creditors of the alleged bankrupt whose demands exceed $250 and are provable; and that her demand constitutes one-third of the provable debts, under the act.

The 32d of the general orders in bankruptcy, adopted by the supreme court, April 12th, 1875, ordains, that the several forms specified in the schedules annexed to the former general orders, for the several purposes therein stated, shall be observed and used, with such alterations as may be necessary to suit the circumstances of any particular case. Among the forms thus sanctioned was that of a creditor's petition, No. 54, in which is contained the allegation of the petitioning creditor, that he "believes" that said debtor "owes debts to an amount exceeding the sum of three hundred dollars." Now, that circumstance is as essential as any other to make out a case for involuntary bankruptcy under the statute. It is sufficiently averred, as matter of pleading, by the averment that the petitioner so believes. If we look to the reason of it, belief upon such a subject is all that, in the nature of things, a stranger can have. Information is important only as leading to belief, unless the sources of information, and the details obtained, are to be set forth, and the court is to judge as to the greater or less probability of truth of the information obtained. But, as pleading, this is quite irrelevant. In pleading, the party is to make his allegations, upon subjects that lie within his personal knowledge, positively, but, upon other points, belief, equally with information and belief, suffices to present an issue. The facts stated on belief in this case, which have been before adverted to, relating to the question whether a sufficient proportion, in number and amount, of creditors have united in the petition, are of the same general character as that fact which the supreme court has directed to be stated on belief. It is, at least, as easy for a petitioning creditor to know, or to be informed, that the debtor owes more than $300, as it is that he should know, or be informed, that one-fourth in number and one-third in amount of creditors have united in the petition; and the same reason which makes the former sufficient ought to cover the latter.

The special provision of the statute, enabling the debtor to controvert this particular allegation, and the court in that case to require of him a complete list of his creditors, and the further provision, that, in case a sufficient number and amount of creditors have not joined, a reasonable time shall be granted for other creditors to unite in the petition, seem to me to show that no substantial purpose would be served in holding that an averment on belief is not sufficient.

There is no novelty in holding, that, as matter of pleading, an allegation upon belief is sufficient. Such was the established rule in respect to sworn pleadings in the court of chancery in New York, where the matters stated, charged, averred, admitted or denied, were required to be stated positively, or upon information or belief only, according to the fact (N. Y. Ch. Rules, No. 18, Ed. 1839); and either mode of statement was sufficient as a pleading.

In re Joliet Iron & Steel Co. [Case No. 7,436]; In re Scammon [Id. 12,430]; In re Scull [Id. 12,568]; and In re Keeler [Id. 7,638],—are not inconsistent with the views before expressed. None of them go further than to hold that an allegation on information and belief is sufficient, but none of them declares an allegation on belief alone to be insufficient.

In respect to the form of the verification, if that question arises on demurrer (In re

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

Simmons [Id. 12,864]), it is that prescribed by the supreme court in the form before referred to; and any criticism in respect to the facts stated on belief alone in this case, as not covered by the form of the verification, would be alike applicable to the form sanctioned by the general orders in bankruptcy.

I am, therefore, of opinion, that the learned district judge ought not to have allowed the demurrer; that his order thereupon ought to be reversed; that the allegations of the petition in that behalf should be deemed sufficient; and that the proceedings should be remitted to the district court, to be proceeded in according to law.

Case No. 9,034.

MANN v. BAYLISS.

[10 O. G. 789, 113;[1] Merw. Pat. Inv. 356; 9 Chi. Leg. News, 18.]

Circuit Court, N. D. Ohio. April Term, 1876.

PATENT—CLAIM—STATE OF ART—INVENTION—DISCLAIMER.

1. The claims in a patent should be liberally construed, but must be limited by the state of the art, showing the degree of improvement effected.

2. Combining a curved metal receiver with an elevated, instead of a horizontal, delivery involves no invention, and is not patentable.

3. A disclaimer made by an attorney in the prosecution of an application does not necessarily estop the patentee from maintaining that his claim embraces the matter so referred to.

In this cause, complainant's bill recites that he is owner of letters patent of the United States, dated February 28, 1871, being a reissue and extension of letters patent No. 15,044, dated June 3, 1856, said reissued letters patent being numbered 4,281, for an improvement in harvesters, complainant having been one of the original patentees, and having acquired the interest of his co-patentee, Jacob J. Mann, by an assignment from said Jacob's administrator. The improvement consists, in brief terms, in having an elevated side delivery of the cut grain in the straw, by means of an endless apron, whereby the grain is discharged into a stationary receiver, of concave form, from whence, by means of a revolving rake, the teeth of which describe a circle nearly coincident with the circle of which the concave receiver forms a segment, the grain is gathered into gavels of suitable size for binding into sheaves or bundles, and discharged upon the ground. The bill prays answer, account of profits and damages, and injunction in the usual form. The answer denies originality and novelty of the invention, as also infringement, in that whereas by complainant's device the grain is discharged into a receiver which is "concave" in form, the machines constructed by defendant discharge their grain by a slightly-inclined chute from the elevating-apron onto a receiver which is "flat and horizontal," from which it is taken by the binder without the use of the revolving rake.

On the hearing, the question turned mainly upon the fourth claim of complainant's patent, which is in these words: The stationary concave receiver I, having a continuous surface, arranged as described at the side of a harvesting machine, having an elevated side delivery so as to receive the cut grain from the elevating and delivery apparatus, and collect the same into gavels preparatory to their being discharged from the machine.

Geo. H. Christy and Wm. Bakewell, for complainant.

S. A. Goodwin, for defendant.

Before EMMONS, Circuit Judge.

The following are the conclusions arrived at by the court in this case. The notes of the short-hand reporter were so imperfect as to render anything like a literal reproduction of the judgment impossible. This outline is sanctioned by the court as correct.

Judge EMMONS, at the close of the argument in the afternoon, announced at some length what he termed the strong inclination of his mind, but said as there was an hour or two before adjournment, and no other business would be taken up, he invited the learned counsel for the complainant to discuss the case further in reference to the objections which the court had presented to the injunction asked for. Counsel occupied the time in replying to the suggestions of the judge.

The following morning the court announced judgment substantially as follows:

His honor said that after the very full conversational interchange of opinion during the argument, it was mere matter of form to add anything now. Nothing new would be communicated. A strong sympathy was expressed with those canons of construction which so interpret a claim as to protect what a meritorious invention had created. He was just as much entitled to his right of property as a farmer to his wheat, or the fat which he put upon his animals. If the invention be trivial, and no important change be wrought in the department of labor into which the device was introduced, a less liberal construction of claims should be indulged in, and a less liberal application of the doctrine of mechanical equivalents should be extended.

The fourth claim is alone in controversy here, and its interpretation the only question necessarily to be decided. The answer insists that when properly interpreted the defendant does not infringe, and that if construed so as to include defendant's device, it is antedated by similar receivers before existing. We hold the fourth claim to include the conditions in which this curved metallic receiver could alone be used in the originally patented device. To construe it otherwise, and make it include, as plaintiff's counsel contend, every kind of barrier between the

[1] [10 O. G. 113 gives only a partial report.]

apparatus of an elevated delivery and the binding-table upon a harvesting-machine, save a perpendicular one, would, upon principles too familiar to be argued at length, render it void. Substantially, it would include all modes, which, in the patent law, is impossible. No man of ordinary intelligence, desiring to annex a table to a harvester, would fail to insert some obstruction between the one and the other, to prevent the grain being carried by the wind into the moving machinery. It would be an equal lack of intelligence to make it perpendicular; and this prior patent of Mann's was by no means necessary to instruct him to make it oblique, and carry it so far forward upon the table as to bring the fallen grain within the reach of the binders. The defendants, in annexing their new and useful binding-table to an old and familiar device, have adopted the only possible mode of conducting the grain from one to the other. Learned counsel were repeatedly asked to conceive of any other. They were unable to state any. To construe this fourth claim so as to include what defendant has actually done, would impute to the patent law the folly of granting to one citizen the right to divorce, during fourteen years, this useful addition from the machine it was intended to improve, and where their union required no device or contrivance which an ordinary citizen, without any mechanical knowledge whatever, would not readily adopt. This consequence is demonstrative that the patent office could not have intended it. It patented the receiver with the rake and accompanying conditions. We read this fourth claim so as to include them. Thus construed, the defendant's device is conceded not to infringe it. We place some confidence in the fact that as often as learned counsel for the complainant were asked to state the leading features of this device and what distinguished it from what preceded it, they invariably pointed to the accompanying conditions which the court include in this fourth claim, and none of which are employed by this defendant. If this claim is to include only a piece of curved metal fastened to the side of the harvester so as to receive the fallen grain, then his honor thought it was antedated by several other devices given in evidence. It was answered, he said, that none of them had been found in combination with an elevated delivery. He thought, however, it would not be a good combination claim to take such a device from a horizontal delivery and combine it with an elevated one. He could not impute to the officers an intention of granting a patent for such a combination. There was no invention in taking it from one and placing it upon the other. It was the other features of the combination which secured the grant, and which incidentally could be used only with an elevated delivery. Take away these features and there was nothing like a patentable combination growing out of the union of an elevated delivery with the piece of curved metal.

The position that defendants infringed, even though the claim was construed to include a receiver with an outer edge so as to collect the grain into gavels that it may be discharged by revolving a rake, was considered at some length. Answering the arguments of complainant's counsel, among other things, Judge EMMONS said the broad level surface of the table was no mechanical equivalent for the narrow basin and turned-up outside edge of the receiver. The one collected the grain into gavels, the other did not. The one was intended to perform the particular function of arranging the grain so as to permit the action of a rake to sweep the straw in suitable parcels to the ground. The other required no such function, and could by no possibility perform it. The position was pronounced wholly untenable that the bodies of the men in the man-holes, and their arms and fingers, when in action, were the mechanical equivalents of the outer edge of the receiver and the action of the rake.

His honor said, while he did not assent to the argument of the learned counsel for the defendant that the complainant was estopped by the declaration of his pleader in the patent office, that this curvilinear receiver was old, and that, therefore, he did not claim it, still in cases of this character such a deliberate assertion was not without its influence. He felt some relief, in denying this injunction, that he was not compelled to go outside of complainant's own record for a plain declaration that he was right in the construction of this claim. He should be unwilling to have it thought the concession found in these papers constituted a very influential element in the reasons which induced his judgment. But when the whole history of this case was looked at, and it is remembered that this is a reissue seeking to claim something thought of originally only to be disclaimed, this matter may be well mentioned as a provocation to pretty close scrutiny of the extraordinary claim now insisted upon—one which declares to every citizen that he shall not insert between a novel device and an old one, to neither of which complainant has any right, a thing so simple, so utterly destitute of everything like invention, as the oblique board or common "chute" down which the grain falls upon the binding table, in the case before us.

Judge EMMONS said, in conclusion, that although he could give no reason for any doubt in this case, and the decision seemed to him plainly right, yet compelled as he was to dispose of them upon the moment, having no more time elsewhere than here to examine them, it would do the court great injustice not to suppose it recognized fully the great liability to error in such conditions. He had in this instance given, as in all similar instances he gave, to counsel the opportunity of meeting and overcoming the objections of

the court. It was a satisfaction to him to know that the complainant in this instance had been represented by counsel as experienced, learned, and able as they had been zealous, and, as he might say, enthusiastic in argument. The usual decree dismissing the bill will be entered.

MANN (FLAGG v.). See Cases Nos. 4,847 and 4,848.

MANN (HAWES v.). See Case No. 6,239.

MANN (McCARTY v.). See Case No. 8,685.

Case No. 9,035.

MANN v. SACKS.

[Bee, 202.] [1]

District Court, D. South Carolina. April 21, 1804.

DAMAGES—TORTS—NEUTRAL VESSEL — FALSE PAPERS.

False papers divest a neutral vessel of all right to redress, under treaties, or the law of nations.

This is a suit for damages. The defendant on the 25th of December last, captured on the high seas, and carried into the island of Cuba, the schooner Ann, with a cargo of slaves. [Henry Maurice] Sacks at that time commanded a French national brig called La Sophie, and was duly commissioned to cruize. When he boarded and took possession of the Ann, she was under the command of one Ogden, who called himself a Danish subject, and was reputed owner, to cover the property which, in fact belonged to [Spencer] Mann and Foltz of this town. The vessel was sailing under a Danish flag; her register, and all the papers on board were Danish; and when Sacks boarded, Ogden asked him if the French were at war with the Danes.

BY THE COURT. It was contended for the actors, that this court, as an instance court, may take cognizance of all maritime causes, and cases have been cited to this effect. In all suits hitherto sustained by me, one or other of the following circumstances existed: 1st. The illegal equipment in our ports of the capturing vessel, contrary to act of congress of 5th June, 1794. 2d. Disregard of sea-letters produced, as required by the treaty with France; as in Delcol and Arnold. 3d. Capture within a marine league of this coast.

It is true that the question of prize or no prize has sometimes been implicated with matters that concerned the sovereignty of the United States, or a violation of her treaties.

According to our present treaty with France, certain papers therein specified shall suffice to fix the national character of the vessels of both powers. If such are produced without due effect, and if the captured vessel be brought infrà praesidia of her own courts, those courts will, without hesitation, interfere. But if American citizens will, for the sake of gain, divest themselves of their neutral character, and send their vessels to sea under foreign or masked papers, they do so at their peril. They forfeit all right to the protection of this court and of the treaties intended for the benefit of those who bring themselves fairly within their provisions. It appears clearly from a variety of evidence, including two policies of insurance, that this vessel had no claim to be considered as American. If the French vessel of war had brought her into this port, the treaty would have justified her in carrying her out again, as a Danish bottom; nor can the captain be now made answerable personally. He has pleaded to the jurisdiction of the court: he has a right to do so; and the libel must be dismissed with costs.

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

MANN (UNITED STATES v.). See Cases Nos. 15,716, 15,717, and 15,718.

Case No. 9,036.

MANN et al. v. WILKINSON et al.

[2 Sumn. 273.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1835.

PRACTICE IN EQUITY—AFTER DECREE—RETAINED FOR FUTURE PROCEEDINGS—MILL DAM.

1. A bill of equity, after a decree, in certain cases may be retained for further future proceedings; but, in the case of an alleged violation of a water privilege, it will not be retained, in order to give the plaintiffs an opportunity, by new trials and proofs, to establish the fact, that a further lowering of the dam of the mill of the defendants is necessary to the protection of their rights.

[Cited in Ronayne v. Loranger, 66 Mich. 375, 33 N. W. 841.]

2. Quaere: Whether, under the mill act of Rhode Island, a mill-owner may raise his dam, so as to affect any water privilege or dam already on the stream, and above his own mill.

This was a bill in equity [by Samuel F. Mann and others] for an abatement of a nuisance to the cotton mills of the plaintiff, situate on the Blackstone river, by the defendants [George Wilkinson and others], by raising the dam of a mill, called the "Albion Mill," lower down on the stream, and thereby flowing back the water upon the plaintiff's mill-wheel. At a former hearing the court made an interlocutory decree, by which the cause was referred to a master. The master made his report at the last June term of the court; to which exceptions were taken

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

by both parties. The cause was afterwards argued upon the exceptions.

R. W. Greene and D. Webster, for plaintiffs.
Pratt & Whipple, for defendants.

STORY, Circuit Justice. On full consideration of all the exceptions taken by the parties, we are of opinion, that they ought all to be overruled, and the report of the master ought to be confirmed. We do not propose to give an elaborate opinion upon all the matters of the exceptions, as they would not be very intelligible without going at large into all the various topics asserted in the arguments at the bar, which would occupy too much time. It is sufficient to say, that we have most deliberately weighed them all; and are satisfied, that no one of them, with reference to the pleadings, and the actual posture of the case, is maintainable.

There are two points, however, upon which a few words may be proper to be said, in order to explain the final decree of the court. We think, that the proof stated by the master conclusively establishes the fact, that the dam of the Albion mill ought to be lowered two feet, in order to restore the plaintiffs to their rights as riparian and mill proprietors. The plaintiffs have asked, that the bill might be retained; so that the dam might be still further lowered, if upon future trials and proofs they can establish the fact, that there is a necessity of so doing, to protect and sustain their existing rights. But if the bill should be so retained, there must be a reciprocity on the other side. And the defendants ought to be let in to establish, by future trials and proofs, that the dam has been directed to be lowered beyond what the plaintiffs' rights required. What would this be, but to try the whole cause de novo on both sides, upon new proofs after publication? Such a course is, in our judgment, incompatible with the known course of practice and principles of courts of equity; and would open a door to interminable litigation. The very object of courts of equity, to put an end to controversies, would be defeated. We entertain no doubt, that in suitable cases, bills of equity may be retained after a decree for further future proceedings. But the present is not one of that sort.

One argument of the defendants is founded upon the existence of the old Eel dam, as an obstruction to the plaintiffs' rights; and it is said, that the defendants are entitled to the benefit of such obstruction, to its full extent, in flowing back the water upon the plaintiffs' mills; that is to say, to the extent of six inches, as it is intermediate in the stream between the Albion mill dam and the plaintiffs' mills. The effect of this would be to require the Albion dam to be lowered only eighteen inches instead of two feet. The court are of opinion, that the state of the pleadings does not raise the question, whether that Eel dam is to be treated as pro tanto a permanent obstruction of the plaintiffs' rights, as mill proprietors, or as a mere obstruction at the sufferance of the plaintiffs and the other riparian proprietors. The defendants have not asserted, that they have acquired any title to the Eel dam by any conveyance or transfer of the proprietors thereof. Nor have they averred, that they have acquired any right to the same by operation of law, by a flowage of the same under the mill act of Rhode Island. And the decree of the court ought to be founded upon the allegata, as well as the probata. These points, not being put in issue, are of course not properly matters in proof. If it had been averred in the pleadings, and established in proof, that the plaintiffs set up such a right to the Eel dam by flowage, under the mill act of Rhode Island, then a very important question might have arisen, whether, under that act, it was competent for any mill owner to raise his dam so as to flow back upon and affect any water privilege, or dam, already in existence across the stream above his mill; or whether the right of flowage is confined to cases, where no dam is erected, or in the course of erection, and the only flowage is to mere land. Upon this question we give no opinion; because the pleadings do not raise it; and as the defendants set up no title to the Eel dam, they cannot protect themselves under it, as an obstruction, in aid of the rights of the Albion mill proprietors.

Another point arises: The master's statement in the close of his report is, that flash-boards might, at certain seasons of the year, be erected on the Albion dam, sixteen inches and one half inch, without injury to the plaintiffs' rights. We are of opinion, that this is not a matter before us upon the present bill; and we shall, in framing the final decree, reserve to the parties all their rights respectively upon this point. If the master's report were confirmed in this particular, it might give rise to the suggestion, that the court had conferred a right on the defendants to raise such flash-boards in such seasons. If, on the contrary, the court disaffirmed this part of the master's report, it might be conclusive against the defendants. The decree will be so framed as to escape both of these inconveniences; and will leave the parties to the assertion of their rights respectively, in regard to flash-boards, hereafter, as they may be advised.

These are all the explanations, which the court deem it necessary to make upon the present occasion. The master's report is to stand confirmed, and the decree of an abatement of the Albion dam two feet, and a perpetual injunction will be consequent thereon.

This cause came on again to be heard upon the master's report, and the exceptions taken thereto by the parties respectively, and was argued by counsel. On consideration whereof it is ordered, adjudged and decreed by THE COURT, that the exceptions of the said

parties respectively be, and the same are hereby overruled, and that the said report do stand in all matters confirmed except as hereinafter stated. And it not appearing by the answers of the defendants, that they assert any right or title to the Eel dam, in the said answers stated, under the owners thereof, by operation of law or otherwise, nor what the true nature and extent of the right and title of the said owners of said Eel dam was, and is;—it is, thereupon, further ordered, adjudged and decreed, that the said Albion dam in the said pleadings mentioned, ought to be reduced from its height at the time of the filing of the plaintiffs' bill, the space of twenty-four inches from the top thereof, as a nuisance to the privileges and mills of the plaintiffs in the same bill mentioned, and in violation of their rights thereto; and the said defendants are hereby ordered to abate and reduce the same Albion dam the said twenty-four inches accordingly, within forty days from the entering of this decree. And it is further ordered, adjudged and decreed, that the said defendants, their heirs and assigns be, and they hereby are, perpetually enjoined, after the same Albion dam is so abated and reduced as aforesaid, never thereafter to raise the same dam above the level, to which the same shall be so abated and reduced as aforesaid. And it is further ordered, adjudged and decreed, that a writ of injunction do issue forthwith against the defendants, commanding them to comply with all and singular the premises so enjoined upon them. And inasmuch as it appears from the master's report, that in low states of the river, when it is not obstructed by snow and ice, the defendants might, without injury to the plaintiffs, put flash-boards on their dam sixteen inches and one half wide, and the same keep up, until the water in the river flows over the top of them with their present mill gates drawn, and it is not the intent of the court, in any manner, to act upon this part of the said report, but to leave the parties respectively to their respective rights in regard thereof in the same manner, as if the same were not stated in the same report. It is further ordered and declared, that no part of this decree is to be construed in any manner to affirm or deny the right of the defendants to put up such flash-boards; but the parties are left to their respective rights in the premises, as if the same were not stated in the report. And it is further ordered and decreed, that the plaintiffs do recover their costs in the premises.

MANN (WOOD v.). See Cases Nos. 17,951, 17,952, 17,953, and 17,954.

Case No. 9,037.

MANNERING v. HOON.

[Nowhere reported; opinion not now accessible.]

Case No. 9,038.

In re MANNHEIM.

[6 Ben. 270; 7 West. Jur. 72; 7 N. B. R. 342; 5 Chi. Leg. News. 149; 5 Pac. Law Rep. 106; 4 Leg. Op. 529; 7 Alb. Law J. 13.] [1]

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

BANKRUPTCY—SUSPENSION OF COMMERCIAL PAPER—BONA FIDE DEFENCE.

M., who was a man of large property, refused to pay a note which he had made, being advised by counsel, and believing, that he had a valid defence against it. A suit was thereupon brought against him, in a state court, by the holder of the note; and, while that suit was pending, the holder of the note filed a petition against M. in involuntary bankruptcy, alleging that he had suspended payment of the note for fourteen days. *Held*, that the case was not a proper one for an adjudication of bankruptcy, and that the petition must be dismissed.

[In the matter of William Mannheim, an alleged bankrupt.]

S. D. Sewards, for petitioner.
J. D. Reymert, for debtor.

BLATCHFORD, District Judge. I do not think this is a proper case for an adjudication. The sole act of bankruptcy alleged is the suspension of payment, for fourteen days, of the promissory note held by the petitioner. It is shown that the alleged bankrupt is a man of large property; that he has not suspended payment of his debts and his commercial paper generally; that he is engaged in prosecuting a regular business wholly unconnected with the transactions in respect to which the note was given; that he failed to pay the note because he was advised by counsel, and believed, that he had a good defence to it, on the ground that he had never received any consideration for it, and that it was passed away by the payee in violation of the agreement under which it was given, and that the petitioner was not a bona fide holder of it for a valuable consideration without notice; and that a suit is now pending in the supreme court of New York against him, brought on the note, by the petitioner, before this proceeding was instituted, which suit is defended on the above grounds, and is at issue and ready for trial. Under these circumstances, the debtor cannot be said to have suspended payment of his commercial paper, within the meaning of the statute. It was not intended that such a person should be put into bankruptcy. It is not for this court to try the question of the actual liability of the debtor on the note, and adjudge that there was a suspension of payment of his commercial paper, if such liability existed. The proper forum for the determination of the question as to such lia-

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission. 7 Alb. Law J. 13, contains only a partial report.]

bility is the court in which the suit on the note is pending. The petition is dismissed, with costs.

Case No. 9,039.

MANNIE et al. v. EVERETT et al.[1]

Circuit Court, E. D. New York. July 15, 1879.

PATENTS—NOVELTY—SUBSTITUTION—PRELIMINARY INJUNCTION—ACQUIESCENCE—AGREEMENT—VALIDITY.

[1. A prior decree sustaining a patent if entered by default is not enough to warrant a preliminary injunction in a subsequent suit.]

[2. In a suit upon letters patent only recently issued very strong evidence of acquiescence on the part of the community is required to justify a preliminary injunction.]

[3. A mere mercantile agreement not to deal in certain patented machines therein named is not an estoppel to deny the validity of the patent.]

[4. In a suit for infringement the foundation of a preliminary injunction is that the patent should be to all present appearances valid.]

[5. The substitution of wood for paper in the construction of a box of peculiar pattern does not amount to novelty.]

[These were bills in equity by George A. Mannie and William H. Bogart against Sidney J. Everett and Archibald S. Van Orden for infringement of letters patent. Heard on motions for preliminary injunction.]

F. J. Mather, for complainants.

Foster, Wentworth & Foster (James P. Foster and Philo Chase, of counsel), for defendants.

BENEDICT, District Judge. These two cases come before the court upon motions for preliminary injunction. The motions have been argued together and will be disposed of together.

The first bill, filed January 3rd, 1879, sets forth letters patent issued May 8th, 1866, to James Shepard and Benjamin B. Lewis, for an improvement in the art of constructing boxes for fruit and other articles, a surrender and re-issue thereof on the 7th of December, 1877, to said Shepard, and an assignment thereof to the plaintiffs on the 25th day of February, 1878. This bill also sets forth letters patent issued on the 25th day of June, 1878, to the plaintiffs for an invention relating to boxes or receptacles made from thin splints or veneer of wood which have a grain, and then charges an infringement of both patents by the defendants.

There is also set forth a decree of this court in favor of the plaintiffs, against one Hugo G. Adam and Henry P. Hildreth, composing the firm of Adam & Hildreth, for an infringement of the same patents, and avers that but for the infringement by the defendants the plaintiffs would be in undisturbed possession, use and enjoyment of the exclusive privileges secured by the said letters patent.

The second bill was filed on the 14th day of March, 1879. It sets forth letters patent No. 55,709, issued on the 19th day of June, 1866, to one Charles Reese, for an improvement in the manufacture of fruit boxes, a surrender and re-issue thereof to said Reese on the 25th day of February, 1879, and an assignment thereof to the plaintiffs. Infringement by the defendants of this patent also is there charged. Both the bills pray a decree for an account and an injunction but neither of them pray for an injunction during the pendency of the suit.

Upon these two bills and various affidavits the plaintiffs now move for preliminary injunctions during the pendency of these suits.

In opposition to these motions the defendants have presented affidavits denying the validity of the patents sued on, on the ground of want of utility or invention, and they charge each of the re-issued patents set forth to be void because for a different invention from that described in the original, and aver that the plaintiffs' claim to the exclusive right as set forth in the bills has never been sustained by the adjudication of any court or acquiesced in by the public. In addition to these answers to the merits the defendants object to the granting of the plaintiffs' motion on the ground of want of regularity of the proceedings and the insufficiency of the moving papers, such as that the drawings, forming part of the patents sued on and without which the patents are unintelligible, are not exhibited in the moving papers; that certified copies of the patents sued on have not been produced upon the hearing; also, that the bills afford no ground for the motions because they contain no prayer for a preliminary injunction, as required by equity rule No. 21. Also that the language used in the bills in regard to infringement does not show an infringement of the re-issued letters patent set forth. Also that upon the papers, title in the complainants is not shown. Also that the plaintiffs have failed to show a cause of action because the boxes produced in support of the charge of infringement as having been sold by the defendants are not claimed to have been bought until after the filing of the bill, and the sale thereof by the defendants even at that time has been disproved.

In disposing of these motions I do not intend to rest my decision upon any of the irregularities that have been pointed out by the defendants, although it is manifest that some of these are of a character not to be disregarded when insisted on; I shall treat the motions as a single motion regularly made in a case presenting the three patents set forth in both bills, and as presenting

[1] [Not previously reported.]

satisfactory evidence of a prior sale by the defendants of the boxes that are claimed to be an infringement upon the rights supposed to be secured by the three patents which the plaintiffs say they own.

So considering these motions, I remark, first, no prior adjudication, within the sense of the rule applicable in cases of this description, has been shown. The decree of this court in the case of Adam & Hildreth [unreported], although shown to have been obtained in good faith without collusion, was entered by default, and proves nothing but a single case of individual acquiescence by the two persons there sued in the plaintiffs' claim under the Shepard and Lewis and the Mannie patent.

There has been no judicial determination of any of the questions that arise in these suits that can in any way affect the action of this court upon these motions.

In the next place, no considerable uninterrupted use by the patentees of the invention described, or a general acquiescence on the part of the trade in the claim to such inventions, has been shown. The re-issue of the Shepard and Lewis patent was made in December, 1877, the Mannie patent was first issued June 25, 1878, and the Reese patent was re-issued in February, 1879, subsequent to the filing of the first of the bills under consideration in January, 1879. At the filing of the bill the patents sued on had been in existence, one a few days longer than one year, one some seven months, and one less than one month. Under such circumstances it would require much stronger evidence than the plaintiffs have been able to produce to show an acquiescence on the part of the community that would warrant the inference that the plaintiffs' claim under the patents could not be successfully denied. Upon the affidavits it cannot be held that a general acquiescence in the plaintiffs' claims of an exclusive right has been shown.

There is, however, a circumstance which bears strongly upon the question of acquiescence so far as the defendants are concerned, and that is the agreement signed by the defendant Everett on July 30, 1878. It appears by the affidavits that, on complaint being made that the defendants were infringing the plaintiff's patent, an agreement was entered into by defendant Everett in the following terms:

We, Everett & Van Orden, agree in consideration that George A. Mannie & Co. shall not proceed against us for infringement heretofore, and not make us account for past royalty to and with George A. Mannie & Co., that we will not, after August 10, 1878, make or sell any more wooden veneer butter boxes having metallic bindings like that described in Mannie's patent, or sewed on the ends as described in the Munger patent, or infringing any patent owned by Geo. A. Mannie & Co. Sidney J. Everett. July 30, 1878.

This agreement the other defendant, Van Orden, refused to sign and declined to be bound thereby, but it is shown that subsequently thereto the plaintiffs purchased of the defendants all their stock of boxes, and the defendants thereafter sold boxes made by the plaintiffs and stamped: "Manufactured for Everett & Van Orden by Geo. A. Mannie & Co."

This evidence affords room for the plaintiffs to contend that the defendant Van Orden assented to the agreement made by his partner. But it is to be observed in regard to this agreement that it is not set up in the bill. These suits are in no way founded upon the agreement. The bills not only are not brought to enforce the agreement, or for an injunction in support of the agreement, but they do not put forth the agreement as acquiescence on the part of the defendants in the plaintiffs' claims under the patents in question.

At most, therefore, upon this motion, this agreement can have no effect except as evidence to show a temporary acquiescence on the part of the defendants in the plaintiffs' claim of exclusive right under such patents as were then known to the defendants to belong to the plaintiffs. Acquiescence on the part of any person in a claim of exclusive right under a patent is a material part in an action upon the patent and may be given in evidence by the patentee as an admission or as evidence pro tanto of general acquiescence, but is always capable of explanation, and if shown to be part of a simple, mercantile agreement, affords little support for an inference in favor of the validity of the patent. Such appears to be the character of the agreement under consideration; and it neither estops the defendant from denying the validity of the plaintiffs' patent, nor does it compel the inference that the defendants have no good ground on which to contest the plaintiffs' claim under the patents mentioned therein.

If no serious doubt had been raised in regard to the novelty of the invention claimed, it might be possible to find ground for granting a preliminary injunction in this agreement, coupled with the shown insolvency of the defendants, taken in connection with the evident attempt on their part to misrepresent their financial ability, and the further fact that it is doubtful whether any real injury would result to the defendants from such an injunction if issued; but in the state of the evidence as it stands upon this motion, the doubt as to the validity of either of the plaintiffs' patents is too serious to permit of an injunction prior to a final hearing of the cause.

The claim of the Shepard and Lewis patent as re-issued is an follows: "In the art of constructing boxes for fruit and other articles from blanks of a single thickness bending the blank obliquely with the grain of thin wood or veneer substantially as and for the purpose herein specified."

Assuming the patent to be either for a product, viz.: a box made of a blank of a single

thickness by bending the blank obliquely with the grain, or for a process of making a box out of a single blank by bending the blank obliquely to the grain, there is much room to dispute the novelty of the invention. This same idea applied in the same way to accomplish the same result appears in the boxes produced by the defendants under the affidavit made by John T. Brown, and also in the old boxes constructed of a single piece of birch bark by bending the bark obliquely to the grain.

The claim of the Mannie patent is for a combination, the elements of which are (1) "a veneer box having its sides prolonged to form flaps lapping over upon its end; and (2) a bent metal strip covering substantially the entire upper edge of the end, and securing the end to the flaps."

The elements of this combination are old. Their combination produces no new result, nor does it appear that invention was required to apply an ordinary metal binding to the edge of a veneer box for the purpose of preventing the veneer from splitting and to confine the ends of the flaps. It is simply the case of a mechanical adaption of an ordinary mechanical device to produce a simple and well-known result. The use of a similar binding to produce a similar result is common.

The remaining patent is the one issued to Reese, which forms the subject of the second bill. This re-issue was granted subsequent to the filing of the first bill, and within a month of the time of commencing suit upon it. The claim of this patent is "a box or receptacle made of a single piece of wood, veneer, or other similar material, bent up to form the sides and ends thereof, and having surplus material at the corners consisting of prolonged parallel projections made to overlap and reinforce the adjacent sides or ends, and which projections are secured to said sides or ends by eyelets or their equivalents, substantially as described." This patent as it stands is shown to be anticipated in several of the boxes that have been produced by the defendants. The substitute of wood for paper in the construction of a box does not constitute novelty, and besides the Reese patent is broad enough to cover not only boxes of wood, but similar boxes made of paper, which are old. Among the defendants' exhibits are several boxes prior in date to the Reese patent, in which are to be found laps and flaps similar to those described in the Reese patent, and similarly applied.

If these views in regard to the novelty of the plaintiffs' invention are correct it is manifestly impossible for the plaintiffs to obtain an injunction against the defendants until their patents shall have been sustained upon the final hearing. The very foundation of an injunction in a case of this description is a patent to all present appearances valid, and such foundation is here wanting. The motion for preliminary injunction must therefore be denied.

Case No. 9,040.

In re MANNING.

[5 Biss. 497.] [1]

Circuit Court, N. D. Illinois. Dec., 1873.

BANKRUPTCY—NOTE—GUARANTOR—PARTNER.

Where partners, in compromise with their creditors, gave their note in settlement, guaranteed by the attorney, such guarantor cannot be made a party to bankruptcy proceedings against the partners, even though, after the settlement, he became a partner.

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

Petition of review filed by William J. Manning, against whom adjudication of bankruptcy had been entered as partner with Edmund Shanahan and James West.

Tenneys, Flower & Abercrombie, for petitioning creditors.

T. M. Manning, for petitioner in review.

DRUMMOND, Circuit Judge. The only question I have considered it necessary to decide is as to the effect of the signature of Manning to the notes that were offered in evidence, which, it was contended, showed that there was a suspension of the payment of commercial paper, and a continuance of such suspension for more than fourteen days.

The petition in bankruptcy was originally filed against Shanahan and West. Afterwards William J. Manning was made a party. It was as amended filed against them all, as partners; and the question is whether the promissory notes offered in evidence showed as to Manning that it was a suspension by him as a partner of West and Shanahan and so continued for more than fourteen days, within the meaning of the bankrupt law [of 1867 (14 Stat. 517)]; and I have come to the conclusion that it was not.

Shanahan and West were partners. They got into trouble, and proceedings in bankruptcy were commenced against them. A compromise was made which was negotiated by Manning, a lawyer of this city. It was proposed that they should pay a certain percentage on their indebtedness and that time should be given them. They were unable to find the security required, and finally Manning became security; and in consequence of that arrangement a partnership was entered into between Manning, and Shanahan and West. The notes offered in evidence were the notes of Shanahan and West guaranteed by Manning, and, except one of the notes, secured by him on real estate. The notes ran in this form: "Five months after date for value received we promise to pay to the order of L. M. Bates & Co. thirteen hundred and ninety-five dollars and ninety-four cents, at the First National Bank. Shanahan & West." On the back of the note was written: "For value received I hereby guar-

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

antee the payment of the within note at maturity. William J. Manning." Now the question under the contract which Manning made with Shanahan and West, by which he became a partner and assumed and indorsed these notes, is whether this was his commercial paper, for which a suspension of payment, and non-resumption for fourteen days authorized a proceeding in bankruptcy against him. It may be a question of some nicety, but I think that it is not fairly within the true construction of the bankrupt law; that it was not such commercial paper given by him as a partner, for which as against him proceedings in bankruptcy could be commenced. He was simply an indorser or guarantor. He had nothing to do with the original consideration for which the paper was given, and there may be great doubt whether Manning, as to the notes guaranteed by him, assumed the character of a merchant, though he did as to the future by his contract of partnership. I make no decision upon any other point. I think the decree of the district court as to Manning, was wrong. The adjudication of bankruptcy as to Manning must be set aside and proceedings dismissed as to him.

[Subsequently Manning filed a petition in the district court asking to have the bankrupt's assets paid over to him as a solvent member of the bankrupt firm. The petition was denied. Case No. 12,701.]

MANNING (ALSTON v.). See Case No. 266.

Case No. 9,041.

MANNING et al. v. CAPE ANN ISINGLASS & GLUE CO. et al.

[4 Ban. & A. 612; 9 Reporter, 337.] [1]

Circuit Court, D. Massachusetts. Nov., 1879.[2]

PATENTS—MAKING ISINGLASS—PUBLIC USE.

1. The question of "public use," discussed.[2]

[Cited in Perkins v. Nashua C. & G. P. Co., 2 Fed. 453.]

2. Letters patent No. 134,690, granted to James Manning, January 7th, 1873, for an improvement in the manufacture of isinglass, *held* invalid.

[This was a bill in equity by John J. Manning and Caleb J. Norwood against the Cape Ann Isinglass & Glue Company and others, to restrain the infringement of certain letters patent.]

T. W. Clarke, for complainants.

Geo. L. Roberts & Bros., for defendants.

LOWELL, Circuit Judge. Ribbon isinglass is made by passing the macerated bladders of fish, especially of hake, through several sets of rollers which squeeze the substance first into a sheet somewhat like dough, and then into the translucent ribbons which are sold in the market. Heat makes the substance sticky and difficult to work in the earlier stages, and it is important that the first set of rollers, called "mumming rolls," should be kept cool. Ebenezer Rowe, in 1848, patented a mode of keeping these rollers supplied on the inside with cold water, and this method has not been superseded. James Manning, assignor of the plaintiffs, took out the patent in suit January 7th, 1873, No. 134,690, for an improvement in this art, or its machinery, by the addition of a stationary knife, or scraper, attached so near to each of the rollers as to clean it for its whole length at each revolution. He describes a machine like Rowe's, with his addition, and claims the described "method of converting isinglass into sheets of any desired thickness by running it between hollow rolls into which cold water is thrown to cool the compressing surfaces, such rolls being preferably made adjustable to graduate the degree of compression, and the adhering sheets being removed from the rolls by stationary scrapers or clearers and returned to the hopper, as required."

James Manning had been a manufacturer of isinglass, at Ipswich, for many years in partnership with one Norwood. In 1859 or 1860, scrapers were added to the rollers in that factory, and were used there by Manning & Norwood until 1867, when the firm was dissolved and this machinery was left with Norwood, and was used by him and his son until his death in 1871. James Manning built a factory at Rockport for his two sons, and they used similar machinery from 1867 or 1868 onwards.

The defendants have pleaded and proved the foregoing facts as showing a public use for more than two years before the application of James Manning for a patent, which was in December, 1872.

It has always been a prerequisite or condition precedent to the grant of a valid patent, that the thing patented shall not have been in use. By the English law, and formerly by ours, a use before the date of the patent, or of the application, destroyed the novelty of the invention. But for the last forty years we have permitted a use not exceeding two years before the application. Obvious reasons of policy and justice require that an inventor should not monopolize what he has neglected to patent for a considerable time, if, in the meantime, the public have acquired the knowledge of it, whether through him or from an independent source. Before 1870 it was generally understood that two years' use would not destroy the patent, unless it was had with the "consent and allowance" of the inventor. Those words are not found in the Statute of 1870, nor in the Revised Statutes; and Judge Blatchford has lately decided that they are no part even of the law of 1839 [5 Stat. 353]. Egbert v. Lippmann [Case No.

[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission. 9 Reporter, 337, contains only a condensed report.]

[2] [Affirmed in 108 U. S. 462, 2 Sup. Ct. 860.]

4,306]. The point is not material here, because whatever was done with this invention was with James Manning's consent.

Our law has the expression "public use," and "public" has been added to the statute of monopolies by the courts of England. The governing idea is, that public knowledge makes public right, and, therefore, in England, a description of the invention in a written or printed book which is published by circulation, or in the specification of a patent which is public in its very nature, is the equivalent of public use, though there is nothing in the statute concerning knowledge. In this respect our statutes follow the decisions.

Public use means not only a use by the public but a use in public, that is to say, one which is not secret, and, therefore, one from which, so far as the inventor is concerned, the public may, by any of the chances of life, acquire the knowledge. A remarkable case is that of the lady who wore an improved pair of corsets given her by the inventor more than two years before he applied for a patent upon the article, which was held a public use. Egbert v. Lippmann [supra]. In a case like the present, the use of a machine by the inventor himself "in the ordinary way of the public use of a machine," which I understand to mean without special secrecy, will be a public use. Pitts v. Hall [Case No. 11,192]; Bevin v. East Hampton Bell Co. [Id. 1,379]; M'Millin v. Barclay [Id. 8,902]; Re Adamson's Patent, 6 De Gex, M. & G. 420; Heath v. Smith, 3 El. & Bl. 256. The nonexistence of public use being a condition precedent to the validity of the grant, the intent of the inventor not to abandon the invention, or his reasons for not applying for a patent, though of a most potent character, such as illness, are immaterial. See Pennock v. Dialogue, 2 Pet. [27 U. S.] 1, and the remarks of Marshall, C. J., on that case in Grant v. Raymond, 6 Pet. [31 U. S.] 218, 248; McClurg v. Kingsland, 1 How. [42 U. S.] 202, 208, per Baldwin, J.; Sisson v. Gilbert [Case No. 12,912]; Egbert v. Lippmann [supra]. Evidence that any one has copied the invention which is thus brought, presumptively, to the knowledge of mankind, is not necessary to the success of his defence. Such a fact would often be difficult to prove or disprove, and the use itself in any of the modes above explained, works a forfeiture, without more.

There is some evidence in the record tending to show that the use of this invention was either secret or experimental, or both; and evidence to oppose this. I have read the case with care, and am of opinion that the use at the factories in Ipswich and Rockport was a public use in the sense of the law, and was not for the purposes of experiment; and that the use was of the same improvement which is patented. As bearing upon this last point there was contradictory testimony as to whether the scrapers were made adjustable until within two years before the application. I think it probable that they were so made; but whether so or not, the adjustability of the rollers or the scrapers is not of the essence of the invention as described and claimed by the patentee, or in fact.

Bill dismissed with costs.

[NOTE. The cause was taken on appeal, by the complainants, to the supreme court, where the decree of the circuit court was affirmed, on the ground that the patent was void, for the reason that the invention had been in public use more than two years prior to the time application was made for a patent. 108 U. S. 462, 2 Sup. Ct. 860.]

Case No. 9,042.

MANNING v. COX.

[4 Cranch, C. C. 693.] [1]

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

ASSUMPSIT—SERVICES RENDERED—VOLUNTARY.

The defendant's male slave, being, by consent of the plaintiff and defendant, at the plaintiff's house, upon a visit to his wife, who was the slave of the plaintiff, was taken suddenly ill of the smallpox, and, after being nursed three weeks by the plaintiff, died at her house. The defendant, as soon as he knew of the sickness of his slave, offered to remove him to his own house, but the plaintiff would not consent to the removal. Upon this evidence, the court instructed the jury that the plaintiff could not recover.

The plaintiff's original declaration contained three counts, namely, 1. Indebitatus assumpsit for $100 for work, and labor, &c., in nursing the defendant's slave, at the defendant's request, while sick of the smallpox, at the plaintiff's house. 2. For money paid, laid out, and expended, at the defendant's request, for the like purpose. 3. Insimul computassent.

The plaintiff [Martha Manning] afterward filed an amended declaration, with four counts. The first charged that the defendant's slave, being, by the order and direction of the defendant [Florentius Cox], on a visit at the plaintiff's house, was suddenly taken sick with the smallpox, and after lingering a long time, died at the plaintiff's house, and the plaintiff, during that time, nursed the said slave, &c. 2. That the plaintiff, at the special instance and request of the defendant, permitted the slave to visit and sojourn at the plaintiff's house, and while there he was taken sick of the smallpox; and after lingering a long time died at the plaintiff's house; during which time the plaintiff nursed him, &c. 3. The third count stated, that, while the slave was visiting and being in the plaintiff's house, with the privity and consent of the defendant, he was suddenly taken sick, &c. 4. The fourth count stated that the defendant, as owner of the slave, "was bound, by law, to make

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

all necessary provision for said slave, when he should be taken sick, and him to nurse and attend, or procure to be nursed and attended." That, while the defendant's slave was at the plaintiff's house, he was taken so suddenly ill with smallpox that he could not leave the plaintiff's house without great danger to his life; of which disease he lingered a long time, to wit, six months, and then died; so that, during the whole time of his sickness, the plaintiff was "necessitated" to nurse and attend him, and administer diet to him to keep him from dying for want of attention. "And the plaintiff avers that the case of the said slave was so pressing, and of such a character, that she was compelled to render services without a previous application to, or employment of, the said defendant. Nevertheless, the said defendant has wholly neglected and failed to compensate the plaintiff for her services and trouble in that behalf rendered, as he was bound to do, by law. Of all which matters the defendant had notice, &c. By means of which said several premises, the plaintiff hath sustained great loss by being compelled to send her children out of her house, &c., &c."

The evidence was, that the wife of the defendant's slave, was the slave of the plaintiff, and that he was permitted from time to time, to visit his wife, with the consent of the plaintiff and defendant. That on one of these visits, he was taken sick, and after lingering three weeks, died at the plaintiff's house. That the defendant, as soon as he heard of his slave's illness, offered to remove him to his own house, but the defendant would not consent to it.

R. J. Brent, for plaintiff, contended that an action will lie upon any breach of duty by the defendant; and that it was his duty to compensate the plaintiff for her services and trouble in nursing the defendant's slave. 1 Saund. Pl. & Ev. 337, 338, 413; 1 Evans' Harr.; 1 Wheat. Selw. N. P. 36.

Z. C. Lee, for defendant, prayed the court to instruct the jury, that the evidence did not support the declaration.

And THE COURT (CRANCH, Chief Judge, contra), gave the instruction as prayed.

MORSELL, Circuit Judge, observing that if the whole evidence was believed by the jury, the plaintiff was not entitled to recover.

CRANCH, Chief Judge, said, that to support the plaintiff's action upon this declaration, she must satisfy the jury that there was a duty on the part of the defendant to be violated by not compensating the plaintiff for the services stated in the declaration. But there was no such duty, unless the services were performed at the request of the defendant, either express or implied; and that if they were rendered upon a sudden emergency, and were beneficial to the defendant, his assent might be presumed, unless the contrary appeared in evidence.

Case No. 9,042a.

MANNING v. The GRACE FEE.

[Nowhere reported; opinion not now accessible.]

Case No. 9,043.

MANNING v. HAYDEN.

[5 Sawy. 360; 7 Reporter, 423, 424; 13 West. Jur. 317, 318; 8 Am. Law Rec. 38; 1 San Fran. Law J. 85.] [1]

Circuit Court, D. Oregon. Jan. 20, 1879.[2]

TRUSTS — AGENT — REAL PROPERTY—STATUTE OF FRAUDS—STATUTE OF LIMITATION—ATTORNEY AND CLIENT.

1. Where a person acquires the legal estate in real property as the agent of another, or upon a trust and confidence that he will acquire it for the benefit of such other, equity will imply a trust in favor of the latter, and compel the purchaser to account to him accordingly.

[Cited in Gest v. Packwood, 39 Fed. 537.]

2. Such a transaction is not within the statute of frauds, and, therefore, the trust need not be manifested by a writing, the law implying it from the circumstances of the case.

[Cited in brief in Vallette v. Tedens, 14 N. E. 53, 122 Ill. 609.]

3. Cases of constructive trust being purely of equitable cognizance, lapse of time is no absolute bar to a suit for relief thereon; but each case depends upon its own nature and circumstances—the court taking the statute as a guide or suggestion, rather than a command.

[Cited in Stevens v. Sharp, Case No. 13,410; Traver v. Tribou, 15 Fed. 28; Hickox v. Elliott, 22 Fed. 18; Lakin v. Sierra Buttes Gold Min. Co., 25 Fed. 344; Allen v. O'Donald, 28 Fed. 24; Powell v. Oregonian Ry. Co., 38 Fed. 191; Gest v. Packwood, 39 Fed. 535; U. S. v. Wallamet V. & C. M. Wagon Road Co., 42 Fed. 358; Id., 44 Fed. 241.]

4. Where an attorney is employed by the defendant in a suit to enforce the lien of a mortgage, the relation of attorney and client continues until the final determination of the matter by the confirmation of the sale, unless the attorney's employment was expressly otherwise limited, or he was discharged in the meantime with the consent of his client, or by the order of the court.

5. An attorney who purchases for himself his client's property at a judicial sale, thereby acquires an interest contrary to his duty as attorney, and, therefore, the purchase will be held void, or the attorney a trustee for the client, at the option of the latter, unless it satisfactorily appears that he was in no wise injured or prejudiced thereby.

This suit is brought by the plaintiff [Charles Manning], a citizen of California, against the defendant [Benjamin Hayden], a citizen of Oregon, to compel a conveyance of certain premises situated in Polk county, containing three hundred and nineteen acres, and known as the south half of the Bethuel and Rachel Dove donation, the same being parts of sections 2 and 3, in township S south, of range 4 west, of the Willamette meridian. Substantially the bill alleges that the premises

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 7 Reporter, 423, 424, and 3 West. Jur. 317, 318, contain only partial reports.]

[2] [Reversed in 106 U. S. 586, 1 Sup. Ct. 617.]

in controversy were the property of said Rachel, the wife of said Bethuel, the same being her half of the donation aforesaid, which was made by the United States to said Bethuel and Rachel, in consideration of the occupation of the same by the former, as a settler under section 4 of the donation act of September 27, 1850 (9 Stat. 497), from and after December 1, 1848; that on March 2, 1859, said Bethuel borrowed one thousand five hundred and fifty dollars from the county aforesaid to pay the balance of a debt then due one William Griswold, and upon the same date said Rachel and her husband executed a mortgage of the premises to secure the payment of said loan; that at the date of the said mortgage the defendant was a practicing attorney, and was the attorney and confidential advisor of said Bethuel and Rachel in the matter of said loan and mortgage and otherwise; that the defendant, for the purpose of enabling himself to cheat and defraud said Rachel out of her donation, solicited her to execute said mortgage, and assured her that he would mortgage his own home-farm before she should thereby lose her property; and that by means of such solicitations and assurances she was induced to execute said mortgage; that on October 23, 1863, suit was brought to enforce the lien of said mortgage, in which the defendant, as the attorney of the mortgagors, appeared and made a defense thereto, notwithstanding which, on November 18, 1863, a decree was given in said suit to the effect that said premises should be sold as upon execution to satisfy the sum then due upon said loan—two thousand and fifty dollars and seventy-three cents in currency—together with the costs of suit, and that thereupon said premises were advertised for sale; that prior to the date of such sale the defendant informed said Rachel that he would see that the property was bid off for her benefit, and would protect her rights therein, and that in consequence of such information, and relying upon the honesty and integrity of said defendant, she did not attend such sale, and took no steps to secure her interest in said property; that said premises at the sale thereof were worth four thousand dollars in gold coin, while the defendant bid in the same in his own name for the sum of one thousand two hundred and twenty-five dollars in currency, then not worth more than six hundred and twelve dollars and fifty cents in gold coin, and afterwards stated and caused said Rachel to believe that said premises "had been bid off in her name, and for her benefit, and that the amount necessary for her to pay to redeem the same was the said sum of six hundred and twelve dollars and fifty cents;" that relying upon such statements and the honesty of the defendant as aforesaid, said Rachel, in July, 1864, paid defendant two hundred dollars in gold coin upon said bid, which he received with the understanding it should be so applied; that said Rachel and her husband continued in the possession of said premises as owners, and intending to redeem the same as aforesaid, until about August, 1865, when the defendant, intending and contriving to disseise the said Rachel, fraudulently procured her tenant, one O. H. Smith, to surrender the possession thereof to him, and has ever since retained the same, and received the rents and profits thereof to the value of four hundred dollars a year; that but for the promises and representations of the defendant as aforesaid, said Rachel could and would have made other arrangements, and secured the redemption of the property for her benefit; that the defendant afterwards obtained a deed to said premises, as the purchaser thereof, from the sheriff making the sale, and claims to be the owner of the same in his own right, and refuses to convey the same to the said Rachel, or account to her for the rents and profits thereof; that on April 7, 1865, said Rachel being aged and infirm, and unable to prosecute her claim to the premises, for a valuable consideration, conveyed the same and all her claim for rents and profits to the complainant; and that at the date of such conveyance, the rents and profits then received by the defendant had more than paid the balance due him, and the premises were in equity the property of said Rachel, and she was entitled to a conveyance of the same from the defendant.

The defendant demurred to the bill for divers causes, but upon the argument only insisted upon two: (1) That the alleged trust not being in writing, is void; and, (2) that at the date of the conveyance aforesaid to the complainant, his grantors had no interest in the premises, and nothing to assign, except a mere right of suit, which is not assignable.

The court overruled the demurrer, saying: "Upon the facts stated in the bill I think that the plaintiff is entitled to the relief sought. After a careful consideration of the argument and authorities submitted for the defendant, my impression is, that this is not a case of mere agreement within the statute of frauds, but one of a fraud practiced by an agent or attorney upon his principal or client, whereby the former was enabled to acquire the legal title to the premises, to the prejudice and wrong of the latter. In such cases equity will redress the wrong by raising or implying a trust in favor of the injured party. The wrong-doer is held to be a trustee ex maleficio. 2 White & T. Lead. Cas. Eq. 708; Baker v. Whiting [Case No. 787]; Ryan v. Dox, 34 N. Y. 307. If my impression is correct upon this point, then the demurrer is not well taken upon the second one. If, notwithstanding the deed from the sheriff to the defendant, he is only the trustee of the estate, Rachel Dove was the owner of the premises in equity, and could convey the trust estate—the beneficial interest—to the complainant. Baker v. Whiting, supra. And such a conveyance passes an interest in the property, and not a mere right of suit.

The defendant had leave to answer, the court saying: "It is to be understood that this opinion is expressed subject to correction on the final hearing, when the questions argued upon this demurrer may be considered in the light of the pleadings and proofs in the case."

The answer of the defendant admits that he was attorney for Bethuel Dove prior to the execution of the mortgage, but denies that he acted as such attorney in the matter of this loan and mortgage, or that he advised the same, or had any knowledge or information concerning the same until long after they were made. It denies that the defendant was employed by Bethuel and Rachel Dove to defend the suit, to enforce the lien of the mortgage, but admits that he was so employed by Bethuel, and that to gain time for him he interposed a demurrer to the bill which was overruled. It denies that the defendant informed or promised Rachel Dove that he would bid in the premises for her at the sheriff's sale, or that there was any understanding to that effect, but alleges that the Doves admitted their inability to hold the land, and asked him to buy for himself. It denies that the premises were worth four thousand dollars in gold coin, and alleges that they were not worth more than one thousand two hundred and twenty-five dollars, without stating in what kind of money. It alleges that the sale of the premises was made on March 5, 1864, after being twice delayed for want of bidders, and that the sheriff's deed to the defendant was executed on April 26, 1864. It denies any information as to the value of currency at the date of the sale, but alleges that Bethuel and Rachel Dove thereby obtained a credit on their debt to the county of one thousand one hundred and seventy-seven dollars and fifty cents, that being the amount for which the property was sold, less the costs. It denies that the defendant ever gave Rachel Dove to understand that she could redeem the land by the payment of six hundred and twelve dollars and fifty cents in gold coin, or that she paid him two hundred dollars in pursuance thereof, but admits that in the summer of 1864, at the request of Bethuel Dove, he agreed with him that if he would repay the defendant the purchase-money, with interest, within a year from the date of the sheriff's sale, he would sell said Dove the premises upon those terms, and thereupon said Dove paid him two hundred dollars in gold coin upon said bargain, it being then and there further agreed between the parties, that in case the balance of said purchase-money was not paid within the time specified, that the said two hundred dollars was to be applied as rent money for the use of said land; that within the first year said Dove occupied the premises, under said agreement, he cut and sold therefrom four hundred dollars worth of timber, and because defendant remonstrated with him for so doing, he left the place and rented the same to O. H. Smith, aforesaid, but retained the possession of thirty acres thereof, which he "cropped the second year," against the remonstrance of the defendant. It denies that the defendant procured Smith to surrender the possession of the premises to him, but alleges that he received such possession from Moses Clark, the sub-tenant of Smith, on October 31, 1865; and also that said Rachel ever demanded the possession of the premises from the defendant, or an account of the rents and profits thereof. It denies that said Rachel ever conveyed her interest in the premises to the complainant for "a valuable, or any consideration," or that the complainant is, in good faith, the lawful owner thereof, or that since said sheriff's sale, she was ever the owner in equity or otherwise, of said land, or any part thereof. It alleges that in 1864, the premises were worth two hundred dollars a year, but that since 1865, the defendant has expended four hundred and eighty dollars in clearing and breaking one hundred and fifty acres thereof, five hundred and forty dollars for posts and plank fence, and four hundred dollars for other fencing thereon, and three hundred dollars for building a barn and repairing a dwelling thereon, since when the value of the premises has been three hundred dollars a year, and that he has paid taxes upon the property to the amount of two hundred dollars; that the contract aforesaid for the sale of the premises to Bethuel Dove was not in writing, and, therefore, void, and that more than six years have elapsed since the expiration of said agreement.

A general replication was filed in the answer. The evidence of a number of witnesses, including that of the defendant and Bethuel and Rachel Dove, was taken before the examiner, and read on the hearing.

George W. Lawson, H. Y. Thompson, and Claude Thayer, for complainant.

E. C. Bronnaugh and William H. Effinger, for defendant.

DEADY, District Judge. Upon the evidence, including the answer of the defendant, the following facts are satisfactorily established: That on September 18, 1874, the register and receiver of the proper land-office issued a certificate, under section 7 of the act of September 27, 1850, aforesaid, from which it appears that the premises in controversy are the wife's half of the donation of Bethuel and Rachel Dove, granted to them by section 4 of the act aforesaid, on account of the husband's settlement and occupation thereon, commencing on December 1, 1868; that some time prior to 1858, and up to 1865, the defendant was the general attorney and trusted adviser of Bethuel Dove and his wife; that in 1858, one William Griswold, after serious litigation, obtained a judgment against Bethuel Dove for over eight thousand dollars, in which litigation the defendant acted as the attorney of said Dove, and as such, procured one J. B. V. Butler, also a friend and client

of his, to sign an undertaking for an appeal from the judgment of said district court to the supreme court of the territory, by which undertaking the parties thereto became bound to pay said judgment, if affirmed, whereas said Butler, at the time of signing said undertaking, understood from the defendant that it was for the costs of the appeal only; that said judgment was affirmed, and all the property of said Dove liable to execution, consisting of the north half of said donation and other lands, were sold to satisfy the same, and that in March, 1859, there was still due upon said judgment the sum of about four thousand dollars, for which said Butler was liable as a defendant therein, but which was afterwards paid by said Bethuel; that on March 2, 1859, said Bethuel and Rachel executed a mortgage upon the premises in controversy to the treasurer of Polk county, to secure the payment of the sum of one thousand five hundred and fifty dollars, then borrowed by said Bethuel from the school fund of said county, and payable three years thereafter, with interest at one per centum per month, to apply upon said judgment, and so far relieve said Butler from his liability thereon; and that the defendant advised said loan and mortgage, and was instrumental in procuring the former, and inducing said Rachel to execute said mortgage, and received some one thousand dollars thereof from said Bethuel and Rachel to apply upon said judgment; that after said debt became due, suit was commenced by the treasurer of said county, in the circuit court thereof, to recover the same, and enforce the lien of said mortgage, to which suit said Bethuel and Rachel were parties defendant, and the defendant appeared therein as their attorney, and made a defense thereto by demurrer, and on November 18, 1863, a decree was made therein, that the plaintiff recover two thousand and fifty-two dollars and seventy-five cents and costs, and that the premises in controversy be sold as upon an execution at law to satisfy the same; that upon March 5, 1864, the said premises were sold, and bid in by the defendant, for the sum of one thousand one hundred and twenty-five dollars, in currency, the sale having been twice postponed in the meantime, "for want of bidders, and other sufficient causes," which sale was confirmed by said court on April 26, 1864, and a deed of the premises executed by the sheriff to the defendant on the same day; that at the date of such sale, the defendant was the attorney of said Bethuel and Rachel in said matter, and, moreover, in making such purchase and receiving said conveyance, was acting on behalf of said Doves, in pursuance of an understanding between himself and them, whereby the defendant was to bid in said premises at the sale, in case they went low enough, as was expected, for the benefit of said Rachel, who was to redeem the same as soon as she could, in a reasonable time, and thereby secure a home for herself and husband in their poverty and old age, and that said Bethuel and Rachel relied upon said understanding, and, therefore, took no other steps or means to secure the property, or redeem it within the time allowed by statute, as they might, and would have otherwise, done; and that on July 26, 1864, said Bethuel, in pursuance of said understanding, paid the defendant, for said Rachel, two hundred dollars in gold coin, for which he gave the following acknowledgment in writing: "Received of B. Dove, two hundred dollars, to be applied on purchase of land purchased by me at sheriff's sale. The land known as Mrs. Dove's half of donation land claim, July 26, 1864. (Signed) B. Hayden;" but that the defendant afterwards, by prohibiting said Bethuel from cutting and selling saw-logs from the premises, and by procuring the tenant of the Doves—O. H. Smith, to whom the farm was rented in the fall of 1864, when Mr. Dove took up a homestead upon an island near by, where he has since lived—to pay him the rent due them; and finally, in the fall of 1865, to surrender the premises to him, hindered and prevented said Bethuel and Rachel from obtaining and acquiring the money wherewith to complete said redemption as per the agreement and understanding aforesaid; that said Bethuel and Rachel are illiterate persons, not being able to read or write, and ever since the loss of the premises have been poor and without means to prosecute a suit for the same, while the defendant, by his position and influence in the county, has made it difficult, if not impossible, for them to assert their rights in the local tribunals with effect; that in September, 1874, said Rachel commenced a suit against the defendant, in the circuit court of Polk county, to recover the premises, but the same was afterwards dismissed by her, and the premises, on April 7, 1875, as aforesaid, conveyed to the plaintiff, her son-in-law, for a valuable consideration, with the expectation and understanding that the plaintiff would bring a suit in this court to recover the premises; and such plaintiff thereby became, and now is, the owner of whatever right and interest therein the Doves then had; that at the date of the purchase of the premises by the defendant—March 5, 1864—the currency, or United States legal tenders, paid by him, was only worth, in gold coin, sixty-five cents on the dollar—seven hundred and ninety-six dollars and twenty-five cents—and that the premises were then worth not less than two thousand dollars in gold coin, and probably three thousand dollars, and are now worth, exclusive of improvements, not less than ten thousand dollars; that the defendant was allowed to purchase the property for a sum so far below its real value, because he was well known in the community as the attorney and friend of the Doves, and was very naturally understood to be acting in their behalf; and that the sum due to the defendant, in coin, on account of this transaction, on January 1, 1879, is as follows: Paid on land March 5, 1864, seven hundred and ninety-six dollars and

twenty-five cents; interest thereon at ten per centum for fourteen years, nine months and twenty-five days, eleven hundred and seventy-nine dollars and ninety-seven cents; taxes paid on land, two hundred dollars; present value of permanent improvements placed thereon, one thousand dollars; total, three thousand one hundred and seventy-six dollars and twenty-two cents; and that he is chargeable thereon as follows: Rent of premises from January 1, 1866, to January 1, 1879, thirteen years, at two hundred and fifty dollars a year, three thousand two hundred and fifty dollars; interest thereon at rate aforesaid, one thousand nine hundred and fifty dollars; cash received, July 26, 1864, two hundred dollars; interest on the same at the rate aforesaid, for fourteen years and five months, two hundred and eighty dollars and thirty-three cents; total, five thousand six hundred and eighty dollars and thirty-three cents; balance against defendant, two thousand five hundred and four dollars and eleven cents; from all of which it appears that the defendant has been long since repaid the money advanced to the Doves, and also his subsequent expenses in connection with his occupation of the premises.

The evidence is conflicting concerning some of these conclusions of fact but the truth is generally apparent, notwithstanding. I do not propose to discuss it in detail, but there are one or two points that justify some special attention. As to the circumstances concerning the preparation and execution of the mortgage there is a direct conflict between the testimony of the Doves and that of the defendant and his witness, Reason R. Boothby. The contradiction can hardly be explained upon the theory of a failure of memory or an unintentional mistake, and therefore it almost necessarily involves willful falsehood.

At the date of the transaction the defendant was living on his donation claim a few miles north of the Doves while Boothby lived at Eola, about half way between them. The Doves swear unqualifiedly that Hayden came to their house and prepared the mortgage there, using Ford's notes of the claim survey which they had, in describing the premises, and left it with them, saying he would send Boothby—a justice of the peace—down to take their acknowledgment; that Boothby came down the next day or two, when they executed and acknowledged the instrument.

On the contrary Hayden swears both in his answer and testimony that he never wrote a line of the mortgage and don't know who did—that he never advised it or knew anything about it until some time after the execution. Boothby testifies that he wrote the mortgage including the names of the mortgagors thereto—Bethuel and Rachel Dove—in short, that he wrote every word of the instrument, except the names of the attesting witnesses—George Bolter and Theodore Ingalls.

The Doves, although not parties in interest, are not disinterested witnesses by any means, while the defendant is deeply interested in the result in both property and character. Boothby does not appear to be a person of any particular character or standing. During the past twenty years he appears to have lived from place to place in Oregon and Washington, for the most part east of the Cascades, and is a painter by trade.

A very satisfactory solution of this problem is furnished by an inspection and comparison of the writings on the mortgage with one another and with that on the receipt of July 26, 1864; and also the signatures of the defendant and said Boothby to their evidence given before the examiner in this cause.

The mortgage bears upon its face indubitable evidence that Boothby's story is untrue—that he never wrote a word of the mortgage except the certificate of acknowledgment and his signature thereto, as an attesting witness. In the first place, Boothby's story and that of the defendant do not agree, for while the latter says he knew nothing about the making of the mortgage, the former said he went to Dove's to attend to his business at the request of the defendant who then furnished him with a blank form upon which to write the mortgage and a prepared description of the premises.

The mortgage is upon a printed form of a deed of bargain and sale. The body of it contains twenty-two lines, which are written or mostly in writing, and the certificate six such lines, beside the signature of Boothby. The handwriting of the body of the instrument and the certificate are both unskillful, but quite uniform and marked in character and radically different. It is safe to say, they were never written by the same person. The difference in the capital Rs, Bs, Ds, Ps and figure 9s is very noticeable. But this is not all. In the body of the instrument the name Rachel is incorrectly spelled with an "ae" in the last syllable, while in the certificate it is spelled in such syllable with an "a" only. Bethuel is spelled correctly in the body of the instrument, but in the certificate it is spelled without an "e" in the first syllable. It is also apparent that this name was first written in the certificate as "B-huel" and then before completion corrected into "B-thuel," by making the loop of an "h" upon the m stroke or lower part of the first "h," and thus converting the latter into a "t." But the loop of the second "h" did not come down directly upon the m stroke of the first one, but at an angle, on the outside, thus leaving the process of emendation quite apparent.

The signatures of Bethuel and Rachel Dove to the mortgage were evidently written by the subscribing witness, George Bolter, who wrote a plain, bold, round hand, as unlike that in the body of the instrument or the certificate as light and darkness.

Again, the words in the condition of the

mortgage—"according to the tenor and effect of a certain promissory note," and the words "and fifty" in the premises of the deed immediately following the words "fifteen hundred," and the word "their" in the concluding clause are in a very different writing from the rest of the instrument. They are written in a skilled hand with different ink, and upon comparison with the indorsement in red ink on the back of the instrument, showing when and where it was recorded, appear to be the writing of Mr. Lucien Heath, the then recorder of Polk county and secretary of state elect.

The second and third of these insertions merely supply manifest omissions, while the first only formally expresses what would otherwise be implied from what was already expressed. Before this interlineation, the condition read: "This conveyance is intended as a mortgage to secure the payment of the sum of *fifteen hundred and fifty dollars,*" all but the words in italics being printed, and continued thus: "The note executed by Bethuel Dove," etc., putting "the note" in apposition with "the sum of fifteen hundred and fifty dollars," which is represented. The interlineation "according to the tenor," etc, was placed between the words "dollars" and "note" aforesaid, and the pen drawn through the "The" before the word "note."

As it does not appear that Mr. Heath was present when the mortgage was executed, it is probable that these interlineations were made by him at the county seat, Dallas, when the instrument was taken there by Dove, or other person, to obtain the money from the county treasurer, and was delivered to him for record.

Attention is called to these interlineations and insertions after the execution of the instrument, not to suggest that any wrong was committed or intended thereby, but to show the incorrectness of Boothby's testimony, who deliberately and repeatedly swore that he wrote every written word in the instrument except the signatures of Bolter and Ingalls, the subscribing witnesses.

Neither is this all. Boothby swears in effect that he took a clean blank with him to Dove's on March, 1859, upon which he then and there wrote this mortgage, and it is very certain that this is not so. The mortgage reads: "This indenture, made this second day of March, A. D. 1859," the words "second" and "March," and the figure "9" being in writing. But upon examination it plainly appears that in place of these words there was first written "twenty-sixth" and "February," the latter words being partially erased, and the former written over and in place of them. Neither were the words "second" and "March" written by Boothby, but probably by Bolter, who appears to have been the best penman that made a mark upon the paper, unless it was Heath, while the words "twenty-sixth" and "February" appear to have been written by the person who wrote the body of the instrument. The coincidences are most convincing, but one is almost demonstrative. The letter "x" in "twenty-sixth" is formed by two perpendicular curved lines with their convex sides approaching and connected by a hyphen or horizontal line, thus)-(. According to my observation it is a very singular formation of the letter, and an almost certain mark of identification. The only other written "x" in the instrument is found in the body of it, in the word "executed," and that is made in precisely the same way.

But the fact of the alteration of the date is a very significant one. It not only tends to prove that Boothby did not write the instrument as alleged, but also that it was drafted, as the Doves testify, by some one other than Boothby before the day of its execution, only the time was four days instead of one or two as they remember it.

The instrument having been drafted on February 26, when the parties came to execute and acknowledge it before Boothby, on March 2, it would naturally occur to some one that the date ought to be corrected, and so the words "twenty-sixth" and "February" were changed to "second" and "March," but not so as to prevent the paper from revealing to the microscope, and even the naked eye, the truth of the transaction.

From these facts, and the striking similarity between the writing in the body of the mortgage and that in the receipt of July 26, which is admitted to be the defendant's, as well as his signature to the examination, it is morally certain that the defendant wrote the mortgage as the Doves testify. The receipt is more than five years later in time than the mortgage; but making some allowance for the careless way in which the former is written, as compared with the latter—it being necessary to write somewhat closely and small to get the matter in the spaces left in the blank—and for some freedom of hand acquired in the meantime, as well as the difference in pen, ink and paper, the writings are very like. All the peculiarities of style—and they are many and marked—observable in the one are apparent in the other. The capital Rs, Bs, Ps and Ds are very notable instances. The terminal ds are uniformly made with an upward and outward curl from the o, instead of a stem, while the middle ones are just as constantly made with a stem, which is well detached from the body of the o—the latter being open. The figure 8 in the two writings is very singular, and "they are like as two black-eyed peas." The s, the ps, the words "Dove," "hundred," "land," "claim"—in short, the whole face and expression of the one is exhibited in the other.

In this connection it may be also mentioned that at the taking of the evidence before the examiner, this receipt was mislaid and supposed to be lost, and counsel for the plaintiff put in a paper which he testified was a

true copy. The defendant being examined afterwards in his own behalf, and while it was thought the original was lost, swore unqualifiedly that it did not contain the final words, "the land known as Mrs. Dove's half of donation land claim;" and that it was for two hundred dollars, "to be applied on land purchased by me at sheriff sale," omitting the words in italic, "to be applied on *purchase of* land purchased by me," etc. Subsequently the receipt was found and produced and read on the hearing.

Next, as to the agreement or understanding between the defendant and the Doves concerning the purchase and redemption of the premises. All the circumstances, and particularly the payment of the two hundred dollars, and the receipt therefor, tend strongly to show that the defendant bid in the property at the sheriff's sale, as the attorney and friend, and for the benefit of the Doves, and that they were to remain in possession and have the benefit of the use and occupation of the place to enable them to repay him the purchase-money with interest; and also that the defendant after a time conceived the design—lucri causa—to ignore his relation and understanding with the Doves, and claim the property as his own. The apparent excuse for this breach of faith was, that these poor, old, unfortunate people would never be able to repay him, and to make sure of this, he did what he could to prevent them from so doing, by depriving them in the meantime of the use and possession of the property.

The defendant pretends that the agreement to redeem was made at the date of the receipt, and not before; and that he did not believe, at the time, that the Doves would be able to perform it, and therefore he made the further conditions that if the redemption was not completed within a year from the date, that is, by March 5 next following, the agreement should be at an end, and the two hundred dollars then paid on it be retained by him as rent of the premises for such year. But with this statement the known and undisputed facts of the case are at variance. The receipt itself is directly opposed to it. If such was the agreement, why does it not appear in this writing? and especially, why does it not contain some reference to the alleged conditions, that the redemption was to be made within eight months from that date, and if not, that the two hundred dollars then paid should be retained by the defendant as rent? The defendant is an attorney, and a person of shrewdness and experience. These provisions are altogether in his favor, and it was his interest to preserve the evidence of them. While he was writing the memorandum, a few words, more or less, would have expressed them. The Doves, according to his statement, had no rights in the premises as against him, and so far as terms are concerned, were at his mercy. But the language actually used in the writing is also contradictory of the defendant's statement. The receipt is not simply for two hundred dollars received by the defendant on account of land then sold the Doves, or then purchased back by them from him. On the contrary, it is in terms and effect for two hundred dollars, to be applied on purchase of Mrs. Dove's land theretofore purchased by the defendant at sheriff's sale. To be applied on what purchase? Why, manifestly, the purchase made at the sheriff's sale, thus suggesting distinctly what the Doves assert, that the land, though purchased at such sale by the defendant in his own name, was, in fact, purchased for them, and was in equity and good conscience, their purchase. Upon no other theory of the facts can effect be given to this word "purchase" in the receipt, or its use therein satisfactorily accounted for. Indeed, some such view of the matter must have suggested itself to the mind of the defendant, for he could not remember, when it was thought the receipt was lost, that it stated that the money was to be applied on the purchase of Mrs. Dove's land-claim, and swore to the best of his recollection that these words were not in the receipt; and by way of giving emphasis and weight to his testimony in this respect, swore that he had seen the receipt, and scrutinized it closely, since this matter was placed in the hands of counsel.

As to the value of currency at the date of the sheriff's sale, I have consulted the contemporaneous quotations of the price of gold and find that legal tenders were then worth, in Portland, sixty-five cents on the dollar, which makes the amount advanced by the defendant, in gold, seven hundred and ninety-six dollars and twenty-five cents. The only testimony upon this point was that of the defendant and Dove, the former stating that they were worth about seventy-five cents and the latter fifty cents; but he also states, what he was more likely to remember, that the amount to be repaid the defendant was about seven hundred dollars in coin.

As to the value of the property in 1864, the testimony is very conflicting, the opinions varying from seven hundred dollars to four thousand dollars in coin. Much of it is unsatisfactory, and some of it utterly incredible; as for instance, that it was not worth more than two dollars per acre. In a country where land is the foundation of society, and agriculture the chief occupation of the people, a certain amount of knowledge upon this subject is common to most persons, and in considering this question it cannot be overlooked that this property is the half of a donation claim selected in 1848, and therefore probably choice land and favorably situated; that it lies very near the Willamette river, within a few miles of the capital of the state; that with any kind of cultivation, much of it will produce at least twenty bushels of wheat and forty bushels of oats to an acre, one year with another, and that probably it has not, since 1851, been held at a less value than ten dollars per acre, and under favorable cir-

cumstances, might have been sold for that at most any time since. In arriving at this conclusion, weight has been given to the fact that in 1859 the property was accepted by the county treasurer of Polk county, as sufficient security for one thousand five hundred and fifty dollars, in coin, payable within three years, with twelve per centum interest. From this fact it must have been valued at about three thousand dollars; and I have no doubt but that was what it was then generally considered worth. And this shows that the inadequacy of the consideration advanced by the defendant, was very marked, it being at most a little over one third its real value, an inadequacy "so gross and manifest as to shock the conscience."

It has been suggested that the price paid, one thousand two hundred and twenty-five dollars, in currency, was credited on the decree against the Doves at par, and therefore the defendant ought to be considered as having advanced that much for them in coin or its equivalent.

So far as Rachel Dove is concerned, a sufficient answer to this suggestion is found in the fact that the decree against her, so far as it was in personam and for money, was void. She was not indebted to the county. She did not join with her husband in the note for the loan; and if she had, being a married woman, the act would have been a nullity. Norton v. Meader [Case No. 10,351]; Dick v. Hamilton [Id. 3,890]. By the mortgage she pledged her property for her husband's debt, and by its sale on the decree it was discharged from the lien.

The parties seem to have acted upon the theory that the husband had no interest in the wife's land. But this was a mistake. Bethuel Dove was seised of an estate for his life in the donation of his wife by virtue of the marriage. Starr v. Hamilton [Id. 13,314]; Wythe v. Smith [Id. 18,122]. But even as to the husband, if the defendant acted for him in making the purchase, the advantage, if any, accrued to the former and not the latter. Between them, the question is, not what effect did the payment of the currency have upon the decree, but what did it cost the defendant? What did he advance? McDowell v. Milroy, 69 Ill. 500.

Upon this state of facts, and leaving out of view, for the present, that the defendant was also the attorney of the Doves at the date of this transaction, the law implies a trust between the defendant and them. His conduct being inequitable and unjust, and involving a gross breach of the special trust and confidence reposed in him by the Doves to their serious injury and his corresponding advantage, equity will treat him as a trustee of the property thus wrongfully acquired, and hold him liable accordingly. 1 Perry, Trusts, §§ 166, 168; 2 Story, Eq. Jur. §§ 1254, 1261, 1265; 3 White & T. Lead. Cas. Eq. 139; Gaines v. Chew, 2 How. [43 U. S.] 649. This is a case of constructive trust, a trust arising out of the misconduct of the defendant, and does not depend upon the existence of a writing. It is without the statute of frauds, and the facts constituting it may be shown by parol. 1 Perry, Trusts, § 85; 2 Story, Eq. Jur. § 1531; 1 Greenl. Ev. § 266; Jenkins v. Eldridge [Case No. 7,266]. This being so, there is no doubt but that the Doves had an interest in the premises at the date of their conveyance to the plaintiff. In addition to the authority cited on the hearing of the demurrer upon this point, reference is made to Perry on Trusts (section 227) where it is said: "The right of a party who has been defrauded of the title to his land, is not a mere right of action to set the deed aside, but it is an equitable estate in the land itself, which may be sold, assigned, conveyed and devised. In the view of a court of equity, he is still the owner of the estate, subject to repay whatever money or other property he may have received from the fraudulent grantee."

But it is contended for the defendant, that this suit is barred by the lapse of time. That the plaintiff or those under whom he claims have been guilty of laches—have slept upon their rights.

In the consideration of purely equitable rights and titles, courts of equity act in analogy to the statute of limitations, but are not bound by it. As was said in this court in Hall v. Russell [Case No. 5,943]: "When an action upon a legal title to land would be barred by the statute, courts of equity will apply a like limitation to suits founded upon equitable rights to the same property. So, in cases of implied or constructive trusts, when it is sought for the purpose of maintaining the remedy, to force upon the defendant the character of a trustee, courts will apply the same limitation as provided for actions at law." Citing Elmendorf v. Taylor, 10 Wheat. [23 U. S.] 176; Miller v. McIntyre, 6 Pet. [31 U. S.] 66; Beaubien v. Beaubien, 23 How. [64 U. S.] 207; to which may be added Wisner v. Ogden [Case No. 17,914]; Kane v. Bloodgood, 7 Johns. Ch. 110; and Michoud v. Girod, 4 How. [45 U. S.] 560. Apply this rule to this case, and this suit may be maintained at any time within twenty years from the fall of 1865, the time when the defendant finally repudiated the arrangement with the Doves and wrongfully took possession of the premises, that being the period limited by statute for the commencement of an action at law therefor.

But where the trust is constructive and also arises out of the fraud of the defendant, there does not appear to be any fixed rule upon the subject. The matter is left to the equitable discretion of the court to be decided in each case according to its nature and circumstances, subject to the qualification that diligence must be used to establish a trust by implication, and that equity will not aid a party to enforce such a trust when the demand is stale or where there has

been long acquiescence in the wrong. 1 Perry, Trusts, § 228.

Periods ranging from fifty to seventeen years have been held to be a bar, and under other circumstances a delay of from eleven to eighteen years has been held to be no bar. Perry, Trusts, § 229. In Michoud v. Girod, 4 How. [45 U. S.] 561, where the matter was thoroughly examined, Mr. Justice Wayne says: "Within what time a constructive trust will be barred, must depend upon the circumstances of the case. Boone v. Chiles, 10 Pet. [35 U. S.] 178. There is no rule in equity which excludes the consideration of circumstances, and, in a case of actual fraud, we believe no case can be found in the books in which a court of equity has refused to give relief within the life-time of either of the parties upon whom the fraud is proven, or within thirty years after it has been discovered or becomes known to the party whose rights are affected by it."

This suit was commenced within eleven years, and the one in Polk county within nine years from the time the defendant took possession of the premises and disavowed the understanding and obligation under which he acquired the legal title, so that in any view of the matter there is no ground on which to rest a claim that this suit is barred by lapse of time, or that the demand is stale, or the wrong long acquiesced in. Indeed, considering the circumstances of the case, and the unequal condition of the parties, the court would not be justified in refusing relief upon the case made, if twenty years had elapsed from the commission of the wrong.

But the decision of this case can be put upon higher and safer ground than the contracts and understandings of the parties, which are liable to both misrepresentation and misapprehension.

If the defendant was the attorney of the Doves at the time he bid in this property, he must be considered as acting for them, and he is liable to them therefor as their trustee, unless he can show satisfactorily that he has purchased for himself with his clients' consent, and that the transaction was in every respect fair, and not to their disadvantage. The presumption is against him, and the burden of proof is upon him; and if his interest as a purchaser may conflict with his duty as an attorney, the sale will be held void, or the attorney charged as a trustee, at the option of the client. This rule is alike necessary to preserve the dignity and integrity of the legal profession, and to protect the interests of a dependent and confiding clientage; and in the enforcement of it courts will not hesitate, because the injury to the client does not fully appear, or a positive intention on the part of the attorney to gain an advantage is not shown. This statement of the law will be found fully supported by the following authorities, some of which go even beyond it, and hold that a purchase by an attorney of the subject of litigation cannot be maintained against the client under any circumstances. 1 Perry, Trusts, § 166; Case v. Carroll, 35 N. Y. 388; Harper v. Perry, 28 Iowa, 60; 1 Story, Eq. Jur. §§ 312, 313; Berrien v. McLane, 1 Hoff. Ch. 428; Cutts v. Salmon, 5 Eng. Law & Eq. 95, 12 Eng. Law & Eq. 317; Ward v. Carttar, L. R. 1 Eq. 29; De Rose v. Fay, 3 Edw. Ch. 389, 4 Edw. Ch. 44; Trotter v. Smith, 59 Ill. 244; Howell v. Baker, 4 Johns. Ch. 120; Hess v. Voss, 52 Ill. 481; Wade v. Pettibone, 11 Ohio, 60; Nesbit v. Lockman, 34 N. Y. 169; McDowell v. Milroy, 69 Ill. 500; Hawley v. Cramer, 4 Cow. 730; 1 White & T. Lead. Cas. Eq. 203; Evans v. Ellis, 5 Denio, 643; Weeks, Attys. at Law, §§ 273 et seq.

The already great length of this opinion precludes any citation from these authorities, but the following paragraph from Case v. Carroll, supra, is so exactly in point and so sound in doctrine and clear in expression that it may be cited notwithstanding:

"It is a settled principle of equity, that no person, who is placed in the situation of trust or confidence in reference to the subject of the sale, can be a purchaser of the property on his own account. And this principle is not confined to a particular class of persons, such as guardians, trustees or solicitors, but it is a rule of universal application to all persons coming within its principle, which is, that no party can be permitted to purchase an interest when he has a duty to perform inconsistent with the character of a purchaser."

But it is contended that the defendant was not the attorney of the Doves at the time of the purchase. It is admitted, however, that he was the general attorney of the husband, and it is not seriously contended that he was not such attorney for the wife also, through the agency of the husband, so far as she needed one. It is also admitted that he was the husband's attorney in the foreclosure suit; and finally upon the hearing the quibble that he was not the wife's attorney also in such suit, was frankly abandoned. And this accords with the record, which states unequivocally that he appeared for both, though the demurrer filed by him, or the transcript of it, states that "the above-named defendant"—in the singular—comes by B. Hayden, etc. But who is "the above-named defendant?" The reference is to the title of the cause in the beginning of the demurrer, and that reads, "J. Emmens, Treas. of Polk County v. Bethuel and Rachel Dove, Defts.," so that if there is any ground for saying that this demurrer was made by the defendant, for either of them rather than both, it is the wife who is expressly named in full, and who was the principal party in interest. But the omission of the s from the word defendant, in the body of the demurrer, is undoubt-

edly a mere clerical misprision and unworthy of serious contention or further consideration.

But it is claimed that the defendant ceased to be the attorney of the Doves from and after the date of the decree of sale in the foreclosure suit, or at most at the expiration of sixty days thereafter—the time then allowed for an appeal to the supreme court.

This sale, being made in a suit in equity, was a judicial one, and so in effect are all sales made upon execution in this state—that is, it was not made absolutely, but subject to the approval of the court which might upon the objection of the defendant set it aside, if it apeared that there were "substantial irregularities in the proceedings" concerning the same, to his probable loss or injury. Civ. Code Or. §§ 293, 413. If, then, the relation between the defendant and the Doves, of attorney and client, had not ceased before this sale, the defendant could not become a purchaser thereat on his own account, without raising a conflict between his duty and his interest. It was his duty to examine the circumstances of this sale and if he found good cause, to object to its confirmation. The property was sold for not more than one third its value. There is satisfactory testimony in the case that a neighbor intended to make the property bring at least the amount of the decree and costs, but learning that the defendant was going to bid for Mrs. Dove, and having sympathy for her, he generously forebore. But this was an irregularity which ought to have avoided the sale. The loss was a direct injury to Dove, who was left personally liable for so much of the decree as the sale of property ought to have satisfied, but did not. But the defendant, as he was situated, could not or would not bring this matter before the court, because, if he purchased for Dove, as was the understanding, his clients were satisfied, while if he purchased for himself, as he now claims, his interest would prevent it.

How or why the defendant ceased to be the attorney of the Doves before this sale is not shown, nor can it be. It is not claimed that there was any change of attorney or any agreement or understanding that his services were to stop short of the final determination of the matter, which was not the mere entry of the order of sale, but the final confirmation.

By the law of this state an attorney has authority to bind his client in any of the proceedings in a suit by an agreement. Civ. Code, § 1007. And he may be changed before the final determination thereof by consent, of record, or the order of the court. Id. § 1010.

As has been shown, the final determination of the proceeding in question was the order confirming the sale. It is not pretended that there was any change of attorney between the order and confirmation of sale, as provided by statute or anywise.

Still it is insisted that in some undefined and occult way the defendant dropped out of the case before the sale, and was thereafter a stranger to the proceeding. Suppose the defendant had not purchased and had signed a stipulation consenting to a re-sale, or had appeared in court and objected to the sale, would it have been necessary to enter his appearance anew as upon a first retainer, or would the court or opposing counsel have presumed or thought of asking for his authority to appear in the proceeding for his confirmation of the sale, in the suit in which he had appeared and acted as the defendant's attorney, in the preparation and hearing of the cause?

It seems to me that the matter is too plain for argument. The defendant was the attorney of the Doves when he made the purchase, and in so doing, if he purchased for himself, as he now claims, he put his duty to them in conflict with his interest as such purchaser, to the manifest injury of his clients, and therefore they have a right to treat the sale as void, or to hold him to account, as their trustee. If, on the other hand, he purchased it for them, as I find from the evidence he did, then of course he is their agent and trustee and bound to account to them as such.

The conclusions here stated, have not been lightly or hastily reached. But they are the result of a thorough examination of the case, and a full and careful consideration of the questions involved in it, after able and instructive arguments by the learned counsel, who appeared for the parties, particularly for the defendant. I now announce them with reasonable confidence in their conformity to the law and justice of the case, and with the comfortable assurance that if they are otherwise the defendant can appeal to so exalted a tribunal as the supreme court of the United States for their correction.

The decree of the court will be, that the defendant, within sixty days, convey the premises to the plaintiff by a good and sufficient deed, with proper covenants against his own acts, to be prepared and settled before the master of this court, and at the same time deliver possession of the premises, and that defendant within the same time pay the plaintiff his costs in this suit expended, and that in default thereof, execution issue therefor.

[NOTE. The defendant took the case, on appeal, to the supreme court where the decree of the court below was reversed and the case remanded, with a direction that the bill should be dismissed for want of jurisdiction and without prejudice to any other action in a proper court. 106 U. S. 586, 1 Sup. Ct. 617.]

Case No. 9,044.

MANNING v. HOOVER.

[Abb. Adm. 188; [1] 12 Betts, D. C. MS. 5.]

District Court, S. D. New York. Feb., 1848.

CARRIERS — SHORTAGE — NO BILL OF LADING — AMOUNT SHIPPED—MODE OF ASCERTAINING QUANTITY.

1. A shipper of a cargo of grain who takes no bill of lading from the carrier, is bound, in an action brought to recover for short delivery, to prove the amount delivered by him to the carrier to be transported.

[Cited in The Pietro G., 38 Fed. 149.]

2. A variance between the amount of a cargo of grain as stated in the measurer's bill in lading it on board, and the amount of such cargo as ascertained on delivery at the port of consignment, may be explained by showing that the mode of ascertaining the quantity is such that similar variations are necessarily of frequent occurrence.

Compare Manchester v. Milne [Case No. 9,007].

This was a libel in personam, by Still Manning against Norman C. Hoover, owner of the sloop Cornet, to recover damages for nonperformance of a contract of affreightment. It appeared, in this case, that the libellant was the owner of 1857 bushels of corn, and 76 bushels of wheat, stored at the city of Brooklyn. The defendant contracted to carry the grain in his sloop to the city of New York, at a specified price per bushel. He received the corn on board his vessel, and was paid freight for the whole quantity; but the quantity actually delivered by him at New York, as there measured by weight, was only 1759 bushels, 24 lbs., thus leaving a deficiency of 97 bushels; to recover for which this action was brought. The defence was, that under the circumstances of the case, the loss was to be attributed, not to any default on the part of the vessel, but to inaccuracy of measurement, and to waste necessarily incidental to the lading and unlading of such a cargo. The evidence upon this point is fully stated in the opinion.

D. McMahon, Jr., for libellant.

I. It is unnecessary for the libellant to show negligence on the part of the carrier. It is sufficient to show the shipment of a certain quantity, and it is for the carrier to show either a complete delivery or an excuse by vis major. He is liable for all thefts, robberies, and embezzlements by any of the crew, or by any other person, although he may have exercised every possible vigilance to prevent the loss. Story, Bailm. 528. And the mere fact that the owner or his servants go with the goods, if the other circumstances of the case do not exclude the custody of the carrier, will not of itself exempt him from responsibility. Id. 533.

II. The master and owners of a ship are responsible for the goods which they have undertaken to carry, if stolen or embezzled by the crew, or any other person, though no fault or negligence may be imputable to them. Schieffelin v. Harvey, 6 Johns. 170.

III. The master and owners of vessels who undertake to carry goods for hire are liable as common carriers, whether the transportation be from port to port within the state, or beyond sea, at home or abroad; and they are answerable as well by the marine law as the common law, for all loss not arising from inevitable accident, or such as could not be foreseen or prevented. Elliott v. Rossell, 10 Johns. 1; Kemp v. Coughtry, 11 Johns. 107; McArthur v. Sears, 21 Wend. 190.

IV. Where the goods are embezzled or lost during the voyage, the master is bound to answer for the value of the goods missing, according to the clear net value of goods of like kind and quantity at the port of delivery. Watkinson v. Laughton, 8 Johns. 213.

V. If freight be paid in advance, and the goods be not carried by reason of any event not imputable to the shipper, it may be recovered back. Watson v. Duykinck, 3 Johns. 335.

VI. In an action for the non-delivery of goods, pursuant to a contract of affreightment, the measure of damages is the value of the goods at the port of destination, but without interest, unless there has been fraud or misconduct on the part of the defendant. Amory v. McGregor, 15 Johns. 24, 38.

BETTS, District Judge. Assuming the subject-matter of this action to be within the cognizance of this court, the question upon the merits is whether the respondent is chargeable for the quantity of grain represented in the bill of measurement to have been delivered on board his vessel for transportation. The evidence shows that the respondent had no agency in measuring or weighing the grain when put on board, or at its unlading and delivery. The libellant employed his own agents to transact that business at each end of the voyage. The owners of the store where the grain was on storage would not permit the measurer employed by the libellant to make the weight or measure of the corn; their clerk measured it and kept his own tally, and by his certificate or return of weight and measure it appeared that there was put on board the lighter the quantity in bushels claimed by the libellant.

The statute of this state fixes the legal capacity of the bushel by measurement (1 Rev. St., 2d Ed., c. 621, § 19), and the weight of corn which shall constitute a bushel at fifty-six pounds. Id. § 40. The contract for the carriage of this cargo was by the bushel. No bill of lading appears to have been executed, but the certificate or account rendered by the warehouseman of the quantity of corn delivered to the vessel was accepted and acted upon as accurate by the parties, in paying and receiving the freight for its transportation.

[1] [Reported by Abbott Brothers.]

The method commonly pursued in this port by dealers in grain for ascertaining the quantity, (and which was adopted substantially in this case,) is to measure it in a half-bushel by tale, tallying at each count of five measures, and to weigh one measure out of ten tallies, or one bushel out of every hundred measured, or other assumed proportion. The multiplication of the sum of the tales by fifty-six is assumed to show the quantity of bushels contained in the mass. The warehouseman refused in this case to permit the corn to be measured and weighed by any person except his own weighers. The libellant employed a measurer of grain to attend for him at the warehouse where this grain was stored and see to its delivery. He was present, and overlooked the tallies of the measures and weights as they were taken from the measurers and entered by the clerk of the warehouse, during the delivery of four or five hundred bushels, and saw that they were correctly stated by him. The residue of the delivery was made by the warehouseman alone.

The cargo was also unladen at New York, from the lighter, under the superintendence of the libellant's agents only.

It is fully proved that this compound method of measurement never works out a perfect concurrence in the two results. There is invariably a difference between the quantity given by the tales of measurement and the product in weight so obtained, at times amounting to an important per centage, but more usually not exceeding about five per cent. The evidence discloses several cases of that difference. The grain is shovelled into the measure by laborers, and then a measurer strikes or evens the measure. When the grain is thrown in heavily by the shoveller, or is shaken strongly or evened loosely by the measurer in striking, the weight of the full measure will be augmented, as will the measured dimension of the mass be diminished, and consequently, the tale line of the return will be reduced, as it may be unduly increased by an opposite irregularity in filling the measure. A difference of but one pound weight to a bushel, by either mode of manipulation, would create a variance in the computation of 1800 bushels, charged as delivered, of over thirty bushels in actual quantity, not participated in mutually by vendor and vendee, but operating exclusively to the advantage of one alone. These differences are usually made to harmonize by pound allowances or estimates, and that method may be fair enough where both parties have been present at the weighing and measuring; but it is governed by no rules or data capable of securing certainty, so as to constitute it a safe law to be enforced against a stranger to the process.

The enumeration of bushels in this case was obtained by compounding the hand-measure in half bushels of the whole bulk, with the weight of the several individual measures, and the sum in pounds, so produced, determined the quantity of bushels in the cargo. This method of determining the quantity was acted upon by both parties in fixing the amount of freight, but is not conclusive between them on the question whether the lighterman delivered to the shipper the whole quantity of grain received on board the vessel; for not only the circumstances stated necessarily lead to uncertainty and variations as to quantity in every measurement made, but moreover, a cargo loaded and discharged in the manner adopted in this case is subject to other causes of wastage and diminution.

After being weighed in the loft of the store, it was, on a windy day, run down to the hold of the sloop in an open pipe or trough exposed to the air. The evidence proves that by thus fanning out the chaff and light matter, a considerable diminution of bulk necessarily ensues, and by reason of this, and of the waste in shovelling and measuring adverted to, there would almost unavoidably be found on delivery a difference between the amount returned as taken on board and the one discharged, even when the same mode of ascertaining the quantity is employed in both instances, and that difference is augmented if the measure alone is used in one case and weight in the other. Some of the witnesses attempted to make out average computations of loss or gain on these heads; but it is obvious that estimates so formed can afford no satisfactory exactness in a given instance; it must be purely matter of conjecture whether under or over five per cent. would be lost.

The respondent proved, by the two men in charge of his vessel, that one of them remained constantly on board the vessel while the grain was there, and that none of it was removed by them or with their knowledge, except by the libellant's agents; and they testify that they do not believe it would have been possible for any to have been taken out of the vessel without their knowledge.

Conceding to the libellant the case in the strongest form in which he places it, that the respondent, as lighterer, stood in the character and assumed the liability of a common carrier, and was responsible for the whole quantity of grain put in his charge, the position must be taken also with the qualification, that he must prove the quantity placed on board, and that less than that quantity was delivered out to him. Both the acts of lading and unlading were his own, to the exclusion of the respondent, and he must prove, beyond reasonable question, that he did not receive from the defendant all the grain delivered on board of his vessel. The evidence on his part may be prima facie sufficient to lay a foundation for the presumption that such is the fact, and that the deficiency arose either from loss in the transportation of the cargo, or from its embezzlement by those in charge of the vessel, or

from its unlawful abstraction by others. For losses of that character the respondent would be liable.

The testimony, however, which has been produced by the respondent, removes all the essential grounds for either presumption, and places the case upon the question of the accuracy of the measurement in lading and unlading the cargo. [For it would be most unreasonable to charge the owner for the purloining or embezzling of the grain upon a mere presumption against the positive evidence of those in charge of it as to their own acts, and the equally strong presumptions against its having been taken by others arising from the facts proved by them.] [2]

The case then stands thus: On the supposed quantity of 1857 bushels of corn, charged against the respondent, the defendant has sustained a loss of about 97 bushels, or over five per cent. of deficiency. The measurer employed by the libellant supposes that ordinarily in loading grain by weight, and delivering it by measure, the difference in quantity found would be very slight, and if there were any, it would be ordinarily rather in favor of the carrier. The excess, he thinks, would be about five bushels to the thousand. But he says that shovelling by hand, for the purpose of measurement, will sometimes make a difference against the carrier of about four ounces to the bushel, which a little exceeds five per cent. In this case he found a difference, on delivery, of five bushels, between weight and measure. Another witness, a weigher and measurer by occupation, supposes that 1800 or 1900 bushels of corn, shipped by weight, would usually deliver a less amount by 30 bushels, the quantity being determined in the same manner. If the grain is loaded in a high wind, the blowing out of chaff, he thinks, would lessen the measure considerably. He has never found the same quantity on remeasurement as on the first trial; there would always be some excess or deficiency. As a general rule, he should expect that one thousand bushels loaded by weight would deliver twelve bushels more by measure. According to his experience, the mode of shovelling may easily make a difference of one pound or more to the bushel. A third witness, Mr. Verplanck, proves that the amount put on board was determined by weighing it in lots of twenty-five bushels each. It was weighed by his clerk, without his personal superintendence. It also appears that freight was charged and paid, according to the statement of the quantity made by the weigher.

I think that upon all the proofs, the inference is just as direct and satisfactory that less than the named amount of corn was laden on board the vessel, as that the defendant delivered less than he actually received. In order to charge him with a supposed deficiency, the preponderance of evidence must be decidedly in favor of the libellant, that more grain was laden on his vessel than she delivered on her discharge.

The amount of deficiency being only about five per cent., would hardly justify an inference of misconduct or negligence against the parties sought to be charged therewith; when it may be assumed, upon presumptions equally cogent, that the difference arose from mistakes in computation of weight or measure, in the combined operations of making up the calculation of quantity, or in actual wastage in the process of loading and discharging.

I shall dispose of the case upon this view of the facts, without reference to the question raised as to the jurisdiction of the court over the subject-matter. Admitting the jurisdiction of the court, there is not sufficient evidence, in my opinion, to charge the defendant with any loss of corn while on its carriage from Brooklyn to its delivery in New York, and the libel is accordingly dismissed.

The libellant has shown a fair prima facie case on his proofs in the first instance, and I therefore impose no costs upon him. Libel dismissed without costs to either party.

[2] [From 12 Betts, D. C. MS. 5.]

Case No. 9,045.

MANNING v. JAMESSON et al.

[1 Cranch, C. C. 285.] [1]

Circuit Court, District of Columbia. March Term, 1806.

CONTINUANCE—AFFIDAVITS—COUNTER-AFFIDAVITS.

Counter-affidavits cannot be read on a motion for a continuance of the cause.

[This was a suit by Manning against Jamesson & Young.]

Mr. Taylor, made an affidavit for a continuance. A counter-affidavit was read, but THE COURT said they would not consider the reading of it as a precedent.

Case No. 9,046.

MANNING v. LOWDERMILK.

[1 Cranch, C. C. 282.] [1]

Circuit Court, District of Columbia. Dec. Term, 1805.

CONTRACTS—TO SHARE COMMISSIONS—EVIDENCE—PROOF OF RECEIPT.

Delivery of the cargo to the owners, by the supercargo, is evidence of his receipt of his commissions in an action against him by a third person, who is entitled to a share of those commissions.

Money had and received. The evidence was a verbal agreement between the plaintiff and the defendant to share the commissions on

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

the sales of a cargo in the West Indies, the plaintiff being master, and the defendant supercargo. There was no special agreement stated in the declaration; and there was no evidence that the defendant had actually received the commissions.

Mr. Key, for defendant. The plaintiff must prove money actually received by the defendant, or must give in evidence such an instrument as the law makes evidence of money had and received.

Mr. Morsell, for plaintiff. The defendant had a lien on the goods or the money for his commissions; and if he relinquished that lien without the assent of the plaintiff, he ought to be liable.

Mr. Mason, on the same side. Actual receipt of money, in numero, is not absolutely necessary. If I sell another man's horse and receive corn in payment, he may bring and support this action. If I sell the horse for cash on credit, and receive payment in corn, it lies. The receipt of the purchase-money for the flour, was a receipt of his commissions. The motion is to instruct the jury that the plaintiff cannot recover in this form of action, unless the money was actually received, or such evidence is produced as will prevent the defendant from denying the receipt of the money.

The opinion of THE COURT was, that the jury must be satisfied that the defendant received the money, but that the delivery of the inward cargo to the owners, without the consent of the plaintiff, is evidence of the defendant's receipt of his commissions, which the defendant in this case ought not to be permitted to deny.

KILTY, Chief Judge, absent.

Case No. 9,047.

MANNY v. DUNLAP.

[Woolw. 372;[1] 3 West. Jur. 329; 17 Pittsb. Leg. J. 11.]

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

AGENCY TO PROCURE INSURANCE — VERBAL CONTRACT—LIABILITY—NEGLIGENCE—SUBROGATION.

1. A direction by a principal to his agent to procure a policy of insurance is not satisfied by a verbal contract for insurance.

2. If an agent has undertaken to procure insurance, but has done it so negligently that a loss which occurs is not covered by the policy, he is liable to his principal.

[Cited in Marquardt v. French, 53 Fed. 606.]

3. If an agent to procure a policy of insurance merely makes a verbal contract for insurance, and a loss occurs, his principal cannot be put to uncertain and expensive resource of a suit on such contract against the insurer, but the agent must make good the loss.

4. If he have a valid verbal contract, he must pay his principal, when he will be entitled to an assignment of it, or may sue on it in the name of his principal.

This was a motion for a new trial.

[1] [Reported by James M. Woolworth, Esq., and here reprinted by permission.]

MILLER, Circuit Justice. This is a motion for a new trial, founded on alleged erroneous instructions to the jury. The plaintiff, who was the owner of certain reaping and mowing machines, directed her agent by letter to procure a policy of insurance on them, with specific instructions as to the amount to be insured on each machine, and the time for which the insurance should run. No policy was executed, but the agent, who is defendant in this action, had some conversation with the agent of an insurance company, which, taken in connection with certain arrangements between them concerning money on deposit by one with the other, is claimed by the defendant to constitute a valid contract of insurance.

From the testimony, these facts are quite clear, that after the defendant received orders to insure, and before the machines were burned, about twenty-five days elapsed; that the defendant had available means of plaintiff's with which to pay the premium; and that, at any time during these twenty-five days, if he had called at the office of the insurance agent, and insisted on it, he could have received a policy which would have covered the loss.

The machines having been destroyed by fire, the insurance agent denied that he had made any insurance on them, and, if his testimony in the case is to be credited, he had not. The present action was brought to recover the value of the goods destroyed, and is founded on the neglect of the defendant to effect the insurance which he had been ordered to obtain. The jury were instructed, that if the defendant had money of the plaintiff's with which to pay the premiums, and if he could have done so by the use of reasonable diligence, it was his duty to have insurance made by a written policy of insurance; and that such duty was not performed by a verbal agreement or understanding for insurance between the defendant and the insurance agent. And the court refused to leave it to the jury to say whether a valid verbal contract of insurance had been made, or to consider that question further.

If these rulings are sound, the verdict must stand; if they are erroneous, it should be set aside. In this discussion, I would premise that the defendant received express instructions in writing to procure a "policy of insurance," a form of expression which is not satisfied by any verbal contract, though such contract may possibly be a valid one. I am not inclined to believe that this fact is material, otherwise than as showing that the defendant was without excuse in anything in the language of his instructions. I think that a direction by the owner of property to his agent to insure, would require an insurance by written policy, because that is the usual mode among prudent persons of doing the thing ordered. And I am further of opinion that a court is bound to know judicially that no prudent and ordinarily careful man would

for twenty-five days rely upon a verbal agreement for insurance, when, on any day of the twenty-five, he could without trouble or difficulty have received a policy.

The duties of agents are well understood. Those of an agent to procure insurance have been often considered by the courts, and are rigidly enforced. It has been decided in general terms that when an agent has undertaken, or it has become his duty, to insure, and without good reason he has neglected to do so, he is liable for all loss which may occur, that would have been covered by the policy. To this effect, among many other cases, are the following: Wilkinson v. Coverdale, 1 Esp. 75; Morris v. Summerl [Case No. 9,837]; [Ela v. French, 11 N. H. 356].[2]

Again, if the agent has undertaken to effect insurance, and has done it in a manner so negligent or unskilful that a loss which occurs is not covered by the policy, the agent is liable therefor. Story, Ag. § 218; Mallough v. Barber, 4 Camp. 150. In Wilkinson v. Coverdale, above cited, the ground of action was, that defendant having sold plaintiff certain premises, had promised to have his policy renewed for the benefit of his vendee. He did have it renewed, but neglected to have such indorsement made thereon as was necessary to enable the plaintiff to avail himself of it in case of loss. Lord Kenyon was of opinion that there was negligence sufficient to have made the defendant liable, if he had in fact promised to renew for plaintiff's benefit; but no such promise could be shown in proof, and there was a nonsuit. The case, however, shows his lordship's sense of the strict diligence required of one undertaking to procure insurance for another. In Callander v. Oelrichs, 5 Bing. N. C. 58, it appeared that defendants were agents for shipping plaintiff's corn, and undertook to use, and did use, their endeavors to effect insurance according to the instructions of plaintiff. Their efforts were unsuccessful, but they never informed plaintiff of their failure. The wheat was lost, and it was held that the agents were liable to plaintiff for their neglect to notify him of the failure to obtain insurance.

In the case under consideration, plaintiff had a right to insurance effected in the usual safe and secure manner, the more especially as he had instructed his agent to effect it in that manner. When a loss has occurred, the agent cannot be heard to say, "I did not do what you directed, nor as a prudent and cautious man under similar circumstances would do for himself. I departed from your instructions for my own convenience. But I have effected a valid insurance for you, and though its enforcement is uncertain, difficult, and costly, and though the contract is denied by the other party, and I have no other proof than my own oath, I insist on your accepting this as a discharge of my duty, and looking to the insurance company, instead of to me, for indemnity." The plaintiff cannot be thrown upon this uncertain and expensive resource. He had a right to a written contract, which would surely bind the company; and if he has failed to obtain this through the negligence of defendant, the latter must make good the loss. If he has any such valid contract as he alleges, let him pay plaintiff, and he will be entitled to an assignment of it, or to sue on it in plaintiff's name for his own benefit. The result of such a suit will be, as it ought to be, at the risk of defendant.

These views are fully sustained by what was said by Mr. Justice Washington, in the case of De Tastett v. Cronsillat [Case No. 3,828]. "The law," he remarks, "is clear, that if a foreign merchant, who is in the habit of insuring for his correspondent here, receives an order for making an insurance, and neglects to do so, or does so differently from his orders, or in an insufficient manner, he is answerable, not for damages merely, but as if he were himself the underwriter, and he is of course entitled to the premium." The motion for a new trial is overruled, and judgment must be entered on the verdict.

[2] [From 3 West. Jur. 329.]

MANNY (McCORMICK v.). See Case No. 8,724.

MANRO (BALDERSTON v.). See Case No. 793.

MANSANITO, The (SMITH v.). See Case No. 13,075.

Case No. 9,048.

In re MANSFIELD et al.

[6 Ben. 284.][1]

District Court, E. D. New York. Dec., 1872.

BANKRUPTCY—COUNSEL FEES — SERVICES BEFORE ADJUDICATION.

1. A petition in involuntary bankruptcy was filed against a firm, an injunction preventing them from parting with any of their property was issued, and a warrant of arrest under the 40th section of the act [of 1867 (14 Stat. 536)] was issued against one of the firm. The bankrupts employed attorneys, who applied for a discharge of the arrest, and attended on a reference to ascertain the facts, which resulted in the discharge of the warrant. An adjudication being had, the attorneys prepared the schedule and inventory required by the 41st section. Thereafter they applied by petition to be paid for such services out of the estate. *Held*, that, under the circumstances, a moderate compensation for such services would be allowed them.

2. The proper practice, in such a case, is for the bankrupts to apply to the court in the first instance for leave to employ counsel.

In bankruptcy.

BENEDICT, District Judge. The petitioners in this case pray for an allowance out of the bankrupt's estate of the amount of a bill

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

for professional services rendered under the following circumstances: An involuntary petition was filed in this court to have John Mansfield and Nathan K. Mansfield declared bankrupts, and their property administered under the bankrupt act. At the same time an injunction was issued, preventing the bankrupts from parting with any of their property, and also a warrant of arrest under section 10, against Nathan K. Mansfield. These being served, the bankrupts employed the petitioners as attorneys at law, who applied to the court for a discharge of the warrant of arrest, and attended at a reference which was ordered to ascertain the facts, and resulted in the discharge of the warrant after the bankrupt had submitted to an examination touching his property. The petitioners, also, upon the adjudication of bankruptcy being made, prepared the schedule of creditors and inventory of the estate, which is required by section 41, and for these services the attorneys now ask to be paid out of the bankrupts' estate. I incline to the opinion that services performed in preparing the schedules and inventory required by section 41 may be considered as having been rendered for the benefit of the estate, in a case like the present, where the employment of counsel was unquestionably necessary. As to the services made necessary by reason of the arrest of the bankrupt, I think they can also be compensated out of the fund in such a case as this is stated to be. The court was entitled to be aided by counsel on the part of the bankrupt in the examination as to the foundation for the warrant of arrest and its continuance, and the amount of bail to be required. The injunction having deprived the bankrupt of the means to employ counsel, such services may, without injustice, be considered a part of the bankrupt proceedings. They were made necessary by the action of the creditors, and could only be obtained by a resort to the fund. It would have been more proper for the bankrupt to have applied to the court in the first instance for leave to employ counsel, and such previous application should be insisted on, as a general rule. Here it may be dispensed with, the mode of proceeding being unsettled and no question made as to the propriety and necessity of the services in question. But I must require that it be made to appear that the bankrupt is now without means, and that there is no reason to doubt that he has surrendered all his property to the assignee. It must also be shown that the efforts of the counsel were not directed towards obtaining delay or hindering the bankruptcy proceedings. This being made to appear, I shall feel inclined to allow a moderate compensation for services rendered in preparing the schedules and inventory, and those made necessary by reason of the warrant of arrest.

If not desired otherwise by the assignee, in order to save expense, the facts may be made to appear by affidavits, and the extent and value of the services shown in the same way; but if asked for by the assignee, a reference will be ordered to take proof of the facts.

Case No. 9,049.

In re MANSFIELD.

[6 N. B. R. 388.] [1]

District Court, D. Louisiana. 1872.

BANKRUPTCY — DISCHARGE — DEBT PROVABLE — ELECTION—ASSIGNMENT—RES JUDICATA.

A gave his bond to the United States as security for a certain claim against a vessel. The cause was tried and a decision adverse to the United States rendered. Additional evidence was produced in the circuit court, on appeal, and the decision of the district court was reversed, and a decree of condemnation rendered on the twenty-seventh of May, eighteen hundred and seventy. While proceedings were pending in the circuit court, A. filed his petition in bankruptcy, and was, on the thirtieth day of June, eighteen hundred and sixty-nine, discharged from all his debts dischargeable under the bankrupt act [of 1867 (14 Stat 517)]. On the eighth of June, eighteen hundred and seventy, the circuit court overruled A's plea of discharge in bar of the claim, and gave judgment against him on the release bond. On the twenty-first of April, eighteen hundred and seventy-one, the secretary of the treasury, for a valuable consideration, transferred the judgment to B., who, on the twenty-seventh of May, eighteen hundred and seventy-one, filed a petition to set aside A's discharge. *Held*, that when the United States elected to take judgment upon the bond they parted with all right to prove it as a debt due and payable from the bankrupt at the time of the adjudication of bankruptcy, and as a debt to be proved against the estate; that it is res judicata that this debt is not affected by the discharge, as the judgment is subsisting and operative. Exception sustained and the petition dismissed.

[Cited in Bourne v. Maybin, Case No. 1,700.]

[Cited in Boynton v. Ball, 105 Ill. 630. Cited in brief in Bowen v. Eichel, 91 Ind. 26.]

In bankruptcy.

J. S. Whittaker, for petitioner.

R. De Gray and J. A. Campbell, for Mansfield.

DURELL, District Judge. On the twenty-third day of March, eighteen hundred and sixty-five, a suit entitled "U. S. v. The Rob Roy" [Case No. 16,179,] was instituted in the then United States district court for the Eastern district of Louisiana, wherein it was sought to forfeit said steamboat and cargo of one thousand one hundred and forty bales of cotton as enemies' property, because said property had been sought for, obtained, and brought on board said steamboat from within territory held in occupation by armed enemies of the United States, "declared to be in a state of insurrection." The boat and cargo were seized, and subsequently released on bond to one A. S. Mansfield, the claimant thereof. The cause was tried in this court, and a decision rendered therein adverse to the United States. Additional evidence having been produced in the cir-

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cuit court, on appeal, the decision of the district court was reversed, and a decree of condemnation rendered on the twenty-seventh day of May, eighteen hundred and seventy. In the meantime, and while said proceedings were being had in the circuit court, to wit: on or about the first of June, eighteen hundred and sixty-eight, said Mansfield filed his petition in this court, praying to be adjudged a bankrupt, and was so adjudged on the ninth day of June, eighteen hundred and sixty-eight. On the thirtieth day of June, eighteen hundred and sixty-nine, said Mansfield was, in due course of law, discharged from all debts dischargeable under the bankrupt act. On the third day of May, eighteen hundred and seventy, said Mansfield filed in the circuit court the following plea, in bar to the suit of U. S. v. The Rob Roy [supra], then pending in said court, to wit: "And the said A. S. Mansfield, by his attorneys, avers that, on the thirtieth day of June, eighteen hundred and sixty-nine, a discharge was granted him in the words and figures set forth in the duly certified copy of the decree hereto annexed, and made part hereof; and he pleads said discharge as a full and complete bar to this suit wherefore he prays judgment, if the said United States ought to have or maintain the aforesaid action against him."

On the twenty-seventh day of May, eighteen hundred and seventy, the judgment of the district court was reversed, the libel sustained, and the Rob Roy and cargo condemned as forfeited to the United States. This judgment fixed the liability of Mansfield under the release bond. On the eighth day of June, eighteen hundred and seventy, the circuit court overruled Mansfield's plea in bar, and gave judgment against him upon the release bond for the sum of two hundred and four thousand nine hundred and eighty-two dollars and twenty-nine cents, with five per cent. interest thereon from the twenty-fourth of March, eighteen hundred and sixty-five, till paid, and cost of suit. On the twenty-first day of April, eighteen hundred and seventy-one, George S. Boutwell, secretary of the treasury of the United States, for and in consideration of the sum of twenty thousand dollars paid into the treasury of the United States, transferred this second judgment in favor of the United States to Stewart Q. Cochrane, who, by motion, entered and filed in the circuit court, on the twenty-seventh day of May, eighteen hundred and seventy-one, caused himself to be subrogated to all the right, title, and interest of the United States in and to said judgment. On the same twenty-seventh of May, eighteen hundred and seventy-one, Cochrane filed a petition in this court in the matter of Asahiel S. Mansfield, a bankrupt, to set aside Mansfield's discharge.

It is not necessary to enumerate the many allegations made and contained in said petition, nor to notice the exceptions taken and answers filed by Mansfield in avoidance of and responsive thereto, except as to the one question: Was the debt set forth in the petition of S. Q. Cochrane provable in the bankruptcy of A. S. Mansfield? Section thirty-four of the bankrupt act provides, "that any creditor or creditors of said bankrupt, whose debt was proved or provable against the estate in bankruptcy, who shall see fit to contest the validity of said discharge on the ground that it was fraudulently obtained, may, at any time within two years after the date thereof, apply to the court which granted it to set aside and annul the same." Under this section Cochrane's petition was filed. Section nineteen provides, "that all debts due and payable from the bankrupt at the time of the adjudication of bankruptcy, and all debts then existing, but not payable until a future day, a rebate of interest being made, where no interest is payable by the terms of the contract, may be proved against the estate of the bankrupt."

Mansfield was adjudicated a bankrupt on the ninth day of June, eighteen hundred and sixty-eight. A decree was entered granting him his discharge on the thirtieth of June, eighteen hundred and sixty-nine. During all this time, the suit of "the United States against the Rob Roy and her cargo," was pending in the circuit court. It is to be remembered that judgment was rendered in the district court against the United States and in favor of Mansfield, the claimant restoring to him the property libelled, and that said judgment was reversed in the appellate court, on the production of evidence not produced in the lower court. Certainly, during the pendency of the appeal in the circuit court, and until the Rob Roy and cargo were adjudged forfeited to the United States, on the twenty-seventh day of May, eighteen hundred and seventy, there was no semblance of any indebtedness due from Mansfield to the United States, which could have been proved against Mansfield's estate, on the ninth day of June, eighteen hundred and sixty-eight, the day on which he was adjudicated a bankrupt. Further, the judgment rendered on the twenty-seventh day of May, eighteen hundred and seventy, was not a personal judgment against Mansfield, condemning him to pay any certain sum of money, but a judgment against the Rob Roy and cargo, as forfeited to the United States. In order to obtain a judgment against Mansfield, further proceedings were to be had; and, accordingly, the conditions of the release bond not being complied with, further proceedings were taken upon the bond, which proceedings ripened into a judgment rendered against Mansfield and his sureties in favor of the United States, on the eighth day of June, eighteen hundred and seventy, for two hundred and four thousand nine hundred and eighty-two dollars and twenty cents. It is this judgment which the peti-

tioner, S. Q. Cochrane, holds by assignment from the United States, and which he alleges to be a debt provable in bankruptcy against the estate of A. S. Mansfield, on the ninth day of June, eighteen hundred and sixty-eight. It will be seen that Cochrane is not the assignee of the release bond given by Mansfield to the United States, but the assignee of the judgment rendered thereon in favor of the United States, which are two very different things. The nineteenth section of the statute says: "If the bankrupt shall be bound as drawer, indorser, surety, bail, or guarantor upon any bill, bond, note, or any other specialty or contract, or for any debt of another person, and his liability shall not have become absolute until after the adjudication of bankruptcy, the creditor may prove the same, after such liability shall have become fixed, and before final dividend shall have been declared." Now, if we concede that under this clause of the nineteenth section of the statute the liability of Mansfield, as the maker of the release bond, became fixed on the rendition of the judgment of condemnation and forfeiture of the Rob Roy and her cargo, and the noncompliance with the conditions of the release bond, and that the United States might have proved the same against the estate of the bankrupt, yet such concession does not involve the application of the same proposition to the subsequent judgment obtained upon the bond, on the eighth of June, eighteen hundred and seventy, and now held by the petitioner, Cochrane.

Mansfield filed in the circuit court, on the eight of May, eighteen hundred and seventy, a plea in bar founded upon his certificate of discharge. The court, for reasons orally given, overruled the same. Certainly the plea was not a good one if it was intended to bar the right of the United States, under the clause cited from the nineteenth section of the statute, to fix Mansfield's liability upon the release bond given by him March twenty-fourth, eighteen hundred and sixty-five. Neither was the plea in bar a good plea in bar of a judgment sought to be obtained upon the bond, where the creditor elects not to proceed under the clause cited from the nineteenth section of the statute, but to enforce his claim against the bankrupt personally as a debt due upon a liability, which has become fixed long after the bankrupt's surrender and adjudication thereon. The United States elected to pursue the latter course. Let us now see what are the legal consequences of such election:

"When a creditor obtains from his debtor a security of a higher nature than he had before, the original debt is merged in the higher security, and can no longer be made the foundation of any action or suit, or of proof in bankruptcy or insolvency." Lindl. Partn. 368; 10 C. B. 561; Wells & Leovy, 3 McM. & G. 378.

This doctrine has been repeatedly held in Louisiana. In Oakey v. Murphy, 1 La. Ann. 372, the court said: "In this case, which is an action by the holder of a promissory note against the maker, the plaintiff filed a supplemental petition, in which he alleged that a judgment had been rendered in his favor, at the time of the institution of his suit, on the note sued on in the circuit court of the United States for the Southern district of Mississippi. On a judgment by default being taken, it was confirmed on the evidence of this judgment rendered in Mississippi. So far from this judgment proving the right of the party to recover on the note, it establishes the reverse, inasmuch as it is a merger of the note. The plaintiff has lost his right of action on the note, and he has no right to amend his petition by an allegation which extinguishes it." The court refers to 9 La. Ann. 419; 2 Mart. (N. S.) 599; and 3 Bl. Comm. 398. See, also, 7 La. Ann. 334; 12 La. Ann. 738.

In Re Williams [Case No. 17,705], the learned judge for the district of Connecticut held, "that a debt, upon which a judgment of law is founded, is merged in the judgment and extinguished by it," citing 27 Me. 441; 32 Me. 418; 2 Cush. 173; 2 Denio, 17, 72; and 11 Cush. 25; 17 Conn. 580. The authorities cited sustain the learned judge in the conclusion to which he arrives. See, also, 6 Hill, 255, where the court says: "The defendant has been discharged, under the bankrupt law, from all debts which he owed at the time he presented his petition. Subsequent to that time the cognovit was given, and the judgment recovered. The original debt has been merged and extinguished by the judgment. The judgment is a new debt, which is not affected by the discharge." Bacon says: "If a bond creditor obtains a judgment on the bond, or has judgment acknowledged to him, he cannot afterward bring an action on the bond, for the debt is drowned in the judgment, which is a security of higher nature than the bond." Extinguishment (D), citing 6 Coke, 40. The authority cited is Higgins' Case, wherein Lord Coke says: "It was objected that if a man recovers debt on a bond, or rent on a lease for years, it is at the plaintiff's election to sue execution on that judgment, or to have a new action." But it was resolved "that so long as the judgment remains in force he cannot have a new action on the same bond, for, as he who has a debt by simple contract, and takes a bond for the same, or any part of it, the contract is determined, so when a man has a debt on a bond, and by ordinary course of law has judgment thereon, the contract, by specialty, which is of an inferior nature, is by judgment of law changed into a matter of record, which is of a higher nature." The latest authority of the highest court of our country is to be found in 6 Wall. [73 U. S.] 234, in the case of Mason v. Eldred. Field, J., the organ of the court, there says: "If the note in suit was merged in the judgment, then

the judgment is a bar to the action, and an exemplification of its record is admissible, for it has long been established that, under the plea of the general issue in assumpsit, evidence may be received to show, not merely that the alleged cause of action never existed, but also to show that it did not subsist at the commencement of the suit." And again, at page 238: "The general doctrine maintained in England and the United States may be briefly stated. A judgment against one upon a joint contract of several persons bars an action against the other, though the latter were dormant partners of the defendant in the original action and this fact was unknown to the plaintiff when that action was commenced. When the contract is joint, and not joint and several, the original cause of action is merged in the judgment. The joint liability of those not sued with those against whom judgment is recovered being extinguished, their entire liability is gone." Indeed, the whole opinion there reported is an able review of the decisions of the state and United States courts upon this most interesting question of doctrine of the law. Counsel for the petitioner, Cochrane, has cited in his brief, opinions adverse to the conclusion at which I have arrived. Opinions to be found in Re Brown [Case No. 1,975]; Re Vickery [Id. 16,930].

But however great may be my respect for my Brothers of the Eastern and Western districts of Michigan and of the Southern district of New York, I cannot readily yield a doctrine which is supported by a long line of decisions, commencing with the year books cited by Lord Coke, and coming down to this day. When, therefore, on the eight day of June, eighteen hundred and seventy, the United States elected to take judgment upon the bond, they parted with all right to prove the bond as a debt due and payable from the bankrupt at the time of the adjudication of bankruptcy, and as a debt to be proved against the estate of the bankrupt. Cochrane, the petitioner, and assignee of the judgment, cannot be held to be conditioned otherwise than was his assignor with regard to the same. It is res judicata that his debt is not affected by the discharge. It has been pleaded, and the decision made in his favor. This judgment is subsisting and operative. What title, then, has he to impeach an act of the court in which he was no wise concerned, and by which he is in no manner injured. The exception must be sustained and the petition dismissed.

MANSFIELD (MASON v.). See Case No. 9,243.

MANSFIELD, C. & L. M. R. CO. (SCOTT v.). See Case No. 12,541.

MANSON (CLARKSON v.). See Case No. 2,867.

MANTON (LANSING v.). See Case No. 8,077.

MANTON, The HERBERT. See Cases Nos. 6,399 and 7,319.

MANTOR (UNITED STATES v.). See Case No. 15,719.

Case No. 9,050.

MANUFACTURERS' & FARMERS' BANK v. BAYLESS.

[Brunner, Col. Cas. 8;[1] 1 West. Law Month. 356.]

Circuit Court, N. D. Ohio. Jan. Term, 1859.

STATE EXEMPTION LAWS — HOMESTEAD — EXECUTION—HOMESTEAD EXEMPTION LAWS.

1. State exemption laws apply to process issued from the federal courts. The homestead of the head of a family is exempt from sale on a judgment rendered by a court of the United States in the same manner as upon a judgment of a state court.

2. Where a portion of the defendant's lands, on which is situated a dwelling-house far exceeding the value of the homestead entitled to exemption, is subject to a mortgage nearly equal to the value of that portion of his lands, and the defendant has another parcel, on which is a dwelling occupied by part of his family, of a value within the limits of the statute exemption, he is entitled, upon his request, to have the latter set off and exempted from sale on execution.

In equity.

S. J. Andrews, for the motion.

Paine & Wade, opposed.

WILLSON, District Judge. A motion is made to set aside the appraisal in this case, and the reason assigned is that the defendant, at the time of the levy and appraisal of the land described in the marshal's return upon the execution, was the head of a family, and that he and his family then resided upon the upper tract of land included in said appraisal, and which was and is known as the "Millville Farm." That the defendant, prior to the making of said appraisement, demanded of the deputy marshal under whose direction said levy and appraisal were made, to set off and assign to said defendant a homestead in the said Millville farm, which the said deputy marshal refused to do, but caused said appraisal to be made without reference to the homestead exemption claimed by said defendant.

This motion presents two questions for our consideration:—(1) Upon an execution issued from the United States circuit court in Ohio, and where the marshal, in executing the writ, levies upon land, has the defendant the right to the homestead exemption, provided for by the Ohio statute of 23d March, 1850? And, (2) If the state law in this particular is applicable, then, is the defendant in this case entitled to its benefits?

The first section of the state law of March 23, 1850, provides that from and after the 4th day of July, 1850, the homestead of each head of a family shall be exempt from sale

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

on any judgment or decree rendered on any cause of action after the taking effect of the act; provided, that such homestead shall not exceed five hundred dollars in value. Swan's St. 511. The third section of the act of congress of May 10, 1828, declares "that writs of execution and other final process issued on judgments and decrees rendered in any of the courts of the United States, and the proceedings thereupon, shall be the same, except their style, in each state, respectively, as are now used in the courts of such state, saving to the courts of the United States in those states, in which there are no courts of equity, with the ordinary equity jurisdiction —the power of prescribing the mode of executing their decrees in equity by rules of court; provided, however, that it shall be in the power of the courts, if they see fit in their discretion, by rules of court, so far to alter final process in said courts, as to conform the same to any change which may be adopted by the legislatures of the respective states for the state courts." 4 Stat. 281. The first section of this act expressly adopts the mesne process and modes of proceeding in suits at common law, then existing in the highest state court, under the state laws, which it has been held included all the regulations of the state laws as to bail, and exemptions of the party from arrest and imprisonment. In regard, also, to writs of execution and other final process and proceedings thereupon, the third section declares they shall be the same as were then used in the courts of the state. There can be no question that the provisions contained in this section relating merely to executions and modes of proceeding after judgment are exceptions to the thirty-fourth section of the judiciary act of 1789 [1 Stat. 92], which enjoins upon the federal courts the adoption of state laws as rules of decision in certain cases. They are exceptions, because nothing is left for implication, as congress has legislated directly upon the subject-matter. The law is express that executions and the proceedings thereupon shall be the same as were used in each state on the 10th of May, 1828, conferring, however, upon the federal courts the power, in their discretion, by rules, to so alter final process in said courts as to conform the same to any change which might be adopted by the legislatures of the respective states for the state courts.

It has accordingly been urged with some plausibility, that inasmuch as there was no homestead exemption law in force in Ohio, on the 10th of May, 1828, the subsequent enactment could have no binding obligation in the execution of process from the federal courts, unless those courts should by rule adopt such law; and that as this court has adopted no rule upon the subject, the defendant cannot claim its benefits. This is not a question upon the mode of proceeding upon an execution. It does not involve the inquiry how the levy upon real estate should be made, and the duties of the marshal as to the mode of appraisal, advertisement, and sale. But the question here goes directly to a rule of property. It relates not to the proceeding, but to the property proceeded against. As an incident to sovereignty, the state of Ohio, through its legislature, has not only the power to declare what shall constitute a valid title to real property, but also the mode of alienation of such property. It certainly has power to change a rule in the common law in the matter of divesting title, as was done by the act of February 28, 1846, in relation to the interest of husbands in the estates of their wives. It can, by a law of limitation, determine when a judgment shall cease to have any legal effect, and by a like law it can deny to the lawful owner the right to recover the possession of his land. And so it can exempt from legal process to the head of a family, a homestead, as provided in the act of March 28, 1850. This law of exemption has a direct operation upon property, and has as much force as the law which gives effect to a title in fee simple when obtained by deed. It confers a right which it is not in the power of congress by legislation, nor within the province of the federal courts, by rules, to divest. This question comes clearly within the principle of the case of Ross v. Duval, 13 Pet. [38 U. S.] 45, where it was held by the supreme court of the United States that the act of the legislature of Virginia in 1792, to regulate proceedings in judgment, was substantially and technically a limitation on judgments, and was not, therefore, an act to regulate process. It was declared to be a limitation law, establishing a rule of property, and under the thirty-fourth section of the judiciary act, affording a rule of decision for the courts of the United States. This was but a reaffirmance of the principle established by the supreme court in the case of Green v. Lessee of Neal, 6 Pet. [31 U. S.] 291. But were this a question of practice merely, we should incline to recognize the provisions of the state law, even in the absence of a rule of court upon the subject. It is far preferable to yield to than encroach upon state laws, especially in enforcing remedies upon contracts entered into with reference to these laws. And it is administering justice in the true spirit of the constitution and laws of the United States to conform, as nearly as practicable, to the administration of justice in the courts of the states. We therefore hold, on principles of law as well as upon considerations of comity, that on execution issuing from this court the party whose land is seized is entitled to the benefits of the homestead exemption, in the manner and to the same extent that is secured to the judgment debtor under the law of the state.

It only remains to consider the evidence touching the defendant's right to a homestead exemption in the property levied upon by the marshal in this case. All the testimony submitted is comprised in three affidavits, to

wit, that of J. M. Rickey (the deputy marshal who made the levy), of J. B. Bayles (the defendant), and of Jefferson Stringer (one of the appraisers). It appears from this testimony that at the time of the levy and appraisal of the "Millville Farm," so called, the defendant demanded a homestead therein to be exempted and set off to him for that purpose, and that this demand was refused by the marshal. It further appears that the defendant was carrying on the farm himself, and a part of his family, with his household furniture, was in the occupation of the house sought to be discharged from appraisal and sale. His other real estate, as the evidence shows, was mortgaged for about its full value, and the mortgage was executed by himself and wife; and that the dwelling-house upon encumbered land was far too valuable to constitute the homestead allowed by the statute. This evidence clearly shows the defendant to be entitled to a homestead exemption in the land levied upon, and which was appraised without recognition of his right under the local law. The appraisal is accordingly set aside.

MANUFACTURERS' INS. CO. (BILSON v.). See Case No. 1,410.

MANUFACTURERS' INS. CO. (CLARK v.). See Case No. 2,829.

MANUFACTURERS' INS. CO. (GLIDDEN v.). See Case No. 5,482.

Case No. 9,051.

In re MANUFACTURERS' NAT. BANK.

[5 Biss. 499; 19 Int. Rev. Rec. 20; 1 Thomp. Nat. Bankr. Cas. 192; 6 Chi. Leg. News, 118; 8 Am. Law Rev. 614; 1 Cent. Law J. 19; 21 Pittsb. Leg. J. 80, 116; 6 Leg. Gaz. 21.] [1]

District Court, N. D. Illinois. Dec. 30, 1873.

NATIONAL BANKS — AMENABLE TO THE BANKRUPT ACT—CURRENCY ACT—REPEALED — SUPERSEDED —CURRENCY ACTS—CUMULATIVE ACTS — REMEDIES—WHEN EXCLUSIVE.

1. A national bank is not liable to be proceeded against in bankruptcy.

2. The bankrupt act [of 1867 (14 Stat. 517)] does not repeal or supersede the provisions of the national currency act [13 Stat. 99] for winding up insolvent national banks.

3. Nor can the two acts exist together, as furnishing concurrent or co-ordinate remedies. The remedies prescribed in such case under the bankrupt act are not so ample and complete as those under the currency act, and the fact that creditors can not of their own motion institute proceedings under the currency act does not change the construction of the acts.

4. Nor did congress intend to inject the provisions of the bankrupt act, so that creditors could apply the remedies of the one, and the comptroller the remedies of the other. Such a construction would inevitably produce confusion.

5. When the legislature creates a corporation, it can also prescribe what remedies shall be had against it, and such remedies then become exclusive.

[Cited in Ryan v. Ray, 105 Ind. 106.]

This was an application by R. J. Smith & Co., of Chicago, for a rule on the Manufacturers' National Bank of Chicago to show cause why it should not be adjudged a bankrupt. The petitioners were creditors of the bank for money deposited in the ordinary course of business prior to its suspension of payment on the 17th day of October, 1873, and the petition was in the ordinary form, alleging suspension of payment of its commercial paper for a period of over 14 days, and preferential payments made to other of its creditors.

Harding, McCoy & Pratt and T. C. Whiteside, for petitioners.

Lawrence, Winston, Campbell & Lawrence and Ayer & Kales, for the bank.

[2][Extracts from argument of Harding, McCoy & Pratt:

[If this proceeding in bankruptcy can be maintained in no conceivable state of case against a national bank, then it is not true that it can be sued as natural persons; it is not true that proceedings may be brought against it in this court as in similar cases against others; it is not true that the provisions of the bankrupt act apply to all monеyed, business, or commercial corporations and joint-stock companies; and it is true that our lawmakers, when they used these clear and explicit terms, putting a national bank in the courts on the same footing with every other natural person, with every other like corporation, did not mean what they have so plainly said, but meant, instead, to confer a privilege, and an exemption from the most speedy and effectual weapon of the law, upon the class of corporations who need such exemption least,—who pretend and profess to take and keep in charge the moneys of others as trust funds, and to be ever ready to pay them on demand. Modern courts have long since denied to themselves the privilege of making laws by foisting interpretations upon statutes, by construction; but the books may be searched in vain for a case resembling this, where the explicit terms of statutes are to be overruled, not from motives of an acknowledged public policy, not to correct mistakes or omissions of legislators, but in order to defeat that expressed policy,—a policy which is the spirit of our institutions, a policy of equity and equality before the law, for one of privilege and exemption from common duties and liabilities. The decision which we ask from your honor will repudiate this unjust distinction, and will be regarded with gratification by every sound bank. It will vindicate them from odium which would attach to such a privilege, which they need less than

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 8 Am. Law Rev. 614, contains only a partial report.]

[2] [From 6 Chi. Leg. News, 118.]

any other institutions,—which they have never needed in their history.

[The national banking system is new and untried; it has had but a brief existence, of less than ten years; it is now called upon, for the first time, to go through a panic, and undergo a strain. But now it is to be tested; and nothing could be more cowardly than for the custodians of the money of others to lie down in the possession of the means of life,—of the reserves and active means of others,—and while others, their depositors, are subjected to severe and swift remedies of the law, of bankruptcy, to set up an exemption and the privilege to get the time which they, in the very nature of their indebtedness, have pledged themselves never to take. What reason can be suggested why the wise policy of the bankrupt act should not extend to these powerful institutions? It is inconceivable that congress, which, in the bank act itself, puts these banks on the same level, subject to the same proceedings and suits as all other persons and corporations, should change this, which is, in this particular, their acknowledged and unquestioned spirit and policy touching these banks. What color is there for this pretended discovery of a contrary spirit which shall overrule the very letter of the law? It is inconceivable that, if congress meant to change this policy, that they should neglect and fail to say so; that they should have left their meaning to inference, to interpretation,—to subtle inference, to be drawn from an unexpressed spirit which is not found in the bank act, or sudden intention conceived to create a distinction, where they had before repudiated distinctions and differences in creating the banks. This is simply, in its essence, a claim of a privilege said to be granted by the bank act; and "the uniform language of the English and American law is that all grants of privilege are to be liberally construed in favor of the public, and, as against the grantees of the monopoly, franchise, or charter, to be strictly interpreted. Whatever is not unequivocally granted in such acts is taken to have been withheld." Sedg. St. & Const. Law, p. 339. This doctrine has been repeatedly declared in cases where the corporation has contended for implied immunities, such as an exemption from taxation; and the supreme court of the United States, in Beatty v. Lessee of Knowles, 4 Pet. [29 U. S.] 152, lay down this doctrine and say, "This privilege can only be granted by express words." In Pennsylvania R. Co. v. Canal Commissioners, 21 Pa. St. 9, this doctrine is thus laid down: "No privilege is granted unless it be expressed in plain and unequivocal words, testifying the intention of the legislature in a manner too plain to be misunderstood, and every resolution which springs from doubt is to be against the corporation."

[The question here raised may be stated thus: How does the provision of the 50th section, providing for proceedings by the comptroller to take away the franchise of a bank, and dissolve it, forbid the remedy given by the 8th and 37th sections, viz. to sue and be sued, proceed and be proceeded against, in bankruptcy or otherwise, as natural persons in similar cases? These are distinct and cumulative remedies given, it may be (they are not in fact), for the enforcement of the same rights, but not given in the same statute. What has the law, touching the distinct rights given in different statutes, to do with this? The doctrine as to a new remedy is the reverse of that as to a new right. Remedies may be inconsistent, may be unlike; but the only consequence is that the injured party must make choice of which he will avail himself. But it is not true in fact that the bank act contains the supposed complete "scheme of bankruptcy." This is a strange scheme of insolvency—of bankruptcy—seen in the bankruptcy act by the lynx eyes of my brethren, who appear for this bank; a scheme which does not recognize or provide for insolvency at all.

[The provisions for a receiver are for nonpayment of a circulating note, for improperly certifying a check, for not making good the reserve, for not keeping good the surplus, for not keeping the stock to its minimum! Not one for insolvency! Not one for an act of insolvency! All for breaches of regulations required by good banking. Each and all of these breaches might be the act of a solvent bank! What connection between insolvency, and certifying a check without having the money deposited! These are sound rules, the observance of which will tend to keep a bank solvent. This proceeding is a statutory remedy to enforce statutory penalties. What parallel proceeding for the same acts is found in the bankrupt act? None, parallel or otherwise, save that for nonpayment of the circulating note. It is no act of bankruptcy to let your reserve run down, to let your surplus run down, to let your stock remain in quantity below its minimum amount, to certify a check for one who has not on deposit the funds to meet it! Suppose it were true that the provisions for a receiver are provisions for insolvency, are there not in the 8th and 57th sections also provisions for insolvency—provision for the action of the courts—for the power of a court of chancery, for the power of a court of bankruptcy, for receiver and assignee? What then? Here are simply concurrent remedies in the same act! Say this remedy stood upon the terms alone of the bankrupt act, as our opponents, without any show of argument or reason, claim, and then, what if the proceedings by the comptroller are inconsistent or unlike those of the bankrupt court? So are, or may be, the proceedings in chancery, in admiralty, in law; so certainly will those be in independent courts; but this furnishes no reason to deny that the law provides for them—to assert that provisions for one

forbid the operation of provisions for the other? But counsel see possible collusion, in case the comptroller has the right to act. It ought to be enough to answer that it does not appear, and that it should first be made to appear that he has the right to act, that there are circulating notes; that they are, or may be, protested. This, by all means, as there are banks which have no circulation. As it is the first act of a bank to redeem, if it can, its notes, and it may have been done by this bank, by the consent of the comptroller, and to put it in funds by the surplus value of its bonds, it ought to be enough to answer, that it is no reason to ask the court to stay its hand, because the comptroller, or even another court, has the right also to act. The rule applying is, first in time first in right. But it is easy, also, to answer that it is inconceivable that the comptroller should desire to act where the same court would act and control his receiver; where the same rule of distribution, so far as the circulating notes go, is preserved, the lien of government being protected in bankruptcy. That is still more inconceivable when, as now, the circulating notes are known to be worth far less, at their par value, than the bonds at their present premium. "But the whole proceeding is different!" Of course it is. Its source, its cause of institution, and its progress differ at each step. The result and effect of the proceedings are just as different; the one closes up and dissolves the bank; the other simply distributes its property among its creditors. But, to the injury to government; do they differ materially, and to a complication? Certainly not. The same court controls. The same law, the same rules control. The officer who acts under the comptroller is called a receiver; but he is under the control of this court, and must ask its advice and seek its aid at every important step. The money is paid over to the comptroller,—to the treasurer! Of course. But for what? For distribution. It is of no advantage for the government, is it, to assume the duty of custodian? Is there danger of loss in the hands of the assignee? So there is in the hands of the receiver. All the money belonging to the government is by the assignee paid over to the United States treasury; the receiver does the same. Here the security and interests of the government are at least balanced. The moneys of other people are paid over to them; and here there is less danger of loss to the government, as it takes no risks. But the comptroller might come in and take the property from the hands of the assignee! Indeed! That is as good a reason why any suit or other proceeding could not go on, could not be effectual, why property would be sacrificed upon sale upon execution! The comptroller could not appoint a receiver, and receiver seize it! This is thus seen to be a chimera. It is not and cannot be true, for it proves too much. It would defeat all suits against the bank. Should the comptroller wish to appoint a receiver for mere malice, mere exercise of power, all the rights and interests of the government protected, he would be answered, it is too late. Or if not, his action would simply supplement that of this court; his receiver would be the quondam assignee, or could take his place, and no friction could occur, as the machinery is all under control of the same court. In Kennedy v. Gibson, 8 Wall. [75 U. S.] 429, all that is decided is that a suit cannot be brought by the receiver against the stockholders until the comptroller has directed him to bring it. All that is said in that case relates to a proceeding commenced by the comptroller under the 50th section of the act of June 3, 1864. It was not meant that the liability of stockholders could only be enforced by the comptroller, and under this section; but only that, in a proceeding under that section, certain action on the part of the comptroller was indispensable, whenever the personal liability of the stockholders is sought to be enforced.] [2]

BLODGETT, District Judge. On the 15th day of November last Messrs. R. J. Smith & Co. filed in this court their petition setting forth that they are creditors of the Manufacturers' National Bank, of this city, for money deposited with said bank in due course of business, and alleging that the said bank had suspended payment on its commercial paper for over fourteen days, and had, when insolvent, made preferential payments, for which acts they prayed that the bank be adjudged bankrupt.

Being aware that grave doubts had been expressed by many lawyers and business men as to the application of the bankrupt law to national banks, I directed notice of the application for a rule to show cause to be served on the officers of the bank, and have heard arguments for and against the application.

The law now in force for the organization and government of national banks was enacted on the 3d of June, 1864 (13 Stat. 99), and has been amended by the act of February 4, 1868 (15 Stat. 34), the act of February 19, 1869 (Id. 270), the act of July 12, 1870 (16 Stat. 251), and the act of March 3, 1873 (17 Stat. 603). Embodied in the original act, are very full and ample provisions for winding up and settling the affairs of these banking associations, mainly through the federal courts. The fundamental purpose of the act and its amendments was to provide a national currency and insure its prompt redemption, and, incidentally, to provide banking or fiscal agencies through which the ordinary financial business of the country could be safely transacted.

The leading features of the system were: 1. The security of the circulating notes of those banks by the pledge of government

[2] [From 6 Chi. Leg. News, 118.]

bonds in the hands of the treasurer of the United States, and in case of the failure of the bank to redeem its notes, then redemption of those notes by the government, for which it is to be reimbursed by the proceeds of the bonds deposited and a first lien on all the assets of the bank. 2. The responsibility of the stockholders of the bank to the extent of the par value of the stock held by them respectively, in addition to the amount invested in their shares. 3. The whole system to be under the surveillance of the comptroller of the currency, with full powers to examine into the affairs of each bank, and in cases of non compliance with the provisions of the law, to appoint a receiver to administer and wind up their affairs.

On the 2d day of March, 1867, congress passed an act to establish a uniform system of bankruptcy throughout the United States; and by the thirty-seventh section of said act it is declared "that the provisions of this act shall apply to all moneyed, business, or commercial corporations and joint-stock companies," and by the third clause of the same section it is declared that "all payments, conveyances, and assignments declared fraudulent and void by this act, when made by a debtor, shall in like manner and to the like extent and with like remedies be fraudulent and void when made by a corporation or company."

The forty-eighth section declares that the word "person" when used in this act, shall be held to include and mean "corporation," and by the ninth clause of the thirty-ninth section it is made an act of bankruptcy for any "banker" to suspend payment of his commercial paper for fourteen days. The bankrupt law is the latest expression of the legislative will, and its general terms and provisions must be held to repeal all previous statutes necessarily incompatible with it. The question then is, does the bankrupt law repeal and supersede the provisions in the currency act for winding up the affairs of insolvent national banks? or can its provisions be applied to those corporations and leave intact the provisions of the currency act on the same subject? There is no doubt of the soundness of the general rule of interpretation cited by the counsel for the respondent: That a statute, although so general in its terms that its letter would comprehend all classes of persons and things to which it can relate, will nevertheless be construed by the courts as not applying to a particular class which has been specially provided for and regulated by another statute relating solely to such class, if there is no language in the general statute, repealing the former statute or in any manner referring to it. Hume v. Gossett, 43 Ill. 297; People v. Miner, 46 Ill. 384.

A thing which is in the letter of a statute is not within the statute, unless it be within the intention of the makers. Bac. Abr. tit. "Statutes," 385. "Where the intention of the legislature is not apparent to that purpose, the general words of another and later statute shall not repeal the particular provisions of a former one." Dwarris, St. 117, quoted from Coke. The rule is thus stated in Sedgwick on the Construction of Statutory and Constitutional Law (page 97; 2d Ed.): "In regard to the mode in which laws may be repealed by subsequent legislation, it is laid down as a rule, that a general statute without negative words will not repeal the particular provisions of a former one, unless the two acts are irreconcilably inconsistent. * * * * The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the later act such a construction, in order that its words shall have any meaning at all."

The currency act provides for the appointment of a receiver to wind up the affairs of a national bank in the following cases: 1. For not keeping good a surplus—12th section. 2. For not keeping stock at minimum—15th section. 3. For not keeping good its reserve—31st section. 4. For not selecting a place for the redemption of its notes—32d section. 5. For holding its own stock over six months—35th section. 6. For non-payment of its circulating notes—50th section. 7. For improperly certifying a check—section 1, act March 3, 1869. 8. For failure to pay up capital stock, and for allowing same to become and remain impaired by losses—section 1, act March 3, 1873.

Upon the happening of either of these contingencies the comptroller may appoint a receiver to take possession of all the books, records and assets of the corporation, who shall proceed to convert the assets into money under the direction of a court of competent jurisdiction. And the money so realized shall be paid over to the treasury of the United States, subject to the order of the comptroller, who, after deducting in full whatever amount shall be due to the United States, shall distribute the balance ratably among the creditors of the bank; the claims of creditors to be proven before the comptroller, or adjudicated in a court of competent jurisdiction.

By the 52d section the "application of its assets in the manner prescribed by this act, with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void." And by the 48th section it is made unlawful for any such bank, after suffering a protest of its circulating notes, and after notice from the comptroller, to in any manner prosecute the business of banking, except to receive and safely keep its money and deliver special deposits. And by the 53d section, any violation of the provisions of the cur-

rency act, done knowingly, by either a bank, or its officers or agents, works a forfeiture of all its rights and franchises, to be adjudged by a federal court at the suit of the comptroller. The 8th section provides that said corporations, i. e., national banks, may sue and be sued, complain and defend, in any court of law and equity as fully as natural persons. And by the 57th section it is declared, that "suits, actions and proceedings against any association under this act may be had in any circuit, district or territorial court of the United States, held within the district in which such association may be established, or in any state, county, or municipal court in the county or city in which such association is located, having jurisdiction in similar cases." And by the amendment to this section, made by the act of March 3, 1873, it is further provided that "no attachment, injunction or execution shall be issued against such association or its property before final judgment."

I am not aware that any adjudication has yet been made, determining what is an "act of insolvency" within the intent and meaning of the 52d section, but it seems to me to be an act which shows the bank to be insolvent; such as non-payment of its circulating notes, bills of exchange, or certificates of deposit; failure to make good the impairment of capital, or to keep good its surplus or reserve; in fact, any act which shows that the bank is unable to meet its liabilities as they mature, or to perform those duties which the law imposes for the purpose of sustaining its credit.

It will thus be seen that while the currency act does not specify in detail, and provide for all the specific acts of bankruptcy enumerated in the bankrupt law, it yet does furnish, through the functions of an important public officer—the comptroller of the currency—a very complete and detailed scheme or plan for administering the affairs of an insolvent national bank. It is true there is no provision for an individual creditor's putting this machinery in motion. But the presumption is that congress deemed it wiser to leave this duty to an impartial public officer rather than entrust it to the hasty, inconsiderate, and perhaps selfish action of one or more creditors. It was probably thought that the necessity of maintaining the public confidence in the system was such as would compel the comptroller to act in all cases when a bank had become derelict or discredited, and that this consideration, together with the clear obligations of duty, thrown upon the officer, would be sufficient to insure his action in all cases where he acquired the right to do so. At all events, the law as it was enacted contained ample and specific provisions for creating and managing these corporations, and for administering their affairs when they became unable or refused to perform their public functions.

The system has been in operation nearly ten years. Over two thousand banks have been organized under it. Of these, twenty-one have been wound up through the agency of the comptroller and a receiver—the great part of them since the enactment of the bankrupt law. All the legislation of congress has looked toward the perfecting and perpetuation of the system, and ought we now to say that congress, by the enactment of the general bankrupt law, intended to place these corporations under the provisions of that law, and to repeal the elaborate plan which it had specially furnished for winding up their affairs when they became insolvent or incapable of transacting banking business?

That it did not intend to repeal them, is conclusively evidenced by the fact that in two of the important amendatory acts, those of March 3, 1869 (15 Stat. 326), and March 3, 1873, especial reference is made to those winding-up provisions of the original act, and they are treated as being in full force. So, too, in several cases which have been before the supreme court since the enactment of the bankrupt law, reference has been made to these winding-up powers as still in force.

It being clear, then, that congress did not intend to repeal the winding-up clauses of the currency act, the question arises, did it intend that the two remedies, that is, the one given by the currency act and the one given by the bankrupt act, should exist as co-ordinate or concurrent remedies, and the affairs of an insolvent national bank be administered by that tribunal which first acquired control.

This construction might be admitted if the two were entirely compatible with each other, or if each was equally as complete as the other,—that is, if each could reach and administer upon all the assets of the debtor bank so as to leave nothing to be done by the other.

But we find upon examination that the important duty of paying the holders of circulating notes, and distributing the proceeds of the bonds deposited to secure them or the surplus of those bonds, and of enforcing the liability of stock-holders, is left with the comptroller, and can only be enforced by or through him. This latter point was fully discussed and decided by the supreme court, Kennedy v. Gibson, 8 Wall. [75 U. S.] 498, where it was expressly held that the comptroller alone could enforce the personal liability clause. The court says: "The receiver is the instrument of the comptroller. He is appointed by the comptroller, and the power of appointment carries with it the power of removal. It is for the comptroller to decide when it is necessary to institute proceedings against stock-holders to enforce their personal liability, and whether the whole or a part, and, if a part, how much, shall be collected. These questions are referred to his judgment and discretion, and

his determination is conclusive. The stockholders can not controvert it.

"It is not to be questioned in the litigation that may ensue. He may make it at such times as he shall deem proper, and upon such data as shall be satisfactory to him. This action on his part is indispensable, when the personal liability of the stockholders is sought to be enforced, and must precede the institution of a suit by a receiver. * * * The claims of creditors may be proved before the comptroller or established by suit against the association. Creditors must seek their remedy through the comptroller in the manner prescribed by statute."

Much stress was laid by the attorneys for petitioners upon the inadequacy of the security for creditors under the currency act, mainly because creditors could not of their own motion initiate winding-up proceedings, but how much more inadequate would the bankrupt court be to the same end if it cannot reach or distribute assets and perhaps must pay what it gets over to a government officer for distribution.

I do not say that an assignee would be obliged to pay over to the treasurer, but that there is grave ground for a claim that he should do so, and that collision might grow out of such claim. The relief which could be afforded to the creditors of a national bank, then, being so incomplete, I cannot think it was the intention of congress to clothe bankrupt courts with jurisdiction over this class of corporations. I have already cited the evidence which shows to my mind that congress did not intend to repeal the winding-up provisions of the currency act by the passage of the bankrupt law, and a comparison of the provisions of the two acts shows with equal clearness to my mind that it did not intend to inject the provisions of the bankrupt act into the currency act, so that creditors could apply the remedies of the bankrupt act, and the comptroller the remedies of the currency act; because such a construction would inevitably produce collisions and conflicts of jurisdiction, and the remedies given by the bankrupt act would be so far unavailing in regard to important assets as to make it evident that there was no intention to apply such a remedy. Suppose this court were to adjudge this respondent bankrupt to-day, and send its messenger and assignee to take possession of the assets, the officer of the court could in no event enforce the personal liability clause, or obtain possession of the government bonds deposited to secure the circulation, or any surplus of those bonds after fully redeeming the circulation. Those assets are beyond the reach of this court or its officers, and can only be approached by the way of the comptroller and his receiver. Then why should this court take cognizance of a case that it cannot administer?

Why not, rather, say that congress has acted upon the subject matter of insolvent national banks and made specific provisions for administering their affairs, and, inasmuch as the general bankrupt law has not expressly repealed these specific provisions nor necessarily suspended them, the courts will presume it was the intention of congress to except this class of corporations from the operation of the later statute? Such conclusion seems to me consistent with authority, and is, in fact, the only conclusion that will not lead to inextricable complication and conflict.

But it is urged that the currency act makes these corporations liable to all suits and actions which might be brought against natural persons, and that they can therefore be proceeded against in bankruptcy. A sufficient answer to this might be found in the fact that when the currency act was passed there was no bankrupt law in force, and therefore the general language must be held subject to this limitation. But I take it there is no doubt that the legislative power which creates an artificial person or corporation can also prescribe what remedies shall be had against it, and that such remedies would be held to be exclusive, and that the provisions of the general bankrupt law would not be held to apply to corporations at all but for the express terms of the act. Should they, then, be held to apply to a class of corporations which have, as it seems, a bankrupt law of their own ingrained into their own constitution and part of their organic law, by the same authority which enacted the bankrupt law? I think not. Nor does it seem to me that there is any necessary hardship in denying the remedies of the bankrupt law to the creditors of this corporation. There is no evidence that either this petitioning creditor, or any other creditor, has applied to the comptroller to take possession and administer the assets. Additional force is also given to this consideration from the fact that in the very latest amendment to the currency act it is expressly provided that no attachment, injunction, or execution, shall issue against a bank until judgment is obtained.

It is well known that in many of the states proceedings by attachment may be taken by a creditor in the first instance, and as a matter of course, and in nearly or quite all the states, attachments can issue upon affidavits showing the existence of certain facts, while injunctions are almost universally issued before judgment or decree in equity cases when a case is made for one. And yet these corporations are, probably for reasons of public policy, exempted from liability to all this class of summary proceedings. Here we have a restriction upon the powers of the bankrupt court, almost, if not wholly, incompatible with the jurisdiction. For of what use would it be to proceed in bankruptcy against a debtor, in a large number of cases, unless he could be enjoined and his property seized by process of the court. Be-

fore adjudication or judgment could be obtained, the property of the debtor might be wasted or spirited away, so that the adjudication would be barren of results.

I do not say that the prohibition to enjoin, or attach property necessarily implies want of jurisdiction, but only that it goes far to show that it was never the intention of congress to clothe a bankrupt court with jurisdiction as against these corporations. I am therefore of the opinion that the rule to show cause should be denied, and the petition dismissed for want of jurisdiction.

Case No. 9,052.

MANUFACTURERS' NAT. BANK v. BAACK et al.

[8 Blatchf. 137; 2 Abb. U. S. 232; 4 Am. Law T. Rep. U. S. Cts. 24; 13 Int. Rev. Rec. 35, 101; 40 How. Pr. 409; 1 Thomp. Nat. Bank Cas. 161; 3 Chi. Leg. News, 169; 5 Am. Law Rev. 567.] [1]

Circuit Court, S. D. New York. Jan. 10, 1871.

FEDERAL COURTS—JURISDICTION—CITIZENSHIP—NATIONAL BANK—PRESUMPTION.

1. A banking corporation, incorporated under the act of June 3, 1864 (13 Stat. 101), and "located," under the provisions of that act, at Chicago, Illinois, can sue, in this court, a defendant who is a citizen of New York.

2. An allegation in a bill in a suit in equity brought in this court by such corporation, as plaintiff, that it is "a citizen of the state of Illinois, and located and residing and doing business in the city of Chicago, in said state," and that the defendant is a citizen of New York, is sufficient, under the 11th section of the act of September 24, 1789 (1 Stat. 78), to give this court jurisdiction of the suit.

[Cited in Cadle v. Tracy, Case No. 2,279. Approved in Main v. Second Nat. Bank, Id. 8,976. Cited in St. Louis Nat. Bank v. Allen, 5 Fed. 555; Orange Nat. Bank v. Traver, 7 Fed. 149; Hughes v. Northern Pac. Ry. Co., 18 Fed. 111.]

[Cited in brief in Cooke v. State Nat. Bank, 52 N. Y. 111.]

[This was a bill in equity by the Manufacturers' National Bank of Chicago against Edward Baack and Edward Baack, Jr. Heard on an application for an injunction and receiver.]

Francis C. Barlow, for plaintiffs.

Clarence A. Seward and Pierre C. Talman, for defendants.

BLATCHFORD, District Judge. The bill in this case describes the plaintiffs as "The Manufacturers' National Bank, of Chicago, Illinois, a banking corporation, incorporated and existing under and by virtue of an act of the congress of the United States, entitled 'An act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof,' approved June 3, 1864, and having capacity to sue by the above title, and a citizen of the state of Illinois, and located and residing and doing business in the city of Chicago, in said state." It describes the defendants as citizens of the state of New York. The allegations of the bill as to the incorporation and location of the plaintiffs are admitted by stipulation. The plaintiffs move for an injunction and the appointment of a receiver in the case, and the question arises, whether, on the allegations of the bill, thus admitted, with the fact that the allegation of the bill as to the citizenship of the defendants is not denied by the answers, this court has jurisdiction of the suit.

The 8th section of the act of June 3, 1864 (13 Stat. 101), under which the plaintiffs are incorporated, provides, that every association formed pursuant to the provisions of the act shall be a body corporate, and may have a corporate seal, and shall have succession by the name designated in its organization certificate, and may, by such name, "sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons." The effect of this provision is not to give to the corporation the right to sue, or the capacity to be sued, in every court within the United States, whether state or federal, or to give to every such court jurisdiction over every suit which may be brought in it, wherein the corporation is plaintiff or defendant. Its only proper effect is, to provide that the corporation, when it has come, or been brought, as a suitor, into a court which has jurisdiction of the suit, shall stand in court, in all respects, in the same position, as regards its own rights or the rights of others against it, as to the subject matter of the suit, in which a natural person, who is a suitor in such court, can stand. The question, as to the proper court in which the suit is to be brought, in respect of jurisdiction, is left to be determined by other provisions of law. If a natural person had brought this suit, in this court, against the defendants, as citizens of New York, he would have been obliged to aver himself to be a citizen of some state other than New York, the bill being what is known as a "creditor's bill," founded on a judgment at law, and praying for equitable relief. Therefore, so far as the provisions of section 8 of the act are concerned, the plaintiffs must show, by the averments of their bill, jurisdiction of this suit by this court, by showing proper citizenship in the parties.

There is no other provision of the act, which can be cited as giving to this court jurisdiction of this suit. The 57th section, even if, under the dictum of Mr. Justice Swayne, in Kennedy v. Gibson, 8 Wall. [75 U. S.] 498, 506, it be held to refer to suits by national banks as well as to suits against them, relates only to suits to be brought in courts of the United States held within the district in which the bank is established, and does not affect the question of the jurisdic-

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Benjamin Vaughan Abbott, Esq., and here reprinted by permission. 5 Am. Law Rev. 567, contains only a partial report.]

tion of this court in this suit. Such jurisdiction, in order to be sustained, must, therefore, appear, by the averments of the bill, to be brought within that provision of the 11th section of the judiciary act of September 24, 1789 (1 Stat. 78), which gives to this court original cognizance of all suits of a civil nature, in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the suit is between a citizen of the state where the suit is brought and a citizen of another state.

The averment in the bill, that the plaintiff corporation is a citizen of the state of Illinois, is, in and of itself, not sufficient to show jurisdiction, as a corporation cannot be a citizen of a state, in the sense in which that word is used in the constitution of the United States. Lafayette Ins. Co. v. French, 18 How. [59 U. S.] 404; Covington Drawbridge Co. v. Shepherd, 20 How. [61 U. S.] 227, 233, 234. The substance of the averments in the bill in regard to the status of the plaintiffs is, that they are a banking corporation, incorporated under the act of congress named; that their members are authorized to sue by the title given to the corporation; that the corporation is located and does business at Chicago, in the state of Illinois; and that, therefore, the real plaintiffs, the members of the corporation, must be regarded, on such averments, as citizens of the state of Illinois.

The various decisions of the supreme court in cases of suits in the federal courts by and against corporations created by the laws of the states, where the jurisdiction depended on the citizenship of the parties to the suit, are reviewed in the opinion given by that court in the case of Ohio & M. R. Co. v. Wheeler, 1 Black. [66 U. S.] 286. The law is there stated to be settled, that, where a corporation is created by the laws of a state, the legal presumption is, that its members are citizens of such state; that a suit by or against such corporation in its corporate name must be presumed to be a suit by or against citizens of the state which created the corporation; and that no averment or evidence to the contrary is admissible, for the purpose of withdrawing the suit from the jurisdiction of a court of the United States. In the case of Cowles v. Mercer Co., 7 Wall. [74 U. S.] 118, 121, the rule is thus stated: "A corporation created by the laws of a state, and having its place of business within that state, must, for the purposes of suit, be regarded as a citizen, within the meaning of the constitution giving jurisdiction founded upon citizenship." This rule, however, does not, ex vi termini, cover the case of a corporation created by an act of congress.

The argument urged against a jurisdiction in this case drawn from citizenship is, that, as the corporation is created by the United States, the only legal presumption that can be drawn is, that its members are citizens of the United States; and that there is no presumption that they are citizens of the state in which the corporation is located.

With a view to the consideration of the question raised, it will be necessary to examine the statutory provisions in respect to the location of banking associations. The 6th section of the act of 1864, provides, that the organization certificate of every association for carrying on the business of banking, formed under the act, (and which, by the execution of such certificate, becomes, under the 8th section, a body corporate,) shall specify the place where the operations of discount and deposit of the association are to be carried on, designating the state, territory, or district, and also the particular county and city, town or village. The 44th section, provides, that any bank incorporated or organized under a law of a state may, by authority of such act of congress, become a national association, under the provisions of such act, by the name prescribed in an organization certificate, such as is required by such act, to be executed by a majority of its directors, the certificate declaring that the owners of two-thirds of the capital stock have authorized the directors to make such certificate, and "to change and convert the said bank or banking institution into a national association under this act;" and that, on a compliance with certain provisions prescribed in that section, the association shall be held and regarded as an association under the act. There is, therefore, no difference, in regard to its status, between an association formed under the act and one converted into a national association under the act. In each case, it must be regarded as holding its corporate existence under and by virtue of the act.

What, then, are the consequences of the fixing of place provided for in the 6th section? The 8th section provides, that the usual business of the association shall be transacted at an office or banking house "located" at the place specified in its organization certificate. The 9th section, provides, that at least three-fourths of the directors shall have resided in the state in which the association is "located," one year next preceding their election as directors, and be residents of the same during their continuance in office. The 10th, 15th, 18th, and 42d sections, speak of the association as being "located" in a city, town or county. The 30th section, speaks of the laws of the state where the bank is "located." The 34th section, speaks of the place where the association is "established." The 41st section speaks of taxes imposed "by or under state authority at the place where such bank is located." The word "place," in this 41st section, is declared, by the act of February 10, 1868 (15 Stat. 34), to mean, "the state within which the bank is located." This act of 1868, also provides, that the legislature of each state may determine and direct the manner and place of taxing all the shares

of national banks "located" within said state, and that the shares of any national bank owned by non-residents of any state shall be taxed in the city or town where such bank is "located." The 50th section of the act of 1864 provides, that an association may apply to the "nearest" circuit, or district or territorial court of the United States, in certain cases, to enjoin the comptroller of the currency. The 57th section, provides, that suits, actions and proceedings against any association under the act may be had in any circuit, district or territorial court of the United States held within the district in which the association may be "established," or in any state, county or municipal court in the county or city in which the association is "located," having jurisdiction in similar cases, provided that all proceedings to enjoin the comptroller under the act shall be had in a circuit, district or territorial court of the United States held in the district in which the association is "located."

The 21st section of the act of 1864, as amended by the act of March 3, 1865 (13 Stat. 498), provides, that, of the three hundred millions of dollars of circulating notes authorized to be issued, one hundred and fifty millions of dollars shall be apportioned to associations in the states, in the District of Columbia, and in the territories, according to representative population; and that the remainder shall be apportioned by the secretary of the treasury among associations formed in the several states, in the District of Columbia and in the territories, having due regard to the existing banking capital, resources and business of such states, districts and territories. The act of July 12, 1870 (16 Stat. 251), provides (section 1), that fifty four millions of dollars in notes for circulation may be issued to national banking associations, in addition to the three hundred millions of dollars, and shall be furnished to banking associations organized or to be organized in those states and territories having less than their proportion under the apportionment contemplated by the act of 1865, before referred to, and that a new apportionment of such increased circulation shall be made as soon as practicable, based upon the census of 1870. The 6th section of the act of 1870, provides for "a more equitable distribution" of the national banking currency, by withdrawing circulating notes from banking associations organized in states having a circulation exceeding that provided for by the act of 1865, and issuing a like amount of notes to banking associations organized in states and territories having less than their proportion, the intention being, as declared by the section, that "the circulation so withdrawn shall be distributed among the states and territories having less than their proportion, so as to equalize the same." The 7th section of the act of 1870, provides, that, after the 12th of January, 1871, any banking association "located" in any state having more than its proportion of circulation may be removed to any state having less than its proportion of circulation, under such rules and regulations as the comptroller of the currency, with the approval of the secretary of the treasury may require.

It is quite apparent, from all these statutory provisions, that congress regards a national banking association as being "located" at the place specified in its organization certificate. If such place is a place in a state, the association is located in the state. It is, indeed, located at but one place in the state, but, when it is so located, it is regarded as located in the state. The requirement, that at least three fourths of the directors of the association shall be residents, during their continuance in office, in the state in which the association is located, especially indicates an intention on the part of congress to regard the association as belonging to such state. Three-fourths of the legal representatives of the unknown associates forming the corporation, with which representatives any person dealing with the corporation must deal, are required to reside in the state where the corporation is "located." The reasons so forcibly stated in the opinion of the court in the case of Marshall v. Baltimore & O. R. Co., 21 How. [62 U. S.] 314, 326-329, why a grant of power by competent authority to certain associated persons to act by representatives and to sue and be sued in a collective or corporate name, should not be allowed to prejudice any right of those dealing with such persons, apply as fully to the case of a bank created by federal authority and located in a particular state, as to one created by state authority and located in the state which created it. The view taken by the court in that case was, that the persons using the corporate name of a corporation created by a state may be justly presumed to be resident in the state which is the necessary habitat of the corporation; that the presumption arising from the habitat of a corporation created by a state in the place of its creation, is conclusive as to the residence or citizenship of those who use the corporate name, and exercise the faculties conferred by it; that the right of choosing an impartial tribunal is a privilege of no small practical importance, and more especially in cases where a distant plaintiff has to contend with the power and influence of great numbers, and the combined wealth wielded by corporations in almost every state; and that it is of importance, also, to corporations themselves, that they should enjoy the same privileges in other states, where local prejudices or jealousy might injuriously affect them. The principle has been settled ever since the case of Louisville R. Co. v. Letson, 2 How. [43 U. S.] 497, that, where a corporation is created by the laws of a state, the legal pre-

sumption is that its members are citizens of such state. Where a corporation is created by competent authority—authority as competent, within a given state, to create such corporation and to locate it in such state, as is the state itself—and a location and habitat within such state, and not elsewhere, is given by the creating authority, to such corporation, there is no reason why the legal presumption should not be that the members of such corporation are citizens of such state, within the meaning of the 2d section of the 3d article of the constitution, and of the 11th section of the judiciary act of 1789. The presumption, in the case of a corporation created by a state, is only arrived at by presuming the members of the corporation to be citizens of the United States, and to be residents in the state, and, therefore, under the decision in Gassies v. Ballon, 6 Pet. [31 U. S.] 761, citizens of the state. The members of a corporation created by the United States, and located in a particular state, in the manner and to the extent in which national banking associations are located in particular states, may as properly be presumed to be citizens of the United States and residents in the state where the corporation is located, so as thereby to be citizens of such state, as the members of a corporation created by a state may be presumed to be citizens of the United States, and residents in the state creating it, and in which it is located, and, therefore, citizens of such state.

But, it is urged that the legislation of congress shows an intention not to confer upon national banking associations the right to sue in the federal courts. The first national banking law was passed February 25, 1863 (12 Stat. 665), and was repealed by the 62d section of the act of June 3, 1864. The 59th section of the act of 1863, provided, that "suits, actions and proceedings by and against any association under this act may be had in any circuit, district or territorial court of the United States, held within the district in which such association may be established." The corresponding section, the 57th, of the act of 1864, provides, that "suits, actions and proceedings against any association under this act may be had in any circuit, district or territorial court of the United States, held within the district in which such association may be established, or in any state, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases." It is urged that this legislation indicates an intention that national banking associations shall not come into the federal courts as plaintiffs, although they may be brought into those courts as defendants. But, independently of the view taken of the 57th section of the act of 1864, in the opinion given by Mr. Justice Swayne in the case of Kennedy v. Gibson, before cited, it may well be said, that the object of that section is to enable a suit to be brought against a bank in any federal court held in the district where the bank is established, without reference to the citizenship of the plaintiff in the suit. Under the decision in the case of Osborn v. Bank of U. S., 9 Wheat. [22 U. S.] 738, such a suit is a case arising under a law of the United States, within the meaning of the constitution, the bank being incorporated by a law of the United States, and it is competent for congress to confer jurisdiction over it on the federal courts. But, the jurisdiction is expressly confined, by the 57th section, to suits brought in a federal court held in the district where the bank is established. Under it, however, these plaintiffs, a national bank, could bring a suit in this court against a national bank established in this district. The section embraces any plaintiff who has capacity to sue at all in any court. If these plaintiffs can sue another national bank in this court, it is difficult to see why they should not be allowed to sue in this court defendants who are citizens of New York. I can perceive no evidence, in the legislation referred to, that congress intended that this court should not assume the jurisdiction invoked in this suit.

So, too, the provision in the 2d section of the act of July 27, 1868 (15 Stat. 227), withholding from banking corporations organized under a law of the United States, the privilege conferred by that act on other corporations organized under a law of the United States, of removing into a federal court certain suits brought against it, cannot be regarded as affecting the question of original jurisdiction involved in this case.

I am, therefore, satisfied, that the averments of the bill are sufficient to show jurisdiction, and that this court has jurisdiction of this suit. On the merits, the plaintiffs are entitled to the receiverships and the injunction asked for in their notice of motion, so far as concerns the property specified in the first and second clauses of such notice; but, inasmuch as such property exceeds the amount of the plaintiffs' claim, the receiverships and injunction will be discharged on the furnishing to the plaintiffs of satisfactory security for the payment of their claim, if they shall recover in the suit. An order will be settled, on notice, embodying proper provisions.

MANUFACTURERS' NAT. BANK (IRONS v.). See Case No. 7,068.

MANUFACTURERS' NAT. BANK (SMITH v.). See Case No. 9,051.

MANUFACTURING CO. (BLANK v.). See Case No. 1,532.

MANUFACTURING CO. (THOMPSON v.). See Case No. 13,967.

MANWARING (L'ARINA v.). See Case No. 8,089.

Case No. 9,053.

In re MANY et al.

[9 Ben. 160; [1] 17 N. B. R. 429.]

District Court, S. D. New York. June 26, 1877.

BANKRUPTCY—ADDITIONAL ALLOWANCES TO ASSIGNEES.

Considerations stated which govern additional allowances to assignees in bankruptcy, under general order No. 30, as amended.

[In the matter of Francis Many and James Marshall, bankrupts. For prior proceedings in this litigation, see Case No. 9,054.]

Carter & Eaton, for assignee.

BLATCHFORD, District Judge. A recent amendment to general order No. 30, in bankruptcy, provides as follows: "It being found, that, in certain special cases, requiring great care and exertion on the part of assignees in bankruptcy, the fees and allowances now provided are insufficient, it is, therefore, hereby ordered, that, in such cases as are above mentioned, the district judge be and is hereby authorized, by and with the advice and concurrence of the circuit justice or judge, to make such additional allowance to the assignee or trustee, or to both or either of them, if there be more than one, as in his judgment shall be a fair and just compensation for his or their services, having regard to the amount of assets, the amount of labor required, and the special circumstances of the case, and that so much of general order thirty as conflicts herewith be repealed." Under general order No. 30, as it stood before this amendment, all allowance to an assignee, as compensation for his services, was forbidden, except that he could have the commissions provided for by section 5,100 of the Revised Statutes, on moneys received and paid, and certain items of fees provided for by general order No. 30, for specific services.

In the present case the assets are, in money, in the hands of the assignee, $11,298.57. The assignee's fees and allowances, including commissions, would be $377.73. The assignee asks for an additional allowance. The register reports, that, in his opinion, having regard to the amount of assets, the amount of labor required and the special circumstances of the case, the assignee is entitled to receive an allowance of $850, in addition to his commissions and fees allowed by law, and that such allowance is, in his judgment, a fair and just compensation for the services of the assignee. This report of the register is based on certain testimony annexed to it, and the register reports that he finds, from that testimony and from his own knowledge of the case, that the assignee has been obliged to perform and has performed unusual services in the administration of the estate, that this is a case which has required great and unusual care and attention on his part, and that he is entitled to an additional allowance for his services herein.

The total compensation to the assignee, if he should receive the $850 and the $377.73, would be $1227.73. This would be over 10.86 per cent on the assets, and there is, undoubtedly, a bill, paid or unpaid, for the services of counsel and attorneys to the assignee, as he is a professional accountant, and not a lawyer, and a portion of the services in respect of which the assignee asks for additional compensation were rendered in regard to matters in suit and in litigation.

The register reports that the services of the assignee were "unusual," but it is not stated wherein, nor does the testimony show wherein. Nor does the report state, nor the evidence show, wherein the care and attention on the part of the assignee have been great and unusual.

The assets consisted of a stock of hardware in a store and of open accounts and notes. The assignee states, that, from the time he took possession of the assets, he attended at the store 25 days, making sales at private sale, posting books, examining accounts and investigating facts about them, conferring with the bankrupts and creditors, and making an inventory of the hardware. There is nothing in all this that is unusual or that required "great care and exertion," and it is only in such a case that an additional allowance can be made. General order No. 30 allows a specific fee of one dollar for each hour necessarily employed in making an inventory, and also 20 cents for each folio of inventory. The assignee charges $90 for 90 hours making the inventory, and $25 for 125 folios of inventory, and also asks for $10 a day for each of the 25 days above mentioned, being $250.

The assignee also states, that, during 150 other days he was employed a part of every day, and during 50 of those 150 days the greater part of every day, in collecting 213 accounts, examining into the merits of each, making out statements of each, corresponding with most of the debtors, and communicating either personally or by letter with all of them. He also states, that he gave his personal attention to the conduct of five suits which were necessary to be brought, and were brought, by him, as assignee, in all of which he obtained judgments; and that he realized for the estate, from the accounts and suits, over $6,000. For collecting that amount he considers himself entitled to $500. There is nothing in all this that is unusual, unless it be unusual for an assignee to attend to the duties of his trust for the compensation fixed by law and known to him when he accepts the trust. Nor does the above statement show a special case involving great care and exertion.

The assignee also states, that he gave a great deal of time and labor to a controversy respecting goods valued at $5,000, held by

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

the bankrupts as security for advances to a party who claimed the goods; and that the matter required him to make a difficult and laborious investigation of the facts, adjustment of complicated accounts, attendances on the taking of testimony, and consultations with attorneys and other persons, covering a period of about 7 months, including the 150 days above named and excluding the 25 days above named. He considers his services in this matter worth $250. The above general statement does not show a special case requiring great care and exertion. It does not state facts on which the district judge can arrive at the judicial conclusion that this was a special case and required great care and exertion, nor facts from which the judge can see what amount of labor was required or what were the special circumstances of the case. It does not amount to more than the conclusions and opinions of the assignee.

The same remarks apply to the next charge. The assignee states that he attended to the matter of contesting invalid claims against the estate, which resulted in expunging proofs to the amount of $20,000; that he investigated facts and adjusted accounts, and had consultations and interviews, and examined memoranda, and attended on the taking of testimony, such services covering 260 days, including the 7 months above named, during which time he was occupied in the matter a portion of each day, and on many occasions the whole of each day, to the exclusion of all other business. For these services he asks $250.

The total sum he claims is $1250. One of the bankrupts testifies that the assignee ought to have that amount, and the assignee's partner in business, as a professional accountant and collection agent, testifies to the same effect. This is all the testimony.

So far as the deposition of the assignee in this case discloses facts to make out a special case requiring great care and exertion on his part, it is difficult to see why any case involving trouble could not be represented by an ill paid assignee in very much the same terms employed by the assignee in his deposition in this case. If the present case, as disclosed in that deposition, is not only a special case requiring great care and exertion, but one of a class spoken of, in the amendment, as "certain special cases requiring great care and exertion on the part of assignees in bankruptcy," almost all cases in which anything is done by an assignee will become such special cases. The purpose of the amendment was not to reform the rate of compensation to assignees in all cases nor in any large proportion of cases. Undoubtedly, the compensation of assignees may often be properly called insufficient, but the supreme court did not, by the amendment, intend to alter it. It intended only to provide for a small class of cases, where a special inadequacy of compensation appears, and great care and exertion are shown. In the present state of the papers in this case I cannot adjudge that a case is made out falling within the amendment.

Case No. 9,054.

In re MANY et al.

[17 N. B. R. 514.] [1]

District Court, S. D. New York. March 29, 1877.

BANKRUPTCY—BUSINESS PAPER—ACCOMMODATION PAPER—USURY—REPRESENTATION OF CHARACTER OF PAPER TO PURCHASER—ADVANCES BY FACTORS.

1. Where an assignee in bankruptcy moves to expunge a claim on the ground of usury, alleging that a promissory note on which the claim is founded was made or endorsed by the bankrupt for the accommodation of another person and took its inception in the hands of the present holder, who obtained the same at a discount of more than the lawful rate of interest, *held*, that the assignee must show clearly that the note was accommodation paper.

2. Where it appeared that the bankrupts were factors for a corporation, and received goods on consignment for sale on commission, and were in the habit of giving their notes to the order of the corporation by way of advances on consignments; and it appeared that some of the notes on which this claim was founded were of that description, and were purchased by the present holder from one of the bankrupts, who was also treasurer of the corporation, at a discount of 18 per cent. per annum; but it did not appear whether these particular notes, or any of them, were given for an excess over the value of goods consigned, *held*, that the assignee had not shown these notes to be accommodation paper.

3. It seems that notes given by factors, by way of advances to their principals, on the credit of goods consigned, are business paper and not accommodation paper.

4. Where one member of a firm makes representations to the purchaser of commercial paper bearing the firm name, to the effect that it is business paper, the firm or their assignee in bankruptcy is estopped from setting up that it is accommodation paper and void for usury.

5. An endorser of a note is in any event liable to his endorsee only for the amount actually paid by the endorsee, with lawful interest thereon, and not for the face value of the note.

Motion by the assignee in bankruptcy of the firm of Many & Marshall, to expunge or reduce a proof of debt by one Joshua A. Clark upon certain notes. The bankrupts [Francis Many and James Marshall], composing the firm of Many & Marshall, prior to their failure, had been hardware dealers in New York. The notes in question had all been either made or endorsed in the firm name, by Francis Many, one of the bankrupts. The assignee claimed that the notes in question were made or endorsed by Many for accommodation of the other parties to the paper; that they had taken their inception in the hands of Clark (the claimant), and as he had purchased them at a greater rate of discount than 7 per cent. per annum, they were void for usury. The assignee also claimed that, on such notes as Many & Marshall were liable upon as endorsers, the claimant could

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in no event prove for more than he had actually paid for the notes. Part of the notes were drawn by Francis Many, one of the bankrupts, in the name of Many & Marshall as makers, payable to the order of the Trenton Lock Company. The Trenton Lock Company was a New Jersey corporation, doing business as manufacturers of locks at Trenton. Francis Many was treasurer of this corporation. He endorsed these notes in the corporate name, and transferred them to Clark at a discount of 18 per cent. per annum. There was evidence to the effect that Many had represented to Clark, at the time of the transfer of the notes, that they were business paper. It appeared that Many & Marshall had acted for some time as factors for the Trenton Lock Company, receiving goods from the company for sale on commission. The firm had been in the habit of advancing money to the company from time to time, by notes similar to those in suit. There was evidence going to show that at the time the notes were given the firm had already issued notes to the order of the Trenton Lock Company, to an amount greatly in excess of the value of the goods held by the firm under consignment from the Trenton Lock Company.

William B. Hornblower, for assignee.
William G. Choate, for claimant.

BLATCHFORD, District Judge. I am of opinion, on the evidence, that the five notes made to the order of the Trenton Lock Company were business paper in the hands of the payees, and not accommodation paper. If they or any of them were given for an excess over the value of goods consigned, it is for the assignee in bankruptcy to show that clearly, and this is not done.

In addition, as to those five notes, I think the evidence shows that Mr. Clark purchased them on the representation by Many that they were business paper, and not accommodation paper.

In so representing, Many must be held to have acted for his firm. If his representation was untrue, he was committing a fraud on Mr. Clark.

His representation bound his firm. Story, Partn. § 108, and cases cited in note 2; Griswold v. Haven, 25 N. Y. 595.

It having been represented by the firm that the five notes were business paper, and not accommodation paper, and Mr. Clark having parted with his money on the faith of such representation, the assignee in bankruptcy of the firm cannot now deny the truth of such representation, so as to work an injury to Mr. Clark.

I therefore decide that Mr. Clark is entitled to prove on the notes A, D, M, N, and P. As to notes C and F, it is for the assignee to show that they were accommodation notes in the hands of Many & Marshall. This has not been done. Mr. Clark is therefore entitled to prove on those notes. As to note E, I think the evidence shows that it was purchased by Mr. Clark on the representation by Mr. Many that it was business paper, and that Mr. Clark is entitled to prove on it. It is contended that Mr. Clark cannot prove upon notes C, E, and F, above mentioned, or upon notes B, G, H, I, J, K, L, and O, all being notes on which Many & Marshall as a firm, if liable, are liable only as endorsers, for more than the amount he actually paid for the notes respectively, he having taken more than lawful interest in each instance. I think that is the law. Cram v. Hendricks, 7 Wend. 569; Judd v. Seaver, 8 Paige, 548.

[For subsequent proceedings in this litigation in reference to allowance to assignee, see Case No. 9,053.]

Case No. 9,055.

MANY v. JAGGER et al.

[1 Blatchf. 372; [1] Merw. Pat. Inv. 650; 1 Fish. Pat. Rep. 222.]

Circuit Court, N. D. New York. Oct., 1848.

PATENTS—ASSIGNMENT — DECLARATIONS AND ADMISSIONS OF ASSIGNOR—INFRINGEMENT — PRIOR KNOWLEDGE — CLAIM FOR ENTIRETY — CAR WHEELS—ABORTIVE EXPERIMENT.

1. The declarations and admissions of an assignor of personal property, made after he has parted with his interest in it, are inadmissible either to show a want of title in him, or to affect the quality of the article, or to impair the right of the purchaser in any respect.

2. In an action for the infringement of a patent, the defendant offered to show that the patentee, after he had assigned all his interest in the patent, had declared that the patented article had been abandoned and had failed and was worthless: *Held*, that the evidence was inadmissible.

[Cited in Woodward v. Boston Lasting Mach. Co., 8 C. C. A. 622, 60 Fed. 284.]

3. The patentee having been previously examined as a witness for the plaintiff, and not having been interrogated as to any such declaration, the evidence offered was not admissible by way of contradicting him.

4. Under section 15 of the patent act of July 4, 1836 (5 Stat. 123), a notice of defence gave the name of B. as having had prior knowledge of the invention. On the trial, F. was called as a witness to prove the prior knowledge by B., the notice, however, not making any mention of F.: *Held*, that the evidence was admissible.

[Cited in Woodbury Pat. Planing-Mach. Co. v. Keith, 101 U. S. 493.]

5. Where the claim of a patent was "the manner of constructing wheels for rail-road cars, with double convex plates, one convex outwards and the other inwards, and an undivided hub, the whole cast in one piece, as herein fully set forth," *held*, that the claim was not for the mode of constructing the wheel, as distinct from the wheel itself, but was for the car wheel after it was constructed.

6. The claim was not for any part of the wheel taken separately, as the plates or the hub, but for the entire wheel as constructed.

[Applied in Andrews v. Carmen, Case No. 371.]

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

7. The plates being described in the specification as "parallel or nearly parallel," and as being "convex on one side and concave on the other," and the specification also setting forth that in consequence of the curvature of the plates they contracted in cooling without danger of fracture, *held*, that the peculiar form of the plates was not claimed as essential except as respected a form that would allow of their contraction in cooling without fracture.

8. The specification held sufficient against the objection that it did not describe the old article on which the improvement was made, and that a mechanic could not, from reading it, distinguish between the old thing and the improvement.

9. To maintain a patent, as regards the utility of the thing invented, it is not necessary that it should be the very best article for the use to which it is applied, but if it be at all valuable, if its use for the purpose for which it is constructed is practicable, that is sufficient to sustain it as a useful invention.

[Cited in Stimpson v. Woodman, 10 Wall. (77 U. S.) 125; Seymour v. Osborne, 11 Wall. (78 U. S.) 549.]

[Cited in Tod v. Wick, 36 Ohio St. 393.]

10. Where a prior invention is set up to defeat a patent, the idea of it must not merely have been conceived, but it must have been reduced to practical use. Nor is an abortive or abandoned experiment sufficient.

[Cited in Ellithorp v. Robertson, Case No. 4,408.]

11. Where a prior invention was claimed to be the same in substance as a subsequent one, the jury were instructed to take into consideration, in passing upon the question, the fact that the prior invention was known to persons who experimented to produce the subsequent invention but failed to do so.

12. The question as to the identity or difference between two rail-road car wheels is, whether one embodies in its mechanical construction, mind and ingenuity not found in the other, by which the result is produced.

This was an action on the case, to recover damages for the infringement of letters patent [No. 640], issued to Samuel Truscott, George Wolf, and James Dougherty, of Columbia, Pennsylvania, on the 17th of March, 1838, for "a new and useful improvement in the mode of making cast iron wheels to be used on rail-roads and applicable to other purposes." The plaintiff was assignee of the entire interest in the patent, (which was commonly called the Wolf patent,) for the whole United States. The defendants were iron founders and workers in iron at Albany, New York, and the infringement alleged was the making of rail-road car wheels substantially like the patented wheel in principle. The defendants claimed on the trial that the wheel for making which they were sued was no infringement of the Wolf patent, but was an entirely different wheel from the Wolf wheel in principle, and was an invention of William B. Treadwell one of the defendants, for which he had applied for a patent. They also claimed that the patentees of the Wolf wheel were not the first inventors of the thing patented by them, and that the patent was void on various other grounds.

The specification annexed to the patent was in these words: "To all whom it may concern: Be it known, that we Samuel Truscott, George Wolf, and James Dougherty, of the borough of Columbia, in the county of Lancaster, and state of Pennsylvania, have invented a new and improved mode of constructing cast iron wheels for rail-road cars and for other purposes; and we do hereby declare, that the following is a full and exact description thereof: We denominate our wheel 'The Double Plate Car Wheel,' because we use two plates instead of the spokes or arms usually employed, which plates are cast with the rim, and form one substance therewith. We give to the rim of our wheels the same form in all respects as is now given to the rims of car wheels; but, instead of arms, we cast our wheels with two parallel or nearly parallel plates, which plates are convex on one side and concave on the other. The hub or nave which is to receive the axle, is cast in the centre of these plates, extending from one of them to the other. The accompanying drawing gives a sectional view of one of our wheels; a a being the rim; b b the front and back plates, convex on one side and concave on the other; c c being the hollow or void space between them; and d d the nave or hub. The hollow c c between the two plates, is formed by a core in the process of casting, which core is supported in the flask by leaving suitable holes in the plates for that purpose, which holes serve also for the removal of the sand of which the core is formed. We cast our rim in a chill, in the usual manner, and, in consequence of the particular form given to the plates, they contract in cooling without danger of fracture, and without it being necessary to divide the hub, as is done when car wheels are cast with spokes or arms. The only effect of contraction is to flatten the two plates in a slight degree, operating in this respect like the curved arms of many cast iron wheels. We are aware that car wheels have been made with plates as a substitute for arms, but such plates have been made separate from the wheels and united together by screwed bolts, embracing the hub in a distinct piece between them. The difference between such wheels and those constructed by us is so obvious as not to need pointing out. What we claim as our invention and wish to secure by letters patent, is the manner of constructing wheels for rail-road cars, or for other purposes to which they may be applied, with double convex plates, one convex outwards and the other inwards, and an undivided hub, the whole cast in one piece as herein fully set forth."

The wheel made by the defendants was cast all in one piece, and had a rim chilled in the usual manner, and a solid hub constructed in the usual manner. Next inwards from the inner circumference of the chilled rim, and starting from its centre, there was a concentric solid ring of metal, next a concentric hollow ring of metal, next another

concentric solid ring of metal, and next the half of another concentric hollow ring of metal, a transverse section of which resembled an acute or lancet-shaped arch, its vertex joining the last named solid ring, and its abutments resting one on each end of the hub and enclosing an annular semi-cylindrical space around the hub, the whole so arranged that a plane extending from the centre of the hub to the centre of the inner circumference of the rim or tread of the wheel divided all the annular parts and the enclosed spaces into two equal parts.

In the course of the trial, the defendants offered evidence for the purpose of showing that the Wolf wheel was not a useful wheel, and, among other things, they offered to prove by a witness, Elias Johnson, that in April, 1847, he went to Columbia, to negotiate for the purchase of the Wolf patent, and that Truscott, one of the patentees, then told him that the wheel had been abandoned and had failed and was worthless. Truscott had assigned all his interest in the patent to Frederick Baugher and George Wolf on the 3d of August, 1839, reserving to himself, however, one manufacturing right not to be located within one hundred miles of Columbia. He assigned his reserved right on the 26th of May, 1847. The plaintiff did not become interested in the patent till the 11th of June, 1847. Truscott had been examined by deposition as a witness for the plaintiff on the trial, but had not been interrogated by the defendants as to any conversation between him and the witness Johnson. The plaintiff's counsel objected to the evidence offered on the ground that it was hearsay evidence; that at the time specified Truscott had no interest in the patent; that the matter sought to be proved could only be proved by Truscott himself; that he had been examined as a witness and should have been enquired about then as to the matter; that he had assigned to Baugher and Wolf in August, 1839, and had nothing in April, 1847, but a reserved shop-right that was nothing till located; that he could not be called to impeach the patent in any greater proportion than he was the owner of it at the time, because it was only as being an owner that his declaration was sought to be proved; that the fact that the patent was not profitable or useful could not be proved by hearsay; and that that was all there was of the proof offered. The defendants' counsel urged that Truscott had an interest in the patent in April, 1847, because he had a right to establish a foundry to make the wheels not within one hundred miles of Columbia; that the amount of his interest was of no consequence; and that the evidence was admissible as a part of the res gestae. The court held the evidence to be inadmissible, and remarked that the declarations and admissions of an assignor after he had parted with his interest in personal property were inadmissible either to show a want of title in him, or to affect the quality of the article, or to impair the right of the purchaser in any respect; that this case came clearly within that doctrine; and, besides, that the evidence was not offered to contradict Truscott, and, if it was, he should have been first interrogated as to the matter. During the trial, the defendants called as a witness one Robert T. Fry, and proposed to prove by him that one Matthias W. Baldwin, prior to the invention of the Wolf wheel by the patentees, invented and had knowledge of a wheel identical with the Wolf wheel. The defendants, in their notice of special matter under section 15 of the patent act of July 4th, 1836 (5 Stat. 125), had given notice of Baldwin as having had such prior knowledge, but had given no notice of the name of Fry. The plaintiff's counsel objected that the witness could not show that Baldwin knew of the invention, because that would be showing that the witness knew of it himself, and that the witness could not show that he knew of it himself because his name was not in the notice. The court overruled the objection and admitted the evidence.

William H. Seward, Samuel Stevens and Samuel Blatchford, for plaintiff.

Seth P. Staples, Azor Taber and Rodman L. Joice, for defendants.

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

NELSON, Circuit Justice (charging jury). The first branch of the case which it is necessary to examine and settle, is the improvement which the plaintiff claims that his patentees have discovered. For this purpose we must call your attention to the specification. That contains a description of the invention by the patentees in their own language, and affords the highest evidence of the thing or instrument which they claim to have discovered. They begin by stating, in very general terms, that they have discovered a new and improved mode of constructing cast iron wheels for railroad cars. They denominate the wheel they have discovered, the double plate wheel, because, as they say, they use two plates instead of spokes or arms as usually employed before in constructing the rail-road wheel, the two plates being cast with the rim and hub and forming one piece with them. The patentees then describe the mode of constructing their wheel. The rim, they say, is cast as usual. They claim nothing new in this respect, but that, instead of spokes or arms, they cast their wheel with parallel plates, which are convex on one side and concave on the other. The hub which is to receive the axle is cast in the centre of these plates, extending from one plate to the other. They then explain the reason why they can cast an iron rail-road wheel with double plates and a solid hub and still retain the chilled rim. This is owing to the form which they give to the

plates, which allows for the expansion by heat and the contraction by cooling in the plates in chilling the rim. This fact or process in constructing the rail-road wheel, by which they avoid this effect of expansion and contraction, and, of course, the breaking of the iron by the contraction, has been explained, illustrated and confirmed by all the witnesses whose attention has been called to the subject. There is no pretence or evidence in the case that this was new. On the contrary, it is admitted by the patentees in their specification, that this mode of avoiding the effect of the contraction of iron was known before. Curved arms, they say, were used in casting the spoke wheel with a chilled rim.

The patentees then state, that they are aware that car wheels had been made with plates as a substitute for arms before their discovery, but that such plates were made separate from the rim and hub and united together with screws or bolts, embracing the hub between them. Then they state their claim, which is the most material part of the specification. The claim is the attempt on the part of an inventor, to describe the very thing which he supposes he has invented and for which he asks the patent. The claim of the patentees here is the manner of constructing a wheel for rail-road cars, with double convex plates, one convex outwards and the other inwards, and an undivided hub, the whole cast in one piece. That is the claim; and, on comparing it with the model of the wheel, it is found to be a perfect description and one that cannot well be mistaken.

It was supposed by one of the counsel for the defendants, that the claim here was for the method or mode of constructing the wheel, as distinct from the instrument itself; not for the rail-road wheel as constructed, but for the mode or process of producing it. But, on examining the language used, it will be found that the good sense of the claim embraces a wheel constructed in the manner set forth in the specification. That is the thing which the patentees were aiming at. It was the car wheel for practical use in running rail-road cars, and a description of the mode or process of constructing the wheel, was essential for the purpose of explaining the thing which they believed they had invented. It was the instrument after it was made which they claimed to have discovered, and which was new and of general utility.

We do not understand, either, that the patentees set up any claim to the parts of this wheel taken separately; that is, the plates, the rim or the hub, when regarded separately and distinct from the perfect wheel. But we understand that they claim the entire wheel as they have constructed it, and which embodies the new idea in the mind of the inventor. This is claimed as a new manufacture, and as the subject of a patent.

They do not claim the solid hub. There is nothing in the specification indicating an intention to claim that as a thing they have discovered and which was never before in public use. Nor do they claim the chilled rim, nor, in terms, the plates separately. The plates taken separately are as old almost as any other form of matter. There could be no novelty in the parts when taken separately; indeed, many and perhaps all of the separate parts which go to constitute this new manufacture, taken detached from the wheel and according to the names given to them, will be found to have existed in most of the wheels theretofore constructed. A rim and a hub are probably essential to constitute a wheel of any description, and the use of plates, as a substitute for spokes, was doubtless common and well known, particularly in the construction of wooden wheels. All that part of the case may be laid entirely out of view, for the patentees claim that they have manufactured a cast iron wheel, with double plates, a solid hub, and a chilled rim, all cast in one piece, and that such a wheel had never before been produced. For that instrument they asked a patent, and for that the patent was granted. The plates were made convex, one inward and one outward, but this peculiar form given we do not understand as essential, or claimed to be essential, any further than as respects a form that will allow for the contraction of the plates in cooling, the allowance being made for the purpose of procuring a chilled rim. This particular form is given as one which affords an allowance for that particular principle in iron. Undoubtedly, if the form of the plate could be regarded with reference simply to the great desideratum—strength—in the construction of a rail-road wheel, it would be made on a plane. The plates would be made straight, because all the experts who have been examined on the subject say, that strength is the quality desirable in a rail-road wheel, and that the plane or straight plate would afford to a wheel the greatest possible strength. That form would be adopted were it not necessary to make an allowance for contraction in cooling, and avoid breaking in chilling the rim; and any form that will make the proper allowance for that principle of iron, is all that is essential, so far as regards the form of the plate, except that it is essential the form should approach as nearly to a straight plate as practicable, and allow, at the same time, for this principle of expansion and contraction.

It was objected by one of the counsel for the defendants to the description of the plaintiff's wheel in the specification, that it is not sufficiently particular and specific to distinguish the improved wheel from the old article on which it is claimed the improvement was made; and the law has been very properly referred to, for the purpose of showing that it is necessary that the

patentee should so describe his improvement as to distinguish it from the old structure on which it is claimed to be an improvement. We think the description is sufficiently particular and specific. Indeed, so far as regarded the improvement itself, the objection was not very strongly urged; but the principal objection was, that the old instrument or thing on which the improvement was made was not described, and that therefore a mechanic would not, on the perusal of the description, be able to distinguish between the old thing and the improvement.

But, as we understand this part of the specification, this improvement was made on the old cast iron spoke wheel, and when the patentees refer in general terms to this old instrument as a cast iron spoke wheel, that affords all the information which is necessary to a person skilled in that department. They say they have substituted the double plates for the spokes. That is the essence of their improvement; a substitution, in the mode they have pointed out. A strong illustration of the soundness of this view is found in the testimony of James Dougherty, who states that the first wheel the patentees cast was cast from a pattern that had been made for casting a spoke wheel, by substituting a core for the spokes.

This being the new manufacture of the patentees, the next question you have to settle is as to its originality, and whether they were the first inventors of the article, because it is insisted on the part of the defendants that they were not. The patent was issued on the 17th of March, 1838. The application for it was made on the 13th of January, 1838. The first wheel was cast at Wolf's foundry, in Columbia, in the fall of 1837, from the pattern of a spoke wheel. That is the date of the invention. The idea seems to have occurred to the patentees early in the fall of 1837, and late in the fall the invention was complete by the casting of the wheel. These wheels went into use immediately on the Philadelphia and Columbia rail-road, and on the Baltimore and Susquehanna rail-road. Many were cast in 1838, 1839, and 1840, also in 1841, 1842, and 1843. This is stated by Wolf, who was the owner of the foundry, and by Smedly, who was concerned in casting the wheels. Smedly says, that during this time, from eight hundred to one thousand of these wheels were put into use on those two roads, and that many of the wheels now in use on the Columbia rail-road, are wheels he cast in that foundry in 1838.

A point is made on the part of the defendants that, conceding this wheel to have been an original production of the patentees, there is no utility in it. But, it will be seen that one thousand were cast and went into general use, and were valuable for the purposes for which they were manufactured. It is not necessary, to maintain a patent, or the right of the inventor, that the thing invented should be the very best article for the use to which it can be applied. Indeed, the objection generally comes with bad grace from a person charged with an infringement, because, if the invention is of no utility, then he ought not to use it, and the very fact of his using it, if he is using it, shows that his practice and his professions, as regards the utility of the instrument, are very much at variance. On the evidence in the case, although the jury should find that the plaintiff's wheel is not the best wheel, yet if it is at all valuable, if its use for the purpose for which it is constructed is practicable, that is sufficient to sustain it as a useful invention.

It is said that three wheels had been constructed and were in use prior to the improvement claimed by the patentees; one a wheel of Baldwin, of Philadelphia; one a wheel of Tiers, also of Philadelphia; and one a wheel of James, of New-York. It is claimed that each of these wheels was substantially identical with the plaintiff's.

Baldwin's wheel, the only one of his wheels relied on in this branch of the case, is a cast iron rail-road wheel, from a pattern which is before you. That pattern was made and the wheel was cast from it sometime in 1835. The time is fixed by Robert T. Fry, who was at the head of Baldwin's establishment at the time. Baldwin himself is unable to fix the time. He says that it was before 1838, as nearly as he can define it. Fry fixes the time. He says the pattern was made and the wheel cast in the old shop, and that they moved from the old shop to the new one in the fall of 1835. This was before the date of the Wolf patent. Baldwin is unable to say how many were cast. Fry is unwilling to say that any number beyond four were cast. The pattern of this wheel of Baldwin's has been critically examined by the experts in your presence. Most of the experts, indeed all of them, concede that the compensating principle for the expansion and contraction of iron is not to be found in the shape there given to the plates of the wheel; that the plate is not a curved plate, but is a straight conical plate, and is not better than if it had been a horizontal plate so far as regards the principle of contraction.

But this is not the most material part of the evidence. It is admitted that the four wheels cast were cast by way of experiment, and that the experiment was abandoned. Baldwin's testimony is as follows: "That none of the wheels cast from the pattern are extant; that he cannot tell how many of them he cast; that he has no data by which he can tell how many; that he cannot tell what became of them; that the success of that experiment was like the others; that they were all very much alike in the result; that that result was," and this is the material part, "breaking in the casting and soft in the tread; that they ascertained these defects sometimes on breaking them up; that, in a word, they were deficient in strength." They

were therefore abandoned, and it was an abortive experiment beyond all doubt.

It is not enough, gentlemen, to conceive the idea of a new manufacture, or of a new and useful instrument. That alone is of no benefit to mankind, and is not worthy of the patronage of government. The new idea must be reduced to some practical use before it can become the subject of a patent, or be set up and relied on to defeat a patent.

It here appears from the person himself who is set up as the inventor, Baldwin, that all the wheels made from the pattern failed and were abandoned, and it appears from the evidence in the case that there were but four cast, and those by way of experiment. We shall not trouble you further on the subject of this wheel of Baldwin's, except to say that the practical result in casting that wheel goes to confirm the opinion of the experts, that it did not contain the principle which is essential to cast the double plate rail-road wheel with a solid hub and a chilled rim.

The next wheel is the Tiers wheel, of which a model is before you. It has double plates resting on spokes or arms, both on the inner and the outer side. The same objection, founded on the testimony of the experts, is made to this wheel, that was made to the wheel of Baldwin. No allowance is made for the expansion and contraction of the plates. The expansion and contraction are prevented by the arms on which the plates rest, and the wheel is, in principle, the same as the cast iron wheel with straight plates or straight spokes. This wheel was made in December, 1835, or in the spring of 1836. Tiers says, that he took out a patent for a spoke wheel in December, 1835, and that soon after, or about that time, he made some wheels with double plates and spokes inside. But it was early enough, if the experiment was successful, to defeat the invention of the plaintiff's patentees. Tiers says, that from half a dozen to a dozen wheels were cast after the pattern of the wheel of which this is a model; that they were all cast by way of experiment, that the experiment was not satisfactory, for the reason that they cracked around the rim, and that they were abandoned. I will refer you to his testimony in regard to this wheel, he speaking himself as the inventor, of his own knowledge and with the best opportunity of any witness. He says on his cross-examination, "that all the wheels that deponent made, of the kind not patented, were made with arms in the middle, like the models thereof shown him on his direct examination; that they were all made as an experiment; that he relinquished the experiment after making the number mentioned in his direct examination; that they were all made about the same time; that they were not satisfactory to him, for the reason that they appeared to be cracked around the rim in a few days after they were made, a circumstance which often happens in castings; that the castings, when they came out, would appear all right, and, after a short time, would be cracked for want of the proper proportions." This is the account he gives of his wheel cast in the spring of 1836. He abandoned it while it was in process of experiment, because it failed and cracked. It thus stands on the same footing as the wheel cast shortly before by Baldwin in the same city, and it failed undoubtedly for want of the compensating principle, if we can believe the testimony of the experts. No perfect wheel, according to Tiers' evidence, was cast by him. He does not give us to understand that he succeeded in perfecting his wheel so as to bring it into any public use, and therefore he abandoned it.

The next wheel is the James wheel. These two models represent his wheel. It is a single plate wheel, with a solid hub and chilled rim. In one of them is the improvement he made of strengthening the rim by a ring on the inside of the wheel. This wheel was cast in the city of New-York, in 1834, at Mr. James' establishment, in Eldridge street. The wheels were immediately put in use on the New-York and Harlem railroad, and they were also put in use on the New-Jersey railroad. Mr. James says, from a reference to his books, that the wheel was cast as early as 1834.

It is insisted that this wheel embodies the same invention as the double plate wheel of the plaintiff, and it is probably the only wheel produced on the part of the defendants that will require your examination. On the part of the plaintiff it is claimed that his patentees have constructed an entirely different instrument, not only different in form, (which of itself would in general amount to nothing,) having double plates and being hollow, but a wheel of greater strength and security, embodying in its production mechanical contrivance and ingenuity that are not found in the James wheel, and involving a new invention beyond anything to be found in that wheel. It is alleged that the plates of the plaintiff's wheel support both ends of the solid hub, one plate supporting one end of it, and the other plate the other end, and that the rim is supported by the two plates, one on either edge of the rim, and that in this respect the wheel is different from the James wheel, not only in mechanical contrivance, but in producing a new and useful result. Mr. Dunham, an exceedingly intelligent mechanist, said, that so far as regarded the effect of vertical pressure on the two wheels, he did not think that the plaintiff's wheel had the advantage, but he admitted that as respected lateral pressure its construction was the better one. Experts on both sides have been examined at large, and, as usual, they differ in opinion. Some consider the James wheel quite as good as the plaintiff's wheel. Some think it superior, and say that it embodies every thing claimed as new in the plaintiff's wheel. Other experts take a different view, and give reasons in detail why they

regard the plaintiff's wheel not only as a different manufacture from the James wheel, but as a better article, of greater strength and of greater practical utility.

It is a question of fact which the jury must determine, whether there was anything substantially new in the mechanical construction of the plaintiff's wheel. But there is one fact to which we will call your attention, that is entitled to some consideration on this branch of the case, although it is not decisive. The James wheel was in general use on the Harlem rail-road in 1834, and, to some extent, on the New-Jersey rail-road. Baldwin, in Philadelphia, in 1835, and Tiers in the same city, in 1836, one of them a year after, and the other a year and a half after the James wheel was in common use on those two roads, made trials to cast the double plate wheel, and we think, on the evidence in the case, it is fair to infer that they made their experiments with full knowledge of the James wheel. That wheel was in use the year before the experiments were made, in an adjoining state, on the New-Jersey rail-road, and publicly on the Harlem rail-road in New-York, and it is natural to conclude that persons bringing their minds to bear on the production of a valuable rail-road wheel, would take an interest in understanding the character of the wheels at that time and before in general use. If this inference be a fair one, and it is for the jury to say whether it is or not, then, with the James wheel before them, Baldwin and Tiers both failed to make a double plate wheel. They had the idea of such a wheel in their minds, but were unable to perfect it. The conclusion would seem to follow, that the James wheel and the double plate wheel were not necessarily identical, or that the former would naturally lead to the making of the latter, without any ingenuity other than ordinary mechanical skill.

There is one more question left. It is, whether the defendants' wheel is in substance identical with the plaintiff's wheel. The question is one of fact. There must be a substantial difference between the two wheels in their mechanical construction; and not only a difference in that, but the defendants' wheel must involve something that required mind and ingenuity over and beyond that of the plaintiff's patentees. It must embody a different principle from that found in the plaintiff's wheel. A change of form will not do, inasmuch as a different form might answer all the purposes of the first invention. There are instruments invented, in which the particular form is a material part of the discovery, and then a departure from the form would be a substantial departure, because the form is essential to the invention. But there are many new manufactures, where the particular form of the thing is not essential to its utility, and there may be a departure from that form and still a valuable instrument be constructed. Take the plaintiff's wheel for an illustration. The curved form is given to the plates to allow for the expansion and contraction of the plates in casting the chilled rim. But, for the purpose of making allowance for contraction, any other form involving the principle of that allowance may be used, and there would obviously be no substantial change in the thing manufactured, because the particular form given by the first inventors is not essential to the production of the instrument. If the form is a part of the thing invented and is essential to its value, then a change from the form is a substantial change, and may be the means of producing a new manufacture. Take the Blanchard machine as an illustration. It is one of the most ingenious machines of the day, and is constructed to turn irregular forms after a pattern, such as gun-stocks, lasts, and spokes for carriage wheels. Blanchard, in his machine, cuts the block, whether for a last or a gun-stock or a spoke, after a pattern, by means of rotating cutters. A modification of this machine was made and set up as a new machine, and claimed not to be an infringement. Instead of rotating cutters, the cutters were made stationary, and the block rotated. It was claimed that this was an entirely different principle from Blanchard's, and that the party making the change had not violated his patent. Now, any person of common understanding would see that the thing could be done in that way. It was a mere difference in the mechanical contrivance, and a change of form, in which there was no skill and no ingenuity. This illustrates the difference between a change of form, and a substantial change involving mind, ingenuity and invention.

Applying these principles to the two wheels, you are to say whether the defendants' wheel involves, in the substantial parts of it, anything different from the double plate wheel of the plaintiff. If it does, then it is not an infringement of the plaintiff's patent. If it does not, then it is, and the plaintiff is entitled to recover the sum of $150, the amount agreed on.

The jury were discharged, being unable to agree upon a verdict.

The construction given by the court in this case to the Wolf patent was substantially affirmed by the supreme court in the case of Sizer v. Many, on writ of error from the circuit court for the Massachusetts district, decided at the December term, 1851. See [16 How. (57 U. S.) 98].

[For other cases involving this patent see Many v. Sizer, Cases Nos. 9,056 and 9,057.]

Case No. 9,056.

MANY v. SIZER et al.

[1 Fish. Pat. Cas. 17.] [1]

Circuit Court, D. Massachusetts. Jan., 1849.

PATENTS—PRIORITY—EXPERIMENT—COMBINATION OF KNOWN PARTS — AMOUNT OF LABOR INVOLVED—GREATER UTILITY—CAR WHEELS.

1. Experiment, alone, is not sufficient to constitute priority of invention; the article must be completed for public use.

2. The conception of the idea and an attempt to produce it, ending in unsuccessful experiment, can not defeat a subsequent patent.

3. If the patentee borrowed the idea of the different parts which go to constitute his invention, and for the first time brought them together into one whole, which is materially different from any whole that existed before, he is the original and first inventor.

4. It is of no consequence how much or how little labor, study or thought the invention cost, if it is to be really a new and useful invention.

5. Superior utility in the defendant's is evidence that some new principle, or mechanical power, or new mode of operation, producing a new kind of result has been introduced, and the greater such utility, the stronger such evidence.

6. But this utility must be derived from the changes introduced, not from the use of better material or greater skill or care in the manufacture.

This was an action on the case, tried before Judge Sprague and a jury, for the infringement of letters patent [No. 640] granted to Trescott, Wolf, and Dougherty, March 17, 1848, and assigned to plaintiff [William V. Many], for a new and improved mode of constructing cast-iron wheels for railroad cars. The defendants [George W. Sizer and Henry Sizer] denied the validity of the patent, and the infringement; denying the validity of the patent because the invention was neither new nor useful. Upon these issues a large amount of testimony was introduced, the material portions of which are referred to in the charge of the court.

The specification accompanying the letters patent is as follows: "Be it known, that we, Samuel Trescott, George Wolf, and James Dougherty, of the borough of Columbia, in the county of Lancaster, and state of Pennsylvania, have invented a new and improved mode of constructing cast-iron wheels, for railroad cars, and for other purposes; and we do hereby declare that the following is a full and exact description thereof: We denominate our wheel the "double-plate car-wheel," because we use two plates instead of the spokes, or arms, usually employed, which plates are cast with the rim, and form one substance therewith; we give to the rim of our wheels the same form, in all respects, as is now given to the rim of car-wheels; but instead of arms, we cast our wheels with two parallel—or nearly parallel—plates, which plates are convex on one side and concave on the other; the hub, or nave which is to receive the axle, is cast in the center of these plates, extending from one of them to the other; the accompanying drawing gives a sectional view of one of our wheels, "a a" being the rim, "b b" the front and back plates, convex on one side, and concave on the other; "c c" being the hollow or void space between them, and "d d" the nave or hub; the hollow, "c c," between the two plates, is formed by a core, in the process of casting, which core is supported in the flask by leaving suitable holes in the plates for that purpose, which holes serve for the removal of the sand of which the core is formed. We cast our rim in a chill, in the usual manner; and, in consequence of the particular form given to the plates, they contract in cooling; without danger of fracture, and without it being necessary to divide the hub, as is done when car-wheels are cast with spokes, or arms. The only effect of contraction is to flatten the two plates in a slight degree, operating, in this respect, like the curved arms of many cast-iron wheels. We are aware that car-wheels have been made with plates as a substitute for arms, but such plates have been made separate from the wheels, and united together by screwed bolts, embracing the hub in a distinct piece between them. The difference between such wheels and those constructed by us, is so obvious as not to need pointing out. What we claim as our invention, and wish to secure by letters patent, is the manner of constructing wheels for railroad cars, or for other purposes to which they may be applied, with double-curved plates, one convex outward, the other inward, and an undivided hub, the whole cast in one piece, as herein fully set forth. Samuel Trescott, George Wolf, James Dougherty."

B. R. Curtis, for plaintiff.

A. McArthur and R. Choate, for defendants.

SPRAGUE, District Judge (charging jury). There are several things required by the patent laws of the United States to entitle an inventor to a patent. He must be the original and first inventor, and the thing patented must be useful. The letters patent are prima facie evidence of both these points, and are sufficient, in the first instance, to entitle the party holding them to maintain a suit for an infringement. Then, if the validity of the patent be contested, the burden of proof is on the defendant. In this instance, the defendants allege two grounds on which they say the plaintiff's patent is invalid. First, that the original patentees were not the first inventors; that though they might have been original, they were not the first. They must be the first, as well as original inventors; for if the thing they produce existed before, though they might have been ignorant of it, they can not take and hold any exclusive right to what before was public property.

The first question, then, is one of pri-

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

ority of invention. Several wheels have been produced and exhibited to you by the defendants, and it is for you to say whether any of them is substantially the same in principal as the plaintiff's, and if so, whether it existed before his patent. And here comes the question, what is the plaintiff's patent? He claims a thing, as a whole; it is made up of several things, or parts, but the claim, after all, is for a whole. In that whole are embraced the several things of which you have heard so much during the trial—the chilled rim, the solid hub, the two curved plates, all cast at once, and forming one substance, one thing, one manufacture, for one use; it is to be taken as a whole, and if you find that as a whole it existed before, then his claim is not valid.

Now, it is necessary to look at the various wheels put in evidence. First, the Elgar wheel, which is a patented article. It is not alleged that in substance this is the same as the plaintiff's, but it has been introduced to show that it has some of its features, and that he has borrowed from it some of his ideas. It has two plates, not of cast-iron, but of wrought-iron, which were screwed or bolted to the rim and hub. In these respects there is a difference between it and the plaintiff's wheel, and this difference is adverted to in the specification of the plaintiff himself.

But I ought, before going any farther, to say to you, that when I state the peculiarities of these different wheels, or any other matter of fact, you are not to take the statement of fact from me; it is your exclusive privilege and duty to judge of all questions of fact.

Then, second, there is the Dunham wheel. Mr. Dunham himself has been on the stand before you. In his wheel, he had double plates to a certain extent; but they did not reach from the rim to the hub; instead of continuous plates, he employed them only for a portion of the distance, and used spokes for the rest; if that does not constitute two plates, connecting the hub and the rim, then it is not substantially the same as the plaintiff's.

Another wheel is that by Baldwin. That, you will recollect, was a double-plate cast-iron wheel; you will also remember, from the statements of the witnesses, that two only of them were cast, and then the manufacture was abandoned, because this wheel did not prove to be a good article. If, with respect to this wheel, you believe the evidence of the witness, Mr. Baldwin's foreman, who superintended the casting, that the plates were not curved so as to embrace the principle of compensation, that is, if they had not such a form given to them as to allow of contraction, without fracture, in the process of cooling—if that was wanting in the Baldwin wheel, then it is not substantially the same as the plaintiff's.

Then, again, there is the Tiers wheel. The deposition of Mr. Tiers has been produced, and he states that his wheel had spokes, or arms, between his plates, and he says that, after trying experiments, he abandoned the manufacture; now experiment, alone, is not sufficient to constitute priority of invention. The article must be completed for public use, and the result must be known, although it is not necessary that it should be actually used by the public; the question is, whether the thing patented was before known? The conception of the idea, and the attempt to produce it, ending in unsuccessful experiment, is not sufficient to defeat a subsequent patent.

Now, there is still another wheel offered in evidence—the James wheel. You will recollect that it has one convex plate, with nothing to prevent a sufficient contraction in cooling. The question is, does that wheel, with its single convex plate, contain all the material parts of the Wolf wheel? The plaintiff alleges that he has introduced a second plate; if the second plate introduced by the plaintiff operates as a brace or truss to support the rim and hub, and thus introduces a new principle, or mechanical power, then the plaintiff's is not substantially the same as the James wheel.

These are all the single and separate wheels introduced by the defendants. I have adverted to them briefly; but you will remember, doubtless, all the peculiarities of their construction and principle.

But then comes this second question: If neither of these wheels, taken separately, will defeat the plaintiff's patent, will they all together? It is contended by the defendants, that all the parts going to constitute the plaintiff's wheel, were known before, and developed in prior wheels.

But if the patentee borrowed the idea of the different parts which go to constitute his wheel, and for the first time brought them together, into one whole, and that whole is materially different from any whole that existed before, then he is the original and first inventor, and is entitled to a patent therefor.

I have been requested to instruct you that it is of no consequence, as to the validity of a patent, how much, or how little labor, study, or thought the invention cost. And, gentlemen, this is so, if it be really a new and useful invention. The degree of labor and thought may be sometimes evidence to the jury, upon the question of invention; but although the invention be accidental, or a sudden flash of thought, the party is entitled to the benefit of his discovery.

I have also been requested to state, that it makes no difference as to the validity of a patent, if the same article or production was known before, whether such prior production or article was patented or not; and such undoubtedly is the law, as you must have seen from the directions already given you.

The next question that arises is that of

utility; the statute requires the invention to be useful. The law does not say that it must be highly useful, or more useful than others; it must have some degree of utility, and that is all that is required. I have been requested to instruct you that an article can not be considered useful if it endangers human life, or is so expensive that manufacturers would not be induced to make it. Those may be very important considerations for you to take into view, but they are not necessarily conclusive; and you will determine, from a consideration of all the evidence, whether the invention is, upon the whole, a useful one.

Another question is: Whether the description given in the patentee's specification is sufficient to enable a skillful artisan to make the wheel from it? The description must be such as to enable a person skilled in the art to which the invention pertains, to make the thing patented in such a manner that it will be useful.

I next proceed to another, and perhaps I may say, the great question in this case, which has been argued very ably by the counsel on both sides. It is: Whether the defendants have infringed the plaintiff's patent? Now, the defendant himself has a patent for his wheel, and that patent is prima facie evidence that the wheel is his invention; that it is new and original in him, and the burden of proof is on the plaintiff to satisfy you that the defendant has infringed his patent. The defendant's patent being subsequent, can not operate to defeat the plaintiff's, if it be for substantially the same thing. The question is: Whether the article actually made by the defendants is substantially the same as that patented by the plaintiff? There is no dispute as to what is actually made by the one party and by the other. The things and productions of both the plaintiff and defendants are before you, as they have been actually constructed. You have the means of comparing them. The burden of proof, as I have said, in this respect, is on the plaintiff. He must prove, beyond a reasonable doubt, that the defendants have infringed his right. And the question is: Whether the article made by the defendants is substantially the same as that of the plaintiff? This is a matter of fact, and exclusively for your determination.

But here it becomes necessary to ascertain, with more precision, what is claimed and secured by the plaintiff's patent.

It is insisted, on the part of the defendant, that the plaintiff is restricted to the degree of curvature described in the drawing annexed to his specification. But the drawing is only an illustration, and the patentee is not limited to the degree of curvature therein represented. The plates are described, in the plaintiff's patent, as convex: and the question is: Whether they must be curved as wholes—that is, from rim to rim—or whether the curvature may be between hub and rim? It is contended by the plaintiff, that the drawing shows that the inner plate is struck from two centers, making some degree of curvature between hub and rim, subordinate to the general convexity. If this be so, and the curvature of the arms of some cast-iron wheels was previously well known to be between hub and rim, then I instruct you that the plaintiff is not confined to curvature between rim and rim, but that curvature between hub and rim is within his patent.

Another question relates to the arrangement of the plates. In the plaintiff's specification they are described as parallel, or nearly so, and the summing up states them to be: one convex outward, and the other inward; and it is insisted by the defendant, that the plaintiff is confined to that arrangement. But I feel bound to instruct you that such is not the law, and that the plaintiff is not restricted to plates that are curved or convexed in the same direction, but that his patent may cover plates, both curved inward or both curved outward, as well as those which are parallel, or nearly so.

Taking these views of the plaintiff's patent, you will come to the examination of the wheel made by the defendant, and see whether it is substantially the same. If the defendants have omitted any one material part found in the plaintiff's wheel, then their wheel is not the plaintiff's, and is not an infringement. They allege that they omit altogether the plates of plaintiff, and substitute others, materially different, and that is the question for you to examine and decide.

It is contended by the defendants, that if a person of competent skill could not, from the description given by the plaintiff, make a wheel like the defendants', then the plaintiff cannot prevail in this action. And this proposition is true, when properly understood. It is not necessary that one skilled in the art should be able, from the plaintiff's description, to make a wheel in the form of the defendants', but it is necessary that he should be able to make one substantially like the defendants'. For, if he could not, it would follow, either that the thing patented could not, from the description given by the patentee, be made by a person of competent skill, or that, when made, it would be substantially different from the defendants', and in such case, the plaintiff could not maintain this action. But this still brings us back to the question, whether the defendants' wheel is substantially the same as the plaintiff's. The defendants have introduced certain changes in the plates and their arrangement. If these are only changes of form and proportions of the thing patented—as described and set forth in the patent, without introducing any new principle or mechanical power, or new mode of operation producing a new kind of result—the defendants' wheel would, notwithstanding these changes, be an infringement of the plain-

tiff's patent. But, if by such changes of form and arrangement, the defendant has introduced any new principle, or mechanical power, or has introduced a new mode of operation, producing a new kind of result, he has not infringed the plaintiff's patent.

If the changes made by the defendant have rendered his wheel one of greater utility than the plaintiff's, such utility is evidence that some new principle, or mechanical power, or new mode of operation, producing a new kind of result, has been introduced. And the greater such utility, the stronger is such evidence. And if a manifest and very high degree of utility is obtained by such changes, it becomes full proof and conclusive, that a new principle or mechanical power, or new mode of operation, producing a new kind of result, has been introduced, and that the defendants' wheel is no infringement.

There has been much evidence before you upon these points. You have the opinions of gentlemen of science and skill, of experts conversant with this particular art, upon this question, and also many detailed facts from those acquainted with the operation of the two wheels. You are to decide upon all this matter by exercising your own judgment upon the facts and reasonings submitted to you. You have another kind of evidence upon which you are also to pass, and that is the proof of the effect of both these productions when put to practical use.

Now, gentlemen, the opinion of experts—contrary to the general principle of law, which excludes opinions from going to a jury as evidence—is admissible in cases like this; cases involving questions of science and artistical skill, in which it is presumable that the jury are not versed, and with regard to which, therefore, they may desire the aid of other persons, skillful and versed in the art or science in question. Hence it is, that the results which such skillful and accomplished persons have arrived at, in their own minds, are suffered to go to the jury as matters of evidence. But they are not to be held as conclusive. They are to be judged of by you, and weighed by you, in the same manner as all the other evidence in the case.

And with regard to this matter, the plaintiff insists that the weight of evidence from the experts is on his side. The defendants, on the other hand, contend that it is clearly on theirs. It is for you to examine the testimony, and consider which side is entitled to be regarded as having the preponderance.

It is insisted, also, by the defendants, that the plaintiff's experts have given an explanation to the meaning they attach to the term "principle," which destroys the force of the opinion they have given as to the defendants' wheel being the same in principle with the plaintiff's; because, they say, it might require skill, ingenuity, thought, and experiment to arrive at the defendants' wheel from the plaintiff's description. Now, it may be that thought and experiment would arrive at something substantially different from the plaintiff's, and it may be that they would produce an article substantially the same, though formally different; and, it may be again, that much ingenuity, thought, experiment, and study may be employed to prevent a similitude in form, although the principle be the same, and so evade the patent.

Besides the opinions of the experts, you have the reasons given by them for such opinions, and the theories and deductions urged by the counsel. All agree that in casting a wheel in a chill, the first effect is a contraction of the rim, diminishing the circumference of the wheel, and thus producing a pressure upon the plates, which, in their heated state, causes them to yield, so as, in the first instance, to increase the curvature, and afterward, by the cooling of the interior, the curvature is reduced so as to be somewhat nearer a straight line than it was originally. The defendants contend that, by the contraction of the rim in the chill, the hub of the plaintiff's wheel rises; and that in the defendants' does not, and that this constitutes a material difference between them. The plaintiff insists that the hub of the defendants' wheel also rises, by the contraction of the rim in casting, and that if it were otherwise, still that would constitute no difference of principle. That the hub, or center of the plaintiff's plates rises, in the first instance, in the process of casting, there is no doubt, although at first it was controverted. Is it the same with the defendants'?

To this point you have the testimony of persons who have cast the wheel, and of others who have made the experiment for the purpose of determining this question; and models prepared with screws, for the purpose of illustrating the effect of the first contraction in casting the two wheels; and also the testimony and reasoning as to the necessary effect of the pressure by such contraction, upon the plates of the form used by the defendants.

It is urged by the plaintiff, that, although most of the curvature in the defendant's wheel is between hub and rim, yet there is what may be denominated a general curvature between rim and rim, and that this last curvature is in the same direction in both plates; so that when the contraction of the rim presses upon the mass of metal constituting the plates, such pressure is not in a straight line between rim and rim, and therefore the center of both plates is necessarily pressed upward, in a greater or less degree, although a part of such pressure may be exhausted upon the subordinate curves between hub and rim. The defendant, on the other hand, insists that there is no such general curvature, and the only effect of the contraction of the rim is to increase the curvature between hub and rim. It is for you to determine, upon all the evidence, whether there be a difference in this respect between the two wheels, and if so, whether it be material.

The curvature of the plates is also necessary, and perhaps even more important, to obviate the danger arising from the contraction of the interior portions of the wheel in cooling, which diminishes the curves, and eventually renders them somewhat less than they were as originally molded. There is no doubt that in this process the hub, or center of the plaintiff's plates, is depressed; but it is controverted whether such is the effect upon the defendants' plates. And upon this point, as well as upon the question of its materiality, you have the same evidence as upon the effect of the first contraction by chilling the rim.

Then, gentlemen, there is another question. It is said that the defendant obtains a distinct advantage, to which, indeed, his patent particularly adverts, by relieving the core in casting so that it need not be removed until the metal is cold. There is no evidence that the core of the plaintiff's wheel was, in fact, ever removed until it was cold, or that its remaining in has proved injurious. But it is urged by the defendant that some injury must have necessarily resulted, because, from the form of the plaintiff's wheel, the whole space between the two plates is at first filled by the core; and that this space being diminished by contraction in cooling, causes an injurious pressure; whereas, the effect of the same contraction upon the defendants' plates would be to increase the space between them, and thus relieve the core. This is denied by the plaintiff, who insists that the first contraction diminishes the space between the defendants' plates much more than any part of the process does the space between the plaintiff's.

There is another distinct species of evidence worthy of your deliberate consideration, and that is the practical effect produced by the changes introduced by the defendant. If the effect is a wheel of greater utility, that is evidence tending to show that some new principle, or mechanical power, or mode of operation, producing a new kind of result, has been introduced; and the higher the degree of utility, the stronger is such evidence. And it may arise to so high a degree as to become conclusive. From our inability to penetrate the secrets of nature, we may not be able to detect the new principle, or power, otherwise than by its effects. But this utility must be derived from the changes introduced—not from the use of better material, or greater skill or care in the manufacture.

Under this head, your first inquiry will be, whether the defendants' wheel is, in fact, superior to the plaintiff's? And if you find that it is, you will next consider whether such superiority is attributable to the changes introduced by the defendant, or to better material, and greater care and skill, or partly to one and partly to the other, and how much to each.

It is in evidence that about eleven hundred wheels were made by the patentees, from the date of their patent in 1838 to the year 1843, which were put upon the Pennsylvania railroads, and that some two hundred of them still continue in use.

And the plaintiff, moreover, insists that railroads, as they were constructed ten years ago, gave a more severe trial to wheels than they do as now built. It is further urged by him, that if any wheel has stood the test of every use, that fact should satisfy you that the article is a good one. And it is maintained, if one wheel can be made from a particular pattern, to stand the test of severe use, another wheel, or any number, can be made from the same pattern, equally good, with sufficient care and skill.

On the other side, it is insisted, that the Wolf wheels, as they were constructed, were bad; that they broke, and were, in fact, a worthless article, and that no one ever made a second purchase of them, but that the old spoke wheels were always substituted for those that failed; and that, with respect to the two wheels exhibited to you as having been run for several years, nobody knows to what use they were put, nor to what trial they were subjected. And again, it is added, that the patentees abandoned the manufacture of the Wolf wheel, and went back to the old cast-iron spoke wheel. This, the defendants contend, is of itself evidence which should satisfy you that the Wolf wheel is worthless. On the other hand, you have the deposition of Mr. Wolf himself, stating that the only reason why he abandoned the manufacture of his wheel was, that he could not procure the proper kind and quality of iron.

With regard to the second period of this wheel, as the counsel have designated it for convenience, it appears that in 1847 the plaintiff himself, at Albany, employed Messrs. Jagger, Treadwell and Perry to manufacture his wheel under his own supervision. The defendant contends that the attempt was a failure. The plaintiff contends that it was successful. One party says that the manufacture was given up because it was not successful, and because the wheel was not useful. The other maintains that that was not the reason for discontinuing the manufacture, but the reason was the want of suitable material. You have had the testimony from both sides before you upon this point. On the one hand, it is insisted that the most perfect opportunity was afforded for a successful production of the plaintiff's wheel; that the utmost care and skill were used in making it, and that the very best material was employed, and that this too, was frequently under the personal inspection of the plaintiff. But the other side contends that the testimony of the witnesses to these things should be taken with much allowance, especially so with regard to the evidence of Mr. Treadwell, who occupies an antagonistic position to the plaintiff.

Mr. Treadwell is the defendant, at Albany, in a suit brought for the infringement of this

very patent. And standing in that position, it is urged that he has such an interest in the question, although not in this suit, that he must be biased. Mr. Kibbee, too, being in his employment, it is said, must be also under a bias. But then, on the other hand, it is stated that the plaintiff complained to the manufacturers of the quality of iron used, and it was changed, at his request. As to the quality of the iron, gentlemen, and the allegation that Treadwell & Co. did not use a proper material, you have the testimony of several witnesses, who state that, in the wheels made in 1847, or at least in that specimen of them which you have seen in the entry of the court-room, the iron was not of a suitable quality for railroad wheels.

You will satisfy yourselves, in the first place, whether the plaintiff manufactured a good wheel or not; and, in the second place, whether, if the manufacture did not turn out to be good, the fault was owing to the form of the plates, or to the inferiority of the material employed. And you are to judge in the same way concerning the defendants' production. You are to look at the tests by which it has been tried, the use to which it has been subjected, the number called for and made, and the various other circumstances in the case, which it is not necessary here to recapitulate. The witnesses from Springfield, produced by the defendant, have testified that some two thousand Sizer wheels were manufactured and sold, for use upon railroads, and that they have not known any of them to be returned. On the other hand, it is contended by the plaintiff, that with the present improved mode of constructing railroads, the strain, or test, or car-wheels is now not nearly so severe as it formerly was; and moreover, in fact, that several of the Sizer wheels upon the Old Colony road have failed. All this is a matter for your consideration.

I have been requested by the defendants to instruct you that the plaintiff's specification and description must be so clear and intelligible as to enable an artisan to make the patented wheel without any new invention or exercise of inventive power. This is so. But you must understand that it is only required of an inventor so to describe the article for which he seeks a patent, as that a person skilled in the particular art relating to it, can construct the fabric from the description, by the exercise of his skill as an artisan—not that it must be so described that a person unacquainted with, or unskilled in the art, may be enabled to produce it.

The only other question, gentlemen, in this case, is that of damages. If your verdict should be in favor of the defendants, this question will not arise. But if you should be of opinion that the plaintiff is entitled to a verdict, then you will have to determine the amount, which should be such as would indemnify the plaintiff for the injury he has sustained from the defendants' violation of his patent. The number of wheels which the defendant has made, and the amount of profit he has realized from them, have been presented to you by the plaintiff, as grounds of damages. They are proper to be taken into consideration, but are not conclusive as to the extent of the injury, which may be either greater or less than the profits realized by the defendants. A plaintiff may be manufacturing his patented article himself, and making it to a profit, while another man may make it to a disadvantage, and yet the spurious article carried into the market may displace the original. In such case, the injury to the patentee would be greater than any profit upon the spurious production. On the other hand, a defendant's article may not displace the original, and in that case the injury would be less. And again, it may be that a plaintiff may derive a profit from licensing other parties to construct his invention; and any piracy upon it, by depriving him of a portion of the profits of such licenses, would be an injury to be taken into account by a jury.

If your verdict should be for the plaintiff, he is entitled to damages to the full extent of the injury he has sustained from the wrongful acts of the defendants.

The jury found a verdict for the plaintiff.

[NOTE. The judgment against the defendant was entered as follows: "It is thereupon considered by the court that the said William V. Many recover against the said George W. & Henry Sizer, the sum of $1,733.75 damages, and costs of suit taxed at ———." Subsequently the defendants sued out a writ of error from the supreme court, for the purpose of having the above judgment revised. The judgment of the circuit court was affirmed December, 1851; case unreported. Upon the receipt of the mandate issued by the supreme court, commanding such execution and proceedings be had in the cause as ought to be had, it was presented to the circuit court, and leave applied for to have the costs in the action taxed and inserted in the blank left in the original record of the judgment. This motion was refused, and plaintiff thereupon applied to the supreme court for a mandamus to direct the circuit court to tax and allow his costs in the original action, amounting to $1,811.59. The motion was overruled for want of jurisdiction. 14 How. (55 U. S.) 24. Judgment having been entered on the original verdict, the case was carried by writ of error to the supreme court, where it was dismissed for want of jurisdiction. 16 How. (57 U. S.) 98.

[This cause was heard on a motion for a provisional injunction in June, 1849, founded upon the verdict in this case. The injunction was refused. Case No. 9,057.

[For another case involving this patent see Many v. Jagger, Case No. 9,055.]

Case No. 9,057.

MANY v. SIZER et al.

[1 Fish. Pat. Cas. 31.] [1]

Circuit Court, D. Massachusetts. June, 1849.

FEDERAL COURTS — COMITY—WHEN NOT APPLICABLE—EFFECT OF VERDICT—CONSTRUCTION OF PATENT—INJUNCTION.

1. The rule of comity which requires judges of the federal courts to conform to the opinions of each other, if any have been given, has no application either by its terms, or the reason on which it is founded, to motions for injunctions where error may be followed by irremediable mischief.

2. The rendition of a verdict in a patent case in favor of a plaintiff is not conclusive, upon the right of such party to an injunction.

3. The question is not, what might have been done, but what has been done by the patentees. And although the court will endeavor, ut res valeat, so to construe the patent as to make it coextensive with the invention, yet the language used may be too clear to be controlled by any extrinsic evidence.

[This was a suit by William V. Many against George W. Sizer and Henry Sizer to enjoin the infringement of letters patent No. 640 granted to Trescott, Wolf, and Dougherty, March 17, 1848. The cause is heard on a motion for a provisional injunction founded upon the verdict of the jury in an action of trespass on the case between the same parties. Case No. 9,056.]

B. R. Curtis, for complainant.

A. McArthur and Rufus Choate, for defendants.

SPRAGUE, District Judge. This application is founded upon the result of the recent trial between the same parties. Exceptions having been allowed in that case, the numerous questions of law which arose in it are yet to be decided by the supreme court. In the mean time the plaintiff prays for an injunction. On the one hand, if the right be in him, although he may have an action for damages, that remedy may be inadequate. On the other hand, if the defendants should be prohibited from carrying on the manufacture in which they are now engaged, and the right should ultimately be decided to be in them, they would have no remedy for the loss sustained by arresting their business. Is the plaintiff's right so clear, and the presumptions in his favor so strong, as to entitle him to the interposition which he now asks? This requires an examination of the questions raised by the exceptions. The first and most important is that which relates to the construction of the plaintiff's patent. At the trial the plaintiff's counsel presented an authenticated report of a trial upon the same patent before the United States circuit court, at Albany, in October last, and insisted that the rulings therein had not only all the weight which the learning and ability of the judges would have given them under any circumstances, but became obligatory by virtue of the rule laid down in Washburn v. Gould [Case No. 17,214], where it is said, "the rule of comity always observed by the justices of the supreme court, in cases which admit of being carried before the whole court, was to conform to the opinions of each other, if any had been given." And Judge Story accordingly adopted a previous ruling made by Mr. Justice McLean. That case was also an action upon a patent, and precisely applicable to the question before me, and I felt bound to conform to a rule established by all the judges of the supreme court. Having thus concluded to adopt the construction of the patent given in the circuit court at Albany, the plaintiff was entitled to the full benefit thereof, and I did not deem it proper to weaken its force by arguments against it, but contented myself with indicating to counsel that it was the result of authority rather than of my own judgment. The above rule of comity has no application either by its terms, or the reason on which it is founded, to motions for injunctions where error may be followed by irremediable mischief. And I am now compelled to consider the true interpretation of the plaintiff's patent without the relief of any previous binding exposition.

At the close of their claim, the patentees state their claim in the following words: "What we claim as our invention, and wish to secure by letters patent, is the manner of constructing wheels for railroad cars, or for other purposes to which they may be applied, with double convex plates, one convex outward and the other inward, and an undivided hub, the whole cast in one piece, as herein fully set forth." The plaintiff, by his counsel, contends that his patent is not for an organized machine, nor for a combination, but for a unit or whole, to the making of which, however, he says certain ingredients or parts are essential, which are a drilled rim, solid hub, two plates connecting the rim and hub, and so far apart as to operate as a brace, the one for the other, all cast at one time, so as to constitute one substance, and the plates curved to such a degree that, in the process of casting, they would first yield to the pressure of the circumference in chilling the rim, and afterward contract in the process of cooling, without fracture. And further, that this claim is not limited to any one kind of curvature, or any particular location of it, or any arrangement of the plates, that the curvature may be wholly between the center and circumference, and the plates may be both convex inward or both convex outward. By the plaintiff's construction, his claim is not merely for the result—the article—the wheel, after it has been made, possessing certain mechanical powers or properties, as two plates connecting the rim and hub, and supporting both, placed far enough apart to act as a brace, the one for the other—for the pre-existing Elgar wheel had all these properties. The plates of that, how-

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

ever, were wrought and fastened to the rim and hub with bolts and screws.

The plaintiff therefore proceeds further, and claims a wheel made by the process of casting, nor does he stop there, because the Baldwin wheel, if indeed that did not end in mere experiment, which would be a question of fact for the jury, was a double-plate wheel, cast all at one time, and the plates far enough apart to support the rim and hub, and to brace each other. But the plates were not so curved as to obviate the difficulty of contraction in cooling, and the plaintiffs proceed still further, and claim that their patent introduces that compensating principle as it has been called. The defendant insists that in his plates the curvature is wholly between the center and circumference, and that all the convexity is inward. The plaintiff contends that by the true construction of his claim, which has been above quoted, the words "double convex plates" and "an undivided hub, the whole cast in one piece," are to be operative and essential, but that the words, "one convex outward and the other inward" are to be inoperative.

It is to be observed, that the language which indicates that the plates are to be curved is "double convex plates." The question arises whether a plate, as a whole, may be said to be convex, by reason of wrinkles or minor curvatures between the center and the circumference, leaving the center still in in the plane of the circumference. This question is not unimportant, and some light may be thrown upon it by extrinsic evidence hereafter to be adverted to. Without pausing upon it here, let us proceed to the inquiry whether the words "one convex outward and the other inward" are to be rejected as inoperative. These words are as clear and imperative as any part of the summing up. If it be said that they relate to form, so does the word convex which immediately precedes them and is essential to the plaintiff's claim. Shall then the words "with double convex plates" be retained, and the words which immediately follow, qualifying them and prescribing the kind of arrangement of convex plates, be rejected? Shall a single sentence of this prescribed form be thus dissevered, and thereby give to the plaintiff the right to double convex plates generally, instead of such double convex plates as he has specified?

The patentees commence their summing up by saying that what they claim as their invention, and wish to secure by letters patent, is the manner of constructing wheels, etc., and close it by words "as herein set forth," referring to the preceding specification, which is to be carefully examined, and the whole instrument construed together. The specification is as follows: The patentees begin by saying that their invention is a new and improved mode of constructing cast-iron wheels, etc., and then proceed to give a full description of such mode, in which it is said that the wheel is to be cast with two parallel, or nearly parallel plates, which plates are convex on one side and concave on the other. Here again the plates are to be convex, but instead of saying the one is to convex outward and the other inward, they are required to be "parallel, or nearly so," which can not be unless they are bent in the same direction, that is one convex outward and the other inward. The language as imperatively requires that they shall be parallel, or nearly so, as that they shall be convex. The illustration by the drawing also represents them as parallel.

Thus far the specification seems to be in exact conformity with the summing up, but it has been urged that the subsequent reference to the curved arms of cast-iron wheels suggests the idea that the curvature of the plates may be the same as had previously been known in such arm. If this were so it might affect the question, whether the convexity was to be of the plate as a whole, that is between rim and rim, or might be a curvature between rim and hub only, but would not reach the question of the parallelism of the plates. But let us see what is the real force of this reference. It reads thus: "In consequence of the particular form given to the plates, they contract in cooling, without danger of fracture, and without its being necessary to divide the hub as is done when car wheels are cast with spokes or arms. The only effect of contraction is to flatten the two plates in a slight degree, operating in this respect like the curved arms of many cast-iron wheels." Here is nothing waiving or varying the form previously prescribed, but only an explanation of the effect of that particular form, namely, that it allows of contraction, and then states the result of that contraction, viz., the flattening of the plates, and as an illustration refers to the curved arms of cast-iron wheels. It does not say that they adopt the form of such arms, but only that the particular form which they have previously described will, in one respect, viz., that of flattening the plates, operate like such curved arms.

The language of the summing up, so far from being inconsistent with the preceding specification, seems to be fully sustained by it.

Let us now advert to the extrinsic evidence, and see what aid we can derive from the history and condition of the art at the time the patent was granted, and read it by the light of surrounding circumstances. It is urged with much force by the plaintiff's counsel that the only form of the plates, which is essential, is such curvature as will allow the metal to contract in cooling without danger of fracture, and that any particular form and arrangement of the plates beyond this, being unnecessary, should not be deemed an indispensable part of the patent. But was it known at the time that this patent was obtained, that a particular arrangement of the plates was not necessary; or was the

method of introducing a second plate, so as to obviate contraction, an essential part of plaintiff's invention?

Has not the fact now relied upon—viz: that that mode is not essential—been of recent discovery? It must be borne in mind that the question is not, what might have been done, but what has been done by the patentees. We must endeavor, therefore, to ascertain, in the first place, what their invention really was, and in the next, how it is described by the patent. The patentees may have claimed either more or less than their real invention. And, although the court will endeavor ut res valeat, so to construe the patent as to make it coextensive with the invention, yet the language used may be too clear to be controlled by any extrinsic evidence, and the statute itself contemplates that errors of description may exist beyond the power of the court to correct, and provides a remedy by a surrender of the patent.

What, then, is the extent of the plaintiff's invention? What was the defect which they undertook to remedy, and in what manner did they do it? Wheels with chilled rims, solid hubs, double plates supporting both edges of the rim and both ends of the hub, and operating as a brace one to the other, were previously known.

Such was the Elgar wheel before mentioned; but the plates were wrought and expensive, and it was desirable that the wheels should be made by casting, and to this a difficulty was presented by the contraction of the metal in cooling. Baldwin had made by casting a double-plate car-wheel, but the plates were not curved so as to obviate the difficulty in cooling, and it is a question whether his attempts did not end in experiment only. Cast-iron wheels with curved arms connecting the rim and hub, and made in that form to allow contraction in cooling, were well known. James made and introduced into successful use a car-wheel with a chilled rim, solid hub, single plate connecting the rim and hub, and convex on one side and concave on the other, so as to allow contraction in cooling, and all cast at one time. Now it is insisted on behalf of the defendants, that as double-plate wheels, having all the mechanical properties of the patentees', namely, supporting the rim and hub, and acting as a brace before mentioned, had been made by Elgar, and were well known, and the idea of making them by casting had been conceived by Baldwin, who failed of carrying it into successful effect only for want of curvature, and such curvature had been actually introduced by James into his one plate wheel, that all the plaintiff did was to introduce into the James wheel a second plate exactly like the first. And it is further insisted, that in this there is not a sufficiency of invention to support a patent. Let us see what difficulties presented themselves, and how the patentees overcame them. All the experts agree that it is necessary that the tread of the wheel should be hardened, and for this purpose must be cast in a chill, that is, that the part of the mold which comes in contact with the exterior surface of the rim should be made of some good conductor of caloric, while all other parts are made of some non-conductor. The rim being thus suddenly cooled is thereby made to contract, and the circumference is diminished, producing a pressure upon the whole mass of interior metal, while it is yet in a highly heated and flexible state. The effect in this first contraction would be in the James wheel to increase the convexity of the plate, causing the central portion or hub to rise, and then by the subsequent cooling of the interior the convexity would be diminished and the hub or center would fall, and to such extent that the plate would at last be somewhat more flattened than it was as originally molded.

If a second plate were introduced and placed in such relation to the first that both would be convex outward, and they were not connected at the center but only at the rim, then both plates would readily yield to the first contraction of the circumference, both rising and receding from each other at the center, and by their subsequent contraction both falling and approaching each other at the center. But if the plates were connected by a solid hub this would counteract the effects of both the first and second contraction, and prevent the plates from receding from each other at the center in the first place, or approaching each other afterward. If the two plates were made both convex inward and not connected at the hub, they would approach each other at the center by the first contraction, and recede by the second; but if connected by a solid hub, both these operations would thereby be prevented. A solid hub was essential, and the plan adopted by the patentees was to place the second plate parallel to the first, one being convex outward and the other inward. The effect of the first contraction would be to increase the convexity of both equally, and as the center of both would rise in the same direction, the solid hub would present no obstruction. So also both would fall together by the subsequent cooling of the plates, and their parallelism be preserved throughout. And thus the principle of compensation by curvature to allow of contraction in cooling, without fracture, would, notwithstanding the solid hub, have free operation according to the extent or degree of the convexity. This is the mode adopted by the patentees as set forth in their specification, illustrated by their drawings, and claimed in their summing up. This is the mode the patentees always adopted in practice. They manufactured their wheel more or less from the date of their patent in 1838 to the year 1843 inclusive, making in all about eight hundred. In some of them, the plates instead of being convex from rim to rim were conical, that is, the line from rim to hub was straight, and the

center was not in the plane of the circumference. Both were conical in the same direction, and their parallelism preserved, and the effect of the successive contractions was to raise and depress the hub or center of both just as in the parallel convex plates. The manufacture was discontinued in 1843, and not resumed until after the plaintiff had become the purchaser of the patent in 1847, when about eleven hundred were made under the plaintiff's direction, all by the same method as that pursued by the original patentees.

The defendants contend that in 1848, by their own skill and labor, they found out a new method of constructing the plates by placing the curvature in both wholly between the hub and rim, leaving the center in the plane of the circumference, and the curvature of both being inward, and that this, by allowing a greater degree of curvature, gives more beneficial operation to the principle of compensation, and causes the plates to brace each other more effectually against one kind of lateral pressure, and that they have thus produced a wheel of greater practical utility, while they insist that the plaintiff's is not superior to the old spoke wheel.

Now if this be so, and there was certainly evidence tending to prove it proper for the consideration of a jury, why should not they have the benefit of the method of constructing the plates which they have introduced, leaving to the plaintiff the exclusive benefit of the method set forth in the patent? Why should the plaintiff's claim be so extended as to embrace a new and more useful method of construction, which the patentee had never described or acted upon? The plaintiff's counsel have made a forcible argument upon that part of the instruction which stated that if the defendants' was in any material part substantially different from the plaintiff's invention, as described in his letters patent, there was no infringement. This taken alone might at first view seem to be sufficiently favorable to the defendants. But it does not stand alone—the jury were not left at liberty to form their own judgment of what was a substantial difference. They were peremptorily instructed that any changes of form or arrangement of plates, even if thereby the plates were both convex inward or both convex outward, and the curvature placed wholly between hub and rim, and producing thereby a result more useful, would not constitute a substantial difference, but that there must be also the introduction of some new principle or mechanical power, or new mode of operation producing a new kind of result. And it was not until this direction had been emphatically repeated to the jury, after they had been deliberating more than twenty hours, that they finally agreed upon a verdict. The jury were, indeed, instructed that increased utility would be evidence tending to prove such new principle, power, or mode of operation, and the greater the utility the stronger would be such evidence, and that a manifest and very high degree of utility would be conclusive evidence thereof. The jury may have deemed the defendants' wheel more useful than the plaintiff's to any extent short of what they might consider a manifest and very high degree of utility.

As I understood the ruling of the circuit court at Albany, and the authority in Washburn v. Gould [supra], I felt constrained to instruct the jury, as before stated, as to the necessity of some new principle or mechanical power, etc., being introduced by the defendants. Should not the instructions have been more favorable to them? If it should be thought that the case of Davis v. Palmer [Case No. 3,645], decided by Marshall, C. J., presents too rigid an adherence to form to be a guide for the present, ought not the court to have followed the decision of the supreme court in Prouty v. Ruggles, 16 Pet. [41 U. S.] 336, and held the plaintiff to the particular instrumentality which he had specified and claimed, whether the defendants' article was more useful or not? Or even if this high authority should be deemed too rigorous, and a more liberal doctrine in favor of patentees should be adopted, ought not the jury at least to have been told that if the defendants, by the method or the changes introduced by them, had carried the principle of compensation and the mechanical power of the brace into more full and complete effect, and had thus conferred a benefit upon the public by making a better and safer wheel, and that these changes and increased utility might be well termed considerable—it was no infringement, although no new principle or power was introduced, and the new mode of operation had produced a beneficial effect, new only in degree and not in kind?

In the case just referred to [Davis v. Palmer], the patentee claimed an improvement in the mole-board of a plow. In his specification, there was first a general and then a more particular description of the form of his mole-board. The plaintiff contended that he was not restricted to the latter and more particular description. Chief Justice Marshall held otherwise.

The case of Prouty v. Ruggles, 16 Pet. [41 U. S.] 336, bears so strongly upon the question now before the court, as to require a particular examination. The patent was for a combination of three things in the construction of a plow, and the whole cause turned upon the question whether the patentee was confined to the particular manner of constructing the top of the standard which he had described in his specification, which was as follows. After describing the other two particulars of the combination, he says: "The top of the standard through which the bolt passes to secure the beam, is transversely parallel to the plane of the share, and extends back from the bolt to such distance as to form a brace to the beam when the

after part is pressed down by lifting at the fore part, the share being fast under a rock or other obstruction. The after part of this extension is squared in such manner that, being jogged into the beam, it relieves the bolt in heavy draft."

In summing up, the patentees say they claim a combination of three particulars. After describing the first and second, they proceed as follows: "3d. The forming the top of the standard for brace and draft. We do not intend to confine our claim to any particular form or construction, excepting such form of the top of the standard as shall serve for brace and draft, but have given such form as we deem to be most convenient, which may be varied as is obvious." The utility of the invention and the validity of the patent were admitted. It appeared that the defendants had made plows embracing the first two elements of the combination, and also having the top of the standard so formed as to serve both for brace and draft, but it was not jogged into the beam, and did not extend so far back upon the beam. It was decided by Judge Story at the trial, and afterward by the whole supreme court, that the patentees were to be held to the mode of forming the top of the standard described in the specification.

The chief justice, in delivering the opinion of the court, holds this language: "The use of any two of these parts, only, or of two combined with a third which is substantially different in form, or in the manner of its arrangement and connection with others, is therefore not the thing patented." Compare this decision for a moment with the case at bar. In the former, the specification describes the mode of forming the top of a standard for brace and draft, to be by extending it and jogging it into the beam. In the latter, it describes the mode of constructing the wheels to be by convex plates placed parallel to each other, or nearly so. Thus far they are similar. But when we come to the summing up, we find that the former claims, as one part of the combination, the forming of the top of the standard for brace and draft, without repeating how it is to be formed for that purpose, but on the contrary, expressly saying, "We do not intend to confine our claim to any particular form or construction, excepting such form of the top of the standard as shall serve for brace and draft, but have given such form as we deem to be most convenient, which may be varied as is obvious."

In the case now before us, the summing up claims, as part of the manner of constructing the wheels, "with double convex plates, one convex outward, and the other inward," thus repeating the requisition of the convexity and parallelism of the plates, without any suggestion that either can be dispensed with. In the former case, the mode of forming the top of the standard seems to be of little importance, while in the latter, the mode or manner of introducing the second plate, if not of the essence of the invention, is a very material part of it. Again, in the former, the defendants had made no improvement. The change introduced by them had produced no effect, even in degree. They had not increased the utility of the instrument, nor conferred any benefit upon the public, while in the latter, the defendants contend (and for the purpose of applying the law, we must take it to be true) that they have, by their changes, produced an effect new, at least, in degree of practical utility, and conferring a substantial benefit on the public.

Will it be said that the former was a patent for a combination, and the latter for a unit or whole? Admit this change of names, yet it is conceded that the convex plates are an essential part or ingredient in this whole, without which, indeed, the patent could not stand for a moment. Why, then, should not the mode of forming them, so imperatively prescribed throughout, be deemed as essential as the mode of forming the top of the standard for brace and draft, described only in the specification, and dropped, if not disclaimed in the summing up.

That case was much stronger for the plaintiffs than is the one at bar, and might be overruled and yet leave abundant ground for the defendants to stand upon.

The plaintiff became the purchaser of the patent now in controversy in 1847. He may be presumed to have known that the manufacture of the patented article had been wholly discontinued for four years, and that the only mode by which it had ever been made was by parallel plates, convex or conical from rim to rim, and that this was the only mode described in the patent which he purchased. Would any injustice be done to him if he should not now be permitted so to extend his claim as to appropriate to himself the more beneficial mode of locating the curvature and arranging the plates introduced by the skill and labor of the defendants, ten years after the patent was granted?

On the whole, had it not been for the rule laid down in Washburn v. Gould [Case No. 17,214], I do not think I should have adopted the instructions that were given to the jury. For, notwithstanding the unfeigned respect and deference which I feel for every ruling of the circuit court at Albany, even in the haste of a jury trial, I can not say that I am satisfied with those instructions; and as they would not have been given but with a view to a revision by the supreme court, which the defendants have not had time to obtain, the injunction must be refused.

[For another case involving this patent, see Many v. Jagger, Case No. 9,055.]

MANY (WOOLCOCKS v.). See Case No. 18,024.

MAQUILLAN (FARMERS' LOAN & TRUST CO. v.). See Case No. 4,668.

MAR, The HELEN. See Case No. 10,543.

Case No. 9,058.

The MARATHON.

PACKER et al. v. The MARATHON.

[5 Adm. Rec. 88, 89.]

District Court, S. D. Florida. July 29, 1853.

SALVAGE—SMALL SKILL—NO GREAT DANGER—MERIT.

[Salvage services rendered, without uncommon skill or exertions, to a ship in no great danger of loss, are of small merit.]

[Libel for salvage by James Packer and others against the ship Marathon and cargo.]

S. R. Mallory, for libellants.

Thos. F. King, for respondent.

MARVIN, District Judge. This ship, laden with a valuable cargo, supposed to be worth between $60,000 and $80,000, from New Orleans, bound to New York, in the afternoon of the thirtieth of June, ran ashore upon the southwest point of the quicksands, where she remained about sixty eight hours. The master carried out a kedge astern, and commenced to lighten the ship by heaving overboard cargo, and endeavoured to heave the ship off. Night coming on, he dropped his starboard anchor to hold the ship where she was until the next morning. The next morning he discovered that the best water was ahead of the ship, and he carried out a kedge in that direction, and commenced again to heave overboard cargo. He hove overboard, in all, —— bales of cotton, —— hogsheads of sugar, 160 hides, and a lot of staves. The next morning the libellant Packer, in the sloop Mystic, with seven men, arrived at the ship, and was employed to lighten the ship, and aid in getting her off. He received on board his sloop one hundred and sixty-three bales of cotton, and then dispatched her to Key West. At about one o'clock the next day, the wind and tide being favorable, and all sails set, the ship gradually worked off the shoal. The bottom on which the ship lay is called a "quicksand," the precise nature of which is probably not well understood. There is no evidence, however, that it is a dangerous bottom.

The libel represents the services of the salvors in general, but strong, language, yet it is very difficult to discover from the facts themselves that the case is one of more than ordinary merit. I do not think that the ship was in much danger of total loss, nor that any uncommon skill or exertions were employed by the libellants in getting her afloat. The services consisted in the taking on board the Mystic the one hundred and sixty-three bales of cotton, and in Packer's remaining on board the ship after the Mystic was dispatched to Key West, to aid the master with his advice, in case it should be needed. The ship and cargo are, however, valuable, and a liberal compensation may be properly made for the service rendered, and I think that twenty-five hundred dollars is liberal and reasonable. It is therefore ordered, adjudged, and decreed that the libellants have and recover, in full compensation for their services rendered the said ship Marathon and cargo, the sum of twenty-five hundred dollars. It is further ordered that the costs and expenses of this suit, the wharfage, storage, bills for labor, notary public's fees, commissions, and all other charges upon the property incurred by the ship's coming into this port, be brought into court, to be examined and allowed or disallowed, and that upon the payment of the aforesaid salvage, costs, expenses and charges, the marshal restore said ship and cargo to the master thereof, for and on account of whom it may concern.

Case No. 9,059.

MARBLE v. FULTON et al.

[1 Hask. 462.] [1]

District Court, D. Maine. Dec., 1872. Jan., 1873.

BANKRUPTCY—BOND TO APPEAR—BREACH OF CONDITION—ACTUAL DAMAGE—ABSCONDING BANKRUPT.

1. An action of debt lies upon a bond given by a bankrupt conditioned for his appearance in court from day to day agreeable to its order.

2. The avoidance of a principal, after being adjudged a bankrupt upon his creditors' petition, is a breach of the condition of his bond authorized by section 40 of the bankrupt act [of 1867 (14 Stat. 536)], taken to secure his attendance in court until decision upon that "petition or the further order" of court.

3. Upon breach of the condition of such bond, the plaintiff may recover the actual damages sustained.

4. Upon a bond of defeasance there can be but one suit and one assessment of damages.

5. In the assessment of damages, the pleadings are not regarded, and damages may be assessed for all existing breaches, whether specified in the pleadings or not.

6. The absconding of a bankrupt with assets greater than the penalty of his bail bond is a direct loss to the bankrupt estate, recoverable upon the bond to the amount of its penalty with interest from the date of the writ.

Debt [by Sebastian S. Marble against James E. Fulton, and others] for the penalty of a bail bond. Upon oyer it disclosed a condition for the appearance of the principal in court to answer to a creditor's petition in bankruptcy against him, and for his appearance from time to time as required by the court until decision upon the petition or until further order of court.

Plea. Omnia performavit.

Replication. Avoidance of the principal by not appearing and furnishing schedules

[1] [Reported by Thomas Hawes Haskell, Esq., and here reprinted by permission.]

in bankruptcy in obedience to order of the court.

Rejoinder. No order of court so to do within the time stipulated by the condition of the bond. Issue taken.

William L. Putnam, for plaintiff.

Henry B. Cleaves, Nathan Cleaves, and Joseph Howard, for defendant.

FOX, District Judge. This is an action of debt on a bond given by a bankrupt, upon his arrest, under the provisions of the 40th section of the bankrupt act, and is prosecuted in the name of the marshal for the benefit of the assignee in bankruptcy. It appears that on the 19th of February, 1872, Locke, Twitchell & Co. filed their petition in the district court of Maine against Fulton & Ricker, praying that they might be adjudged bankrupts, and an order of notice was issued thereon returnable March 4th. On the 19th of February another petition was filed by the same creditors praying for the arrest of Fulton & Ricker under the provision of the 40th section of the act, and upon probable cause being shown to the court, they were ordered to be held to bail in the sum of $2,000.

Upon his arrest on February 27, Fulton gave bond in that amount with Elijah Fulton and John D. Spiller as sureties, conditioned "that if the above bounden James E. Fulton shall appear and answer to the said Locke, Twitchell & Co., petitioners as aforesaid, as by said order provided, and shall thereafterwards appear from time to time as required by said court until the decision of said court upon said petition, or the further order of said court, then the above written obligation shall be null and void, otherwise in full force." On the return day of the order of notice, Fulton & Ricker appeared, but the hearing was postponed from time to time until the 6th day of May when they were adjudged bankrupts, and the usual decree of bankruptcy was then entered against them with an order to furnish schedules of their assets and liabilities within five days as provided in form No. 58, General Rules and Orders, which order not being complied with, on the fifth day of June a petition was presented by their assignee in bankruptcy that the said James E. Fulton might be required by order of court to appear on a day certain and file such schedules. Upon this petition it was ordered that he appear on June 17th, which order was served on the said Fulton by leaving a copy of the same at his usual place of abode, and the same was also duly served on the sureties on his bond, and no appearance being then had, said James E. Fulton and his sureties were on said 17th day of June defaulted, and their default was duly entered on the docket.

The first objection taken is, that an action of debt upon this bond cannot be maintained in this court, but that the only remedy in the federal courts in Maine is by scire facias. It is clear that in the courts of this state scire facias is the only remedy against bail, as it was thus decided in Packard v. Brewster, 59 Me. 404, and the act of congress approved June 1, 1872, c. 255, § 5 [17 Stat. 195], requires "that the practice, pleadings, forms and modes of proceeding, in other than equity and admiralty causes in the circuit and district courts, shall conform as near as may be to the practice, &c., existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held." If this obligation were a common bail bond, in accordance with the law of the state, it might be the duty of the court to restrict the remedy thereon to an action of scire facias.

But in this state it is prescribed by law, that a bail bond shall be returned to the court by the sheriff and filed with the writ, and if judgment is rendered thereon, the clerk is required to enter on the margin of the execution the names of the bail and their abode, and demand must be made upon the bail personally by the officer holding the execution fifteen days at least before the return day, certifying that he cannot find the principal or property to satisfy it; all of which must appear by his return on the execution, and thereupon scire facias issues. In the present case, few if any of such provisions are applicable. The proceeding in which the bail is required, instead of being an action at common law for the recovery of a claim, is in the nature of a proceeding in equity, and there is nothing to be found in the act requiring the marshal to return the bond to court and file it with his warrant; no fixed amount is recovered by a judgment, and no execution issues to the marshal upon which a return of "not found" can be made, as is done by the sheriff on the state process. Under the state practice, all the proceedings from the inception are required to appear upon the files of the court, and become substantially a part of the record, while nothing of that kind is required by any of the provisions of the bankrupt act. The practice of the state courts in such matters is so entirely different from the course to be adopted in bankruptcy proceedings, that the court is of opinion, that the requirements of the act of 1872 cannot be held applicable in the present instance, but that the common law may be appealed to for a remedy, which it is not disputed authorizes an action of debt in such a case.

The defendants plead performance, and the plaintiff replies, a breach by the principal's not appearing and producing his schedules in obedience to the order of the court. The condition of the obligation being in the very words of the statute, what is its legal effect? It is claimed that its operation is limited to the time of the adjudication of bankruptcy, and should not extend beyond that period;

that if the bankrupt complied with all orders of the court made prior to the adjudication, and appeared from time to time as he may have been required by the court, that any order subsequent to the adjudication is not within the condition, so as by its disobedience to constitute a breach. At first this objection would seem to be of considerable force, but upon reflection and an examination of the entire section and looking at the purpose to be accomplished, it appears to me, that such a construction is too restricted, and if adopted would to a great extent defeat the intended purpose. The section authorizes the arrest when probable cause is shown for believing that the debtor is about to leave the district, or to remove or conceal his property, or make any fraudulent disposal thereof. The presence of the party and control of his estate, if he shall be decreed bankrupt, are the objects to be reached by his arrest, and not that the court may be enabled to render a decree against him. This the court could accomplish without his personal presence, as the same section authorizes service of the petition by delivering to him a copy personally, or by leaving the same at his last or usual place of abode, and if he cannot be found or his place of residence ascertained, service shall be made by publication in such manner as the judge may direct. The court therefore, without an arrest of the party, it will be seen, can thus obtain jurisdiction over him, so as to authorize a decree of bankruptcy.

If the operation of the condition of the bond terminates by the decree of bankruptcy, the arrest will accomplish little or nothing, as it is not until after the adjudication that the personal presence of the bankrupt is ordinarily required, or the assignee is authorized to assume the possession and control of his property. In most instances, nothing whatever is required to be done by the bankrupt before his bankruptcy is established, and it is after that time that the law requires his aid and assistance in a full exposition of his condition, and of his assets and liabilities, and in reaching his estate for the benefit of his creditors. When the statute authorized the arrest it was that he might thus be compelled to render his personal assistance in the adjustment and investigation of his affairs, and any construction of the law which would tend to defeat this object, the court ought not to adopt unless absolutely compelled so to do by the language of the act. The act declares, "that he shall give bail for his appearance from time to time until the decision of the court upon the petition, or the further order of the court."

Two distinct periods are here designated in which the debtor may be required to appear. One, until the adjudication, the other, on the further order of the court. When then must this further order be made to become obligatory on the bail? It would certainly seem that it does not contemplate an order made prior to the adjudication of bankruptcy, because such is fully provided for by the preceding words in the same clause, which in terms require the appearance from time to time as required prior to the adjudication. These words "on the further order of the court" must, if they have any effect, be construed as referring to orders for his appearance subsequent to the adjudication, and by so doing they become effective and not mere surplusage, and they assist most materially in accomplishing the purpose of the arrest; but if they are stricken from the act by any judicial construction, and it should be held that by the condition of the bond the attendance of the principal was not requisite after the adjudication, the purpose of the arrest would in most instances be defeated. "Or" is sometimes construed as "and" when it is necessary to give effect to some legislative provision and in the construction of wills, and this rule has been heretofore adopted in the construction of one of the original provisions of the bankrupt law.

By the 39th section of the act as passed, it was declared that the assignee might recover back the money or other property conveyed contrary to law, provided the person receiving the payment or conveyance had reasonable cause to believe that a fraud on the act was intended or that the debtor was insolvent. In Wadsworth v. Tyler [Case No. 17,032], the word "or" in this provision was construed "and," and this interpretation was sustained by congress by an act affirmed July 27, 1868 [15 Stat. 227], substituting "and" for "or." The failure of the principal to appear and file his schedules in obedience to the order of the court, although made subsequent to the adjudication of bankruptcy, was in my view a breach of the condition of the obligation within the meaning of the act.

It is shown that the penal sum named in the bond, together with the entire assets which can be realized from the estate, would not be sufficient to satisfy the debts proved against the estate, and the plaintiff therefore claims that he is entitled to recover as damages the full amount of the penalty, but this, in my opinion, cannot be adopted as the rule of damages.

It is said, that this obligation is a bail bond with the ordinary usual effect of such bonds; that it runs to the marshal, and the bail may be exonerated by a surrender of the principal before judgment, and that unless they are thus discharged, bail are held accountable for the full amount of the original demand and costs, and cannot relieve themselves by proof of the inability of their principal. Such is probably the result attending bail at common law, and the sureties are held accountable for the debt. But in such case, the arrest is made on process for the recovery of a fixed definite amount, which is determined by the judgment, while in the present instance, the amount of

the penalty is wholly in the discretion of the judge, determined entirely without reference to the amount of the debtor's liabilities, but only in such sum as will be likely to secure his attendance and compliance with the orders of the court. No judgment is ever rendered by the court in the proceeding upon which an execution could issue and the liability of bail thereon be fixed. The only indebtedness of the bankrupt, which is shown to the court at the time of the order of the arrest, is the amount due to the petitioning creditors, which in the present case was about $1,400 only. The analogy therefore, between bail at common law being held accountable for the amount of the execution which may be recovered and the amount of the bankrupt's indebtedness to all of his creditors, does not appear to me to be so strong as to require me to give judgment and execution for the penal sum in the bond. The act of 1789 (1 Stat. p. 87, § 26) requires, "that in all causes brought before either of the courts of the United States to recover the forfeiture annexed to * * * any bond or other specialty, when the forfeiture, breach or non-performance shall appear by the default or confession of the defendant or upon demurrer, the court before whom the action is brought shall render judgment therein for the plaintiff to recover so much as is due according to equity. And when the sum for which judgment should be rendered is uncertain, the same shall, if either of the parties request it, be assessed by a jury." The present hearing is not brought strictly within this provision, as the case is not presented for a decision on default, confession or demurrer, but is submitted on the pleadings and evidence to the judge for decision of law and fact; but it seems to the court that this provision is declaratory of the true rule as to the damage to be recovered upon a breach being shown of such an obligation, that is, the plaintiff should recover only the amount equitably due and no more. Such is the ordinary practice in a hearing in damages on such instruments. Forrar v. U. S., 5 Pet. [30 U. S.] 375; Ives v. Merchants' Bank, 12 How. [53 U. S.] 159.

It is claimed that this construction should not be adopted as it is impossible to determine the damages occasioned by the breach; but the uncertainty attending the computation of the damages cannot affect the rule of law as to the right of recovery. The plaintiff is bound to satisfy the court or jury as to the damages he has suffered from the breach, otherwise he is entitled only to a nominal sum (Gowen v. Nowell, 2 Me. 13); and this rule cannot be modified by reason of the difficulty of proof.

In Greely v. U. S., 8 Wheat. [21 U. S.] 257, and in U. S. v. Hatch [Case No. 15,325], the penalty of each bond was fixed by congress, and that amount must have been understood to be the sum which was established by law to be paid in case of a breach of the conditions by violation of a positive provision of the law which the bond was given to enforce. In bonds given under process of ne exeat, the arrest is made by order in chancery; but the action on the bond, if broken, is before the courts of common law, who render judgment for the penalty which is paid into the chancery court, and by the order of that court disposed of and applied according to the rights of the parties, which in many respects, is applying the chancery practice to the disposal of this sum. The plaintiff, therefore, can only recover for such damages as he may satisfy the court he has sustained by a breach of the obligation by the principal.

FOX, District Judge. The court having decided that the principal has broken the condition of the bond by his non-appearance on the 17th of June and not filing his schedules in compliance with the order of court, the question of damages is now submitted for determination on a hearing in chancery. The obligation not being one for the performance of covenants or agreements, there can be but one suit and one assessment of damages for which execution shall issue. This principle is very fully discussed in the learned opinion of Davis, J., in Philbrook v. Burgess, 52 Me. 271, and is fully sustained by that authority. The breach assigned in the present case is of a double character, first, by the principal's non-appearance on the 17th of June, and secondly, by his not filing his schedules in bankruptcy on that day as required by the order of the court. Similar breaches are shown to have been committed on a previous day, as by the order of reference to the register, the bankrupts were required "on or before the third day of June to file with the register a duplicate copy of the petition and the schedules of creditors, and an inventory of their estate individually and as co-partners, and to attend before said register on said day, and thenceforth as said register may direct to submit to such orders as may be made by said register or by this court relating to the said bankruptcy."

It is in proof that but a short time prior to the institution of the proceedings in bankruptcy against Fulton & Ricker, said Fulton converted into money or notes a large amount of the assets of the firm by disposing of property and collecting from the debtors of the firm considerable sums. It is not shown that the amounts so received by him were applied in discharge of firm liabilities, and upon all the evidence, I find that at the time said Fulton absconded, he had in his possession or under his control more than $2,000 of the assets of the firm, which with reasonable diligence the assignee has not been able to recover for the benefit of the estate, and in this amount, I have not included any portion of the sums received by James E. Fulton from Elijah Fulton subsequent to January 1, 1872. The plaintiff claims, he is entitled to recover

as damages the amount thus abstracted by Fulton and withdrawn by him beyond the reach of the process of the court in bankruptcy; while the defendants insist that this is not brought within any breach of the condition of the bond, and is not recoverable in this suit. The rule as stated in Hatch v. Attleborough, 97 Mass. 538, is: "The hearing to ascertain for what amount execution shall be awarded is an assessment of damages according to equitable principles, and no pleadings on either side are required, nor can any defect or admission in the previous pleadings deprive either party of the right to a complete adjustment of all the claims secured by the bond." The plaintiff therefore is entitled to recover all his damages sustained from any breach of the bond, whether such breach is or is not assigned in the pleadings; but it is only the damages occasioned by existing breaches, and not such as may hereafter arise from any future breach of its conditions, which are recoverable. The only breaches shown by the testimony are the principal's non-appearance at court on the several occasions when ordered so to do by the court, and his failure to comply with the orders to file his schedules of liabilities and assets, for the non-compliance with the first of which orders, he was adjudged in contempt, and a warrant for his arrest was in the hands of the marshal at the time he was ordered a second time to appear in court.

In determining whether the plaintiff should recover under these breaches the amount thus abstracted by the principal, he must ascertain whether the loss of this sum to the estate is or not an immediate direct result of his refusal to appear in court in obedience to its command, for if it is, the plaintiff should recover the full amount.

The argument for the defendants is, that if the principal had appeared in court and filed his schedules, he would have obeyed the order and prevented any breach of the obligation, and that a further order of the court, commanding him to refund to the assignee the amount in his hands, would have been required, service of which he could have avoided by immediate flight if he so desired; but such I apprehend would not have been the result if he had appeared before the court on the 17th of June, as on his appearance in the court on that day, it would have been the duty of the court to have ordered him at once into the custody of the marshal to answer for his contempt, and he, beyond all question, would for some time at least have been in such a situation that the marshal would have had no difficulty in notifying him of any further requirements of the court.

The question here is, not what would have been the effect of his obedience to the order of the court, and what further proceedings would then have been requisite on the part of the assignee to obtain from the possession of the bankrupt this property; but it rather is, what are the consequences of his non-compliance with the order, and of his continued avoidance; and it is clear that the result of his non-appearance is that he continues beyond the process of the court of bankruptcy with this amount of property belonging to the estate, which most certainly he would have been compelled to restore to the assignee if he had obeyed the authority and command of the court; and the necessary consequence of his disobedience and avoidance is, to deprive the estate of that amount of assets by holding them beyond control of the assignee or of the authority of the court in bankruptcy. If he had been present in court June 17, that amount would have been saved and obtained for the estate, which by his absence he is enabled to withhold. His presence or absence therefore resulted directly in a gain or loss to the estate of the sum then in his possession and which belonged to the estate.

I therefore award as damages the full amount of two thousand dollars and interest from the date of the writ.

MARBURY (LINGAN v.). See Case No. 8,371.

MARCELLA, The (TAYLOR v.). See Case No. 13,797.

MARCELLUS, The (CAMP v.). See Case No. 2,347.

Case No. 9,060.

In re MARCER.

[6 N. B. R. 351;[1] 29 Leg. Int. 76.]

District Court, E. D. Pennsylvania. Feb. 29, 1872.

BANKRUPTCY — PETITIONING CREDITOR — RECEIPT OF PART OF CLAIM.

The receipt by a creditor of part of his claim does not preclude him from petitioning to have his debtor adjudged a bankrupt if the creditor offers to bring this payment into the registry of the court.

[In the matter of the petition of the creditors of J. F. Marcer, a bankrupt.]

George D. Budd, W. J. McElroy, and C. H. T. Collis, City Sol., for city of Philadelphia.

David W. Sellers, for bankrupt.

CADWALADER, District Judge. The thirty-ninth section of the bankrupt law [of 1867 (14 Stat. 536)] enacts, not only that a payment or transfer by an insolvent person to a creditor, with intent to give a preference, shall be an act of bankruptcy, but also that a payment, gift or transfer, made by the insolvent with such intent, to any person or persons liable for him as sureties, shall be an act of bankruptcy. Therefore, if any other creditor than the city of Philadelphia had been the petitioner, the

[1] [Reprinted from 6 N. B. R. 351, by permission.]

payment or transfer made by this debtor to the persons who were sureties on his bond to the city, would unquestionably have constituted an act of bankruptcy. The fund which was the subject of this preference was paid in money to the city by the sureties with other money of their own, in discharge of their liability on the bond. The whole sum thus paid, being the amount of the penalty of the bond, was not more than, say one-fourth, of the alleged bankrupt's debt to the city. The question is, whether such receipt of the part of the debt secured by the bond precludes the city from suing here as the petitioning creditor.

If the city had actively promoted the payment and appropriation of the fund in question to the indemnification of the sureties, in order that this very fund might become a specific part of what should be received from the sureties in discharge of the bond, or if the sureties had paid the whole amount of their liability on the express condition that this fund should be received as part of such payment and it had been so accepted, there would in either case have been such an election as to preclude the city. But nothing of the kind is alleged. Whether the city or its officers knew of the source from which the payment was, in part, derived, is immaterial to the question of election. To constitute an election it is not enough that the party to be precluded shall know the fact on which the question of election depends. He must also be made to understand that the question has arisen and that he is put to his election. 11 H. L. Cas. 588, 602, 603, 611–613. The money, as it was offered in this case, could not have been refused. The payment has discharged the bond at law, leaving open all equities under questions of preference and of election. But the fund in question having found its way into the possession of the city, the petition, as originally framed, was not sustainable, because it contained no offer to bring this fund into the registry of the court, or otherwise make it a part of the estate in bankruptcy. This difficulty has been removed by the averment and offer contained in the amendment of the petition. If there should be no other creditor than the city, and a bill in equity at the suit of the assignee in bankruptcy should be hereafter sustainable against the sureties, they will be entitled to a deduction or credit equal to what would have been their dividend of the fund in question.

What might have been the course of procedure if the city had not been a creditor to an amount exceeding that of the bond, or if the excess had not been so great as to make the question one of mere deduction or credit, need not be considered. For the present, the rule that a party asking equity must do equity, or offer to do it, has been complied with.

The debtor is adjudged a bankrupt. The usual bond of the petitioning creditor is dispensed with.

Case No. 9,061.

MARCH v. HEATON et al.

[1 Lowell, 278; [1] 2 N. B. R. 180 (Quarto, 66).]

District Court, D. Massachusetts. Oct., 1868.

BANKRUPTCY — DETERIORATING STOCK — SALE BY MARSHAL—PURCHASE BY BANKRUPT—PRICE.

1. A voluntary bankrupt is entrusted with the care of his estate before an assignee is chosen, as a sort of trustee. He has no right to buy of the marshal the stock of goods which the court has ordered to be sold as likely to deteriorate.

[Cited in Lansing v. Manton, Case No. 8,077; Re Jessup, 19 Fed. 95.]

[Cited in Williams v. Merritt, 103 Mass. 187.]

2. Such a sale will be set aside on complaint by the assignee without proof that the price was inadequate, or that there was any fraud in fact intended.

Bill in equity [by George N. March against Samuel W. Heaton and Hubbard] to set aside the sale of a stock of goods. The bankrupts applied for the benefit of the act in the month of August, and there was some delay in the appointment of an assignee. In the mean time certain creditors petitioned the court to order the stock of goods to be sold, on the ground that they were liable to deteriorate and depreciate. An order was passed authorizing the marshal to sell the goods at a price to be ascertained by the appraisement of three disinterested persons. The marshal made sale of the goods at the precise sum at which they were valued, though he was told that another purchaser would give more. They were bought by Heaton, one of the bankrupts, for the account of a friend of his, one Hubbard of Pittsburg; and Heaton had ever since remained in possession of the goods as agent of Hubbard, and was selling them out in the usual course of business. The bill alleged fraud in the appraisement and in the purchase. A hearing was had on the application for a preliminary injunction.

B. F. Brooks and G. Z. Adams, for complainants.

A. W. Boardman, for defendants.

LOWELL, District Judge. In the view I take of this case it will not be necessary to consider the affidavits bearing upon fraud in fact, though I ought to say that I do not find that the bankrupt Heaton, or any one else, intended any wrong. Still I cannot but see that Heaton misunderstood entirely his position and duties. The statute has seen fit to entrust the bankrupt himself in voluntary cases with the care and custody of his estate until an assignee is appointed. It guards the rights of creditors by making it a crime punishable by imprisonment, with or without hard labor as the court may adjudge, for the bankrupt to withhold any property from his assignee, or to destroy or mutilate any book, deed, or writing relating

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

thereto; and by refusing his discharge if he shall be negligent in the care and custody of his estate and in delivering it to his assignee. All this may be said to be, and doubtless is, less efficient than the simple rule which obtains in proceedings in invitum, giving the marshal as messenger custody of these effects from the moment of adjudication. There appears to be no solid reason for this difference, unless we can safely assume that all voluntary bankrupts are to be trusted with property in which they no longer have any personal interest.

Be this as it may, voluntary bankrupts are bound to take every care of their assets for the benefit of their creditors. They are the assignees until the creditors have chosen others; and I hold it to be as illegal for a bankrupt to purchase his own stock in trade before he has an assignee to deal with, as it would be for the assignee to do so afterwards. Now, in this case, it seems to be made out by the evidence that the petition to sell and all the proceedings were arranged by and for the benefit of Mr. Heaton. It was he who discovered the importance of an immediate sale and pressed it to a conclusion, and became the purchaser for a friend who was willing to advance him the money. I must assume him to be the owner subject to repayment of his friend's advances.

The careful and experienced deputy of the marshal misunderstood my order, which, of course, intended the appraisement to establish a minimum and not a maximum price; and the defendants, by means of this mistake, may probably have got the goods for somewhat less than another purchaser was willing to give. But I do not rely upon that. My judgment is placed upon the simple ground that the bankrupt had no right to buy, and that the assignee has a right to overrule the sale. Whether he will succeed in getting more for the goods is no part of the question for me; that was for him to consider before he brought his bill. I shall not enter upon that inquiry. Injunction ordered.

MARCHANT (HAWES v.). See Case No. 6,240.

Case No. 9,062.

The MARCIA TRIBOU.

[2 Spr. 17.] [1]

District Court, D. Massachusetts. Feb., 1858.

COLLISION—NO LOOKOUT—ANCHORED AT IMPROPER PLACE—BOTH IN FAULT—DAMAGES AND COSTS.

1. A schooner, going out of a harbor in the daytime, came into collision with a sloop at anchor in the channel outside the harbor-master's line. Both vessels were held in fault; the schooner for not keeping a look-out stationed forward, and the sloop for being anchored in an improper place.

[Cited in The Clover, Case No. 2,908; The Columbia, Id. 3,035; Vanderbilt v. Reynolds, Id. 16,839.]

[Cited in Lambert v. Staten Island R. Co., 70 N. Y. 108.]

2. In collision cases, if both vessels are in fault, the damages and costs are borne in equal proportions.

3. It seems that in the daytime a vessel at anchor out of the channel and inside the harbor-master's line need not keep an anchor-watch, if her crew consists of but two men.

This was a libel in admiralty to recover damages to the sloop Diploma, arising from a collision in Boston harbor, in October, 1856, between that vessel and the schooner Marcia Tribou. The facts were as follows: The sloop, with a load of stones and gravel, beat up the harbor till she arrived at a point between Bird Island and East Boston, where, owing to the strength of the tide and the decrease of the wind, she came to anchor in the channel, to await the turn of the tide. The precise part of the channel where she anchored was disputed, and evidence was introduced by the libellant to show that the place of anchorage was on the north side of the channel and within the harbor-master's line; while evidence to the contrary, and that she was anchored nearer mid-channel and outside of the said line, was introduced by the claimants. After she had been at anchor for about three-quarters of an hour, and while her crew, consisting of a man and boy, were in the cabin at dinner, she was run into by the schooner which was bound out, and was damaged. The schooner received no injury. It was urged on the part of the claimants that the Massachusetts act of 1848, c. 314 [Laws Mass. 1868, p. 800], rendered it obligatory upon all vessels not only to anchor within such lines as should be established by the harbor-master, but while at anchor to keep an anchor-watch on deck; and that if the court should be satisfied that the sloop was not within these lines, and kept no watch on deck, the libellant was thereby deprived of all remedy against the schooner, notwithstanding that she may have been also guilty of negligence which contributed to the collision. The libellant controverted this position, and cited The New York v. Rea, 18 How. [59 U. S.] 223.

C. P. Curtis, Jr., for libellant.

R. H. Dana, Jr., for claimant.

SPRAGUE, District Judge. The position of the sloop is one of the most material points in this case; and upon the evidence which has been introduced, I am of opinion that she was anchored in the channel outside of the harbor-master's line, in an improper place, and must be held to have been guilty of negligence in so doing. I am further of opinion that the schooner was also in fault in not avoiding the sloop, notwithstanding that she was anchored in an improper place.

[1] [Reported by John Lathrop, Esq., and here reprinted by permission.]

The weather was fine, and the evidence shows that all the crew of the schooner, except the captain, were occupied in preparing to bend a sail, and that no look-out was kept. The captain was at the wheel, but the square sail on the foremast came down so low, that he could not see ahead of his vessel without stooping. If a proper look-out had been kept forward, which is always requisite in going out of a harbor where other vessels are generally lying at anchor, the sloop might have been easily seen and avoided. In regard to there having been no watch kept on the sloop, I may say, that if she had been anchored well out of the way, inside of the harbor-master's line, and inside of other vessels at anchor, it would perhaps be too strict to require her to keep a constant watch on deck, especially when her crew consisted of but two persons. But as she was not anchored within the line, it becomes unnecessary farther to consider this question. Both parties having been in fault, by the rule of admiralty law, the damages and costs are to be borne by each in equal proportions.

Case No. 9,062a.

MARCUS v. UNITED STATES.

[2 Hayw. & H. 347.] [1]

Circuit Court, District of Columbia. Nov. 17, 1860.

INDICTMENT FOR KEEPING A FARO BANK.

An indictment under the act of congress of March 2, 1831, c. 37 [4 Stat. 448], which enacts that whosoever shall be convicted of keeping a faro bank or other common gaming table, shall be sentenced, &c. The following count was *held* good, which charged that the traverser, "on the 10th of Nov., 1859, and on divers other days, and between that day and the taking out this inquisition with force and arms, at the county aforesaid, a certain faro bank there situate, for their lucre and gain, unlawfully and injuriously did keep and maintain against," etc.

Error to the criminal court.

The indictment contained two counts: 1st. That Wm. H. Marcus, on the 10th of Nov., 1859, and on divers other days and times, between that day and the day of the taking of this inquisition with force and arms, at the county aforesaid, a certain faro bank there situate, for their lucre and gain, unlawfully and injuriously did keep and maintain against, &c. 2d. That Wm. H. Marcus, &c., a certain gaming table there situate, for their lucre and gain, unlawfully and injuriously did keep and maintain against, &c. The jury brought in a verdict of guilty on the first count and not guilty on the second.

Before the jury withdrew from the bar the prisoner, through his attorney, prayed the court to instruct the jury as follows, viz.: "That unless the jury from the whole evidence shall find that the defendant, within two years next before the finding of the said indictment, did keep a faro bank, he is entitled to a verdict of acquittal, and that to keep a faro bank means that he must have continuously, for a series or succession of days or times, kept such bank, and the keeping one for one day, or occasionally within the two years, is not within the meaning of the statute; and such keeping alone will not be sufficient to warrant a conviction. The word 'keep' necessarily implies duration, and not a casual or occasional incidental act." And THE COURT gave the instructions as follows, viz: "Granted with the remarks that keeping applies to all concerned in managing the faro bank, whether the proprietor or the dealer employed by him, or a person employed to lift money won, or to pay money lost, or to give tokens to play with in exchange for money, are engaged in keeping are punishable under the law of 1831. Keeping means a series of transgressions, having a faro bank for play by those the keeper chooses to admit; but not to play at cards daily or frequently is not keeping in the sense of the law, though the keeping need not be continuous from day to day. There may be intervals and still the party guilty, but there must be a succession of acts against the law."

The defendant moves the court to arrest the judgment on the verdict found in this case because: 1st. There is no criminal offence charged in the indictment. Motion in arrest of judgment overruled, and writ of error granted.

Before MERRICK and MORSELL, Circuit Judges.

MERRICK, Circuit Judge. The only question presented for the consideration of the court is whether the criminal court erred in holding good the 1st count in an indictment, which charges that the traverser, "on the 10th of November, in the year of our Lord one thousand eight hundred and fifty-nine, and on divers other days, and between that day and the day of the taking out this inquisition with force and arms, at the county aforesaid, a certain faro bank there situate, for their lucre and gain, unlawfully and injuriously did keep and maintain against the form of the statute," &c. This indictment is framed upon the act of March 2, 1831, c. 37, which enacts that whosoever shall be convicted "of keeping a faro bank, or other common gaming table," shall be sentenced to suffer punishment in the penitentiary for not less than one or more than five years. The general principles by which we are to test this indictment admit of no dispute. They are found in all the text books, and with their reasons are most succinctly stated by the supreme court in U. S. v. Mills, 7 Pet. [32 U. S.] 142, as follows, viz: "The general rule is, that in indictments for misdemeanors created by statute it is sufficient to charge the offence in the words of the statute. There is not that technical nicety required as to

[1] [Reported by John A. Hayward, Esq., and Geo. C. Hazelton, Esq.]

form, which seems to have been adopted and sanctioned by long practice in cases of felony, and with respect to some crimes where particular words must be used, and no other words, however synonymous they may seem can be substituted. But in all cases the offence must be set forth with clearness, and all necessary certainty to apprise the accused of the crime with which he stands charged." That the crime laid to the traverser's charge in the present instance is a statutory and not a common law offence, and that we are therefore to resort only to the statute, and not to the common law; for its definition and description would hardly seem to admit of doubt after the many instances in which the offence has been brought under the consideration of this court. See the cases collected in U. S. v. Ringgold [Case No. 16,167], in all of which it has been treated as a statutory offence.

Before the passage of the act a case came up in which the traverser was charged with keeping a common gambling house, in which, among other things, it was averred that the traverser caused and procured divers idle and evil disposed persons to frequent and come to play together at certain unlawful game called faro. U. S. v. Dixon [Case No. 14,970]. In that case the court said: "Act Md. 1797, c. 110, § 2, is the only act in force in this county for restraining any kind of games, except by the laws of the corporations of Washington and Georgetown, and that act only prohibits the setting up, keeping and maintaining certain gaming tables or devices, faro among the number, in any tavern or house occupied by a retailer of wine, spirituous liquors, &c. The game of faro is not an unlawful game; no person can be punished under that statute for playing at that game, whether it be played in a tavern or a private dwelling house. The offence under the statute is the setting up and maintaining the table or device. The indictment derives no assistance from any statute, nor does the playing at faro constitute any part of the offence. If it can be supported at all it must be as an indictment for a common nuisance in keeping a common gaming house for lucre and gain, at which divers idle and dissolute persons were permitted to assemble and game for divers large and excessive sums of money."

The court had long before held (in U. S. v. Willis [Case No. 16,728]) that playing at any game, even for money, is not an offence at common law. The offence is created by statute, and can only be punished as the statute directs. The common law is laid down to the same effect by Bailey, J., in Rex v. Rogier, 2 Dowl. & R. 436, as follows, viz: "Playing at a game is not per se illegal, unless the betting be excessive, for it is the amount played for, and not the name or nature of the game, which is the essence of an offence in the eye of the law." Such being the state of the common law upon this subject, the first blow against faro banks was struck by Act Md. 1797, c. 110; but that statute, as appears in the case of U. S. v. Dixon, above quoted, and by a decision of the court of appeals (Baker v. State, 2 Har. & J. 5), extended only to cases of a faro bank or like device, when set up and kept in a tavern or out-house, or place occupied by a tavern-keeper or retailer of wines and liquors. After the lapse of thirty-four years the prohibition was extended by the law of congress to the offences of keeping "faro banks or other common gaming tables," irrespective altogether of the character of the house or place where they might be kept. Now what is the true interpretation of this statute in view of the existing legislation and the evil intended to be remedied—the keeping of a faro bank or other device for the purpose of gaming for money in a tavern or house where liquors were retailed was already provided against. The statute of 1831 made the offences at which it aims independent altogether of the place where the acts may be done, and it dropped also the further limitation that the games to be criminal must be played for money. So that whatever article of value be the stake, it is equally within the statute as if money alone were played for. But it is argued that this statute nevertheless did not mean to prohibit all faro banks from being kept and maintained, and that the word "common" is to be supplied in its construction so that it shall read "whosoever shall be convicted of keeping a common faro bank or other common gaming table, &c." Such is certainly not the natural import of the words, but on the contrary the mention of a particular followed by that of the class to which it belongs, in the alternative as expressed by the word "other" is a legislative declaration that the particular has all the characteristics inherent in itself of its class, and so used it serves to illustrate and give character to the general expressions in which the class is described, so that the class is illustrated by all its particular rather than the particular is defined by its class. The expression as used then, according to its natural import is tantamount to saying, "Whosoever shall be convicted of keeping any common gaming table, of which common gaming tables a faro bank is one, shall be punished, &c." Now, although penal statutes are to be construed strictly, so as not to embrace within their purview anything which is not distinctly expressed, yet I know of no rule which requires the natural sense of terms to be rejected, and words not in the statute to be supplied so as to narrow the sense and come short of remedying the evil under which society labors. It is not only fair to presume, but it is our duty to infer that in legislating concerning the game of faro, congress knew what every individual knows, that it is a game at which people indiscriminately play for money, and frequently in large sums; and that it is not a game

played for amusement, and hence by its very nature the faro bank is a common gaming table. Therefore when the term "Faro Bank" is used in an indictment, a particular kind of common gaming table is spoken of as explicitly and distinctly as if the further terms of definition, "the same being a common gaming table" were superadded.

This interpretation of the law is borne out by the unanimous opinion of this court at March term, 1836 (U. S. v. Cooley [Case No. 14,859]), in which case it was held that an indictment under the statute would be good, which charged the offence to be either the keeping of a common gaming table or the keeping of a faro bank. But it is said that the opinion in Cooley's Case was repudiated in the case of U. S. v. Ringgold [supra]. In that case the chief judge maintained (as has already been urged) that the words of the statute "a faro bank or other common gaming table," necessarily implied that a faro bank is a common gaming table, and that the keeping of a faro bank is per se made an offence. Upon an admission by the prosecuting attorney, that a faro bank might be innocently kept, Judge Thruston argued that the faro bank was too uncertain in itself to maintain an indictment, and hence thought the indictment ought to be quashed. Judge Morsell being unprepared to express an opinion, the case was held under advisement until the following term, when the indictments were quashed. The chief judge was not present at nor concurring in that judgment, for which no reasons are given in the report further than a memorandum, that it was understood that the indictments were quashed because the defendant was not charged with keeping a common faro bank, nor with keeping a common gaming table. If we compare the indictments in the Case of Ringgold with the present, a most important difference in structure appears, which is abundantly sufficient to relieve the case from the only objection assigned by Judge Thruston upon the argument to Ringgold's indictment, to wit: that a faro bank might be innocently kept. The indictment there charges only that the traverser on a particular day "did keep a faro bank against the form of the statute, etc."

The present indictment goes far beyond that, and contains averments which are entirely inconsistent with the idea, or rather which exclude the conclusion that the faro bank was kept innocently, or casually, or for mere amusement; for it avers that on a certain day, "and on divers other days, and times between that day and the taking this inquisition a certain faro bank for lucre and gain unlawfully and injuriously he did keep and maintain against the form of the statute," &c. These averments contain all the necessary description of a common law nuisance, viz.: its establishment and continued maintenance for unlawful profit during a considerable space of time. Insomuch then as the present case differs in the important particulars just indicated from Ringgold's case, and the indictment contains averments which meet the only objection which was urged in that case, and the decision there was by a divided court, we do not think that precedent sufficient to establish a rule or decision outside of the very form of indictment then used, nor to control this case which charges the offense, not only in the terms of the statute, but with superadded averments which repel any possible inference that the acts here charged in manner and form could have been innocent. Moreover we think according to the rule laid down by the supreme court, it has that clearness, positiveness, and certainty necessary to apprise the traverser of the precise crime which he must come prepared to defend. It is also abundantly specific to furnish the party with complete record evidence under a plea of anterfois acquit or anterfois convict. For these reasons we think the count good, and affirm the judgment of the criminal court.

MORSELL, Circuit Judge. The indictment in this case contains two counts. The one under which the question arises charges that on the 10th of Nov., 1859, and on divers other days, and between that day and the day of taking of this inquisition, the traverser with force and arms, at the county aforesaid, a certain faro bank there situate, for their lucre and gain, unlawfully and injuriously did keep and maintain against the form of the statute, &c. This indictment is upon the statute of March 2, 1831, 1st and 12th sections, which are: "That every person duly convicted of keeping a faro bank or other common gaming table," &c., in the 1st section; and in the 12th "or of keeping a faro bank or gaming table," &c. These two parts or sections must be taken together in construction so that it will then read "convicted of keeping a faro bank or other common gaming table shall be sentenced to suffer imprisonment for a period not less than one year, nor more than five years." At the time of the passage of this law, St. Md. 1797, c. 10, was in force and practiced under; the title of this act is: "To prevent excessive gaming," and reciting that certain persons, &c., carry about with them, from one public place to another certain gambling machines or inventions, calculated to deceive and defraud the innocent and unguarded, to the prejudice of society and the corruption of morals, to put a stop to such pernicious and baneful effect. "No E. O. A. B. C. L. S. D. or faro table or other device except billiard tables, for the purpose of gaming for money, shall be set up, kept and maintained in any dwellinghouse, out-house, or place occupied by any tavern-keeper, retailer of spirituous liquors, &c., on pain," &c. In addition it is made the duty of the magistrate to suppress the playing as in other cases of common nui-

sance. At the time also the common law, as laid down by Chief Justice Abbott in King v. Rogier, 1 Barn. & C. 272, was as follows: "Now in this case the indictment states not only that the defendant kept a common gaming house, but that they permitted persons to play there for divers large and excessive sums of money. The playing for large and excessive sums of money would of itself make any game unlawful, and if so there can be no doubt that this is an offence at common law."

I have thus placed the legislation and common law on this subject together. At the time of the passage of the act upon which the indictment is founded, in order that it might appear, as I think it clearly does, that although the name faro bank was not known to the common law, yet the crime which it has made is a species, namely as a common nuisance, and that in all cases of that nature the description in the indictment must allege the offence as practically applied by the term "common," in contradistinction to "private." This is the very gravamen of the offence and therefore indispensable. It is true that where the crime is by statutory provision, and the indictment is in the words of the statute, it will be sufficient; but this is a general rule, and only applicable where the statute sets out the crime fully and clearly. The rule, with its qualification, may be found laid down in the case of U. S. v. Gooding, 12 Wheat. [25 U. S.] 474, 477. The words of the judge (Story) are: "In general it may be said that it is a sufficient certainty in an indictment to allege the offence in the very terms of the statute—we say in general, for there are doubtless cases where more particularity is required, either from the obvious intention of the legislature or from the application of known principles of law;" so again, "In certain classes of statutes the rule of very strict certainty has some time been applied when the common law furnished a close and appropriate analogy, such as the cases of indictments for false pretences," &c. This offence stands on the statute in juxtaposition to the offence indicated in this case. Again at page 477, Id., the judge proceeds: "This is a penal act,—Slave Trade Act April, 1818, c. 373 [6 Colvin's Laws, 325],—and is to be construed strictly, that is, with no intendment or extension, beyond the import of the words used; there is no certainty that the legislature meant to prohibit the sailing of any vessel on a slave voyage which had not been built, &c., within the jurisdiction of the U. S., &c." So in this case, the statute is a very penal one. There is no reason to think that the statute intended to make it an offence to keep a faro bank in a private house and for private purposes, nor that playing at such bank for any other thing than money, or some other valuable thing (neither of which is mentioned in the statute) should be offensive in a penal point of view. It would be entirely inconsistent with the rule just stated in a case like this to infer it. I think then I may confidently say, that the word "common" used in the latter part of the sentence should be distributably applied, by which the nature of the offence would be made to appear and reasonable certainty offered—it seems to me to be the very gravamen of the crime and charge in the indictment, and the charge stated according to the operation of the statute. The opposing argument following, as it purports the natural order of the word, and concluding that the import is tantamount to saying "whoever shall be convicted of keeping any gaming table—of which common gaming tables a faro bank is one, shall be punished, &c." seems to be for the purpose of proving that by construction the term "keeping a faro bank" may be considered the offence punishable by the statute. This may be correct, but if so, does not meet the grounds upon which I think the indictment defective. The want of an allegation or averment of the practical application or operation, instead of the equivocal sense in which it may be understood—such as stated in the conclusion of that argument—for although in the construction of the statute this may be correct, yet the rule is very different in the case of an indictment; as I have already shown, the practical operation of the statute ought to be averred, no intendment or implication can supply a direct allegation of anything material in the description of the substance or nature or manner of the crime.

In conclusion, I think the decision of the court in the Case of Ringgold is correct. It has stood, and I suppose been acted under for upwards of twenty years, and I think it ought not to be disturbed. For the aforegoing reasons I think the indictment in this case is insufficient, that the judgment ought to be arrested and the decision of the criminal court ought to be reversed.

MARCUARD v. UNITED STATES. See Case No. 3,097.

MARCY v. OHIO. See Case No. 9,457.

MARCY (SUMNER v.). See Case No. 13,609.

Case No. 9,063.

MARCY v. TROTTER.

[3 App. Com'r Pat. 303.]

Circuit Court, District of Columbia. April 16, 1860.

PATENTS—SECOND INVENTOR—DELAY—ABANDONMENT—APPLICATION—SCOPE OF COMMISSIONER'S EXAMINATION.

[1. A first inventor's delay to apply for a patent for eight years after the second inventor has secured one bars him from thereafter making application.]

[2. Upon application for the issue of a patent, the commissioner should decide not only questions of law, but also of fact, including abandonment or neglect.]

[Application by E. E. Marcy for letters patent for an improved process for curing India

rubber. An interference with the patent of John E. Trotter was declared, and the commissioner thereafter denied Marcy's application. Applicant appeals.]

DUNLOP, Chief Judge. This is an appeal to me, by Dr. Marcy, from the decision of the commissioner of patents, dissolving the interference heretofore declared by the office, between the parties above named, and refusing a patent to Dr. Marcy, for improvement in processes for curing India rubber. There is no dispute, that the invention claimed by the parties litigant are the same, and identical.

A great many questions of law and fact, have been presented and discussed, which it would be vain to consider and determine, because the solution of them would have no influence, on the judgment I am to render. I assume argumenti gratia, and only for the sake of the argument, that Dr. Marcy was the first and original inventor, and the question remains, has he forfeited his right to a patent by failing to apply for it in a reasonable time? The same invention was patented to Trotter in December, 1850, more than eight years before Marcy presented himself to the patent office, which was first done on the 6th July, 1859. Dr. Marcy resided in the same city with Trotter, who introduced his invention into public use there, of which Dr. Marcy had no doubt actual notice; at all events, he had constructive legal notice, because all citizens are bound to know the doings of the patent office, to which they all have access, and which is the legal public repository of the muniments of title in relation to all inventions.

The policy of the patent laws favors diligence and condemns neglect. It is the duty of an inventor without delay to patent his perfected invention. He has no right to use it himself or permit others to use it, as in this case, for eight years, and then expect a monopoly from the public, for fourteen years more.

A main inducement and consideration, with the public, in granting the monopoly, is the right of the public to have immediate knowledge and restricted use, of the perfected invention, and the free and unrestricted use of it, at the end of fourteen years. Dr. Marcy, has by his neglect and laches, permitted Trotter to enjoy a monopoly of the invention, for more than eight years, and now claims for himself the same monopoly for fourteen years more. This subject of laches, in inventors, has been several times before the supreme court of the United States, and has always received the condemnation of that high tribunal, and the law must be considered conclusively settled in that court.

In Pennock v. Dialogue, 2 Pet. [27 U. S.] 1, they say: "If an inventor should be permitted to hold back, from the knowledge of the public, the secrets of his invention, it would materially retard the progress of science and the useful arts, and give a premium to those who would be least prompt to communicate their discoveries"; and in Shaw v. Cooper, 7 Pet. [32 U. S.] 523, the same court says: "Whatever may be the intention of the inventor, if he suffers his invention to go into public use through any means, whatsoever, without an immediate assertion of his right, he is not entitled to a patent, nor will a patent obtained under such circumstances protect his right." If Trotter pirated the invention, as Dr. Marcy insists, no more stringent call could exist for the prompt action of the appellant.

The doctrine of the supreme court in the two cases above cited has been reasserted and reaffirmed by the same court, in the late case of Kendall v. Winsor, 21 How. [62 U. S.] 329. In this last case they say: "It is the unquestionable right of every inventor to confer gratuitously the benefit of his ingenuity on the public, and this he may do, either by express declaration, or by conduct equally significant with language, such, for instance, as an acquiescence with full knowledge in the use of his invention by others; or he may forfeit his rights as an inventor by a wilful, or negligent postponement of his claims, or by an attempt to withhold the benefit of his improvement from the public until a similar or the same improvement should have been made and introduced by others"; and again they say: "These (referring to the cases of Pennock v. Dialogue and of Shaw v. Cooper [supra]) may be regarded as leading cases upon the questions of the abrogation or relinquishment of patent privileges, as resulting from avowed intention, from abandonment or neglect or from use known and assented to."

If Dr. Marcy was misled by the opinion of Judge Grier, to which he refers as an excuse for his delay in presenting his claims to the patent office, the doctor himself ought to suffer, and not the public. He knew or ought to have known that the office treated the invention as patentable, and had actually granted a patent to Trotter, on the 3rd December, 1850. The effect of now giving him a patent for fourteen years more would be creating a monopoly against the public for twenty-two years, instead of fourteen, which the office has no right by law to do.

The 2nd reason of appeal denies the jurisdiction of the commissioner, to decide the question of abandonment or neglect. That question, in a suit for infringement of a patent right, is no doubt a question of fact for the jury, and not for the court, but on an application to the commissioner for the issue of a patent, it is his duty to decide all questions, both of law and fact, which go to establish the right, or the absence of right, in the applicant, to the patent which he seeks.

The 1st, 3rd and 4th reasons of appeal are hereinbefore treated of and answered.

I affirm the judgment of the commissioner, and return to him all the papers with this my opinion and judgment, this 16th April, 1860.

MAREAN (HINKLEY v.). See Case No. 6,523.

Case No. 9,064.

MAREAN v. UNITED STATES INS. CO.
[3 Wash. C. C. 256.] [1]

Circuit Court, D. Pennsylvania. April Term, 1814.[2]

INSURANCE—MARINE—AGAINST TOTAL LOSS—PARTIAL LOSS—SALVAGE EXPENSES—ABANDONMENT.

1. Insurance on goods on board the brig Betsey, from Cape Henry to Lisbon. The cargo consisted of corn, corn meal, and navy-bread; and the policy contained the usual memorandum, in which it was stated, that upon certain articles, and among them those insured, the insurer agreed to pay for a total loss only. The brig Betsey was driven on shore, within one or two miles of Lisbon; and the cargo was so injured, that when the part which was taken to Lisbon, was sold, it did not pay the expenses of saving it; and the insured claimed, in this action, for a total loss.

2. As to memorandum articles, the insurer agrees to pay for a total loss only; and if the property arrive at the port of delivery, reduced in quantity, or in value, to any amount, the loss cannot be said to be total; and the insured cannot treat it as a total loss, or demand indemnity for a partial loss.

3. There is no instance where the insured can demand, as for a total loss, that he might not have declined making an abandonment, and demanded a partial loss. If the property insured, be included within the memorandum in the policy, the insured cannot, under any circumstance, call upon the insurer for a partial loss; and consequently he cannot elect to turn it into a total loss.

[Cited in brief in Delaware Ins. Co. v. Winter, 38 Pa. St. 184.]

Action on a policy, dated 14th December, 1812, on goods on board the brig Betsey, at and from Cape Henry to Lisbon, at a premium of 6 per cent. valued at five thousand dollars, the sum underwritten; declared to be against all risks, except British captures; warranted neutral. The jury found a verdict for the plaintiff, subject to the opinion of the court, on the following facts agreed by the counsel: The cargo consisted of 4406 bushels of Indian corn, 100 barrels of navy-bread, and 20 barrels of corn meal. The brig sailed from Baltimore on the 11th, and from Cape Henry on the 13th of November; she experienced on the voyage many severe gales of wind. On the 18th of December, she passed the rock of Lisbon, and came to anchor about four miles below Belem castle. She leaked considerably, in consequence of the injury she had sustained, from the violent gales to which she had been exposed. After passing the rock, the wind died away, and the current being adverse, she came to anchor. The captain and supracargo landed; went through the customary forms at Belem, to obtain a permit to pass the castle, and then proceeded to Lisbon. The health-boat visited the brig, and ordered her to get above the castle as soon as possible. On the 19th, she was again exposed to a heavy and fatal gale, which drove her ashore, just below Belem castle, the sea breaking entirely over her. The supracargo considered both vessel and cargo as totally lost; but by directions of the custom-house, as much of the cargo as could be got out, was unladen, by a number of French prisoners, who were employed for that purpose. The cargo was all wet, and the part of it which was taken out was carried to the castle, where it was dried. From thence it was carried to Lisbon, in lighters, and was sold in the corn market, by the consignee of the cargo, at about one-fourth of the price of sound corn. The quantity thus saved and sold, amounted to 1988 bushels. The supracargo petitioned for liberty to sell, at the place where the corn was first deposited, which could not be granted; and he was obliged to submit to the custom of the place, and allow it to be sold at the corn market. The brig was so completely wrecked, that she was sold, with her materials, in lots, where she lay. Had the supracargo been left to the free exercise of his own judgment, he would not have attempted to save any part of the cargo, in consequence of the total damage, and the great expense of saving it. The nett proceeds of the cargo, after paying the expenses of unlading, drying, and selling it, exceeded very little the expenses of the supracargo, in attending to the business. The port of Lisbon commences above Belem castle, and the custom of the place is to discharge cargoes of corn, between that castle and Cantara; which latter place, is from one to two miles below Lisbon. The vessel never arrived at her port of discharge. She was entered, on the 23d of December, at the custom-house, by the American consul; which, he said, was a necessary measure; but port duties do not attach to vessels, till they pass the castle. Still, as part of the cargo was carried to Lisbon, the entry was made by the consul, and the dues were paid. On the 11th of March, the plaintiff having received notice of the shipwreck, offered to abandon, which was refused.

Chauncey and Sergeant, for plaintiff, contended, that the loss as to the cargo amounted to a total loss; and if not so, then (2) the voyage was lost, the vessel having been wrecked before she reached her port. That although a part of the cargo was saved, it was done by the orders of the government, not of the agents of the insured; and was not restored to them with full power to do with it what they pleased. That a right to abandon once existed; and it continues, unless

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

[2] [Affirmed in 1 Wheat. (14 U. S.) 219.]

before the offer is made, it is restored to the owner, in a condition to prosecute the voyage, clear of the effects of the peril—none of which circumstances concur in this case. Cases cited, 1 Marsh. Ins. 222; Wilson v. Smith, 3 Burrows, 1553; 1 Marsh. Ins. 226; 2 Strange, 1065; 1 Marsh. Ins. 227, 229, 233, 588; Burnett v. Kensington, 7 Term R. 210; Dyson v. Rowcroft, 3 Bos. & P. 474; Leroy v. Governeur, 1 Johns. Cas. 226; Neilson v. Columbia Ins. Co., 3 Caines, 108; Maggrath v. Church, 1 Caines, 212; 2 Caines, 324; Manning v. Newnham [3 Doug. 130] 2 Marsh. Ins. 586; Goss v. Withers [2 Burrows, 683] Park. Shipp. 582, 486, 585, 587, 566.

Binney and Rawle, for defendants, insisted, that there can be no partial loss on memorandum articles, if they arrive at the port of delivery, either for deterioration, inequality, or reduction in quantity; and that it is the duty of the insured, to send on the cargo, however injured, if he has the means to do so; and he cannot, by neglecting to do so, turn a partial into a total loss. If this, as a partial loss, was a case out of the policy, it cannot be treated as a total loss, under any circumstances. Although the insured might, whilst the loss by the shipwreck continued, have abandoned, yet he cannot do so, if, at the time the offer is made, the loss has ceased to be total. Cocking v. Fraser [4 Doug. 295] Park. Shipp. 152; Mason v. Skurray [2 Doug. 438] Park. Shipp. 116; Nesbitt v. Lushington, 4 Term R. 783; Schieffelin v. New York Ins. Co., 9 Johns. 21; Wilson v. Royal Exch. Assur. Co., 2 Camp. 623; Anderson v. Royal Exch. Assur. Co., 7 East, 38; Hamilton v. Mendes [2 Burrows, 1198] Park. Shipp. 195; Id. 153, 156.

WASHINGTON, Circuit Justice. We shall in the outset, dismiss from this case all considerations connected with the loss of this cargo, in respect to quantity or value. As to memorandum articles, the insurer agrees to pay for a total loss only—the insured taking upon himself all partial losses, without exception. If the property arrive at the port of delivery, reduced in quantity, or in value, to any amount, the loss cannot be said to be total, in reality; and the insured cannot treat it as total, or demand an indemnity for a partial loss. There is no instance where the insured can demand, as for a total loss, that he might not have declined making an abandonment, and demanded a partial loss. But, if the property insured be included within the memorandum, he cannot, under any circumstances, call upon the insurer for a partial loss; and consequently he cannot elect to turn it into a total loss. These principles I consider to be clearly established, by the cases of Mason v. Skurray, Neilson v. Columbia Ins. Co., Cocking v. Fraser, M'Andrews v. Vaughan [1 Marsh. Ins. 219], Dyson v. Rowcroft, and Maggrath v. Church.

The only question which can possibly arise, between the insurer and insured, in relation to memorandum articles, is, whether the loss was total or not; and this can never happen, where the cargo, or a part of it, has been sent on by the insured, and reaches the original port of its destination. Being there specifically, the insurer has complied with his engagement—every thing like a promise of indemnity against loss or damage to the cargo, being excluded from the policy. If the question turn upon the totality of the loss, unconnected with the subject of loss by deterioration of the cargo in value, or reduction in quantity, we know of no difference between memorandum and other articles. If the loss be total in fact, or is such as the insured is permitted to treat as such, he is entitled to abandon, and to recover as for a total loss, in the case of memorandum articles; but always with this exception, that he is not permitted to turn a partial into a total loss. Keeping this distinction in view, the loss of the voyage, by capture, shipwreck, or otherwise, may be treated as a total loss. This is the doctrine of Dyson v. Rowcroft; in which case, the right to abandon was placed, not upon the ground of deterioration of the cargo, but upon the justifiable necessity which resulted from it, of throwing the cargo overboard. This was in effect the same thing, as if it had, in a storm, been swept from the deck. Such too was the case of Manning v. Newnham. In Cocking v. Fraser, no such necessity existed; and the breaking up of the voyage, was attempted to be justified, by the damaged state of the cargo, which, per se, did not authorize the insured to put an end to the voyage, and thus to turn an average loss, for which the insurer was not liable, into a total loss. Maggrath v. Church also establishes the same doctrine.

Now what is the present case? The brig being thrown on shore, within a mile or two from her port of destination, the agent of the insured employs persons to unlade as much of the cargo as could be saved; and by his exertions, nearly a half of it was landed, dried, and sent forward to the market at Lisbon, and sold by the consignees, at about one-fourth of the price of sound corn, leaving a very inconsiderable sum for the owner, after paying the expenses. Is not this precisely the case of Wilson v. Royal Exch. Assur. Co., and Anderson v. Royal Exch. Assur. Co.? with this difference only, that in the first case, the insured declined sending on the corn, when he might have done so, and consequently he was not permitted to turn a partial into a total loss, by his own neglect; and in the latter case, part of the cargo having been rescued from the wreck, before the offer to abandon was made, the insured could not claim as for a total loss, either on account of the injury which the corn had sustained, or of his own act, in not sending it forward to the port of its destination. In this case, the cargo which was

saved was sent forward, and sold at the port of its destination. But it is contended by the counsel for the plaintiff, that if the loss be such, as that the insured might at one time have treated it as total, it continues to be so, unless at the time when the offer to abandon is made, it is restored to his possession, clear of the effects of the peril, and in a condition to prosecute the voyage. Now this is certainly not the condition of property, which, at the time of the offer to abandon, is in possession of the re-captor, who has a right to retain it, until he has satisfied his salvage. But in this case, the corn was never out of the possession of the agents of the insured, who exercised every act of ownership over it; subject nevertheless to the laws and customs of the country to which it was sent, with which the insurer and insured are supposed to have been acquainted, at the time they entered into this contract, and to which they impliedly agreed to submit. The cargo which was landed, not only continued in the possession and under the direction of the agents of the insured, but it was relieved from the effects of the peril, as between the insurer and insured; and it was not only in a condition to prosecute the voyage, but it did in fact complete it.

Upon the whole, we are clearly of opinion, that this is not such a loss as the defendants have engaged to indemnify against, and that judgment should be given in their favour. Judgment for defendants.

[Subsequently this case was carried by writ of error to the supreme court, where the judgment was affirmed. 1 Wheat. (14 U. S.) 219.]

Case No. 9,065.

The MARENGO.

[1 Lowell, 52;[1] 1 Am. Law Rev. 88.]

District Court, D. Massachusetts. April 11, 1866.

LIBEL FOR DAMAGES—COMPENSATION FOR USE OF A VESSEL—PART OWNER—DISSENT TO VOYAGE.

1. A part-owner of a vessel, dissenting from a voyage, and receiving a stipulation from the other owners for the vessel's safe return, is not entitled to compensation for the use of his part of the vessel during the voyage.

[Cited in Coyne v. Caples, 8 Fed. 639; Scull v. Raymond, 18 Fed. 550; Head v. Amoskeag Manuf'g Co., 113 U. S. 23, 5 Sup. Ct. 447.]

[Cited in Swain v. Knapp, 34 Minn. 236, 25 N. W. 399.]

2. A court of admiralty has no jurisdiction of a claim by a part-owner dissenting from a voyage, for the use or destruction, during the voyage, of his share of the outfits. The remedy is in equity.

[Cited in Lewis v. Kinney, Case No. 8,325; The H. E. Willard, 52 Fed. 388, 53 Fed. 600.]

In the year 1859, the libellant brought his libel in this court, and therein alleged that the respondents were owners of three fourth parts of the ship Marengo, and were about to send her to sea on a whaling voyage, against the remonstrance of the libellant, who owned the remaining one-fourth part; and he prayed that his share might be appraised, and stipulation be taken in this court for its safe return: all which was done. At his request, his share of the outfits remaining on board the vessel from her former voyage was not included in the appraisement nor in the stipulation. The Marengo [Case No. 9,066]. The vessel made her voyage, and returned in safety to New Bedford, her port of departure, according to the exigency of the stipulation, bringing a very valuable cargo of oil; and this libel in personam was brought to recover compensation for the use of the libellant's part of the vessel, together with the value of such of the outfits above mentioned as were consumed in the course of the voyage. The law of England, which we have followed in this country, approximates the co-ownership of vessels to other commercial associations in this, that it gives to a majority in interest of the owners the right to control the employment of the chattel. A court of admiralty will, in their favor, dispossess the minority, or a master holding under and for them. If the majority, however, wish to employ the vessel in a way and upon a service from which the minority dissent, the court will require security to be given, as in this case, for her safe return. Story, Partn. § 428; 3 Kent, Comm. 152. So will a court of equity in cases not within the jurisdiction of the admiralty. Haly v. Goodson, 2 Mer. 77. It is upon this doctrine and practice that the libellant founds his claim to compensation. We say that the law which authorizes another person to use his property ought to require payment to be made for that use. It is like the taking of private property for public uses, which, by a principle universally admitted, and expressly sanctioned by the fundamental law of nearly every state of the Union, can only be done upon just compensation to the owner.

T. Parsons, R. C. Pitman, and W. W. Crapo, for libellant.

B. R. Curtis, T. D. Eliot, and T. M. Stetson, for respondents.

LOWELL, District Judge. The libellant contends that the law has taken his property, or required it to be taken for the benefit of the respondents. It would be more strictly accurate to say, that the law allowed the respondents to use their own property, or to dictate the use of the common property. The libellant's property happened to be, from its own nature, inseparable from theirs; but it may have been as great a hardship for them to be obliged to use it, involving, as such use must, an outlay and risk beyond their proper proportion, as it was for the libellant to have the vessel go upon a voyage

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

which he did not approve. In the average of cases, it is equally probable that the majority would be embarrassed by the necessity of equipping and providing the whole vessel, as that the minority would be embarrassed by the necessity of providing for their part. It must be considered, then, as a difference of opinion between persons otherwise equal, excepting in their shares in the common chattel. The minority could hardly expect that their opinion should prevail; and the question then arises between the enforced idleness of the vessel, and her use according to the wish of the greater interest. The law says the latter alternative shall be adopted. The minority have full right to join in the enterprise, but refuse: the vessel sails at the sole risk and expense of the majority. Does it not logically follow that it shall be for their sole profit? This voyage happened to be successful. If there had been a loss, the libellant would not have shared it. What share shall he have in the gain? It is said that so much only is demanded as may fairly be due for the bare use of the libellant's fractional interest, after allowance for insurance and all other proper charges. The argument would be unanswerable, if the parties were strangers, and their property divisible; but in fact the compulsion and the hardship are or may be as great on one side as on the other. The respondents must either use the libellant's property, or let their own lie idle; and, to do this, they must furnish a capital, and assume a risk, proportionately greater than the use of their own fraction would require.

Again, the reason usually assigned for the rule is, that the free use and circulation of commercial property may be promoted. Now, if the majority owners are required to charter as well as to insure the whole vessel, it is to be feared that the burden will be too great, and that the contention would come to be, not who should employ the vessel, but who should evade this responsibility; and so the design of the law would be defeated.

The rights of a minority, indeed, are not fully equal to those of a majority, either in this or in other associations, whether social, political, or commercial. It is difficult to see how they can be made so. Perhaps, in this particular case, a law authorizing the sale of the ship under proper regulations might give the nearest approach to such equality. For in truth the actual hardship of their position comes chiefly from the fact that a small fraction of a ship does not readily find a purchaser. If it were as salable as the shares in any well-known stock company, the difficulty would be as nearly met as could be expected in a matter of this kind. But, whether this be so or not, I cannot believe that the remedy now sought to be applied would work fairly for the other owners. In theory of law, the choice is, as has been said, between the use and the idleness of the ship: if she is used, and the minority will not take their chances of the adventure, they are insured; if she were not used, they would earn nothing, and so they are not injured. Their rights are more fully protected than in most other similar cases. If they were partners or joint owners in a stock company, the majority could compel them to take the risks of any lawful enterprise. Here they have their option. That congress might well be asked to regulate this matter, I readily admit, for the rule does not seem so well adapted to modern voyages as to those of earlier times; but whether the regulation should extend to granting compensation, in all cases, to the minority owner, I very much doubt.

The weight of authority agrees with what I have supposed to be the true reason of the case. In an English case in chancery, decided in 1680, which brought up this point, the plaintiff was nonsuit. Anonymous, 2 Ch. Cas. 36. This action was taken upon consideration of a certificate of the course of the admiralty, made by Sir Lionel Jenkins, to whom this question was referred by the lord chancellor. See 2 Wynne's Life of Sir L. Jenkins, p. 792. The language of that learned judge is very explicit, as well as forcible. "I humbly submit," he says, "unto your lordship, that, in regard Mr. Clare was, according to the ancient practice of the admiralty of England in such cases, duly summoned, and admonished to contribute his quota as part-owner to the setting out of the ship, as the other part-owners did, and that he refused or at least neglected so to do; and that thereupon a due appraisement was made, and bail given by Mr. Newton, and other owners of the other parts, to bring back the ship, and consequently Mr. Clare's part in it, within the time limited in the acts of court for letting his part go out upon bail; or else, in case the ship should miscarry, to pay him the value of his part, as it stood appraised before its setting out, and that the said Mr. Clare's part was repaired, fitted, and set out in those voyages at the charge of the said other part-owners,—he, the said Mr. Clare, ought not, by the civil law, nor by the practice of the admiralty of our neighboring nations, nor particularly by the course of the admiralty in England, to have any share in the freight or any other profits made by the said ship in those voyages. If the law and practice in England were otherwise, it would be very mischievous to our shipping and navigation, the greatest part whereof being carried on by the contribution and joint power of part-owners, all partnership would cease, if a partner bearing no part of the burden should come to a share of the profits. Nor would there scarce any sea voyage go forward, if it were not in the power of the major part of the owners to overrule a cross-grained partner, and dispose of the whole ship," &c.

In a recent case, this doctrine has been reaffirmed, with the addition, that where the dissent was not notified until after the vessel had been repaired, and fitted for the voyage, the dissenting owner, though not entitled to

any share of the earnings, must contribute his proportion of the repairs and outfits. Davis v. Johnston, 4 Sim. 539.

Although the point has not been directly decided in this country, yet the early case above cited is strong evidence of what the law was when our jurisprudence assumed a separate character. And the opinions of our jurists have generally coincided with the English doctrine. See Willings v. Blight [Case No. 17,765]; Story, Partn. § 431; 3 Kent, Comm. 152. And the course of practice and forms of stipulations in use here accord with this view. In a late treatise of acknowledged value, it is indeed suggested that the point is still open, and reasons are given in support of the position now taken by the libellant. 2 Pars. Mar. Law, 558. In the present case I have had the great advantage of the able development and illustration of these reasons by the learned author, in argument at the bar: but I cannot persuade myself that the law is still unsettled; and upon authority, if not upon the reasoning of the case, I must decide for the respondents.

The claim of compensation for the use or destruction of outfits is beyond the jurisdiction of a court of admiralty. A court of equity is the proper tribunal for the adjustment of accounts between part-owners. Kellum v. Emerson [Case No. 7,669]. It is true that the account in this case might be a very simple one, but that is not the test of the jurisdiction. The subject-matter is not within the cognizance of the court. The same objection would hold to the claim for earnings, considered as an item of an equitable account between part-owners. In undertaking to decide it, I have regarded it only as a demand for compensation in the nature of freight, due at all events, without regard to the issue of the enterprise, as upon a compulsory letting of the libellant's fraction of the vessel. If part-owners would be liable to make such a payment, it might be recovered here. Libel dismissed.

Case No. 9,066.

The MARENGO.

[1 Spr. 506.] [1]

District Court, D. Massachusetts. Nov., 1859.

SHIPPING—PART OWNER—DISSENT TO VOYAGE—STIPULATION TO RETURN—RETURNED OUTFITS.

1. Where the owner of one-fourth of a whale ship, before any preparation had been made for a new voyage, gave notice to the owners of the major part, that he would not pay anything toward outfits or expenses for a new voyage, but did not say, in terms, that he should not dissent from the voyage, or apply for security for the return of his quarter part, until the vessel was nearly ready for sea; but it did not appear that the major part owners had been misled, or subjected to any loss by such delay: *Held*, that the libellant was entitled to security, by stipulation for the return of the vessel; and that such return should be to the port of New Bedford, to which the vessel belonged.

2. The libellant's part of the returned outfits will not be included in the estimated value of his part of the vessel, when he verbally requests the court not to include them.

3. Whether they could be included, if desired by the libellant, quaere.

In admiralty.

T. D. Eliot and T. M. Stetson, for claimants, cited Christie v. Craig, 2 Mer. 137.

W. W. Crapo, for libellant, cited Haskins v. Pickersgill, 2 Marsh. Ins. 727; The Dundee, 1 Hagg. Adm. 109; Gale v. Laurie, 5 Barn. & C. 156; Richardson v. Clark, 15 Me. 421; Lano v. Neale, 2 Starkie, 105; Kynter's Case, 1 Leon. 46, 47; Starr v. Goodwin, 2 Root, 71; Briggs v. Strange, 17 Mass. 405, 20 Roccus, Moll. de J. Mar. lib. 2, c. 1, § 8; Emerigon, c. 4, § 7; Hall v. Ocean Ins. Co., 21 Pick. 472. See, also, Shannon v. Owen, 1 Man. & R. 392; Willings v. Blight [Case No. 17,765]; The Orleans v. Phoebus, 11 Pet. [36 U. S.] 175; The Seneca [Case No. 3,650]; Loring v. Illsley, 1 Cal. 24; The Apollo, 1 Hagg. Adm. 311; The Petrel, 3 Hagg. Adm. 299; Rodick v. Hinckley, 8 Greenl. 274; Fox v. Paine [Case No. 5,014]; Buddington v. Stewart, 14 Conn. 404; 3 Kent, Comm. 153, 156; Graves v. Sawcer, 1 T. Raym. 15, 1 Lev. 29; Gould v. Etanton, 16 Conn. 12; Moody v. Buck, 1 Sandf. 304; Langton v. Horton, 6 Jur. 594, 23 Leg. Obs. 524; 2 Starkie, 105; Woods v. Russell, 5 Barn. & Ald. 942.

SPRAGUE, District Judge. The libellant, owner of one-fourth of the ship Marengo, prays the court to require the claimants, owners of three-fourths, to give security, by stipulation, for the return of that ship from a whaling voyage, on which they are about to send her, against the will of the libellant.

The claimants object, on the ground that the libellant did not dissent from the voyage, or make known his intention to ask for security, until after the claimants had expended a very large sum in preparations and outfits for the voyage, and the ship was nearly ready for sea. It is admitted, however, that the libellant did, in due season, give notice to the claimants, that he, the libellant, would not fit his quarter part of the Marengo, or pay any of the bills for the contemplated voyage. It is not alleged in the answer, that the omission of the libellant to give notice of his intention to ask security, or make a more explicit declaration of his dissent, has caused any loss or inconvenience to the claimants, or that it would in any manner have changed or affected their determination, as to the voyage, or their action in relation thereto. The court cannot, either from the allegations of the answer, or from the evidence, infer that such delay, on the part of the libellant, has worked any injury or inconvenience to the claimants.

Beside this, the letter of the fifth of May, which was before the claimants had begun to

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

prepare this ship for sea, was an express notice, that the libellant would not unite in the preparations for this voyage, or bear any part of the expenses thereof. This, surely, was sufficient to indicate to the claimants, that he did not concur in the contemplated enterprise, and the claimants could hardly have believed that the libellant was willing that his one-fourth of the ship should be sent upon a whaling voyage, of three or four years' duration, not only without compensation to the libellant, and for the sole benefit of the claimants, but also without any security for the final restoration of his property. And it is not even alleged in the answer, that the claimants went forward in the fitting of this vessel, under the belief that the libellant did not dissent from the voyage, or would not claim the security now asked. The only case cited to sustain this defence, is Christie v. Craig, 2 Mer. 137. That was an application to the chancellor, just as the vessel was about to sail. It seems to have been an ex parte motion, which the chancellor would not grant, without further inquiry. It did not appear that the applicant had, in any way, indicated to the major-part owners, that he should not concur in the voyage, or warned them against incurring expenses or liabilities; and the chancellor states that they had made charter-parties, and might be subjected to demurrage. That case was quite different from the present. If it had appeared that the libellant had once assented to this voyage, either expressly, or impliedly by knowing that the ship's husband would, in the usual course of business, prepare the vessel for sea, under the general authority previously given by all the owners, and had permitted the agent to incur large expenses in these preparations, certainly the court would have taken those facts into consideration, and either refused this application altogether, or granted it only upon such terms as would do justice to the claimants. But upon the answer, and, I may add, the evidence also, in this case, I do not think the objection can be sustained.

The remaining question is, for what shall the stipulation be taken? It seems, from the case of The Apollo, 1 Hagg. Adm. 306, that in the high court of admiralty in England, it is taken for the estimated value of the ship. But, in this court, the practice has been to take security in double the estimated value. Dun. Adm. Prac. 473. This is also the practice in the district court of the United States in Philadelphia,—Fox v. Paine [Case No. 5,014],—and this practice I shall follow.

In determining what shall be the estimated value, the question has arisen, whether the outfits which remained upon the return of the vessel from a former whaling voyage, in which all the owners had united, should be included. Those returned outfits were the property of all the owners in common. It is insisted, that the libellant's one-fourth of those returned outfits should be included in the stipulation, as constituting a part of the vessel, or of her tackle, apparel, and furniture, as a whale ship. The libellant insists that they ought not to be so included, and that they constitute no part of the ship, for the return of which he asks for security. This question may be disposed of, by saying that the court does not think it necessary to go into an inquiry, as to the value of articles of property, for the purpose of including the amount thereof in the stipulations, when the libellant does not desire such increase of his security; or, in other words, that the court need not give to the libellant more than he asks.

That the outfits are capable of a separate valuation, there is no doubt. Every witness, to whom that question has been put, has given a separate valuation of the ship, and of the outfits, without suggestion that there was any difficulty in making the distinction. The libellant, by his counsel, verbally requests the court for a stipulation upon the estimated value of the ship, without including the outfits, and that is what I shall give. I do not go into the question, whether the libellant might have had the outfits, included in the valuation, nor whether the claimants have the right to hold and use the returned outfits, upon the same terms as they have a right to hold and use the ship. Upon the actual request made by the libellant, I do not think it necessary to go into that inquiry. Upon the evidence, I think that the libellant's quarter part of the ship, exclusive of the returned outfits, was of the value of $1,700; and I shall require a stipulation in double that amount. As to costs, the claimants insist that no costs should be awarded to the libellant, because the whole litigation has arisen from his refusal of a reasonable proposition to give security out of court. This renders it necessary to look into the correspondence. Both parties offered to refer the valuation, upon which security was to be given, to suitable men; but the claimants insisted that the returned outfits should be included in such valuation, and to this the libellant would not accede. The adjustment out of court was prevented by the claimants insisting that the question of their right to hold and use the returned outfits, as a part of, or appurtenant to, the vessel, and give security therefor accordingly, should be settled at the same time with the valuation. But as the libellant was then, as now, willing to take security for the vessel only, there was no necessity for connecting with that the question of the right to the outfits. The claimants might have agreed to a valuation of the vessel, therefore, without yielding their claim to the use of the outfits, but reserving it to the same extent as it is now left, untouched by the decree of the court. If they had done this, the litigation would probably have been prevented.

I must award costs to the libellant.

The vessel having been heretofore delivered to the claimants, on stipulation, the de-

cree will be, that they give a stipulation, with sureties for the return of the vessel to the port of New Bedford. This being a whale ship, and all the owners resident in New Bedford, I think she should be returned to that port.

[NOTE. Subsequently, upon the safe return of the vessel, the libellant, who had objected to its being sent on the voyage, filed a libel in this court to recover damages or compensation for the use of his part of the vessel, together with certain outfits consumed in the course of the voyage. The court held that, since the libellant had received a stipulation from the other owners for the vessel's safe return, he was not entitled to compensation for the use of his part of the vessel during the voyage, and that a court of admiralty had no jurisdiction of his claim for the use or destruction, during the voyage, of his part of the outfits. The remedy was in equity. The bill, therefore, was dismissed. Case No. 9,065.]

MARENGO, The (BACKUS v.). See Cases Nos. 712 and 713.

Case No. 9,067.

MARET et al. v. WOOD.

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

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

PLEADING AT LAW—GENERAL ISSUE—WHAT IT ADMITS.

By pleading the general issue the defendant admits the right of the plaintiffs to sue by the name of Charles Maret & Son, without naming the son; and a note, indorsed to the plaintiffs by that name, and produced by them on the trial, is primâ facie evidence of the existence of such a firm.

Assumpsit, on the defendant's promissory note for $163.25, dated May 27, 1820, payable twelve months after date to one Thomas Williams, or order, and by him indorsed "to Charles Maret & Son." Plea, non assumpsit, and issue. The declaration stated that "William Wood was attached to answer to Charles Maret & Son, trading under the firm of Charles Maret & Son," without naming the son, whereupon the said plaintiffs complain, &c.

Mr. Hall, for defendant, prayed the court to instruct the jury that the plaintiffs could not recover unless they proved, by other evidence than the indorsement, the existence of such a house or copartnership as that of Charles Maret & Son; which instruction THE COURT refused to give, (THRUSTON, Circuit Judge, absent,) being of opinion that the defendant, by pleading the general issue, had admitted the existence of such a firm and the competency of the plaintiffs to sue by that name; and that if the defendant had now any remedy, it must be by motion in arrest of judgment.

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

MORSELL, Circuit Judge, was of opinion that the production of the note by the plaintiffs, indorsed to them, by that name, was primâ facie evidence of the existence of such a firm.

Verdict for the plaintiff.

Case No. 9,068.

The MARGARET.

[5 Biss. 353; [1] 5 Chi. Leg. News, 565.]

Circuit Court, E. D. Wisconsin. July, 1873. [2]

SHIPPING—TUG AND TOW—GROUNDING OF TOW—PRESUMPTION OF KNOWLEDGE—SAILING QUALITIES—CONDITION OF HARBOR.

1. The captain of a tug is bound to know the sailing qualities of a vessel which he had towed into a harbor on several previous occasions.

[Cited in Stretch v. The Margaret, 2 Fed. 258.]

2. He is also bound to know the condition of the harbor, the effect of the wind and waves, and the necessary course to safely enter the harbor.

3. Though the tow should be properly steered and follow in the wake of the tug, the responsibility as to the mode, manner and speed of entrance, and the course pursued, is with the tug.

This was an appeal from the decree of the district court, dismissing a libel filed by Charles F. Bliss et al., owners of the brig Mechanic, against the tug Margaret, to recover damages by reason of the grounding of the brig while entering the harbor of Racine in tow of the Margaret. [Case unreported.]

DRUMMOND, Circuit Judge. This case has been ably argued, and it must be admitted is not free from difficulty. I have hesitated somewhat in consequence of the decision of the district judge dismissing the libel, but the parties are entitled to my best judgment on the facts, and not being able to agree with the district judge on some of the leading facts, and on which the case must turn, I shall reverse the decree.

The facts are, that the brig Mechanic, of which the libellants were the owners, in November, 1868, took on a load of lumber at Suamico, for Racine, and not far from noon on the thirtieth day of November, arrived off that harbor, and signaled the tug Margaret to come and tow her in. The tug accordingly went out and reached the brig, about a mile and a half from the harbor, the precise distance not being distinctly ascertained. The tug approached the brig on the starboard, or weather quarter, the wind at the time blowing from the north and west. A starboard line was thrown from the brig to the tug, and either then, or shortly afterwards, and before the tug entered the har-

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

[2] [Affirmed in 94 U. S. 494.]

bor with the tow, there was a port line attached to the tug, and the brig was taken in tow. At this time the brig was northeast of the harbor. The harbor consisted of two piers extending out into the lake in nearly an easterly direction, and about 175 feet apart, the north pier extending 300 feet further east than the south pier. The evidence is not entirely clear as to the precise manner in which the tug approached the harbor. The channel was close to the north pier, and was about 12 feet in depth, and perhaps not exceeding 75 feet in width. On the south side of the entrance, there was a shoal. In rounding to, or approaching the harbor, either at a greater or less distance from the north pier, there being a considerable sea or heavy ground swell driving into the harbor, apparently from the northeast, the brig sagged off to the southward, struck the shoal there, and finally was thrown, by the force of the swell, upon the south pier, and a hole stove in her quarter, and was sunk and very seriously damaged. The question is, whether this was the fault of the tug.

There are several points on which there is a conflict in the evidence. The first is, as to the time and place where the port line was attached to the tug. On the part of the libellants it is claimed that, in the first instance, the starboard line was attached and then the brig towed within a hundred feet, more or less, from the north pier, when the tug stopped and another line was called for and attached to the tug, and the lines tautened up, and in that way the tug curved around the north pier with both lines fastened, the brig having thus lost her steerage way, and in consequence of that was thrown over on the shoal.

On the part of the defense, it is claimed that a mile from the north pier, and almost immediately after the starboard line was attached to the tug, and before it was tautened up so as to really commence the operation of towing, the captain of the tug called for another line, and it was immediately attached.

This is the first and one of the principal points of conflict in the evidence. Another is, as to what caused the parting of the lines. On the part of the defense it is claimed that the swell of the lake, the rise and fall of the tug and the brig, not always together, caused such a strain on the lines in entering the harbor that the port line parted, and then the brig sagged over on the shoal, and afterwards the starboard line parted.

The fact is, that the brig did fall off and run aground, and the question is how it was done, judging by the best lights that are before us in the evidence.

I think this fact may be considered as established by the clear weight of the evidence; and it tends greatly to elucidate this case, and to enable us to arrive at a correct conclusion: It is that the port line did not part until the brig was aground. That removes a great deal that was claimed as to the want of strength of the port line. It could hardly be expected that any line would stand the tension of a vessel of such tonnage, and loaded in the manner in which the Mechanic was when she was aground, and therefore it would not be surprising if the line should part under such circumstances.

The brig, then, did not run aground because the port line parted, but the port line parted because the brig ran aground. Now I think one of two things is true upon this hypothesis, that the tug had stopped or was moving so slow in entering the harbor that the brig lost steerage way in rounding the north pier, or that the tug had not given a proper opportunity, and had not the requisite steam upon her to enable the brig to enter the harbor, by laying the right course for that purpose.

Something was said of the brig not having ported her helm in time, and of her not being so manageable a vessel as some others. I think there is not sufficient evidence of any want of skill or diligence on the part of the brig in that respect. And as to the brig not being so manageable a vessel as others, if that were the fact it was known to the captain of the tug when he took her in tow, as he had taken her in port several times before, and it should have induced extreme caution in entering the harbor.

But perhaps there is no sufficient evidence indicating that the brig was any more unmanageable than vessels ordinarily are under such circumstances, and it seems quite clear to me that, from some cause not attributable to the brig, there was not sufficient steerage way on her, either in rounding the north pier or entering through the piers, to enable her to keep her course, and that the tug was bound to see that she had it.

There is a most extraordinary conflict in the testimony, especially in the first particular, namely, as to the time when the port line was given to the tug. Every witness on board of the brig declares that the starboard line was first given, and then, after a considerable interval, when the brig had been towed some distance, the tug arrested her progress and took in the other line and tautened them both up. On the part of the tug, this is asserted to be untrue. It is difficult to understand why, consistently, with the proper knowledge on the part of these witnesses, there could be such a conflict in the evidence upon so important a point; but without deciding where the truth may have been as to this point, I hold, as I have already stated, that owing to some cause, the fault of the tug, either in laying the course, or in turning the pier, the brig had not that control over herself through her helm as to enable her to lay her course so as to "hug" the north pier and go into the harbor by the regular channel. Now, the condition of the harbor, the ground swell, the depth of the water, were all better known to the tug than

to the brig. The tug had just left the harbor, and the captain of the brig told the captain of the tug how much the vessel drew at the time, and he therefore had all the data proper to determine what course he should take in towing the brig into the harbor.

Something was said about the protest which was made almost immediately after the accident occurred, not having set forth that the tug was in fault. The protest does not pretend to state what was the cause of the fact which it alleges, namely, that in entering the harbor, the brig fell off to the southward and struck against the shoal, and therefore it is not a circumstance of any material weight in considering the general testimony in the case.

There is the more difficulty in this case because of the particular liability growing out of the relations between a tug and tow. The master of the brig perhaps misapprehended, to some extent, his relations to the tug. It is true the tow is under the control of the tug. The tug directs the course of the tow and its speed. The tug may be said in one sense to be the agent of the tow, and might be under certain circumstances required to accept an act under instructions from the tow. The theory of the master of the brig was that it was entirely under the control of the tug. While this is so in a general sense, it is not exclusively so. There are certain duties incumbent on those who have the management of the tow. It is the duty of the tow to be steered properly; to follow in the wake of the tug, and to perform all those duties which nautical skill demands in order to properly manage the tow. It will not do, in other words, to leave the tow without a suitable man at the helm, and the course of the tow must be directed in the wake of the tug; but, after all, as I have said, the tug controls the speed and the course of the tow, and in entering a harbor, such as that of Racine, the responsibility as to the mode and manner of entrance, the speed with which it is done, and the course to be taken, mainly, if not exclusively, rests with the tug. She should know the natural and necessary effect of the wind and of the waves upon herself and tow, and she should be managed with reference to herself and tow with competent nautical and engineering skill under the circumstances. This demand of the law was not, I think, met by the tug in this case, and, therefore, the court finds the tug was in fault, and liable for the damage sustained by the libellants, and refers the case to a commissioner to ascertain and report the amount of damages, and also to report the value of the tug at the time it was released, on the 2nd day of March.

[This case was taken by appeal to the supreme court, where the decree of the circuit court was affirmed. 94 U. S. 494.]

As to the relative responsibility of tug and tow, consult The I. M. Lewis and Aline [Case No. 6,991], The Mosher [Id. 9,874], and cases there cited.

Case No. 9,069.

The MARGARET.

[6 Wkly. Notes Cas. 304; 26 Pittsb. Leg. J. 86.]

District Court, E. D. Pennsylvania. May 3, 1878.

COLLISION—STEAMER AND SAILING VESSEL—LIGHTS—HALF DAMAGES.

Torch to be exhibited by sailing vessel upon approach of steamer. A steamer seeing but one light of a sailing vessel until too late to avoid a collision, *held*, under the evidence, responsible. Half damages.

Libel for collision, by Pickering, master of the schooner Margaret, against the steamship Catharine Whiting. Upon the night of November 2, 1877, the steamer Catharine Whiting was proceeding up the river Delaware in mid-channel, nearly opposite Salem creek, under steam, at the rate of about six miles per hour, with proper lights, and a good and sufficient lookout. The tide was about flood, and the wind blowing up the river. The schooner Margaret, a small vessel, was beating down and tacking, and at the moment of collision was heading S. S. W. and was struck on the port side and sank. She had proper lights, but did not exhibit a lighted torch upon the approach of the steamer. The witnesses for the steamer testified that they saw nothing but the green light of the schooner until immediately before the collision, when both lights suddenly appeared; that the green light appeared upon their starboard bow, and their wheel was then starboarded; that when both lights appeared their wheel was put hard-a-starboard and the engine reversed, but, the schooner being then under the steamer's bows, the collision was inevitable.

On the part of the schooner there was testimony that at the time of the collision she was on her western or port tack; that the captain, his son, and steward had gone below, but the captain had come on deck before the collision; that they had proper lights (red and green), and a man in the bow as a lookout. This man, however, was attending to the sails, and there was evidence that he was not forward and did not report the steamer to the man at the wheel. No one on the schooner saw the steamer until the two vessels were very close—almost twenty or thirty yards off—and then saw only the bright light and heard two whistles. The captain of the schooner testified as to the course of his vessel, and that it was impossible that the steamer could not have seen the red light much sooner. It was rather a stormy night, and the schooner made no effort to exhibit a lighted torch.

J. Warren Coulston, for the schooner.

The direction of the wind compelled the schooner to tack as she did, and the steamer is in fault for not keeping out of the way. It is impossible, in view of the course of the schooner, that the red light was not visible long enough before the collision to have prevented it, had it been seen. As to the torch,

inasmuch as the failure to exhibit it did not contribute to the collision, the schooner was not guilty of contributory negligence. The Tonawanda [Case No. 14,092].

M. P. Henry, for respondent steamer.

The testimony proves conclusively that the schooner did not exhibit a lighted torch, and is therefore in fault, and that the steamer had a good and sufficient lookout, and did not see the red light of the schooner until it was impossible to avoid the collision. The schooner must therefore have changed her course when immediately in front of the steamer, and is therefore responsible. The Wenona [Case No. 17,411].

THE COURT (CADWALADER, District Judge,) held both vessels to be in fault; the schooner for not exhibiting a lighted torch, and the steamer for not seeing sooner the red light, its failure in that respect not being sufficiently explained. Decree entered in favor of the schooner for half damages with costs.

[NOTE. The following June, Judge Cadwalader granted a motion for a reargument, under which libelant took further testimony touching the allegation of fault in his vessel. The cause was reargued September 24, 1880, before Judge Butler, and a decree entered against the respondent for the damages sustained, with costs. 3 Fed. 870.]

Case No. 9,070.

The MARGARET v. The CONNESTOGA.

[2 Wall. Jr. 116.] [1]

Circuit Court, E. D. Pennsylvania. Nov. 3, 1851.

PRACTICE IN ADMIRALTY—COSTS ON APPEAL—NEW EVIDENCE—COUNSEL FEES.

1. On an appeal from the district court in admiralty where the decree of that court is reversed here, the successful party has costs on the appeal, unless new evidence was introduced above, which might have caused a different judgment, if it had been offered to the court below.

2. Although, perhaps, in aggravated cases of appeal, where the judgment of the district court in admiralty is affirmed, the court might add by way of taxable costs a sum for counsel fees, in this court, yet such an allowance is not favoured. Involving the exercise of discretionary power, it is a dangerous jurisdiction and one disliked. And in the present case, although this court had decided that the libellee was to blame, yet it refused an application to make him pay fees to the libellant's counsel.

[Cited in The Baltimore, 8 Wall. (75 U. S.) 392.]

A collision had taken place in the dark between a schooner and a steamboat, in which the schooner was sunk and lost. The testimony was in conflict throughout; the hands on the schooner swearing that the accident was caused by the fault of the steamboat: and those on the steamboat swearing it was owing to the fault of the schooner. The testimony in favour of the steamboat being, as he thought, rather the stronger, the district judge, on a libel by the schooner, decided in favour of the steamboat. [Case No. 8,622.] The schooner paid all the costs ($154) incident to the judgment of the court below against her, and brought the case by appeal here, where, being well prepared, it was twice argued on the facts, and quite ably argued by Mr. Waln and R. R. Smith for the schooner, and R. P. Kane and H. Wharton for the steamboat. This court examined the testimony with more than usual attention and not believing all the steamboat's part of it, and declaring its conviction "that it is necessary to the safety of sailing vessels that steamboats be held to a rigorous rule of accountability," and that these latter "are always considered as having the wind free, and must always give way," and "must shew it," reversed the decree below for error in judgment on fact, and referred it to the clerk to assess the damages. [Case No. 8,622a.] The clerk, among other charges which he reported the steamboat bound to pay, reported, not only the $154 paid by the schooner in the district court, on the judgment against her, and a bill of costs ($60) now first filed, as if she had been originally successful and had judgment in her favour below, but also her costs ($44) in this the circuit court on appeal: and, stating that the counsel for the schooner made an additional claim against the steamboat of $200 as counsel fees for defending the schooner, reported the amount as a fair charge, but left the allowance or disallowance of it for the court itself. The allowance of either of these costs on appeal or the fee, as matters to be paid by the steamboat, were now the points in issue.

Mr. Waln and R. R. Smith, for the schooner.

The costs of the appeal are like all other costs: and are to be paid by the party against whom judgment is finally given. It is no fault of the now successful party that the court below erred in its decree: and it would be unreasonable to charge him with costs incident to appeal from a judgment which he strove every way to avert, and which on the same facts as were presented below, is now decided to have been erroneously given. He had as good a right to be heard on appeal as he had to libel the party at all. A recent rule of the supreme court of New York, varying a practice derived by it from the English house of lords, declares that in all cases of reversal of any judgment in this court, except for want of jurisdiction, costs shall be allowed the plaintiff in error or appellant, unless otherwise ordered. The practice independent of rule, is the same in Massachusetts, on all reversals for error in fact. Bullard v. Brackett, 2 Pick. 85. The reversal here was for error in fact.

On the subject of counsel fees the supreme

[1] [Reported by John William Wallace, Jr., Esq.]

court has said as follows (The Appollon, 7 Wheat. [20 U. S.] 362, 379): "It is the common course of the admiralty to allow expenses of this nature, either in the shape of damages or as part of the costs. The practice is very familiar on the prize side of the court; it is not less the law of the court in instance cases, it resting in sound discretion to allow or refuse the claim;" and the court accordingly, in an instance case, regarded an allowance of $500, counsel fees, as one that was "unexceptionable." In Kentucky the principle is established that the plaintiff, in an action for mesne profits, is entitled to be re-imbursed in such amount as he has in good faith been compelled to pay for the restoration of the property which the defendant has wrongfully taken or withheld from him, and he may therefore recover any counsel fee which he has paid or bound himself to pay in respect to the ejectment, if such fee be not unreasonable. Doe v. Perkins, 8 B. Mon. 198, 200. The same rule prevails in like cases in New Jersey. Den v. Chubb, 1 Coxe [1 N. J. Law] 466. In the present case the court has decided that the steamboat alone was in fault. The owners of the schooner will lose, at any rate, their time, and will go unpaid for much trouble which they have had in prosecuting their case through two courts. They ought, at least, to be indemnified for all money actually paid in the suit. Stimson v. Railroads [Case No. 13,456], which rejected such allowances, and rightly, in patent and common law suits, admitted the distinction between such suits, and cases in admiralty.

R. P. Kane and H. Wharton, for the steamboat.

It is extremely hard to charge the defendant with costs incident to an error not of his, but of the court below. He is in no fault for that judgment. No statute gives costs in such cases, though statutes do in others; and the supreme court of Pennsylvania has held costs in cases of reversal to be so unjust that, where they had been levied by execution, it quashed the writ, and ordered the different officers to refund them. Wright v. Small, 5 Bin. 204; and see Smith v. Sharp, 5 Watts, 292. In an early leading case in New York (Le Guen v. Gouverneur, 1 Johns. Cas. 436, 523), an appeal from chancery, Mr. Justice Benson, after looking into all the cases, delivered the unanimous opinion of the court of errors, "that if judgment be given in the court below against the plaintiff, and he bring error, and the judgment in the court below be reversed, he recovers only the costs of the action below, because the court of errors gives such judgment as the court below ought to have given, and none other; and it would be unreasonable to compel a person, in case of a reversal, to pay costs for the error of the court below. The cases," he says, "are express and decisive." 1 Strange, 617; 1 Anstr. 180, 183; 1 Salk. 262. In 1829, this case was solemnly confirmed in a chancery suit, and declared to be in accordance with the practice of the house of lords in England. Murray v. Blatchford, 2 Wend. 221, 224. In Massachusetts, and in Maine, the plaintiff in error is refused costs on reversal for error in law, though there is a statute in both states, which declares that "in all actions the party preventing shall be entitled to his legal costs." Marble v. Snow, 14 Me. 196. Mr. Beames, in his treatise on Equity Costs (page 246), says: "It seems a general rule, that costs are not given where the decision of the tribunal appealed from is reversed, 'and that very reasonably, for why should any man, in case of a reversal, pay costs for the error of the court below?'"

On the matter of the counsel fees: Although the judgment in The Appollon is that of the court, the language quoted is in its opinion as given by Judge Story, who, in his circuit, went so far as to include counsel fees as damages in a suit on the law side of the court His doctrine, full before the eyes of this circuit, has been pointedly rejected by it, and is at variance with the tone of some of the best courts in the Union; those of Massachusetts, New York (see Stimpson v. Railroads [supra], and cases cited in the court's opinion), and Pennsylvania (Good v. Mylin, 8 Pa. St. 51). "The principle founded on it," says Chief Justice Gibson, "would be without bound or limit, both in the generality of its application, and the extent of its operation. A defendant sued on a plain bond, might find himself soused in damages, not only for the detention of the debt, but for the amount of a surgeon's bill for curing the plaintiff's leg, broken in a fall from his horse while travelling to court, in order to prosecute the suit. Where would it stop? . . . . . No law suit is prosecuted without trouble or expense, and were compensation for these recoverable, as an original ground of action by anticipation, the claim would be a standing dish, and we should have a direct precedent for it in every trial. There is many a right which is not worth the trouble and expense of enforcing it . . . . . and to pay for expenses and trouble in order to make it valuable, would make it the principal battle-ground." A reputable text writer (Conk. Adm. Prac. 780) refers to The Appollon as a cause involving questions of great importance, affecting the rights and sovereignty of foreign nations, and speaks with disapprobation of applying its principle to "other than such as are likely only very rarely to occur;" and says that doing so "would introduce a new element of controversy, and impose on the judge a disagreeable and embarrassing duty." He adds that in the Southern district of New York, extra counsel fees are not allowed except in extraordinary cases, and that no instance has occurred of such an allowance in the Northern. The allowance would have

no foundation in professional delicacy, good morals or policy. A fee in this court, at least, is honorary, and cannot be recovered. So it ought to remain; and the court will not lay down a rule which refers the counsel from his client to his client's enemy, and tends to tarnish the brightness of professional honour by allowing counsel to receive his pay not as a grateful recompense from a protected client, who knows and appreciates his service, but makes him extort it from the client of opposing counsel; a client who feels unkindly to him, and whom his own client, stimulated by success, is ready, to any extent, to assist in burdening with appressive and unjust charges. But The Appollon at furthest makes the allowance discretionary; and whatever may be the abstract principle, this case is not one for its application. The collision was in the dark. The evidence was in conflict throughout. The decision of this court rested on a disbelief of the facts positively sworn to by one side, and on a presumption that every collision between a schooner and steamboat is presumed by law to be the fault of the steamboat, till she shows that it was not her fault. This presumption, however necessary to be adopted, may often be false in fact. The court below, on the same evidence that the court had here, thought it repelled by the testimony. Certainly the case was one of doubt. It was ordered for re-argument on facts only and the court examined the evidence with a care more than a case not doubtful would require. It was a case on which two minds might naturally disagree; and which, under favour, comes to be decided as it is, only because one mind was in a court below, and the other in a court above.

GRIER, Circuit Justice. When the judgment of an inferior court is affirmed on error or appeal, it is of course, that the defendant in error has judgment for costs. But when the judgment of the court below is reversed on writ of error or appeal, costs are not of course. It is said that as the appellee is not in fault for the judgment below, he should not pay the costs on appeal; but each party should be left to pay his own costs. Formerly, as there were no damages given on a writ of error, there could be no costs either at common law or by statute of Gloucester. The statute of 3 Hen. VII., c. 10, first gave costs where a judgment was affirmed on a writ of error. That of 4 Anne, c. 16, § 25, gave costs where a writ of error was quashed, but no statute gave them in case of a reversal. In equity and in admiralty there seems to be no other rule than the discretion of the court, as to costs, on appeal. So far as any rule on the subject has been announced by this court, it is only, that we would not allow costs on appeal where new evidence has been introduced above, which might have caused a different judgment if it had been offered to the court below. Carrigan v. The Charles Pitman [Case No. 2,444]. But I believe it has been our usual practice to give the party his costs here, who obtains the judgment of this court, with the above exception only. It is true the defendant is not in default for the judgment of the court below. And to this it may be answered, neither is the plaintiff.

The plaintiff who recovers a debt, or damages for an injury done to him, has a right to recover also the cost incurred in obtaining his judgment. The costs on appeal would seem to form a part of these, as justly as any other, unless in the excepted cases I have mentioned, where he failed below by not producing sufficient evidence, which was afterwards produced on appeal. In courts of law, at the present time, I believe in most instances, costs are given on reversal of a judgment. And I think also as a general rule, that where a plaintiff is forced to appeal in order to recover his debt or damages, and does not succeed in so doing, on his appeal he recovers all his costs up to the date of his decree or judgment, unless some special reason be shown to the contrary.

But while this rule applies to actual taxable costs I know of no instance where we have added a large sum for supposed counsel fees. I know that it was decided, in the case cited at the bar (The Appollon, 9 Wheat. [22 U. S.] 362), that courts of admiralty have a wide discretion to allow expenses of this nature, not only in prize, but in instance cases. The allowance is there said to rest in the sound discretion of the court. I must confess my decided repugnance to the exercise of discretionary power over men's property. This principle has been introduced from civil law courts. It partakes rather of the hall of the cadi, than of the judgment seat of the court. I have already refused to follow the practice of the late Judge Story in patent cases, and allow necessary counsel fees as part of actual damages. Stimpson v. The Railroads [Case No. 13,456]. "Sound discretion" is no doubt an excellent phrase in the abstract, but the exercise of it over men's property, liberty or life is sometimes called a tyrannical, not a judicial power. "Discretion" is admitted to be dangerous; but "sound discretion" is claimed as a different thing. Who is to judge of the soundness but the court? And by what is it to judge when it abandons precedent and principle? "Sound discretion" is discretion as settled by rules. Otherwise it is sound only when you decide as the party seeking the decision wants. And hence in practice it would come to mean the notion, whim or caprice of the judge who exercises it. In prize cases, the money is in court. Like plunder, it belongs to no one till it is divided, and it may be no more than right that some crumbs should fall to the share of the learned doctors and proctors who have the trouble of its distribu-

tion. I confess my decided aversion to the exercise of an arbitrary power over the property in the pockets or possession of parties in common cases. If I were to judge of the reward merited by the learned counsel on either side of this case, I should say that their labours on behalf of their respective clients, were worthy of ample remuneration. For the case was well prepared, and well argued on both sides; and I think it due to the younger gentlemen, who have for the first time made their appearance in this court (Mr. H. Wharton and Mr. R. P. Kane), to say, that they have defended the case of their clients, with a zeal and ability which deserved, if it did not obtain success, and which are certain omens of their future success and eminence in their honourable profession.

The defendants in this case have acted in good faith in making this defense; and, I have no doubt, consider themselves wronged by the judgment of this court. In all collision cases, both sides are sure they are not in fault, and they swear to it, believing it to be true. In deciding these cases, the testimony is always contradictory; much of it, though not intentionally false, is not true. The truth has to be guessed out by the court by a careful comparison of the admissions and contradictions of the witnesses. The last guess may not be the right one, but he in whose favour it is, may at least be said to have good fortune, if not justice on his side.

Now I will not say that there may not be aggravated cases of appeal when the judgment below is affirmed, that this court, in the exercise of this permitted but disliked exercise of discretion, may add, by way of penalty, to the taxable costs, a sum for counsel fees in this court. But where the defendants, as in this case, had the judgment of the district court in their favour, where there has been no attempt on their part to oppress the plaintiff by protracted litigation, we do not think that a case is presented, where this dangerous discretion of adding two hundred dollars to the damages should be exercised. If the plaintiffs have fortunately recovered in this doubtful contest, they must pay their counsel, as in common law cases, out of the damages recovered, and be thankful for the balance. But for the very able and valuable services of their counsel, they would not probably have recovered anything. It is true, that civil law tribunals by the exercise of this sound discretion, or summum jus propose to make the complainant whole for his entire loss; but this is not always possible, and we should be careful, lest the exercise of this discretion may be to the opposite party summa injuria.

The report of the clerk is therefore confirmed, without the addition of the two hundred dollars demanded as counsel fees.

Case No. 9,071.

The MARGARET & JESSE.

[Blatchf. Pr. Cas. 581.] [1]

District Court, S. D. New York. Dec., 1863.

PRIZE—BLOCKADE.

Vessel and cargo condemned for an attempt to violate the blockade.

In admiralty.

BETTS, District Judge. The vessel and cargo in the case were captured in about the same locality with the Banshee [Case No. 965], and by the United States vessel Fulton, for the same offense. The master, in his examination in preparatorio, states that the vessel and cargo were owned by a company or association residing in Charleston; that she was of English build; that she was laden at Nassau, N. P., and destined for Wilmington, North Carolina; and that the voyage was intended to run the blockade of that port. A large portion of her cargo was thrown overboard by her in the effort to escape the chase of the gunboat which pursued and captured her. There is no essential difference in the great mass of the evidence produced on the hearing. The master testifies that he was employed to break the blockade of Wilmington on this voyage. The first, second, and third mates and the steward corroborate the general evidence of the master, and prove, unequivocally, that the prize was engaged, carrying the Confederate flag, to run the blockade at Wilmington. No appearance is made in this cause for any party, and no defense is found in favor of the vessel, upon the proofs. The prize master found no papers on board the prize, and was told that she had none.

The evidence establishes a clear case of an attempt to violate the blockade of Wilmington, with full knowledge, by all parties concerned in the enterprise of its efficient existence. The vessel and cargo are, consequently, subject to condemnation and forfeiture.

Case No. 9,072.

The MARGARETTA.

[2 Gall. 515.] [2]

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

NON-INTERCOURSE — PENALTIES — SECRETARY OF TREASURY—POWER TO REMIT — GOODS SUBSEQUENTLY IMPORTED—COLLECTOR'S SHARE.

1. The secretary of the treasury has no power to remit penalties, unless in cases provided for by law. If he recites his authority under a special act, and remits in pursuance of that act, the remission, if unsupported by such act, cannot be supported under the general act of March,

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

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

1797, c. 67 [1 Story's Laws, 458; 1 Stat. 506, c. 13].

[Quoted in New Orleans Nat. Bank v. Merchant, 18 Fed. 849.]

2. Under the act of 27th of February, 1813, c. 175 [2 Story's Laws, 1298; 2 Stat. 804, c. 33], the secretary of the treasury had no authority to remit the penalties for goods subsequently imported, contrary to the non-importation acts.

3. Under the act of 3d of March, 1797, c. 67, the district judge is bound, upon a petition for remission, to state the facts, and not merely the evidence of the facts; and the secretary of the treasury is bound by this statement of facts, and cannot legally act upon any other evidence. The district judge, in stating such facts, acts judicially, and the proof before him must be made by competent, as well as by credible testimony. A statement by the district judge, that the claimant only swore to the facts before him, is no legal proof under the act of 1797, upon which the secretary of the treasury is authorised to remit.

[Cited in Jewels Stolen from the Princess of Orange, Case No. 11,431; The Palo Alto, Id. 10,700.]

4. Under the act of 27th of February, 1813, c. 175, the secretary of the treasury had no authority to make a remission of part only of the property forfeited. If he remitted, at all, he was bound to remit the whole penalty or forfeiture.

5. Neither under the act of 1797, nor the act of 1813, had the secretary of the treasury any authority to remit the collector's share of the forfeiture, nor any part of it, eo nomine.

6. Until final judgment no part of the forfeiture vests absolutely in the collector; but, after final judgment, his share vests absolutely, and cannot be remitted.

[Disapproved in Confiscation Cases, 7 Wall. (74 U. S.) 461.]

[See The Hollen (Case No. 6,608). But see, contra, McLane v. U. S., 6 Pet. (31 U. S.) 404.]

This was an appeal from the district court of Maine in a proceeding upon an information in rem on the instance side of that court. The information contained two counts. The first, which is the only one now necessary to be considered, charged that the cargo, consisting of prohibited goods, was, on the third of September, 1813, imported into the United States from New Brunswick, contrary to the non-importation acts. There was no question, that the vessel and cargo were liable to forfeiture under these acts. Pending the proceedings in the court below, the claimants, Stephen Glover and Charles Tappan, procured a remission from the secretary of the treasury, in consequence whereof the learned judge of that court decreed condemnation of nine sixteenths of the goods claimed by them, and restoration of the remaining seven sixteenths. [Case unreported.] From so much of the decree, as restored the seven sixteenths, the United States appealed to this court; and the sole question was as to the legal sufficiency of these remissions. They were both in the same form, and that to Glover was as follows: "To All to Whom these Presents shall Come, I, George W. Campbell, Secretary, &c., Send Greeting: Whereas a statement of facts, bearing date the 24th of February, 1814, with the petition of Stephen Glover thereto annexed, touching certain forfeitures and penalties incurred under the statute of the United States, entitled 'An act to interdict the commercial intercourse between the United States and Great Britain and France, and their dependencies, and for other purposes,' has been transmitted to the secretary of the treasury by the judge of the United States for the district of Maine, pursuant to the statute of the United States entitled, 'An act directing the secretary of the treasury to remit certain fines, penalties and forfeitures therein mentioned,' as by the said statement of facts and petition remaining in the treasury department of the United States may fully appear; and whereas, I, the said secretary of the treasury, have maturely considered the said statement of facts and petition: Now, therefore, know ye, that I, the said secretary of the treasury, in consideration of the premises, and by virtue of the power and authority to me given by the said last mentioned statute, do hereby decide to remit to the said petitioners, the right, claim and demand of the collector only to the said forfeitures and penalties, except one eighth part thereof, on payment of costs and of the duties on the part remitted. Given under my hand and seal, &c. the 29th day of July, A. D. 1814." The summary statement of facts here alluded to consisted solely of the petition of the claimant attested on oath, and the following certificate of the district judge: "District of Maine, February 24, A. D. 1814. Upon a summary examination now had upon this petition, in the presence of the attorney, Lee, and the collector of Bath, the only evidence offered to support the facts stated in it is the deposition of the petitioner, taken before William Stevenson, a notary public and justice of the peace for the county of Suffolk, hereunto annexed."

G. Blake and Mr. Preble, for the United States.

Prescott & Kinsman, for claimants.

STORY, Circuit Justice. The points involved in this discussion are of peculiar delicacy and embarrassment, inasmuch as they embrace considerations of the legal power and duties of one of the high officers of the government. It is not the duty of this court, and certainly it is not its inclination, to pry into the conduct of high executive officers with a jealous and scrutinizing eye. The court is, on the contrary, disposed to exercise towards them every liberality not inconsistent with the principles of law. Let it, however, be recollected, that ours is a government of laws and not of men; and that consequently every act of every officer, of the highest, as well as of every inferior grade, must be tried by the test of the law, and stand or fall, as that has dictated. The

power to remit penalties and forfeitures is one of the most important and extensive powers, which can be exercised under the government. It vitally affects the rights, the revenues, and the prerogatives of the United States. These cannot be waived, or extinguished, except in the cases and by the persons provided by law. The party, therefore, who sets up a treasury pardon, to purge away a forfeiture, must show that such pardon is within the purview of the powers confided to that department. I do not say, that every thing is to be proved to be done with the precision and accuracy of special pleading, or that a rigid adherence to forms is to be exacted. But there must be a substantial compliance with the requisites of the law; and if, after every reasonable allowance, this cannot be found, the pardon must be adjudged to be inoperative.

I have come with these impressions to the consideration of this cause, and shall now proceed to examine the points, which have been made, with all the respect due to the talents and integrity of the late secretary of the treasury, and with all that firmness which befits the station, I have the honor to occupy. The counsel for the United States have introduced their argument with two propositions, which cannot well, upon legal principles, be doubted. The first is, that the power of the secretary of the treasury to remit penalties and forfeitures can be exercised only in the cases prescribed by law; and the second, that where he recites that the remission is granted by virtue of a special authority granted by a special statute, he cannot be presumed to have acted under any general authority granted by any general statute. The latter position has indeed been questioned at the bar; but I have not been able to perceive in what manner it has been, or can be, impugned. To adopt a contrary doctrine, would be to presume a fact, of which there is no evidence, against the express written declarations of the party; and might often lead to the most mischievous consequences. The present case affords an illustration of the propriety of the position. By the general act authorizing remissions (March 3, 1797, c. 67 [1 Story's Laws, 458; 1 Stat. 506, c. 13]), the secretary of the treasury can remit penalties and forfeitures, only when in his opinion the same shall have been incurred without wilful negligence or any intention of fraud. And, in my judgment, the argument is perfectly correct, that sufficient matter must be stated in a remission under this act, to show that the case is within its purview. It is a special authority, to be exercised only in given cases, and it must be shown on the face of the pardon, that in the opinion of the secretary, there has been no wilful negligence or intention of fraud; and such indeed has been the uniform practice under the statute. But it has never been considered, that it was compulsive upon the secretary to exercise this power; on the other hand, it has ever been deemed a subject submitted to his sound discretion. Very different is the statute (Feb. 27, 1813, c. 175 [2 Story's Laws, 1298; 2 Stat. 804, c. 33]) under which the secretary purports, in this case, to have acted. It is mandatory to the secretary to remit the penalties and forfeitures, where the facts of the cases are brought within the statute. If he is satisfied of the existence of such facts, he has no further discretion, but is bound to remit. The facts too required to be proved under this statute are very different from those under the statute of 1797. It is not necessary to be shown, that there was no wilful negligence or intention of fraud. The only facts to be proved are, that the goods seized were bona fide American property, at the time of their importation; that they were not clandestinely imported or introduced; and that they were imported or introduced since the declaration of war. There are other material differences in the powers given by these statutes, which might authorize and require a remission under the one, which could not be authorized or required under the other. To presume, therefore, an exercise of authority under the general statute, when it is recited to be under the special statute, would not only be a presumption against the fact, but a presumption in some cases, which would involve a violation of law.

The first objection to this treasury remission is, that it was made without any statement of facts, or competent evidence, according to the provisions of the statute, under which it purports to be granted. That statute requires the party to petition for relief to the judge proper to hear the same in pursuance of the act of 1797; and the facts shown on the inquiry before the said judge are to be stated and transmitted, as by the same act is required, to the secretary of the treasury. Nothing can be clearer, than that, by the act of 1797, the judge must state the facts, not merely the evidence of the facts, which appear upon the summary inquiry before him; and it is upon this statement of the facts, and this only, that the secretary is authorized to proceed. In the performance of this duty, the judge exercises judicial functions, and is bound by the same rules of evidence, as in other cases. The proof, therefore, of the facts must be by competent, as well as credible testimony; and he is to transmit a statement of the facts, as they judicially appear before him, and not the evidence, from which he draws a legal conclusion, as to the existence of those facts. Such a statement of facts is in the nature of a special verdict, or an agreed case; and, as there is no appeal allowed by law, it is not competent for any other tribunal collaterally to call in question the competency of the evidence, or the regularity of the proceedings, which preceded such state-

ment. It is conclusive upon all the parties. In the present case, however, there was no such statement of facts. The only evidence offered, to support the petition, was the oath of the party, which was manifestly incompetent in itself, and appears not to have been taken before the district judge. The learned judge does not pretend to give any opinion, as to its competency or credibility, or to certify any facts relative to the subject matter of the petition. The whole proceeding was as pure a nullity, as can well be imagined. The question then comes to this; whether the secretary of the treasury can remit, where no statement of facts has ever been transmitted to him? It is conceived, that but one answer can be given to the question, viz. that he cannot. If, notwithstanding, he should so do, it would deserve great consideration, whether it ought not to be held void, as having issued by mistake or upon false suggestions. Upon this point, however, I beg leave to reserve a decision, until it shall be necessary in judgment. To guard, however, against misapprehension, it is proper to add, that where such statement of facts is transmitted, the opinion of the secretary, as to their sufficiency to bring the case within the statute, is conclusive, and cannot be overhaled in any collateral inquiry.

The next objection is, that the secretary had no authority, under the act of 1813, to remit the forfeiture upon a part only of the goods; nor, under any statute, to remit the collector's share, eo nomine. By the act of 1797, the secretary is authorized to remit "upon such terms, or conditions, as he may deem reasonable and just," the whole or any part of any forfeiture within the purview of that act. And the same power is expressly given, as to all cases within the non-importation act. March 1, 1809, c. 91, § 18 [2 Story's Laws, 1114; 2 Stat. 528, c. 24]. The forfeitures under this last act are to be distributed in the same manner, as those under the collection act of 1799, c. 128 [1 Story's Laws, 573; 1 Stat. 627, c. 22], which in general gives (section 91) to the collector, and naval officer, and surveyor, if any there be, a moiety of the seizures made within the revenue district. But until final judgment or decree no absolute title vests in the collector. His right is merely inchoate, and when it is consummated by a final judgment, it becomes an inefeasible right. If, pending the proceedings, a remission be made of the whole property forfeited, his whole title is gone; if of a part only, his right attaches to the remainder, and by a judgment of condemnation becomes fixed and indissoluble. It is not therefore competent for the secretary to remit eo nomine the collector's share; for the law has expressly given him a moiety of all forfeitures recovered, and whatever may be the portion recovered, his right to the moiety thereof attaches. It is only by a remission of the whole forfeiture, that the collector's share can be wholly defeated; and then it takes place by the mere operation of law. Under the acts of 1797 and 1809, therefore, this special remission could not be supported. And the other part of the objection seems equally well founded. The act of 1813, c. 175, contains no provision authorising a partial remission. It is directory to the secretary to remit all forfeitures within that statute, upon the simple condition of payment of the costs, charges and duties. It was not competent, therefore, for him to interpose any limitation or condition, beyond that which the law had expressed.

Another objection, which rides over all the others, is, that under the act of 27th of February, 1813, upon which the remission purports to proceed, the secretary had no authority whatsoever to grant the remission. This objection, if true, is in every possible view fatal. The importation in the present case is conceded on all sides to have been made in September, 1813, at least six months after the passage of the act. If therefore it be not prospective in its operation, it is very clear that the remission is utterly void. It seems to me, that upon no reasonable construction, consistent with the apparent intent or language of the statute, can it be deemed to apply to future cases. It speaks of goods, which had then been imported into the United States, and of penalties which had then been incurred; and directs the secretary to remit such forfeitures, if it should be proved to his satisfaction, that the goods, at the time of their importation, were (not, should be) American property, and were not (not, should not be) clandestinely imported or introduced, and that they were (not, should be) imported since the declaration of war. The language, therefore, obviously points to cases already past; and directs the prosecutions, if any shall have been (not, shall be) instituted, to be dismissed. The only words of the statute, on which to hang a doubt, are the words, which give the benefit of the act to goods, "which were shipped from the said kingdom (i. e. of Great Britain and Ireland) prior to the second of February, A. D. 1811." But these words are evidently used with reference to goods already imported, and which had already incurred a forfeiture, and must be explained by reference to a preceding act. The act of the 2d of January, 1813, c. 149 [2 Story's Laws, 1283; 2 Stat. 789, c. 7], directing the secretary to remit the forfeiture upon all goods, which had been imported from the kingdom of Great Britain and Ireland, and were shipped on board of vessels, which departed therefrom between the 23d of June, and the 15th of September, 1812. This act afforded a very limited relief, for there were many shipments made to ports in Nova Scotia, and other British colonies, with a view to be imported into the United States upon the repeal of the non-importation act, and which, since the war, had come directly

from thence into the United States. The act of the 27th of February, 1813, was designed to reach this very large class of cases. It is not, like the act of 2d of January, 1813, limited to importations direct from the United Kingdom, but to cases, "where goods, &c. have been imported or introduced into the United States from the dependencies of the United Kingdom, &c. since the declaration of war by the United States against the said kingdom, or which were shipped from said kingdom prior to the 2d of February, A. D. 1811." If the sentence had stopped here, there might have been some foundation for the argument, that this last clause might apply to future importations of goods so shipped. But it is immediately added, "whereby the person or persons interested in such goods, &c. or concerned in the importation or introduction thereof, hath or have incurred any fine, penalty or forfeiture, &c." Now no fine, penalty or forfeiture could by law have been incurred, under the non-importation act, by any shipment of goods from Great Britain prior to the 2d of February, 1811, unless they had been subsequently imported into the United States; for that act was not in force until after that day. It is plain, therefore, that the legislature, in this clause, meant to speak of goods, which had not only been shipped, but had been actually imported into the United States. Whether the word "or" is to be construed, as here used for the connective "and," and so operate as a qualification upon the preceding description of goods, or whether it is to be construed as a disjunctive, and so refer to goods not only imported from the British dependencies, but also from other places, if shipped before the 2d of February, 1811, is not now material to consider. It is sufficient, that the words, in their connexion, refer to importations already made, and that it is impracticable, in any other manner, to reconcile the other provisions of the statute. The consequence is, that the present importation was not within the purview of the statute, and the remission was made without competent authority.

Upon the whole, in every view of this subject, I am entirely satisfied that the remission is void and ineffectual. I cannot but regret, that it has fallen to my lot to pronounce this unwelcome sentence; but it is pressed upon me by duties, from which I am not at liberty to shrink, and which, I trust, I am incapable of betraying.

Let the decree of the district court be reversed, and the property be condemned to be distributed according to law. Condemned.

This case was carried by appeal to the supreme court, and afterwards the appeal was abandoned upon a compromise between the parties.

MARGARETTA, The (CORNELL v.). See Case No. 3,239.

MARGARET YATES, The (UNITED STATES v.). See Case No. 15,720.

Case No. 9,073.

The MARIA.

[Blatchf. Pr. Cas. 283.] [1]

District Court, S. D. New York. Dec. 23, 1862.

PRIZE—ENEMY PROPERTY — CLAIM BY NEUTRAL—CLANDESTINE VOYAGE—BLOCKADE—FALSE PAPERS—LOG-BOOK.

No legal transfer of the vessel shown from her enemy owner to her neutral claimant. She came out of the blockaded port clandestinely, on the voyage next preceding the one on which she was captured. She knowingly attempted to violate the blockade. Her papers were false as to her destination. Her log-book was mutilated and altered. Vessel and cargo condemned.

[See The Albert, Case No. 138.]

In admiralty.

BETTS, District Judge. Many of the matters connected with this vessel and her cargo and voyage, and the prosecution and defence of this suit, are strikingly coincident with those occurring and considered in the case of U. S. v. The Albert and Cargo [Case No. 138]; and the proofs in the one case have in several respects been reciprocally invoked into the other, and made part of its proceedings. The Maria was Charleston built, and proceeded from that port to Matanzas, in March, 1862, with a cargo of cotton. She took in a cargo at Matanzas and Nassau for New York, and a charter agreement was entered into between William Smith, her owner, and Messrs. Monet, Jemenez & Co., merchants at Matanzas, March 26, 1862, to add to and complete her cargo at the Bahama Islands, for the port of New York. The cargo consisted chiefly of salt, especially adapted to the Charleston market. There was also a quantity of cotton cards, shipped by R. L. Sanchez. A provisional register of the vessel was taken out in the name of William Smith, at Nassau, New Providence, April 16, 1862. A crew-list was executed by the master, at Matanzas, March 20, and by the mate and men, at Nassau, April 16 and 19, 1862, for a voyage to New York, and back to the port of Nassau. All the cargo was shipped in the name of Charleston hirers, except one shipment by R. L. Sanchez. The vessel cleared at Nassau April 16, but the destination of the cargo was not named. The log described her departure from Nassau, Sunday, April 20, 1862, towards New York, and her arrest by the United States steamer Santiago de Cuba, at 1 p. m. on the 1st of May. It is alleged in the libel that this seizure was made at sea, near the South Carolina coast, on or about the 30th of April. The master, intervening in the suit, and claiming and answering for the owner, admits the allegation in the libel to be correct, and as the log contains no other entry after the close of the last day of April than the mention of the capture, that undoubtedly occurred at sea-time, 1 a. m. instead of 1 p. m.

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

Monet, Jemenez & Co., intervene and claim a part of the cargo, 800 bags of salt and two cases of cigars. Rafael L. Sanchez claims forty boxes, containing eighty dozen of cards for cleaning cotton, as shipped at Matanzas for New York, to touch at Nassau. The names of Monet, Jemenez & Co., printed in the bill of lading, signed by the master at Matanzas March 26, 1862, as shippers of the goods, are erased in the bill found on board, and the name of R. L. Sanchez is inserted in the place, as shipper. Francisco Otero & Co., merchants, of Matanzas, were charterers of the vessel, and were to be her consignees at Nassau and New York. The bill of lading directs the consignees named therein to pay freight on their consignments to Messrs. F. Otero & Co., the charterers.

The facts, established by direct proof or strong presumption, were claimed by the libellants to be: 1. That the schooner, being enemy property, went, on the voyage directly preceding the one on which she was captured, with a cargo, from Charleston to Matanzas, and in violation of the blockade of the former port. 2. That her owner colorably attempted, at Matanzas, to change her title to a neutral ownership, but that the vessel remained, in law, enemy property. 3. That at Matanzas and Nassau she took on board cargo destined for Charleston or a blockaded port, and attempted, with such cargo, to enter a blockaded port. 4. That her papers, and the presentation of her voyage, were intentionally simulated and false. 5. That her log was culpably mutilated, and also contained false entries, intended to mislead belligerent cruisers. 6. That the voyage was fitted out and prosecuted with full knowledge of the existence of the war and of the blockade of the Southern ports of the United States, with a design to evade the blockade.

The claimants of the vessel and cargo contest these positions in pleading and on trial, and maintain that the voyage was honest and lawful in all particulars, and that the approach of the vessel, out of her true course, towards a blockaded port, was compelled by stress of weather and injury to the vessel therefrom, and a want of water. These various propositions have been subjects of such repeated consideration in this court for many months past, that all labored discussion of the points at this time will be unnecessary to disclose their legal bearing in the cause. The decisions in regard to them will remain the law governing the action of this court until changed by the judgment of the higher tribunals, and the attention of the court will be limited to ascertain the conclusions justly deducible from the proofs given in the cause.

The master and mate of the vessel, and Monet, a passenger on board, differ somewhat as to the time and place of the capture of the vessel. The master says it was about the 30th of April, 1862, near 12 o'clock, in latitude 30° and some minutes north, and longitude 84° 4′ 30″ west, but he rather thinks that the longitude was 80° 4′ 30″ west, and presumes the latter is the reckoning by the mate in the log-book. The mate testifies that the capture was on the 1st of May, twenty or thirty miles off the coast of South Carolina; and the passenger, Monet, states the time of capture to have been Wednesday, April 30, eighteen or twenty miles off land, and in the vicinity of Charleston. The entry in the log is that the prize was hailed by the capturing vessel May 1, at one p. m., and the computation of her position at the close of April 30 is entered at latitude 32° 7′ north, longitude 80° 44½′ west. The statement of this matter by the master is of no great moment, other than as showing that his verbal representation of facts connected with the voyage is to be accepted with caution. For instance, it is palpable that if the vessel was, when seized, at either point of latitude or longitude adopted by the master in his evidence, she would have been widely clear of any existing attempt to evade the blockade of Charleston or of the coast of South Carolina. The master says that he heard from Smith that he purchased the vessel at Matanzas from an agent of her American owner, and received a bill of sale, but the witness never saw any bill of sale, and does not know its contents.

The master had known, for ten months, of the war and the blockade of Charleston. These facts were publicly notorious on board. The master imputed her position out of the due route to New York to violent weather, and damages to the vessel, and loss of water on board, incurred after her departure from Nassau. He says he was not steering for any particular port, but was endeavoring to make the blockading squadron, to obtain a supply of water; that the course of the vessel was altered April 27, to endeavor to fall in with the blockading squadron to obtain water; that on the 22d or 23d of that month she had experienced a gale and shipped large quantities of water, and had two water casks stove in and lost all the water they contained; and that when the vessel left Nassau she had four casks of water. The original and natural entries in the log respecting the state of the weather on the 22d and 23d days of April are these: "22d, p. m. begins with fresh breezes, with rain, squally; 3 p. m. double-reefed the main and single-reefed the foresail, took in the flying jib; 5 p. m., tacked to the S. W.; 6 p. m. set the flying jib; 11 p. m. took in flying jib and tacked to N. W." Then follow in lighter ink and more constrained formation of the words: "Shipped several heavy seas, and stove the head in water-casks." After that paragraph is written, in the same hand and ink as the first entry, "M., fresh breezes." This supplies a forcible presumption that the paragraph in regard to water-casks was interpolated in the entry at an after day, to support the excuse set up on the seizure of the vessel, that she was seeking relief because of sea damages and the loss of water. Neither the mate nor

the passenger, in their testimony, supports the statements of the log, or the evidence of the master in this respect, on his examination in preparatorio. Another flagrant inconsistency in the master's evidence under the 12th and 24th interrogatories forcibly impairs his title to credit as a witness.

Upon the facts and law of the case, the libellants have, in my judgment, established the culpability of this voyage. The claimants fail to show a legal transfer of the vessel from her enemy owner to the neutral claimant. She came out of a blockaded port clandestinely on the voyage next preceding this on which she was captured. She was hired, freighted, and despatched on this voyage with full knowledge of the existence of the war and of the blockade of Charleston and the Confederate ports. She was destined for Charleston or a blockaded port in that vicinity, and an attempt to make such unlawful voyage was made and persisted in, in her navigation, to the time of her capture. The papers of the ship, setting forth the destination of the voyage, were intentionally falsified. The log was unlawfully mutilated, and falsely changed and varied in important entries. The condemnation and forfeiture of the vessel and cargo are decreed.

Case No. 9,074.

The MARIA.

[Blatchf. & H. 331.]

District Court, S. D. New York. Oct. 19, 1832.

SEAMAN'S WAGES—MISCONDUCT — IMPRISONED ON SHORE—LEFT BEHIND—CLAIM FOR TIME —EFFECTS ON BOARD.

1. Misconduct in a seaman will not be punished by an absolute forfeiture of his wages and of his effects on board, unless it be continued or repeated, or, if occurring but once, be of a highly aggravated character.

[See The Almatia, Case No. 254.]

2. If a master causes a seaman to be imprisoned on shore for misconduct, he ought, before leaving port, to ascertain if the seaman is willing to return to his duty.

3. If the seaman is imprisoned and wrongfully left behind, he will, in an action in rem for his wages, be entitled to include in his claim the time he is thus imprisoned and detained, and his necessary disbursements during that time, and the value of his property which was left on board; but direct damages, by way of compensation, are not, under such circumstances, recoverable in a court of admiralty.

4. If the voyage mentioned in the shipping articles is broken up without cause, and without the seaman's consent, he may recover wages for the whole voyage stipulated, deducting his earnings meanwhile.

[Cited in Highland v. The Harriet C. Kerlin, 41 Fed. 224; The Idlehour, 63 Fed. 1019.]

This was a suit in rem for seaman's wages. The defence was, that the libellant had, by disobedience and misconduct in the port of New-Orleans, forfeited his wages, wearing apparel, &c. The shipping articles were for a voyage from Boston to New-Orleans, thence to a port in Europe, and thence to the United States. The vessel returned directly from New-Orleans to New-York, without any cause assigned or shown for the non-performance of the agreed voyage; and it did not appear that the intended change of voyage was made known to the seamen, or acquiesced in by them. On the voyage out to New-Orleans, the conduct of the crew was unexceptionable. At New-Orleans, after the vessel had arrived at the wharf, and about noon of the day of her arrival, Rogers, the libellant, went on shore without leave, and against the orders of the mate, and returned that evening in a state of intoxication. The next morning, when called to duty, he did not turn out at the call. No other act of insubordination was shown. He was subsequently, but not the same day, put into prison, and was left at New-Orleans, when the vessel sailed.

Edwin Burr, for libellant.
William Emerson, for claimant.

BETTS, District Judge. The acts of disobedience or misconduct which are proved against the libellant are not enough to justify the withholding of all his wages. Courts will not visit, with an entire forfeiture of wages, every act of disrespect or disobedience by a seaman to his officers, or every neglect of duty. The misconduct must be either continued or repeated, or, if occurring but once, must be of a highly aggravated character, to subject a seaman to a forfeiture of the wages of a whole voyage, previously earned by him, and to justify, moreover, his imprisonment and his abandonment in a foreign port without money or clothing. This is the well-understood doctrine of maritime courts, both in this country and in England. Abb. Shipp. 472, and notes; The Mentor [Case No. 9,427]; Thorne v. White [Id. 13,989]; Relf v. The Maria [Id. 11,692]; Black v. The Louisiana [Id. 1,461]; Drysdale v. The Ranger [Id. 4,097].

The act of disobedience in the libellant was, his refusing to come back on board the vessel when ordered by the mate, and his absenting himself for half a day, and neglecting to turn out on the following morning when called to duty. No one of these offences calls for a forfeiture of wages. He behaved well up to the time of his arrival at New-Orleans; and the imprisonment he there suffered was itself a severe punishment. His not coming promptly to work on the morning after his return, was not noticed at the time, and was ascribed, no doubt properly, to the stupor following his recent debauch. After he was put in prison, there was no effort made on the part of the officers to induce him to return to his duty, and he did not even have notice that the ship was about to sail.

It was the duty of the master to have given him such notice, and to have ascertained whether he was willing to return to his duty; and, if he then persisted in refusing to do so, the master would have been justified in treating him as a deserter. The Bulmer, 1 Hagg. 163. I am, therefore, of opinion, that he is entitled to wages for the voyage, with an abatement because of his fault, and also to the value of his property left on board. Since the voyage actually performed was varied from the one stipulated in the shipping articles, without cause and without the consent of the seamen, the latter is to be taken as the voyage upon which the wages are to be estimated. This precise point has been adjudged in this state. Hoyt v. Wildfire, 3 Johns. 518. The admiralty courts of this country adopt the same doctrine. Woolf v. The Oder [Case No. 18,027]; Moran v. Baudin [Id. 9,785]; Emerson v. Howland [Id. 4,441]. See, also, 3 Kent, Comm. 187.

When the voyage is improperly broken up, or the mariner is wrongfully discharged in a foreign port, he is entitled to compensation for his charges and expenses incurred in consequence, which is sometimes given in the name of wages, and sometimes in the form of damages for breach of contract. I shall not regard the libellant's imprisonment any further than as it marks the time he was out of employ, and was necessarily detained at New-Orleans. If he makes claim to compensation, founded on the act of the master in imprisoning him, it must be pursued in another form, and before a different tribunal. He ought, however, to be allowed any disbursements he was subjected to for board, or for obtaining necessaries and comforts during the period of his imprisonment.

As the usual course of trade between New-Orleans and Europe is to the port of Liverpool or Havre, either of these may be taken by the claimant as the one to which the vessel would have gone, and wages will be allowed for the ordinary time of a voyage to such port, for the time of unlading and lading, and for the return of the vessel to the United States. On the other hand, the wages earned by the libellant, from the time he left New-Orleans up to the time when, by the estimate, the vessel would have returned to the United States, and also three days' wages for the day he was absent at New-Orleans without leave, and also the sum paid by the vessel for a man to supply his place, during that absence, are to be deducted. As the misconduct of the libellant appears to have been a sudden freak after the vessel had arrived in port, and was attended with no ill consequences, I consider the punishment already inflicted upon him as fully commensurate with the gravity of his offence.

It will be referred to the clerk to ascertain the amount due to the libellant, in conformity with the principles which have been indicated.

Case No. 9,075.

The MARIA.

[Deady, 89.] [1]

District Court, D. Oregon. July 26, 1864.

SHIPPING — SALE TO FOREIGNER — FORFEITURE — CORPORATION — ON CREDIT — AMERICAN REGISTER — SEAMAN'S WAGES — UNLICENSED ENGINEER.

1. A sale of a vessel to a corporation organized and existing under the laws of a foreign country, is a sale "to a subject or citizen of a foreign prince or state," as the case may be, within the meaning of section 16 of the registry act (1 Stat. 295), without reference to the nationality or citizenship of the shareholders therein.

2. But if such corporation were not a subject within the purview of such section, then if any of the shareholders therein were such subjects, such sale would be thus far, and therefore "in part," a sale "to a subject or citizen of a foreign prince or state."

3. A sale upon credit, and upon the condition that the purchaser shall not use the vessel until the purchase money is all paid, and that if default is made therein, the seller may retake the vessel into his possession, is a sale within such section 16.

4. Sale of vessel to a subject of a foreign prince, how and by whom made known, and upon whom, is the burden of proof concerning the omission to make such sale known.

5. Upon the sale of a vessel to such subject, she is no longer entitled to the benefit of her American register; and if she is afterwards navigated thereunder, it is a violation of section 27 of the registry act (1 Stat. 298).

6. An unlicensed engineer cannot recover wages for services on a steam vessel engaged in carrying passengers on the waters of the United States.

In admiralty.

Edward W. McGraw, for United States.
Amory Holbrook, for claimant Fleming.
Lafayette Grover, for claimant Lubbock.
David Logan, for Gibson.

DEADY, District Judge. This suit is brought by the United States to enforce a forfeiture of the steamboat Maria, for alleged violations of sections 16 and 27 of the registry act, of December 31st, 1792 (1 Stat. 295, 298), which read as follows:

"Section 16. If any ship or vessel * * * which shall be hereafter registered as a ship or vessel of the United States, shall be sold or transferred, in whole or in part, by way of trust, confidence, or otherwise, to a subject or citizen of any foreign prince or state, and such sale or transfer shall not be made known, in manner hereinbefore directed, such ship or vessel, together with her tackle, apparel and furniture, shall be forfeited."

"Section 27. If any certificate of registry or record shall be fraudulently or knowingly used for any ship or vessel not then actually entitled to the benefit thereof, according to the true intent of this act, such ship or vessel

[1] [Reported by Hon. Matthew P. Deady, District Judge, and here reprinted by permission.]

shall be forfeited to the United States, with her tackle, apparel, and furniture."

The libel of information was filed on the date of the seizure—March 3d, 1863—and the first article thereof, alleges that the Maria, at the port of San Francisco, on July 29, 1858, was duly registered as an American vessel, of $69^{81}/_{95}$ tons burthen, with William Lubbock sole owner and master; that in August, 1858, the Maria cleared from the port aforesaid for the foreign port of Victoria, where in the year 1859, she was sold and transferred to a foreign corporation—the British Columbia and Vancouver's Island Steamboat Co.—the same being a body corporate under the laws of Vancouver's Island, and composed in whole or in part of aliens; that afterwards—about August 8, 1862—the Maria entered at the port of Astoria, in the district of Oregon, with Robert Haley as master, the same being the first American port that she had entered after the sale and transfer aforesaid, and said master did not then make such sale known to the collector at Astoria, but fraudulently and wrongfully concealed the same therefrom, whereby the Maria became forfeited, etc. The second and third articles of the libel are substantially the same as the first, except that in the third, it is further alleged, that said Lubbock first sold an interest in said vessel to certain persons at Victoria, citizens of the United States, and that afterwards said Lubbock, and such other persons, sold and transferred her to the foreign corporation aforesaid; that upon the entry of the vessel at Astoria, said Haley filed the American register aforesaid, with the collector of that port, together with a certificate of Allen Francis, United States consul at the port of Victoria, dated July 31, 1862, to the effect that the Maria was then owned by one John T. Wright, of San Francisco, and also his own affidavit that he was an American citizen and master of the Maria, and did then and there demand of and apply to the collector, for a coasting license for said vessel. The remaining article alleges, that the American register aforesaid was by the said vessel knowingly or fraudulently used at the port of Astoria, at the time of her entry then as aforesaid, she not being then entitled to the use of such register, according to the true intent of the act of December 31, 1792, whereby the Maria became forfeited, etc.

On April 1, John C. Gibson, intervening for his interest, answered the libel, wherein he alleged there was due him for services as engineer upon the Maria, at the wages of $200 per month, from July 27 to November 8, 1862, the sum of $728, and also $256 advanced by him about August 26, 1862, to the master and clerk, to purchase necessary supplies for said vessel.

On April 6, John R. Fleming filed a claim of ownership and answered the libel, denying all the material allegations therein, except the ones concerning the issuance of the register to the Maria, at San Francisco, her sailing to the port of Victoria and remaining there until her entry at Astoria.

On April 13, the claimant, Fleming, answered the claim of Gibson for wages and money advanced, wherein he denied all knowledge of money advanced, but admitted that Gibson served as engineer from July 28 to September 17, 1862, for which he was entitled to the customary wages of $150 per month, and the further sum of $11 expended by him for board while engaged in repairing the vessel, which amounts had been duly tendered to said Gibson and by him refused; alleges that Gibson was employed by one John T. Wright, who then owned the vessel, and that as soon as claimant came into possession of the vessel—about September 17, 1862—he discharged Gibson.

On April 6, the libellant filed exceptions to the claim of Gibson for money advanced to the master and clerk; and on the same day Robert Haley aforesaid, as agent of William M. Lubbock aforesaid, filed a claim of ownership and answered the libel, denying thereby all the material allegations of the same, except the ones admitted by the claimant Fleming, and alleging that said Lubbock is the sole owner of the Maria, and he, Haley, is the master and husband thereof and duly authorized by said Lubbock, now of San Francisco, to appear and make this claim and defense on his behalf.

On the trial the libellant read the testimony of C. A. Gillingham, Alexander D. McDonald, Frank Tarbell and Allen Francis, of Victoria, taken upon letters rogatory; and that of H. C. Leonard and William Irvine, taken before the court; also the following documents: A certified copy of the "Memorandum of Association of the British Columbia and Victoria Steam Navigation Co."; and of the entry in the books of the American consulate at Victoria, concerning the Maria. The claimant, Fleming, read in evidence a bill of sale of the Maria, dated September 1, 1862, from John T. Wright to himself, and acknowledged at Victoria the day of its date, before Allen Francis, aforesaid; also an extra-official certificate from said Allen to said Wright, dated March 21, 1863, wherein the former, for some reason not disclosed, certifies that on July 31, 1862, said Wright consulted with him about the propriety of purchasing the Maria, and that upon inspection of the papers then deposited in his office, including "various bills of sale," he advised said Wright, that as the vessel had an American register, and had never been under the British flag, he might purchase her with safety. The claimant, Lubbock, offered no evidence.

The following facts are satisfactorily proven: That early in the Frazer river gold excitement, in the summer of 1858, the Maria being a registered American vessel, the property of the claimant Lubbock, was taken to Victoria, to navigate the waters of British

Columbia, that the vessel was commanded by Henry Lubbock, a brother of the claimant, William M., who, in the early part of 1859, sold one half of her to Leonard and Green, American citizens of Portland; Ainsworth and Thompson, of the like citizenship and residence, but then at Victoria, being interested in the purchase; that the Maria was run in opposition to the boats of the British corporation aforesaid, under special permits from the colonial authorities, until the close of 1859, or the beginning of 1860, when she was sold by her American owners aforesaid, to the corporation aforesaid, who continued to own her until sometime between May and August, 1862, when she was transferred to John T. Wright, aforesaid, by said corporation, for the purpose of being brought to Portland, to navigate the waters of this district, where she afterwards arrived, and remained until seized as alleged in the libel—said Wright being an American citizen, but then, and now, a resident of Victoria, and a large stockholder in said British corporation. A point is made on behalf of the claimant, Fleming, that the transfer to the British corporation was conditional, and did not amount to a sale within the purview of section 16 of the registry act. The facts are, that the Maria was sold and delivered to the corporation for $20,000. The terms of the sale were, that the corporation was to pay this sum in installments, bearing a certain proportion to the profits of their business. These profits, it was naturally supposed, would be much enhanced by the purchase, and thus the corporation expected to make the payments agreed on. It was also agreed, that if the corporation should fail to make the payments as per contract, that the sellers should have the right to retake the Maria into their possession, and to prevent any depreciation of their security in the meantime, it was provided, that the vessel should not be used by the corporation, until all the purchase money was paid, except an occasional trip, when one of its other boats might be disabled. Substantially, this is the testimony of Leonard, one of the sellers, and there is nothing in the case that suggests a doubt as to its correctness. The testimony of Irvine is to the same general effect, though being a very unwilling witness for the libellant, he endeavors in his account of the transaction, to make it as mild as possible.

This was a sale by way of trust or confidence at least; the trust and confidence being, that if the corporation should be unable to pay the purchase money, according to the terms of sale, then it would return the vessel to the sailors. To bring a case within the purview of the act, it is not necessary that the sale should be a beneficial or bona fide one, but it is sufficient if there be "a transmutation of ownership, by way of trust, confidence or otherwise." The Margaret, 9 Wheat. [22 U. S.] 424. In the case just cited, the supreme court held that a mere colorable change of ownership or sale, made for the purpose of evading the revenue laws of a foreign country, was a sale within the statute. But if it was a conditional sale, the condition being in substance and effect, that the seller might reclaim the property, upon a failure to pay the purchase money; nevertheless, it was a sale. The property in the vessel in the meantime, was in the corporation, and if she had been destroyed by any casualty, it would have been its loss. But, in fact, the British corporation paid the purchase money as it agreed to, or as the sellers subsequently agreed to receive it, and the vessel was never retaken by the latter, but remained in the possession of the former. In pursuance of the terms of the sale, the corporation paid the former American owners the sum of $13,000, when in December, 1861, or January, 1862, Leonard, acting on behalf of the Portland parties, and Gillingham, of the claimant Lubbock, arranged with the corporation to take its notes, endorsed by the witness Irvine, for the sum of $7,000, the amount then remaining due, and give the latter an absolute bill of sale of the vessel. This arrangement was carried out at once. Leonard and Gillingham executed the bill of sale. The notes were made and delivered, and afterwards duly paid. Here, then, at least, was an absolute and unqualified sale to this foreign corporation.

Counsel for the claimants insist that the government should produce the bill of sale last mentioned; but upon the evidence it is probable, and such is the legal presumption, that this instrument as a muniment of title followed the ownership and possession of the Maria, and that, therefore, it is under the control of the claimants, at least in the case of Fleming, who claims to have purchased since the execution of this bill of sale to the corporation. Again, it is questioned whether this corporation, the British Columbia and Victoria Steam Navigation Company, can be considered "a subject or citizen of a foreign prince or state." The evidence proves that the corporation was formed and exists under and by virtue of the laws of the foreign country where it is located and doing business. Without reference to the nationality of the stock or stockholders therein, I am satisfied that the corporation, for the purpose of section 16 of the registry act, must be deemed a subject or citizen of the country by authority and permission of whose laws it was created and exists. Manifestly, the omission to make known a sale to such a corporation, is within the mischief intended to be guarded against and prevented by the section. But even admitting that the individuals who constitute the corporation or association, must be "subjects of a foreign prince or state," to make the latter such, I think there is enough before the court to warrant the conclusion that this was a sale to such a subject. The "memorandum of association" of the company, contains a list of the stockholders and

their places of residence. Fifteen of them—about three fifths of the whole number—appear to be residents of Vancouver's Island, and one of the remainder of Canada. There is direct testimony that some of them are British subjects, and that two or three of the heaviest stockholders are American citizens, though probably they are British subjects by birth, and now so in fact. A sale in a foreign port to a person resident there, particularly if such person be of foreign birth, is sufficient to put the claimant upon the proof that such vendee is a citizen of the United States. But it is not necessary that all these individuals should be subjects of a foreign prince, for if any one of them is, then the sale was thus far and therefore "in part" made to such subject, and within the purview of the act.

It is claimed by counsel for claimant, that the Maria did not sail under the British flag, and was not registered as a British bottom; and much stress is laid upon these circumstances in considering the question of whether or not there was a sale. There is no direct testimony upon the subject, but all the circumstances tend to support the conclusion that the vessel was not registered in British Columbia. The fact that she was scarcely if ever used by the corporation while in its possession might account for the non-registry, if it was necessary or material to account for it. The forfeiture is not declared on account of the vessels obtaining a foreign register or not, but because of a failure to make known a sale to a foreigner. It makes no difference, then, whether the Maria sailed under the British flag, whatever that may mean, or not, or whether she had a British registry or not. If the alleged sale was doubtful, these circumstances might be evidence upon the question. But a sale, proven as this is beyond a possibility of a doubt, cannot be affected by the mere fact that the vessel did not have a British register. It appears that soon after the bill of sale to the corporation, and probably as early as May or June, 1862, John T. Wright, formerly of San Francisco, became a large shareholder and active manager in such corporation, and a resident of Victoria. The Maria being still laid up, the question of sending her to Portland began to be mooted in the corporation. It is a matter of general notoriety, that about this time a great impetus was given to steamboating on the waters of the Columbia and Willamette rivers, by the recent discovery of gold mines to the eastward of the Cascade Mountains. It is possible that the prospect of sharing in this rich harvest, or selling the Maria at a high figure to those who were already engaged in the business, was the immediate inducement for the contemplated removal. From all the circumstances, particularly the subsequent developments, it is equally probable that said Wright was the prime mover in this project. Irvine testifies, that in a conversation about this time with a fellow-stockholder, on the propriety of sending the Maria to Portland to engage in the navigation of the waters of this district, that he objected to her going as the property of the corporation, for fear she would be libeled here—in other words, seized as a foreign bottom engaged in the coasting trade—saying that if she went at all he wanted her to go as the property of said Wright. Soon after Irvine was informed by the same stockholder, that it had been settled that the Maria should go to Portland as the property of Wright. And this testimony shows who Irvine thought the Maria then belonged to. It is consistent with the fact otherwise abundantly established, that she was and had been the property of the British corporation of which he was a stockholder. This being the case, he was not willing to risk her being sent to Portland as the property of such corporation, but if Wright saw proper to become the owner and take her, well and good.

On July 30, 1862, the Maria arrived at Victoria from New Westminster, under charge of Wright as owner and master, on the way to Portland. At the consulate at Victoria, Wright produced the register issued to the Maria at San Francisco, and induced Consul Francis to make an entry in the records of his office concerning the Maria in these words: "1862, July 31. Bill of sale to John T. Wright, Jr., from C. A. Gillingham and A. C. Leonard, value $——." In his testimony, Francis says he made this entry upon information derived from Wright, and that otherwise he knew nothing of such sale to Wright. Both Leonard and Gillingham, disinterested and credible witnesses, testify that they never sold or made any bill of sale of the Maria to Wright. Wright is deeply interested in the result of this suit, and the whole circumstances excite a strong suspicion, that he is the real claimant, and that Fleming is only put forward because it was thought that he might have some advantage over Wright, by claiming as an innocent purchaser. The bill of sale to Fleming is dated September 1, 1862, but it is doubtful if he was ever in possession of the vessel. Why don't Wright produce the bill of sale from Leonard and Gillingham to himself, which he represented to the consul to exist in July, 1862? If it is lost or mislaid, why not account for it? He is a competent witness. There is no doubt but that the consulate entry of July 31, 1862, was fraudulent and false, and that Wright procured it to be made, to show an apparent title in himself directly from the American owners, and thereby suppress the fact of the intermediate sale to the foreign corporation, and to deceive the collector of this district into receiving and entering the Maria as an American vessel and entitled to a coasting license. There is no evidence or pretense that any of the sales or transfers made during the three

years the Maria remained in British Columbia, were ever reported to the collector at Astoria, or that the American register was ever returned to any American collector, other than as stated at Astoria. This he did, either by false representations to the consul or by exhibiting to him a forged bill of sale. His silence, now that he is called upon to explain, justifies the worst conclusion. If he ever owned the Maria at all, he bought her of the corporation. To this conclusion points the testimony of McDonald, who testifies that he knows from the members of the corporation and an inspection of their books, that Wright did so purchase the vessel, and paid for her by giving in exchange $^{19}/_{40}$ of the American steamboat Eliza Anderson, now and then navigating Puget's Sound.

In pursuance of the fraudulent purpose above mentioned, Wright on the same day that he procured the false entry of sale to be made in the records of the consul's office, procured the consul, by some means, to make the extra-official endorsement upon the American register, to the effect that the Maria was the property of said Wright. Haley, the now professed agent of the claimant Lubbock, was present when this endorsement was made, and on the same day was qualified as master before the consul, and took command under Wright as owner. He also sailed the Maria to Astoria under this register, and there surrendered it and applied for a coasting license, first entering the vessel as the property of Wright, which involved the necessity of his swearing to that fact. As the law required him to swear to the ownership, it is fair to presume that it was done.

How then is the claim of Lubbock, or rather that of his professed agent, sustained? Waiving the question of forfeiture, he does not appear to have a title of right to the Maria. It is satisfactorily shown that Lubbock sold her long since. He does not appear in person to make this claim, or to testify in support of it, although Haley states that he is of San Francisco—and it is highly probable that he is to-day ignorant that one has been made for him. Even Haley himself does not come forward and testify as a witness in support of the claim. Fleming shows a paper title from Wright, but offers no evidence to show that Wright ever had any interest in the vessel to transfer to him, except the false entry in the consular records of the bill of sale from Leonard and Gillingham to him. Upon this ground, his claim might be dismissed as unfounded in fact. But I think it sufficiently appears from the evidence of the libellant, that Wright did become the owner of the vessel before her departure from Victoria. As has been said, it is probable that he purchased her from the British corporation, and gave $^{19}/_{40}$ of the Eliza Anderson in exchange. But this fact Fleming dare not avow. He has denied in his answer that the corporation ever purchased or owned any interest in the Maria. Either Wright purchased from the corporation or he did not. If not, then so far as appears, he never had any interest in the vessel and could not transfer any to Fleming. If he did, then the corporation must have been the owners in some way—"trust, confidence or otherwise"—and the sale by which it became such owner not being made known upon the return of the person in charge of her to an American port, but studiously and fraudulently concealed, she thereby became forfeited under section 16 of the registry act, some time before the bill of sale to Fleming. This being so, Wright lost his property in the vessel on August 8, and therefore had none to transfer or convey to Fleming on September 1, 1862.

The law is well established that the forfeiture, unless otherwise provided, attaches to the property at the moment of the commission of the act for which the forfeiture is denounced, and that from that moment the title of the previous owners is divested. Gelston v. Hoyt, 3 Wheat. [16 U. S.] 311; 1960 Bags of Coffee, 8 Cranch [12 U. S.] 398, 417. It matters not whether Fleming purchased after this in good faith or otherwise. The forfeiture to the United States had occurred, and this proceeding is only for the purpose of establishing that fact by a judicial decree. The doctrine of an innocent purchaser, even if Fleming be one, which is very doubtful, has no application to the case. The two circumstances which constitute a cause of forfeiture under section 16—a sale to a foreign subject and the neglect to make such sale known as directed by the act, are established. There can be no question on the evidence but that there was a neglect to make this sale known, not only "in the manner hereinbefore directed," as expressed in such section, but in any manner by any one having charge of or connected with the vessel. But how this sale is to be made known is not so clear as might be. The question has not been made in the case, and it is not necessary to particularly consider it. Mr. Justice Story, in The Margaret, 9 Wheat. [22 U. S.] 422, takes it for granted, that the "hereinbefore directed" of section 16, refers to section 7 of the act, and so far as I have observed, there is no other section of the act to which this clause can refer. Section 7 provides for the giving bond for a register, and one of the conditions of such bond, is that in case of any transfer of the vessel to a foreigner at a foreign port, the "master or person having the charge or command thereof, shall, within eight days of his arrival in any district of the United States, deliver up" the register thereof, "to the collector of such district." This direction appears to imply that the duty of delivering up the register devolves upon the person in charge or command of the vessel at the time of the transfer. The act intends that such transfer shall separate the vessel and the register. Presuming that the American owners and persons in charge at the time of this sale to the British corporation returned to a district of the United

States, this register should have been delivered up long ago. But, as a matter of fact, it was not returned until the entry of the vessel at Astoria in August, 1862, and then it was not delivered up with notice of sale, as provided in these sections. I question whether Haley could have made the delivery of the register and given the information of this sale required by the act. Nor do I see my way clear in the absence of evidence to that effect, to presume that the party in charge at the time of this sale has yet returned to any district of the United States, and therefore had an opportunity to cause a forfeiture of the vessel by neglecting to deliver up the register and make known such sale. To show this in the first instance, is, I presume, a part of the libellant's case, though very slight proof may put the burden on the claimant to show the fact that such party is still abroad. True, it appears that Leonard has returned to this district, and it may be that under the circumstances it would be proper to consider him the party in charge of the vessel at the time of the sale, and whose failure to deliver the register and make known the sale upon his return to the United States, caused the forfeiture of the vessel. It also appears that Ainsworth, another one of the owners at the time of the sale to the British corporation, gave the information upon which this seizure was made, from which it is to be inferred that he had already returned to the district without delivering up the register or making known such sale.

The facts also show a clear case of forfeiture under section 27—the sailing of the Maria from Victoria to Astoria, and her entry at the latter port by the use of this register when the master and owner both well knew that she was not entitled to it, because she had been sold to a foreign subject since it was given, and should have been returned long before. And not only was this misuse of the register knowingly made, but also fraudulently. There must be a decree of condemnation. As to the claim of Gibson for wages, there is no proof that he was a licensed engineer under the laws of the United States, and therefore he was not qualified to serve in that capacity on the Maria while she was navigating the waters of this district. This fact is fatal to a recovery for the period that the vessel navigated such waters. After careful consideration this court held in The Pioneer [Case No. 11,177] that a pilot or engineer not licensed under the laws of the United States could not recover wages for services on steam vessels navigating the waters of the United States, and carrying passengers. But I see nothing in this fact to prevent the engineer from recovering wages for the time occupied in coming from Victoria to Astoria. This service was not performed upon the waters of the United States, nor on a voyage commencing on them, but on the high seas, and on a voyage from a foreign port. Besides, it may be considered that as the vessel came over in ballast, she was not engaged in carrying passengers, unless being ready and willing to carry passengers, if they offer, is being so engaged.

It is further urged by the district attorney, that this voyage was an illegal one, and that therefore the vessel is not liable for the wages of any one who contributed to it. But I cannot perceive wherein the voyage was illegal. The use of the registry was illegal, but the engineer is not responsible for that, or even chargeable with notice of the fact. The property in the vessel was already forfeited in fact to the United States, but until the government asserted its right to the forfeiture, whoever was in possession of her might make any lawful use of her—and for aught that appears a voyage from Victoria to Astoria was such a use. Nor do I wish to be understood as admitting that a forfeiture of a vessel affects the lien of the crew thereon, unless such forfeiture is caused upon or by the voyage on which such wages are earned; and that, too, by the vessels being employed in some transaction or voyage which is made a crime for any one to aid or participate in, or the unlawful purpose of which is manifest to the commonest understanding. The voyage from Victoria here was an extraordinary one for a vessel of this class, and I will allow Gibson one month's pay for it, at the rate of $200 per month.

Concerning the claim for money advanced, on the evidence, I have serious doubts as to the fact. It appears quite certain that Gibson loaned Haley $225, but I think it not unlikely that it was loaned to the latter for his own use, or that some of it was money which Haley lost to Gibson at cards. The proof of the claim rests upon Haley's testimony, and he has shown himself a very unreliable witness throughout this suit. The evidence as to the vessel's necessities is very indefinite. Haley states that between $70 and $80 of the sum was paid to Allen and Lewis, on account of freight taken from the steamship Pacific, of San Francisco, and that there was an open account between the vessels. Averaging this item at $75, it is disallowed. The remainder of the claim—$150—is allowed. Admitting that it is doubtful if all this sum was ever applied to meet the necessities of the vessel, and without attempting to argue the question of fact involved in its allowance, I remark that it is a hard case. By no fault of Gibson's he has been kept out of the money justly due him by the prolonged pendency of this suit. And even now he will be paid in legal tender notes received upon the sale of the vessel during such pendency at par, when their actual value on this coast is far below it.

Decree, that the vessel is and was forfeited to the United States for the causes alleged in the libel, and that Gibson recover of said vessel the sum of $350, which sum is ordered to be paid out of the funds in the registry of the court arising from the sale of the Maria,

heretofore made, and that the remainder of such funds, after paying thereout the costs of this suit, be disposed of as by statute is provided.

MARIA, The (RELF v.). See Case No. 11,692.

MARIA, The (SPRAGUE v.). See Case No. 13,253.

Case No. 9,076.

MARIA v. WHITE.

[3 Cranch, C. C. 663.] [1]

Circuit Court, District of Columbia. Dec. Term, 1829.

SLAVERY—MARYLAND IMPORTATION ACT—SUIT FOR FREEDOM—RESIDENCE—INTENTION.

1. A slave was brought into this county by her master, a delegate from the territory of Florida, to wait upon his family while attending congress; and, at the end of the session, not being in a condition to be carried back with safety, was left here until the meeting of the next congress, with leave to hire herself out, and receive her wages to her own use, which she did until the return of her master, who was re-elected, and who, at her request, offered to sell her to her husband, a free colored man, residing in Washington, for $400, if he could raise the money, but he could not, and never paid it, or any part of it. The court (nem. con.) refused to instruct the jury that these facts were not evidence of an importation, contrary to the Maryland act of 1796, c. 67.

2. They also refused to instruct the jury, that, upon that evidence, they ought to find their verdict for the defendant; but instructed them that the petitioner is not entitled to freedom under the first section of the act, unless she was brought into this county, by the defendant, for sale, or to reside therein; and that the circumstances stated, although found by the jury, are not conclusive evidence that the petitioner was brought into this county with such intent, or for sale; and that the residence contemplated by the first section of the act is a permanent residence, as contradistinguished from a sojournment.

3. The court also refused to instruct the jury, that the defendant's offer and agreement to sell the petitioner to her husband, under the circumstances stated, was evidence of an importation, contrary to the act of 1796, c. 67, unless the jury should believe, from the circumstances given in evidence, that the defendant had no intention, at the time of importation, that she should be sold, or should reside in this county.

The petitioner, negro Maria, claimed her freedom by reason of importation, contrary to the act of Maryland, 1796, c. 67; by the first section of which it is enacted, "that it shall not be lawful to import or bring into this state, by land or water, any negro, mulatto, or other slave, for sale, or to reside within this state. And any person brought into this state as a slave, contrary to this act, if a slave before, shall thereupon cease to be the property of the person or persons so importing, &c., and shall be free." By the fourth section it is provided, "that nothing in this act contained shall be construed or taken to affect the right of any person or persons travelling or sojourning with any slave or slaves within this state, such slave or slaves not being sold, or otherwise disposed of in this state, but carried out of this state, or attempted to be carried." Upon the trial, evidence was given to prove that the petitioner was the slave of the defendant [Joseph M. White], a resident of the territory of Florida, and the delegate in congress from that territory. That he brought the slave to Washington to wait upon his family, while he was attending congress, in the winter of 1828–1829. That she remained with his family during the session; but, at the end of the session, on the 4th of March, 1829, was too far advanced in pregnancy to be removed, with safety, to Florida; and was, therefore, left by her master in Washington. That, at her request, after her confinement, she was permitted by her master, who was reëlected, to hire herself out in Washington, until he should return to congress, in December, 1829; which permission was given by a writing inclosed in a letter to Mr. French, the agent of the defendant. That she accordingly hired herself out, and received her wages to her own use. That the defendant, learning that she had a free husband in Washington, and that she wished to live with him, agreed that if he could raise $400 for him he should have her. That the money was never raised, nor any part of it ever paid to the defendant.

Upon this evidence, Mr. Key, for petitioner, prayed the court to instruct the jury, that if, from the evidence, they found the facts to be as above stated, then the continuing of the petitioner in this county, under such circumstances, is evidence of an importation contrary to the law of 1796, c. 67.

But THE COURT (nem. con.) refused to give the instruction. Whereupon Mr. Swann, for defendant, prayed the court to instruct them, that upon these facts, if believed by them, they ought to find their verdict for the defendant.

Which instruction THE COURT refused to give; but instructed them that the petitioner is not entitled to freedom under the first section of the act of 1796, c. 67, unless she was brought into this county by the defendant for sale, or to reside therein; that the circumstances aforesaid, although proved to the satisfaction of the jury, are not conclusive evidence that the petitioner was brought into this county with such intent, or for sale; and that the residence contemplated in the first section of the act is a permanent residence, as contradistinguished from a sojournment.

Mr. Key then prayed the court to instruct the jury, that "if they believed that the defendant contracted with the husband of the petitioner, (a free man,) for the purchase of the petitioner, at the price of $400, and that the said husband agreed to pay the said sum of money, as the price of the petitioner;

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

then such contract is evidence of an importation contrary to the act of assembly of 1796. Unless the jury should, from the circumstances given in evidence, believe that the defendant had no intention, when he brought in the petitioner, of her being sold, or residing in this county."

But THE COURT refused to give the said instruction. And CRANCH, Chief Judge, suggested a doubt, whether a slave gained his freedom, under the third section of the act, by being sold within three years after being imported, if he was not originally imported for sale, or to reside.

The cases cited in argument were, Baptiste v. De Volunbrun, 5 Har. & J. 86; Defontaine v. Defontaine, in a note to the former case, 5 Har. & J. 86; Henry v. Ball, 1 Wheat. [14 U. S.] 5; Gardner v. Simpson [Case No. 5,237], in this court, at April term, 1823; Jordan v. Sawyer [Id. 7,521], in this court, at the same term; Stewart v. Nokes, 5 Har. & J. 107.

MARIA, The ANN. See Case No. 427.

Case No. 9,077.

The MARIA BISHOP.

[Blatchf. Pr. Cas. 552.] [1]

District Court, S. D. New York. Oct. 14, 1863.

PRIZE—ENEMY PROPERTY—SALVAGE—AFTER CAPTURE.

1. Vessel and cargo condemned as enemy property.

2. The vessel and cargo having been shipwrecked after seizure, and having been saved by salvors, the court allowed to the salvors, as salvage, one-half of the net proceeds of the salved property, deducting the costs incurred by the United States in the prize suit.

In admiralty.

BETTS, District Judge. The above vessel and cargo were captured off Charleston harbor, May 17, 1863. After seizure the vessel and cargo were shipwrecked. The vessel became a total loss, and was abandoned at sea, and the cargo was reclaimed by salvors, and brought to this port for adjudication. A libel was filed by the libellants, against the prize, in this court, June 3d thereafter, and a writ of attachment was issued thereon on the same day, returnable on the 23d of June following. The marshal returned thereon due service of it upon the said cargo, and no person intervening therefor, except as salvors, defaults were taken, according to the course of the court, and a decree of condemnation was ordered by the court thereupon. On the hearing of the case upon the merits, it was fully proved on the part of the United States that the vessel and cargo were enemy property, owned in Charleston, and had been brought out of that port in violation of the blockade thereof. On the 2d of June, 1863, the Coast Wrecking Company filed a libel against the aforesaid schooner Maria Bishop and her cargo, demanding a salvage compensation for services, etc., in relieving and saving her from shipwreck and loss while under capture, as aforesaid, by the United States. On the 21st of June following, the United States interposed an answer and claim, and also their own libel, setting forth and demanding the same relief for the aforesaid services. The United States attorney having admitted in court the justness of such demand, and the counsel for the respective parties having submitted it to the judgment of the court to determine the amount of salvage rightfully payable for the salvage services aforesaid, the court, having examined the testimony submitted in the case, and considered the premises, adjudges and determines that one-half of the net proceeds of the salved property, deducting the costs incurred by the United States in the prize suit, be paid to the salvors, or the party representing their interests. A decree to that effect will be entered.

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

Case No. 9,078.

The MARIA JOSEPHA.

[Brunner, Col. Cas. 500; [1] 2 Wheeler, Cr. Cas. 600.]

Circuit Court, D. South Carolina. May, 1819.

INTERNATIONAL LAW—DUTIES OF NEUTRAL POWERS—NEUTRALITY.

The law of nations requires that strict neutrality should be observed between belligerents by other powers.

In admiralty.

JOHNSON, Circuit Justice. Questions of salvage are always questions of the most disagreeable kind. In vain the mind looks for relief in its anxiety to do justice by seeking the aid of fixed rules and principles. Such questions are addressed exclusively to discretion, and that discretion must move in a range to which there are no defined limits. This is attended with another embarrassing circumstance. It is impossible to separate the question of salvage from that which must finally dispose of the residue of this vessel and cargo. The same rule cannot be applied indifferently to both parties claimants. If the residue ought to be restored to the Spanish claimants, then no salvage can be demanded; if the treaty applies to the case, or if it does not apply, then much higher salvage ought to be paid than if it be adjudged to the captor. The principal question in the case, then, is forced upon me before I can dispose of that salvage; and here I cannot hesitate on the decision that must be made. The law of nations requires of the United States the observation of strict neutrality be-

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

tween the belligerents. Flagrante bello, no neutral nation is bound to pursue a course of conduct that may ultimately embroil it with the victor. We found the property in possession of one of the belligerents, and we are bound to leave it there. It is enough for us that we see a state of open war existing between two powers who are able to maintain it. The question of right is with the god of armies. This is no recognition of the independence of Buenos Ayres; it is the recognition of a fact known to all the world, and admitted by the claimant himself; that of a state of open war between Spain and one of her colonies. This is a most solemn and notorious fact by which nations can exhibit their independence to the rest of the world; and whilst the struggle continues other nations are not at liberty to distinguish between fact and right. Under these impressions I award one fifth of the net proceeds to the libelant; convinced that, had the captors been consulted at the time the vessel was taken charge of, they would have freely given that proportion to secure the rest; and that the libelants ought to be satisfied with eight thousand dollars for the service rendered.

There is another point on which I feel myself called on to make a remark; that is, the effect of the treaty between Spain and the United States. The sixth article has no bearing on the case. The object of that article is the protection of the vessels or effects of Spanish subjects from seizure, at the time of their being within our jurisdiction. Nor does the case come under the ninth article, since, in whatever light Spain may think proper to consider the cruisers of her enemy, they are not pirates in the view of other nations; and as to the second section of the fourteenth article, it makes no provision for the restitution of property captured by citizens who have accepted commissions to cruise against Spain. The provisions are, that no citizen shall accept such a commission, and that he who accepts such a commission shall be punished as a pirate. In a government of laws, everything has been done which good faith required to be done. Laws have been passed, and our courts are open for the punishment of such as accept of commissions under the enemy of Spain. But information must be lodged and evidence produced, before it can be required of the courts of justice to punish those offenders. For anything further Spain must depend upon the vigilance, activity, and intelligence of her agents; and in no case is it, or can it be made, an addition to the punishment of such offenders, that the property shall be restored, unless the United States may be made liable for indemnity; for when the capture is made, the property is vested in the government that grants the commission. It is the seizure of the state, and not of the individuals. In the case before us, there is no evidence that the San Martin privateer was fitted out in the United States. She has, indeed, very improperly, recruited her crew within our limits; and every individual concerned in that transaction will be punished, if prosecuted. But all the world knows that the arbitrary exertion of power is unknown to the genius of our constitution, and all that any state can expect of the United States is, that adequate laws should be passed to punish and prevent the commission of such acts. When acts are done in evasion of those laws, unless the government can be charged with winking at those evasions, it is not liable to indemnify Spain for such captures; and our courts of justice cannot, on that ground, violate the obligation of neutrality by seizing and restoring prizes that have been made by either party.

Case No. 9,079.

The MARIA MARTIN.

[2 Biss. 41; [1] 1 Chi. Leg. News, 57.]

Circuit Court, E. D. Wisconsin. Sept. Term, 1868.[2]

COLLISION — PRIMARY CAUSE — NEGLIGENCE—APPROACHING TOO NEAR—LOOKOUT.

1. A propeller ascending the Detroit river discovered the lights of an approaching barque and tug about two miles distant, the night being clear and starlight, but did not change her course until within half a mile of them, and then only enough to pass the tug at a distance of one hundred feet, when the barque suddenly sheered and struck the propeller amid-ships. *Held*, it was bad seamanship in the propeller to put only so short a distance between herself and the tug, and not slacken speed.

2. Though the proximate cause of the collision was the improper handling of the barque, the propeller, having committed faults, cannot go free.

3. It is immaterial that the propeller had not a competent lookout, the captain and mate having seen the lights in good season and needing no information which the lookout could give them. After they saw the lights the responsibility attached to them.

4. A vessel in tow is not excused from keeping close watch, and observing and obeying all signals.

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

In admiralty. Libel by the Northwestern Transportation Company, as owners of the propeller Cleveland, for damage caused by collision with the barque Maria Martin. [From a decree of the district court dismissing the libel (case unreported), the libelants appeal.]

Spaulding, Dickman and Finches, Lynde & Miller, for libellant.

George B. Hibbard and Emmons & Van Dyke, for respondent.

DAVIS, Circuit Justice. This case was argued last September with eminent ability, and for want of time to read the evidence

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

[2] [Affirmed in 12 Wall. (79 U. S.) 31.]

was taken under advisement. Owing to my official duties in other circuits and the supreme court, I have been unable to consider it until recently. A very decided impression was made on my mind at the argument, which has been confirmed by an examination of the testimony. The result at which I have arrived is different from that of my learned brother, and I therefore state it with diffidence on account of his superior knowledge and larger experience. As the case will doubtless go to the supreme court, and as other engagements press heavily on me, I have deemed it necessary only to give my conclusions, and shall not therefore analyze the testimony in order to prove their correctness. In all cases of this kind the evidence is conflicting. The rules of navigation being well settled are easily applied to the facts in proof, but the difficulty lies in ascertaining the facts. The propeller Cleveland, owned by the libellants, on her voyage from Ogdensburg to Chicago, during the night of the 22nd June, 1866, while in the Detroit river and near its mouth, collided with the barque Maria Martin, in tow of the tug McClellan on their way down the river and was sunk.

The point to ascertain is, with which party, if either, or both, the fault rests. It is proper to remark, if the night had been dark and there had been difficulty in discovering objects on the water, some excuse would have been afforded for this collision, but as there was a clear starlight, and the signal lights of all the vessels burned brightly, and gave sufficient indications to careful mariners, the accident ought not to have happened. After the propeller entered the river, she steered north by east and headed for the Bois Blanc light, and her officers discovered at the distance of about two miles, the lights of the tug and tow. It is not important to determine whether the propeller blew her whistle after the first or second whistle of the tug was sounded, for that she understood the signal is evident, because she ported her helm at the distance of half a mile from the tug. She swung to starboard about half a point and then steadied, the tug being to the westward of her port bow, and there is no evidence that the barque was not then nearly in range with the tug. After the tug blew her whistle, she also ported half a point and then steadied. She was then heading southwest by south one-half south. The propeller pursued her course until she was abreast of the tug—distant about 100 feet—when her wheel was put hard a-port, and she swung to starboard. This change of course was rendered necessary, as the libellants say, because the barque took a sudden sheer to port, shutting out her red light, and showing only her green light to the propeller, but if so, it availed nothing, for the barque struck the propeller on her port side, as she was swinging to starboard, and she went to the bottom of the river. The libellants do not charge that the tug was in fault, but insist the propeller was blameless, and that the responsibility for the collision rests wholly with the barque. This position is not well taken. It is clear the collision occurred in a few minutes after the propeller answered the tug's whistle, and that her officers could see, owing to the calmness of the night and the conceded brightness of the lights, that the vessels were in close proximity to each other.

It is equally clear that they knew that the Detroit river, on account of the magnitude of its commerce, and the number of tugs with loaded vessels, passing through it, had to be navigated, to avoid accidents, with great watchfulness and care, and that the tug and barque, whose lights they had made, as they were descending the river, could not be handled, in case of peril, as well as the propeller. Notwithstanding these things, we find these officers managing their boat without regard to the dangers of navigating this river, and exercising no more watchfulness than if they had been navigating the open lake. Although they saw the lights of the tug and barque and pronounced them to be very bright at the distance of two miles, yet they did not change the course of their boat until the tug had signaled them to do it, and at this time the vessels had approached within half a mile of each other. But even then by the practice of reasonable seamanship all trouble could have been avoided. If the propeller, instead of porting half a point, or three-fourths even, had gone a point further to the eastward, the collision could not have taken place. There was nothing in the way of her doing this, for the river was wide enough and there were no lights closing on them from the east. To put only one hundred feet between her and the tug, when she could with safety to herself put a greater distance between them, considering the circumstances of this navigation, was bad seamanship. Watchful and careful officers, having due regard to the rights of persons and property, would not have taken the risk that the officers of the propeller did. They surely risked enough by not changing the course of their boat until she was close on to the tug. Common vigilance required that when they changed the course of the propeller they should have made a more decided change. But these officers, besides not going further to the eastward, were in fault in not checking the speed of their boat. They should not have entered a narrow river, where, in the night, there is always more or less danger of collision, without materially slackening the speed at which they had been running. And this duty was the more incumbent on them, because at so short a distance from the tug and barque they should, as careful seamen, have apprehended the possibility of danger. It will not do to say the propeller performed her whole measure of duty, because she safely passed the tug, and that the proximate cause of the collision was the improper handling of the barque. The

propeller, having committed faults, cannot go free because the barque was also in fault. It is said the propeller had not a competent lookout, but whether she had or had not is immaterial, because this collision was not caused by any omission of duty on her part. The captain and mate of the propeller, standing abaft the capstan, with the lookout near by, in his proper position, at a distance of two miles discovered the lights of the approaching tug and barque, and from this time forward were in command of the ship, and needed no information that the lookout could give them. It would have been a useless thing to point out to them the lights which they saw in good season, and were commenting on as being very brilliant. After they saw the lights, the responsibility attaches to them; and if the ship was afterwards badly managed, the lookout is not to blame for it.

The next question for solution is, whether the responsibility for this collision rests with the propeller alone, or was the barque in such fault that the damages must be divided? It is plain, notwithstanding the faults of the propeller, that this disaster would not have occurred had the barque followed, as she was required to do, the course of the tug. That she did not follow after the tug, but, when the propeller was abreast of the tug, sheered to the port of the tug, shutting out from the propeller her red light, and showing only her green light, and continued on in this course until she struck the propeller on her port side as she was swinging to starboard, are facts clearly established by the weight of the evidence. The current or wind did not cause the sheering, for the barque moved faster than the current, and the wind, being southwest, would not cause her to sheer to port, and the officers of the boat say she steered well. It is said the fault was on the part of the tug, because at the critical moment she altered her course and turned short off to starboard. But the weight of the evidence is against this view of the case. After the tug blew her whistle she ported, as has been before stated, a half point, and then steadied herself back on her course, and was pursuing it when the propeller came abreast of her, and continued in it until after the collision. I agree that it is not easy to reconcile the sheering of the barque with the testimony of those on board of her, but we are more concerned to know that the sheering did occur than to show how it occurred. There have been many theories on this important question presented for consideration, but I have not time to examine them. The conduct of the barque was the result of either mistaking orders or careless management. We have the testimony of the mate that an important signal was mistaken, and it is not at all unlikely that the error in management commenced with this mistake.

It is in proof that the barque through the night did not steer after the tug, and, as she was a good steering vessel, the inference is plain that there was a want of proper observation on the part of those who had her in charge. The approach of the propeller was not regarded by her, because the officers of the deck understood the signal of the tug for casting off line, instead of an approaching vessel. If a vessel is in tow she is not therefore excused from keeping close watch and observing and obeying all signals. The duty of watchfulness was the greater because the river was full of boats, and, light as the night was, there was more necessity for it than if it had been daylight; but this duty does not seem to have been appreciated by the officers of the barque.

When the barque made the sudden sheer to port, the propeller, not being required to anticipate it, did all she could under the circumstances—put her wheel hard a-port.

It follows from what has been said that a decree should be entered dividing the loss, and it is so ordered.

This case was affirmed, on full argument, by the supreme court, 12 Wall. [79 U. S.] 31.

The liability of a steamer, at night, in approaching too near a sailing vessel, when there is room to give her a wide berth, enforced. The Western Metropolis [Case No. 17,440]. See also The Alabama [Id. 122].

Case No. 9,080.

The MARIANNA FLORA.

[3 Mason, 116.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1822.[2]

CAPTURE AT SEA—MISTAKE—DAMAGES.

1. Case of capture or mutual combat by mistake.

2. Where a capture is lawful, the subsequent bringing in of the captured vessel is not a cause for giving damages.[2]

This was an appeal from a decree of the district court on the libel of the Portuguese ship Marianna Flora, by Robert F. Stockton, commander of the United States ship of war, the Alligator, in behalf of himself and his officers and crew; Philip Marett, the Portuguese vice consul, and Vertura Anacleto De Britto, being claimants and respondents in behalf of the owners of the Marianna Flora and cargo. The principal facts in the case were these: On the morning of the 5th day of November, 1821, the United States schooner Alligator, whilst on a cruise to the coast of Africa, commanded by Lieut. Stockton, fell in a with a large vessel, apparently in distress, and which, when first perceived, was judged to be about nine miles from the Alligator; she was supposed, by the officers on board of the Alligator, to be in distress, from the circumstance of her lying to shortly after she was first perceived, and from her having

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

[2] [Affirmed in 11 Wheat. (24 U. S.) 1.]

apparently a flag hoisted half mast high. Lieut. Stockton made inquiries of the purser of his vessel as to the quantity of provisions on board, and said he would move towards her and see what she wanted, and the course of the Alligator was accordingly changed to the direction of the strange sail. When the Alligator had arrived within gun shot of the latter, a gun was fired from the latter, the shot of which fell at a considerable distance forward of the Alligator's bow. American colors, an ensign and pendant, were immediately hoisted on board of the Alligator. Another gun was very soon fired from the strange sail loaded with round and grape shot, upon which Lieut. Stockton directed the bow gun of the Alligator to be fired as soon as it could be brought to bear, which was done; immediately after, another gun was fired from the strange sail and was returned by one or two of the cannonades of the Alligator, which fell short of the other vessel. No more guns were fired from the Alligator until she got within musket shot of the other vessel, when Lieut. Stockton hailed her, which was only answered by another gun. Lieut. Stockton then ordered a broad side to be fired, which was done, after which he got upon the arms-chest where his person and uniform could be seen, and waved his hat and trumpet to prevent further hostilities, when two more guns were fired by the other vessel. After these were returned by several from the Alligator, the Portuguese flag was seen to be hoisted by the other vessel, upon which Lieut. Stockton ordered the firing to cease, and again hailed, and called upon the other vessel to send its boat on board the Alligator. He was answered by another gun, but before this could be returned by the Alligator, Lieut. Stockton had an opportunity of hailing several times more, and a boat came on board the Alligator with the mate of the other vessel and her papers and log-book. A boat was then despatched from the Alligator for the captain, who was brought on board. In answer to inquiries made of him by Lieut. Stockton, why he fired on the Alligator, bearing the flag of the United States, he replied in Portuguese, that he took her for a pirate, and his suspicions were strengthened because she did not affirm her flag; and he appealed to his papers to show that his vessel was a Portuguese merchantman. Lieut. Stockton replied, that he did not understand the papers, but should send him to the United States for examination. Capt. De Britto, the Portuguese master, protested against such a measure, and told Lieut. Stockton that he should consider him answerable for damages. All on board the Marianna Flora were put in irons, except the captain and two boys. Provisions were put on board her from the Alligator. Lieut. Abbot, of the Alligator, was appointed to take charge of her and conduct her to the United States, and on the 7th day of November she left the Alligator and proceeded on her way to the United States, according to orders from Lieut. Stockton. It was satisfactorily proved by the evidence in the case, that the Marianna Flora was a Portuguese merchant ship, and was on her way from Bahia to Lisbon at the time of the capture.

Messrs. Blake and Webster, for libellants.
Messrs. Knapp and Prescott, for claimants.

STORY, Circuit Justice. This is a most distressing and calamitous case, in which a serious loss must be borne by one of two innocent parties. The facts and the general principles applicable to them have been discussed with so much fulness, accuracy, and ability, in the opinion [3] of the learned judge of the district court accompanying the record, that it is wholly unnecessary for me to go at large into the examination. In general I may say, that I concur in his views of the facts, and the only questions that occur for decision here, are questions of law lying in a very narrow compass.

The first question is, whether the capture was justifiable; and if so, then the next and most important is, whether there was good cause for sending the vessel in for judicial inquiry and examination. In a time of peace it is admitted, that the public ships of war of one nation have no right to search the ships of other nations upon the ocean. Every ship sails there with the unquestionable right of pursuing its own lawful business without interruption; but whatever that business may be, it is bound to pursue it in such a manner as not to violate the rights of others. This results from the necessary equality of nations upon the ocean in time of peace. The general maxim in such cases is, "sic utero tuo, ut non alienum laedas." In respect either to merchant ships or ships of war I do not know that there is any thing reprehensible in approaching each other at sea. Each has an equal right to the use of the ocean, and neither has any right to assert that the ocean within a certain distance, not essential for its own movements, is exclusively its own. In respect to ships of war which sail as in the present case under the authority of their governments, to arrest pirates and slave-dealers, the latter being in truth the worst and most detestable of pirates, there is no reason why they may not approach any vessels descried at sea, for the purpose of ascertaining their real character; and it is no just cause of offence, even if all nations had not a common interest in such humane and laudable enterprises, that they make an approach, unless the conduct of such ships of war betray a design to insult or injure those they approached, or to impede them in their lawful commerce. And merchant ships certainly may in like manner innocently approach each other, either for the purpose of information or to relieve their own distress, or to ascertain the

[3] [Nowhere reported; not now accessible.]

probable character of strangers; and there is no breach of the customary observances or of the strict law of nations in such conduct. On the other hand it is as clear, that no vessel is, under such circumstances, bound to lay by, and wait the approach of other ships; she is at liberty to pursue her voyage in her own way, and to use all necessary precautions to avoid any suspected attack or sinister enterprise. Each party is, in short, left free to act according to his own reasonable discretion, taking care not to violate the rights of the other; and if any mischief is sustained by either party from accident or mistake and without any fault or negligence of the other, it is a common evil, to be borne by the unfortunate sufferer without redress. It is, in the phraseology of the common law, "damnum absque injuriâ," a damage without a wrong. If, therefore, two armed ships should happen to meet upon the ocean and approach each other, and finally commence a combat upon mutual mistake, and without any hostile intent or any want of reasonable care, no wrong is done by either, for which the other can justly claim a recompense, whatever may be the extent of the calamity inflicted. But if the attack be wanton or from gross negligence, the party who is in fault is bound to make the most ample remuneration. Such are the principles deducible from the maxims of general justice, independently of those derived from the laws that regulate maritime warfare.

Without doubt, pirates may be lawfully captured on the ocean by the ships of any nation, private or public; for they are the common enemies of all mankind, and as such, they are liable to the laws of war. And any piratical aggression or attack by an armed vessel belonging to any nation, or sailing under the protection of its regular flag subjects the offending vessel to the penalty of confiscation, in the same manner as if they are common pirates (see act 3d March, 1819, c. 76 [1 Stat. 510]); nor do I conceive that it is indispensable to constitute piracy, that there should be an intent of private gain, for if a piratical burning or sinking of a ship or murder of her crew should take place by freebooters on the sea, it would be as genuine piracy as if the primary object were immediate plunder. The act would exhibit a piratical and felonious intent, an intent to despoil the owner of his property, and to accomplish it by the murder of the crew. The murder would be adminicular to the robbery. But every hostile attack of one armed vessel upon any other in time of peace is not necessarily piratical. It may be by mistake or in necessary self-defence, or to repel a supposed meditated attack by pirates. It may be justifiable or excusable, and then there is no blame, or it may be under circumstances of manifest default, and then it carries with it responsibility in damages. If, however, an attack be not piratical, but is yet wanton and unprovoked, arising from gross fraud or revenge, or abuse of power, it is a waging of private unauthorized war, and subjects the vessel if captured to the penalty of confiscation. For that penalty is ordinarily denounced against property taken in delicto, where the act is an offence against the law of nations. Such, I conceive, are the principles which are applicable to cases of this nature, springing from the general rights of nations upon the sea, and the duties resulting from their independence and amity.

In the present case, it appears to me that the contest arose from mutual mistake and misapprehension. There is no pretence to say that the Alligator approached the Marianna Flora with any hostile intention; she was induced to do so in the first instance by signals and manoeuvres, which were mistaken for indications of distress; and when the attack was commenced upon her, she had strong reasons to suspect the real character of the Marianna Flora, and at all events was entitled to repel a hostile attack by all the means in her power. The approach, even without these circumstances, was justifiable. It was in the performance of public duties confided to the commander by his government, and he might well wish to ascertain, as far as he might without violating the rights of other nations, whether the ships, met with in the course of his voyage, were engaged in lawful commerce, or in common piracy, or in the slave trade. If he did nothing more than approach, without indicating an intention to board or to attack the Marianna Flora, no law is to be found within my knowledge which imputes it to him as a fault or violation of duty, and I am as far from imputing any fault to the Marianna Flora. In the circumstances in which he was placed, her commander probably did suspect the Alligator to be a piratical cruiser, and whether he lay to or shortened sail before or after this supposed discovery, is immaterial, for he had an unquestionable right to prepare for his defence as soon as he thought that the danger was real. The first act of aggression was certainly on the side of the Marianna Flora. She had no right to prevent by force the approach of the Alligator if the latter was a lawful cruiser in amity. But the real character of the cruiser could not be known, and the firing upon her, while at a great distance, if it were wrong, was levissima culpa, and may fairly be construed as an indication of defensive resistance. It might justly inflame suspicion on the other side, but it was not decisive of meditated hostility, any more than of mistake, resulting from fear of pirates. Under these circumstances I agree entirely with the district judge in the conclusion, that the capture by the Alligator was lawful; and that her commander was in no fault for resisting an attack made upon him under no just provocation. If, indeed, there was any blame, it was in the first attack by the Marianna Flora; because she had no right to apply force, unless in self-defence, and where the circumstances

admitted of no reasonable doubt of a hostile or piratical attack.

If the capture was lawful, the next question is, whether Lieut. Stockton was justified in sending in the Marianna Flora for adjudication. It was argued that there was no probable cause for sending her in, and if there was, that probable cause forms no justification except in cases of the exercise of belligerent rights on the ocean. In other cases of marine seizures, it is said the party can only justify himself by the event of condemnation. I am not aware that any such doctrine has been judicially settled. The cases of Murray v. The Charming Betsy, 2 Cranch [6 U. S.] 64, Little v. Barreme, Id. 170, and Maley v. Shattuck, 3 Cranch [7 U. S.] 458, which have been relied on at the bar, establish no such doctrine; for in each of these cases the court came to the conclusion, that there was no probable cause of capture. As far indeed as they go, they lead in the opposite direction, for the seizures in those cases were made under our non-intercourse acts against France. Act 27 Feb. 1800, c. 10 [2 Stat. 7]; Act 9 Feb. 1799, c. 108 [1 Story, Laws, 588 (1 Stat. 611, c. 2)]; Act 13 June, 1798, c. 70 [1 Story, Laws, 508 (1 Stat. 565, c. 53)]. So far from the court having undertaken to decide that probable cause would not have justified the capture, the judgments proceed upon the tacit assumption that it would, and limit the inquiry to the simple fact; and in the case of The St. Louis, 2 Dod. 210–264, where the seizure of a French ship in time of peace for traffic in the slave trade was held a marine trespass, Sir William Scott expressly overruled the claim for damages upon the ground, that the question was of the first impression. The court, therefore, in the present state of judicial opinions on this subject, is not called upon to admit, that probable cause would be no justification.

It is the less necessary in this case to sift that doctrine, because here there was not only probable cause, but justifiable cause of capture. The Alligator had a perfect right to resist the attack and to subdue a vessel acting as an enemy. And if this be so, where is the case which decides that a justifiable capture becomes tortious by sending in the vessel for adjudication? If in the combat any persons had been killed on board of the Alligator, it would have been a matter of absolute duty to have sent in the vessel for the deliberate consideration of the government, in what manner to deal with the parties to the aggression. If any persons had been killed on board of the Marianna Flora, it would have been an act of great prudence to have sent her in, that the government might have had an opportunity in their own courts to have ascertained the fact and the truth of the vindication from the very parties in interest, flagrante facto. It was not even denied in the argument, that cases of this sort might have authorized the act, and they differ not in nature but in degree only from that before the court. I do not say, that under all the circumstances it might not have been fit for Lieut. Stockton to have dismissed the Marianna Flora without further inquiry. Judging from the lights now before the court, that would certainly be my own opinion, because there were strong reasons to believe, that the attack was not hostile. But we are to consider that this is not the case of a private ship of war. Lieut. Stockton held the commission of the government, and his vessel bore the national flag. The attack was an indignity to that flag. It was a trespass upon the sovereignty of the nation, unintentional indeed, as the court now believes, but still it was a trespass. If the government should choose to seek any redress, it could be had against the vessel in our own ports only. If it should choose deliberately to investigate the circumstances, it had a perfect right to institute a judicial inquiry. Lieut. Stockton might therefore have justly thought, that in a case confessedly new in its character, he was not bound to take upon himself the responsibility of a final decision; that it was more compatible with his own honour and with that of the nation, as well as with the rights of the other party, to submit the whole to the judgment of a legal tribunal. If he thought, and that certainly appears to have been his impression, that the attack was wanton and piratical, the duty of sending in became almost peremptory. Certainly if there had been no probable cause of capture, this would not have justified him, but as the capture was justifiable, it takes off all pretence that his conduct was malicious or oppressive. Lieut. Stockton might have released the vessel; but the question upon which damages depends is, whether he was bound so to do. In a case of such novelty and responsibility I cannot say that he was bound so to do, or that his mistake in not doing it binds him to damages. I adopt in this respect the doctrine of Sir William Scott in the St. Louis. The question here, as there, is primae impressionis; the case here, as there, is the first of its kind. The nature of the attack could not be absolutely ascertained, in a manner free from doubt on the ocean, and the law arising out of it was certainly of no easy interpretation. If there be any case in which the admiralty has given damages for sending in a vessel for adjudication, where the capture was justifiable, it has escaped my notice. I do find that damages have been sometimes refused even where the capture was a marine tort. I am not for making the hard duty of a public officer in the exercise of his discretion (compelled as he often is to decide suddenly upon emergencies) more hard by inflicting damages, unless the law has imposed upon me that duty. In this case I cannot come to the conclusion that such is my duty; and therefore with the greatest respect for the opinion of the learned judge of the district court, I feel myself compelled to reverse his decree as to damages, which, I understand, is the only part of his decree appealed from,

restitution having been acquiesced in after the first decree. Under all the circumstances each party ought to bear his own costs.

I am not sorry that the amount in controversy will enable the highest tribunal to revise the present decision, and to correct any errors into which I may have fallen.

[On appeal to the supreme court the decree of the circuit court was affirmed, without costs to either party. 11 Wheat. (24 U. S.) 1.]

Case No. 9,081.

The MARIA PIKE.

SAWYER et al. v. The MARIA PIKE.

[6 Adm. Rec. 630.]

District Court, S. D. Florida. Feb. 9, 1861.

SALVAGE—PILOTING THROUGH DANGEROUS SHOALS.

[Piloting a vessel through dangerous shoals, where she could not have made her way unaided, is salvage service, if performed in connection with other salvage services.]

[Cited in Pent v. The Ocean Belle, Case No. 10,961.]

[Libel for salvage by George A. Savage and others against the schooner Maria Pike and cargo.]

W. C. Maloney, for libellants.

John L. Tatum, for respondent.

MARVIN, District Judge. This schooner, laden with cotton and molasses, got ashore on the North Key Flats, one of the Tortugas Shoals. Three smacks, carrying 20 men, went to her assistance. They found the master employed in staving his deck load of molasses to lighten the vessel. She was lying easy, but surrounded with intricate and extensive shoals. On the arrival of the smacks, the master ceased the business of staving the casks of molasses, and the next morning forty barrels of molasses were put on board one of the smacks, and, sail being made she went off the reef into deep water, by an inner channel, known to the salvors, but unknown to the master. Considerable skill and good judgment were displayed by the salvors in managing the sails to get the vessel clear of the shoals, and by subsequently piloting the vessel through the channel out to sea. The master could have got the vessel afloat by throwing overboard the forty barrels of molasses, but he could not have got her out of her difficulties without a pilot. The chief value of the service consists in the piloting, which very likely has been the means of saving vessel and cargo. The value of the vessel may be estimated at $8,000, and the cargo at $25,000. I think $3,200 is a reasonable salvage. It is therefore ordered and decreed that the sum of $3,200 be allowed the libellants in full compensation for their services rendered in saving said vessel and cargo, and that upon the payment thereof, and the costs and expenses of this suit, the marshal restore said vessel and cargo to the master thereof, for and on account of whom it may concern; that the wharfage, storage and other bills be examined, and allowed by the court among the expenses.

Case No. 9,082.

The MARIA THERESA.

District Court, E. D. Pennsylvania. July 28, 1848.

SHIPPING—ILLEGAL SEIZURE OF VESSEL BY AMERICAN CONSUL—LIEN FOR WAGES.

[1. Where a vessel is illegally seized by an American consul, in a foreign port, abandoned by the representative of the owners, and sent home under a master and crew shipped by the consul, she is liable to a lien for the wages of such crew, and for pilotage. See The Anne, Case No. 412.]

[2. There is a lien created against the vessel, both for wages and for pilotage.]

[Decided by KANE, District Judge. Nowhere reported; opinion not now accessible. The above statement of the case was taken from 1 Brightly, Dig. 589, 801.]

Case No. 9,083.

The MARIA WHITE.

[1 Hask. 204.] [1]

District Court, D. Maine. May, 1869.

SHIPPING—PERISHABLE CARGO—SALE BY MASTER—REFUSAL BY CONSIGNEES—AWAITING END OF LAY DAYS—RECOVERY AGAINST SHIPPERS FOR FREIGHT.

1. A perishable cargo may be sold by the master at the port of discharge for the benefit of all concerned, when the consignees refuse to receive it, and it cannot readily be stored in a place suitable to preserve it.

2. The master need not, before sale, await the expiration of lay-days, within which the cargo is to be discharged by the shippers, who are consignees, if they refuse to receive it.

3. Owners of the vessel, in such case, may recover from the shippers full stipulated freight, less the net proceeds from the sale of the cargo.

In admiralty. Libel in personam by the owners of the vessel against the shippers, to recover freight according to the terms of a bill of lading, for carrying a cargo of ice from Gardiner, Maine, to New Orleans, that had been sold on arrival by the master from necessity, inasmuch as it was perishable and the consignees had refused to receive it. The owners of the cargo, who were both shippers and consignees, appeared, and answered that they did not refuse to receive the cargo at the port of discharge, but that the master, without authority or necessity, sold and sacrificed it, and that the owners of the vessel are chargeable with its value, which was much greater than the stipulated freight.

Henry B. Cleaves, Nathan Cleaves, and Joseph Howard, for libellant.

William L. Putnam, for respondents.

[1] [Reported by Thomas Hawes Haskell, Esq., and here reprinted by permission.]

FOX, District Judge. This libel is promoted by the owners of the brig, one of whom was master, to recover from the respondents Messrs. Cheeseman and Marshall, the balance of the freight for the transportation of a cargo of ice for the respondents from Gardiner to New Orleans. The bill of lading is produced as evidence of the contract. It bears date at Gardiner, August 21, 1865, and recites "the lading on board of the brig of 260 tons of ice by the respondents; ice and dunnage to be loaded and discharged by shippers, with the assistance of vessel's crew; freight $3,000." Certain stipulations are found in the bill of lading touching the care to be exercised over the cargo on the voyage by the master, upon which no question is presented. "The ice was to be delivered in like good order and condition, excepting what may be lost by the natural waste of the article, at New Orleans, the danger of the seas only excepted, unto Cheeseman and Marshall or agents, for the medical department of the United States army or their assigns. Freight for said ice, payable at place of discharge, after a proper discharge of cargo; twelve working lay-days for discharge of cargo; after that, demurrage at the rate of fifteen cents per ton on each register ton of vessel per day."

The brig arrived about seven miles below New Orleans on the 21st of September. The captain went up to the city and ascertained that one Gould was acting agent of the respondents, who were engaged in the business of shipping ice to that place. The master called on Gould that afternoon, and informed him that he had this cargo on board and was ready to deliver it. Gould replied, that he was the agent of respondents, but had not received from them any bill of lading, or instructions about the cargo. The next day, the master again called on Gould and tried to get him to receive the cargo. Gould offered to receive it, but said that he could not pay the freight or any part of it, as he had no funds. The master offered to deliver him the cargo if he would pay one thousand dollars on account of the freight and endorse on the bill of lading that the cargo had been delivered. Gould replied that he could not do it as he had no funds, and did not know as he could raise money enough to pay expense of unloading the cargo. Notice was given in the public prints, calling for the agent of respondents to come forward and receive the cargo, in reply to which, Gould again appeared, claiming to act in behalf of respondents, offering to receive the cargo and give the master sight drafts on respondents for the freight money, but at the same time informing the master, that his drafts heretofore drawn on the respondents had been returned protested for non-acceptance, one of which for $500, or $600 was shown to the master by Gould.

Gould finally notified the master that he would have nothing to do with the cargo, and that he abandoned all claims to it. The master thereupon took legal advice, and by direction of counsel the cargo was sold on the afternoon of October 4th at public auction for the benefit of whom it might concern. The quantity of ice delivered as per auctioneer's certificate was 153 tons, and the net amount realized was $664.85. The sale was advertised in three daily papers, and a large company was in attendance. The respondents had another cargo of ice at the time in New Orleans, and so far as there is any evidence before the court, the sale was fairly and honestly conducted, and the fair cash value realized.

The vessel was not entered at the custom house until September 23d, and did not reach her berth until that day, but she could have been ready to discharge on the morning of September 22d, if Gould had been prepared to receive the cargo and pay freight according to the bill of lading. The master remained at New Orleans until the 29th of October, but he received no communication from the respondents, and it is not shown that the bill of lading was ever forwarded by them to New Orleans, or that at any time they advised Gould, or any other person there, in relation to the cargo. The master applied to the medical department at New Orleans to receive the cargo, but it was declined.

The answer of the respondents admits that the master did notify their agent at New Orleans of his arrival, but claims that the notice was given on the 23d, instead of the 21st, and sets forth in justification, "that defendants at that time reasonably expected and supposed that their said agent at New Orleans would, on the arrival of said cargo, have sufficient funds to pay said freight, and they now believe that he did have sufficient funds as aforesaid, but that they are informed and believe that when called on by the master of said vessel as alleged in said libel, he did refuse to pay said freight in the manner stipulated as aforesaid, but he did not refuse to receive said cargo, or have anything to do with it, but gave as a reason for not paying freight that he had no funds, but that he would receive the cargo and give sight drafts for the freight on defendants, which drafts would have been duly honored and paid."

The agency of Gould is therefore fully admitted by the respondents, and I am satisfied from all the evidence in the case, that at last, he abandoned the cargo to the master and refused to have anything to do with it; and that before this, he had been requested by the master to obtain instructions from his principals by telegraph, to which he replied that the lines were out of order; and on another occasion that he had received no reply from them. Whilst I am still of opinion, as I intimated at the trial, that the mere declaration of the agent, that he had sent a telegram but had not received a reply,

may not be admissible as evidence of the fact that such a telegram had been sent by him, I think the fact of the agent's having so informed the master is legal evidence bearing upon the question of good faith on the master's part, and of his desire and purpose to obtain directions from the shippers as to the disposition to be made of their property.

The agent, whose duty it was to receive this property, having thus abandoned it with the information to the master that he could get no instructions from the shippers, what was the duty of the master under all the circumstances? In the case of an ordinary cargo, the duty of the master under such circumstances, is settled by the supreme court of the United States, in the case of The Eddy, 5 Wall [72 U. S.] 495. In the opinion Judge Clifford says: "When the goods are not accepted by the consignee or owner of the cargo, the carrier should not leave them exposed on the wharf, but should store them in a place of safety, notifying the consignee or owner that they are so stored, subject to the lien of the ship for the freight and charges, and after he has done so, he is no longer liable on his contract of affreightment."

The master has a lien on his cargo for the freight due thereon, but this lien is a mere right of retention to hold the property as security for the payment of the amount due, and does not authorize him to sell the property to obtain the amount. His proper course is, either to retain the property from the consignees, or else to libel it in admiralty, as this is a maritime lien, which the district court of the United States will enforce and render available by taking the property into its custody, and determining the amount due, and ordering a sale of a sufficient portion to realize the amount with incidental expenses. I do not think any case can be found, which will justify a sale by a master of a portion of his cargo merely to defray his lien for its freight. If such an one is reported, it has escaped my observation. If this is the only ground on which this sale is to be sustained, I should think the master was not justified. It is claimed, however, that it was a necessity; that the master was so situated that he could not adopt any other course; that he was obliged, from the very necessity of the case, to act as he did; and on the whole, I am inclined to adopt this view of the transaction.

The agent of the shippers had, by his abandonment of the property, so placed the master that he had become the agent for all parties interested, and he had reason to believe that the shippers had themselves consented to that condition of things, as no advices or bill of lading had been received from them, although the master believed that an attempt had been made to obtain their directions. He was in a warm climate with a cargo of a most perishable nature, fast wasting away by the mere heat, more than forty per cent. having, as it appears, been already lost. The cargo was of a character which required a special warehouse for its preservation, one of peculiar construction, built for storing ice, and there is no evidence before me that such a building could have been obtained by the master, excepting that belonging to respondents, and this only by his surrendering all claim on the property and delivering it to their agent, taking drafts upon them for payment, which he had good reason to believe would be protested, and which he was under no obligation to receive and abandon his lien.

The cargo was of such a nature that it would very much diminish by its removal, and it must also have been attended with very great expense, the article being excessively bulky in proportion to its value. The bill of lading requires the cargo to be discharged by the shippers with aid of the crew, and there is not any evidence before me of any resources at the captain's command, to defray the expenses of discharging, if a place could have been obtained for it. It is true the master might have instituted, before the district court of the United States, a libel for his freight, but I apprehend the consequences would have been, that after defraying the court expenses, a much smaller amount would have remained to the credit of the defendants than now appears. It is claimed that the sale was made before the lay-days stipulated in the bill of lading had expired, and such appears to have been the case. But the sale was delayed to so late a day, that the vessel could not possibly be discharged before the expiration of the lay-days, and the respondents never appeared to claim the benefit of the lay-days under the bill of lading. The agent having declined to receive the cargo, and the master having become agent for all interested, I do not think he was absolutely bound to wait for the expiration of the lay-days before the sale.

In 1 Pars. Mar. Law, 248, it is said: "If the charterer has refused to load a cargo, the master should proceed at once to obtain another, and not wait till the time expires during which the charterer had a right, by the charter party, to put on board goods." He cites Blight v. Page, 3 Bos. & P. 295, note, where a vessel was allowed thirty lay-days by the charter, but on her arrival, the captain was informed by defendants' agents that the government had prohibited the exportation of the cargo, and that it would not be in their power to furnish it. The captain however, entered the port and remained forty-nine days, and then returned in ballast. Lord Kenyon held, that notice having been given to the master that the cargo would not be provided, there was no pretence to hold the defendant answerable for demurrage. This authority is cited with approbation by Cowen, J., in Heckscher v. McCrea, 24 Wend. 309, where he says: "It

was completely ascertained that Low, Wilson & Co. could not fill the 130 tons, and the ship was not even bound to remain till the lay-days had expired with any view to performance. And if there is nothing more in the case, the master might have immediately weighed anchor and sailed for home. The defendant's contract might be considered as pro tanto already broken, and the master absolved from the duty of all further stay."

The case of Avery v. Bowden, 85 E. C. L. 728, affirmed on appeal, 88 E. C. L. 952, is not inconsistent with this view of the law, as Lord Campbell, in delivering the opinion of the court, states that the evidence did not show an absolute refusal to provide a cargo for the ship, but he says: "If the defendant, within the running days and before the declaration of war, had positively informed the captain that no cargo had been provided, or would be provided for him at Odessa, and that there was no use in his remaining there any longer, the captain might have treated this as a breach and renunciation of the contract; and thereupon, sailing away from Odessa, he might have loaded a cargo at a friendly port from another person, whereupon the plaintiff would have had a right to maintain an action on the charter party, to recover damages equal to the loss he had sustained from the breach of contract on the part of the defendant. The language used by the defendant's agent before the declaration of war can hardly be considered as amounting to a renunciation of the contract, &c."

Curtis, J., in Clarke v. Crabtree [Case No. 2,847], says: "It is objected, that the master waited but twenty-four hours at Bonaire; that if a master sails away, without waiting the stipulated number of lay-days, if the number is stipulated, or a reasonable number, if there be no stipulated number, he cannot recover for dead freight, and that the evidence shows, that three to five days is the usual and therefore the reasonable number at Bonaire. But the evidence only proves three to five days, the ordinary time occupied in taking a cargo of salt on board there; not to wait to find a cargo; and if the master ascertained, in less than twenty-four hours that by waiting three to five days, he could not obtain a cargo, he was not only not bound to wait, but he had no right to wait and impose the charge of lying there on the charterers." I do not deem it an insuperable objection to the validity of the sale of the cargo of the Maria White that it occurred before the expiration of the stipulated lay-days. Was the sale justifiable from necessity?

In Arthur v. The Cassius [Case No. 564], Story, J., says: "But suppose in the next place there was a final refusal to receive the cargo by the consignee, did that authorize the master to carry it to New Orleans? * * * I agree that in cases of necessity, the master becomes by mere intendment and authority of law the agent of all concerned, as well of the owners of the cargo as of the ship. But this right of the master is to be clearly made out by unquestionable proof of such necessity. In the present case, the cargo could have been landed at Velasco, which was the port of destination. Then there was no necessity of carrying it elsewhere. It is said, it could not have been sold at Velasco for want of money in the hands of purchasers. Be it so. But there was no necessity of any sale, the cargo was not perishable, and therefore the sale would have been unjustifiable on the part of the master, since it would not have been a sale from necessity. * * * If the consignee refused to receive the cargo after it was landed, and to give the bill on New York for the freight, then it became the duty of the master to place the same in the hands of some trustworthy person for the security of his lien for the freight, and, subject thereto for the benefit and account of the owners. But no right, even under such circumstances, could exist on the part of the master to sell the cargo, unless it was perishable and might otherwise have been lost or have perished. * * * It might, perhaps, have admitted of a very different construction, if the cargo could not have been landed at Velasco, or there deposited in safety for the owners, or if the sale had become indispensable from the perishable nature and condition thereof."

In that case, the cargo was lumber, freight payable in New York; applying the principles there laid down to this cargo of ice, in a warm latitude, fast wasting away, with no proper place for storage, and with no funds to pay the expenses of discharging the cargo, I am well justified in holding that this sale was from necessity, and authorized under the special circumstances attending it. It would perhaps have been more in strict accordance with his duties, after the agent had abandoned the cargo, if the master had himself attempted to communicate with the shippers by telegraph. But I think that his failing so to do should not be held so great a violation of his duty, as to render invalid all his subsequent proceedings, taken under advice of counsel, and which were all conducted in good faith on his part, and which I apprehend have proved as beneficial to the respondents as any course which could have been adopted, especially as their own agent induced the master to believe, that the respondents were unwilling to send instructions in regard to their property.

In case of The Treasurer [Case No. 14,159], which was in relation to a cargo of coal, the bill of lading of which had been assigned to the libellant, but which he did not receive, Judge Sprague says: "Even if the libellant were the owner of it, the master would have been authorized," in case of an absolute refusal by him to receive the cargo, "as an agent from necessity, to dispose of

the cargo, and would have been responsible for the net proceeds, after deducting freight and his expenses and compensation as such agent." If such a necessity could exist in the case of a cargo of coal in Boston harbor, where the owner resided, and where probably a hundred places for its landing could be procured, much stronger must it exist in case of a cargo of ice at New Orleans in the early part of October, on board a single deck vessel, not very carefully stowed and protected from the sun as it appears from the great waste of forty per cent. in as many days, on a voyage from Maine.

It must be remembered, that in the very outset the respondents failed to comply with their duty. They should have forwarded the bill of lading with instructions to their agent, and provided him with funds to pay freight. All this they entirely failed to do. Their retention of the bills of lading is quite inexplicable. By their neglect, and the abandonment of their property by their agent, the master was thrown into a perplexing and hazardous situation; he was obliged to deal with a perishable article. Delay would be ruinous to the thing itself, and attended with great expense of demurrage if the cargo should be allowed to remain on board the vessel, and if removed and stored on owner's account, had it been practicable, in all probability the owners would not have been benefited thereby; under such circumstances, the conduct of the master should not be severely scrutinized by a court of admiralty, so as to establish a liability in behalf of parties as negligent as these respondents are shown to have been. The master acted honestly, and as he believed to be for the best interests of all parties under the very critical position in which he was placed, and on the whole, the shippers have no right or occasion to object to his conduct in their behalf.

The libel contains a claim for three days demurrage which is not allowed. Decree for the freight, less the net proceeds of sales of cargo at New Orleans, viz. for $2,335, and interest from date of filing libel.

Case No. 9,084.

The MARIETTA TILTON v. The HARRISBURG.

[36 Leg. Int. 66.] [1]

District Court, E. D. Pennsylvania. Feb. 14, 1879.[2]

COLLISION—RULES OF EVIDENCE—CONTRADICTING WITNESS—DEPOSITION BEFORE INSPECTORS—FOR WHAT USED.

1. In a plenary cause of collision, a witness was regularly examined for the libellants. He had been previously examined on oath in an investigation before the board of inspectors of steam vessels under the authority of an act of congress. The respondents could not use his deposition before the inspectors as evidence of what the witness stated in it, but could only use it for the purpose of contradicting him.

2. However the application of ordinary rules of evidence may be relaxed in a court of admiralty in proceedings which are summary and informal, there is no such relaxation in plenary causes.

In admiralty.

Henry Flanders and Curtis Tilton, for libellants.

Thomas Hart, Jr., and J. W. Coulston, for respondents.

CADWALADER, District Judge. The collision occurred in Vineyard Sound near to the Cross Rip light-ship. The case of the libellants, owners of the schooner, was that when the colliding vessels were about two miles apart, they were both approaching the light-ship upon converging courses, the schooner from the westward, and the steamer from the eastward; that from this time the schooner showed her red light on the starboard bow of the steamer, and that, throughout this distance, both vessels held their courses, without deviation, till in the peril of collision, when the schooner ported, and the steamer improperly starboarded.

The case of the respondents, owners of the steamer, was that although the respective courses were more or less easterly, and more or less westerly, they were not converging courses, that, on the contrary, each vessel showed her green light to the other vessel until just before the collision, when the schooner improperly changed her direction, attempting to cross the bow of the steamer, and thus caused the disaster.

What can have caused any danger of the collision which occurred is not easily conceivable. The night was very clear, the moon shining in her first quarter. It was not later than nine o'clock. Each vessel had the proper lights burning brightly. The deck of each was properly manned and officered. There was a sufficient look-out from each vessel; and each was actually sighted from the other at full distance. The light-ship, at her usual and known anchorage, was also in full view from each vessel. There was no extraordinary tide or wind—the actual wind being a full sail breeze for the schooner. The channel was broad. The narrowest part of it is where the light-ship lay, very near to the point of collision. Here the channel is three-quarters of a mile wide; and vessels pass in deep water, both inside and outside of the light-ship. The seeming absence of danger may, perhaps, have caused inattention where it has not been detected. The sum of the velocities of the approaching vessels was such that if an injudicious act or omission occurred on the part of either of them, there may not have been sufficient time afterwards to avert the evil consequences. There is, however, no certainty on the subject. The least improbable conjecture is, perhaps, that which may arise from the fact that, on board

[1] [Reprinted by permission.]

[2] [Reversed in 9 Fed. 169.]

of the schooner, although it was the mate's watch, and he was thus nominally officer of the deck, her captain was also on deck directing some of her movements before and at the crisis of peril. To give such orders was not beyond the legitimate power of the captain. But his simple presence on deck and occasional giving of directions did not wholly exclude or supersede the duty or authority of the mate, whose watch it was; and it is not impossible that this may have caused some fatal misconception or confusion of orders.

It is not, however, necessary to consider the case upon any such theory or hypothesis. The burden of proof is on the owners of the schooner, who are libellants, to show that the steamer was in fault. The question is, whether the libellants have relieved themselves of this burden. The course of the steamer was more or less westwardly, with a bearing towards the light-ship; and the course of the schooner more or less eastwardly, with a bearing which must sooner or later have been towards the light-ship. But independently of testimony which is irreconcilably conflicting, it is impossible to assume how far to the northward or southward of a line due east and west from the light-ship, either colliding vessel may have been at any point of time before the crisis of peril. Therefore the ingenious diagrams exhibited on the argument may define or elude the difficulties of the case, but cannot assist us in resolving them. We know, with sufficient certainty, that when the colliding vessels, having sighted each other, were still perhaps two miles or further apart, their respective courses were such that the green light on the starboard bow of each vessel was shown to the other vessel. So long as this may have continued to be the case the vessels cannot have been upon converging courses, and there was no danger to be guarded against. We also know that the course of the steamer was maintained, without any change, until the crisis of peril. This was right, unless the schooner's direction had been so changed in the meantime that her port bow, with its red light, was shown to the steamer. Just before the collision this red light of the schooner was discerned by those on board of the steamer. The wheel of the steamer was then immediately put to starboard. If the vessels had not been in very close proximity this would have been a wrong movement, because the steamer's helm should have been ported. But according to the preponderance of opinions of the nautical experts who have been examined, if the schooner's red light had not been previously shown, the putting of the steamer's wheel to starboard, at this crisis of peril, was not injudicious. If the question were doubtful, there would not have been any responsibility for an error of judgment at such a crisis.

The point to be decided therefore is whether the peril was caused by any previous fault of the steamer. It is contended for the libellants that the schooner's course had, in point of fact, been previously so determined as to show her port light to the steamer. If such were indeed the case, the vessels must have been on converging courses before the crisis of immediate peril. In that case, the steamer was in fault for not porting her helm in season, to avoid the schooner. The question of fact is thus whether the schooner's red light had been shown to the steamer before the crisis of peril? Of the schooner's company two persons only survived the disaster. Of these two, one was not upon deck, and cannot have known any thing material. The other, a seaman named Carter, has been examined. He testifies that he was on the lookout, and reported the steamer's green light to the mate, when the captain came forward. The witness, after mentioning several orders given by the captain of the schooner, deposes that when about three quarters of a mile from the light-ship, and about two miles from the steamer, the captain ordered the helmsman to keep for the light-ship, that the steamer then bore on the schooner's port-bow, and the light-ship was on the schooner's starboard bow, and that, from this time, there was no change in the course of the schooner until a minute before the collision. If this was the truth, it establishes the case of the libellants. But it is irreconcilably contradicted by previous sworn statements of the witness himself. The first of these statements was an affidavit procured and written by an agent of the respondents under such circumstances that no effect useful to the respondents ought to be attributed to it. The second sworn statement was in an investigation before the local board of inspectors of steam vessels. This was a sworn examination, authorized by act of congress, and appears to have been conducted without any exercise of improper influence. In this examination Carter states that, in his judgment, the cause of the collision was "the undecided movements of the captain of the schooner, who was very nervous and excited;" and says that, when both vessels were showing their green lights, the captain ordered the wheel of the schooner hard down (or a-port), and that, if this had not been done, the collision would certainly have been avoided.

It is contended for the respondents, that they may use this former affidavit of Carter before the inspectors as evidence of what he states in it. The argument is founded on a supposed disregard in courts of admiralty of the ordinary judicial rules of evidence. The relaxation or inapplicability of such rules, which is to a limited extent allowable in summary causes, cannot, however, be extended to plenary causes. The present is a plenary cause. Therefore the only use which the respondents can make of the former affidavit is to contradict the judicial examination of Carter. This contradictory effect is so absolute as wholly to deprive the libel-

lants of what might otherwise be the benefit of his testimony. This is the less to be regretted, because there is another extra-judicial affidavit of Carter, which we have not seen. This was an ex parte sworn statement to the proctor of the libellants. It was, under a notice to produce it, called for at the hearing, but was not exhibited. The call gave to the libellants an opportunity to exhibit it if they thought it confirmatory of his judicial examination. The court could not make an order, which was asked to compel its production. But this does not prevent an unfavorable presumption from its non-production. Such a presumption would arise in any tribunal. But the reason for the presumption is peculiarly strong in a court of admiralty, where all persons on board of colliding vessels are witnesses of necessity, rather than witnesses for the respective parties adducing them for examination.

The result is that the libellants are without any support of their case from testimony of any one who was on board of the schooner. The testimony of two persons who were on duty in the steamer is direct and explicit. Budd, who was on the look-out, sighted the schooner and reported her to the mate, whose watch it was. The mate responded. The schooner was then on the starboard bow. Budd, having reported her, was under no obligation of duty to keep her afterwards constantly in view. But there was nothing else in sight, and nothing to prevent him from doing so; and he testifies that he was watching her and her movements all the time. He certainly was in the most favorable position for discerning whatever was to be seen. He states that when she was within about three or four hundred feet off, and on the starboard bow of the steamer, she luffed, which brought her across the bow of the steamer, and caused the collision. Murphy, the mate, is a more important witness. He saw the schooner's green light before Budd reported her. She was about two miles off, on the starboard bow of the steamer. Murphy says, "the schooner kept on showing me her green light after the man reported her, for three or four minutes, ... when she shut in her green light for a second or two. As she did this, I told the man at the wheel to starboard the wheel. In a second, just as he commenced to starboard his wheel, I told him steady, for she showed her green light all plain again. The schooner at this time was two and a-half to three points on our starboard bow. She kept showing her green light until she came down about four points on our starboard bow. The schooner put her helm hard a-port, and showed her red light, shutting the green light in entirely. At this time she was between forty and fifty yards off." This was just before the collision. Murphy says further: "From the time I first saw the green light of the schooner up to the time she showed the red light, just before the collision, she was never less than two points on our starboard bow. She did not indicate at all that she was going to cross our bows until she showed her red light."

Recurring to the former part of his testimony, in which he had said that three or four minutes after the man at the wheel reported the schooner, she shut in her green light for a second or two, when the witness starboarded, and in a second steadied—he added, the vessel was then "all clear of me on the starboard bow; she showed her green light again immediately. . . . . When I starboarded and steadied, I could see the schooner; she did nothing to concern me; she did not actually port. The shutting out of her green light for an instant may have been due to the wind or her sail. It was not due to porting at that time." Here it is important to observe that when the green light was thus shut out for an instant, she did not show her red light.[3] If the red light had then been shown, it would have indicated such a changeableness, or uncertainty, in the course of the schooner as might have required the steamer to slow, or take some suitable precaution. But as the red light was not shown at all, and the green light was immediately again in full view, no change of direction was indicated, none can have occurred, and there was no occasion for any precautionary measure. If Murphy tells the truth, the steamer was not in fault. His testimony is not of a negative kind. He does not merely say that he did not see the schooner's red light, but positively deposes that her green light was fully in view until the sudden change of her direction which caused the disaster.

The man at the wheel of the steamer, named Kelly, has also been examined. His testimony is not clear. Neither is it important. The man at the wheel owes no duty to look out. He does not leave his post, and is there only to receive and execute orders of the officer of the deck; and a man at the wheel of so large a vessel would not be in a position to see much if it were his duty to look out. When he receives and executes an order, there is nothing to fix it in his recollection unless it is immediately followed by some extraordinary effect. This man remembers the order to starboard given to him at the crisis of peril; and seems to have an obscure and confused recollection of the previous order to starboard which was instantly countermanded. There was an interval certainly of some minutes between the two orders to starboard; but the witness, from indistinctness of recollection, or from the form or inverted order of questions put to him, seems to express himself without any clear discrimination between the two orders. His testimony, standing alone, might perhaps be understood as intimating that the course of the steamer had been changed when the prior

[3] In one of the briefs of counsel there was a mistake on this point.

order to starboard was given, which order as is explained by Murphy, was instantly revoked, and never executed. All obscurity in this part of Kelly's testimony is however cleared up when we bear in mind that by the other evidence in the case, and by the pleadings and arguments on both sides, it is admitted, without question, that the steamer's course was not, in any wise, changed, until just before the collision, when the only starboarding, properly so called, occurred. The witness explicitly and repeatedly states that he does not remember seeing the red light of the schooner until she thus got "right close," and was apparently crossing the bow of the steamer; and he says that if the schooner had kept her previous course she would, to the best of his judgment "have gone all clear." This witness says that when he first saw the schooner, he should judge she was about two points on the starboard bow as near as he can remember. He says: "I could not tell how far off she was. I asked Mr. Murphy what is that fellow doing. I did not know exactly how the schooner was going, and that is the reason I asked Mr. Murphy. He looked through the glasses and made some remark that she was coming this way as near as I can remember." In another part of the testimony the witness says: "When I first saw the schooner and noticed her course, I could not say how far she was off; she might have been three or four hundred feet; I starboarded at that time; I mean the time when I got the order. As near as I can remember it was after I starboarded that I saw the red light of the schooner. Mr. Murphy immediately took the glasses when I called his attention to the schooner. He immediately thereafter gave me the order to starboard."

It is not easy to analyze and apply this testimony. The libellants' counsel endeavors to apply it so as to impute negligence or inattention to Murphy. But I cannot see any sufficient reason for the imputation. The question put by Kelly was not one which required an answer from the officer of the deck. It was not necessary that the officer of the deck should be all the time using his glasses. The schooner and her light could be well discerned without them. But Murphy was actually using them at the time when the schooner's green light suddenly disappeared and reappeared; and there is no reason to doubt that he was using them as constantly as was necessary. This he was doing independently of any suggestion from Kelly. On a review of Kelly's testimony, I do not think that it materially assists or injures the case of either of the litigant parties.

A fireman named Butler, who was in the steamer, has been examined for the libellants. His duty was to work below at the coal bunker. He states that he was at work below when the vessel struck, but had not gone below until the schooner was distant four or five times her length from the steamer, and that he had continued to see her red light for ten minutes before he thus went below. It is highly improbable, if not incredible, that any man could thus have gone quietly below to his work, when within only four or five times the schooner's length from her, because a man the most unaccustomed to the water must then have seen that immediate collision was inevitable. But the witness, in cross-examination, admits that he "had been back at work about three minutes before she struck." He afterwards says "three or four minutes;" but persists in the statement that she was only four or five lengths off and that for ten minutes he had been watching the schooner, seeing, not her green light, but "only the red light." He admits that he saw nothing while he was below. Butler's testimony, however qualified, would, if true, decide the case in favor of the libellants. He is contradicted by another fireman named Duffy. But whether contradicted or not, the testimony of Butler is of little weight. Those who are in the habit of considering the testimony of persons on shipboard, even that of persons of the nautical profession, rely very little upon impressions on the memory of witnesses who were not performing any duty connected with the subject of their evidence. Listlessness and inattention when off duty are frequent if not habitual; and this man, if he was observing the schooner at all, was more or less neglecting his own duty. It would be quite unsafe to rely upon such evidence in opposition to that of the officer of the deck. Therefore the case of the libellants would fail if it depended upon testimony of persons in the colliding vessels.

The light-ship was at her anchorage, close to the point of collision. She was "lying head to the westward, stemming the tide." If we knew, with sufficient certainty, the respective bearings upon her of the approaching steamer and schooner, we might determine at about what distance their courses first became converging. It was not a duty of any one in the light-ship to observe such courses or bearings of passing vessels. But there was nothing to prevent such observation, and there might occasionally be strong reasons to induce it. Two persons who were in the light-ship have been examined. One of them, a seaman named Barnard, testifies in a very imposing manner. But when his testimony is carefully considered, he appears to have hastily conceived crude impressions, and to have relied on them afterwards with overstrained confidence. Thus, for example, he undertook to say that from his position in the light-ship he could see on board of the steamer, and that he could see no lookout on her deck. This he said so as to imply a statement or a belief on his part that there was no lookout from the steamer. Now he cannot have had any sufficient knowledge on the subject, and the testimony of those on board of the steamer establishes most conclusively

that Budd was, from first to last, on the lookout, and remained upon the forecastle deck until he jumped down at the instant of the collision. I mention the fact here with a sole reference to the credit attributable to impressions on Barnard's mind.

In another part of his testimony, being asked what enabled him to give the bearings accurately of both the steamer and the schooner when he first saw them, and whether he looked at his compass, or made any particular observations at the time, he answered "yes;" and, being asked what induced him to look at that time, and whether doing so was any part of his business, he answered, that sometimes he went and looked at the compass to see how vessels were bearing when they were coming down, and that he took particular notice how this schooner was bearing from the light-ship before the steamer struck her. Here he does not mean to affirm that he took the bearing of either approaching vessel (not even that of the schooner) by the compass, nor was it contended in argument that he did so, and yet his language almost implied an assertion that he made either some observation by the compass, or some observation of not less precise accuracy.

This having been premised, we may consider his testimony. He was on the deck of the light-ship, and saw each of the approaching vessels. He says that when he first observed the steamer she was about a mile and a-half off, and was bearing east from the light-ship, and that when he first observed the schooner she was about half a-mile off, and bore from the light-ship about northwest by west, and that he saw no subsequent change in the course of either vessel until the collision. If all these impressions on the mind of the witness were, in every respect, precisely correct, the vessels must have been on such converging courses that the schooner's red light very soon became discernible from the steamer. In that case, the steamer ought to have ported her helm instead of continuing her course. According to the libellants' theory of the case the steamer was thus in fault. To this theory, as applied through Barnard's testimony, the libellants' diagrams mentioned in a former part of this opinion are adapted.

But the theory, so far as thus dependent upon Barnard's testimony, is refuted in a great measure, if not altogether, by that of the other witness, namely Plaskett, the captain of the light-ship. Captain Plaskett was not on deck of the light-ship at the moment of the collision. But he had been on her deck less than, or not more than, five minutes before it; and he did not go below until after he had seen the lights of both of the approaching vessels; and he testified that there was nothing in what he saw to lead him to expect a collision between them. An important part of his testimony with an intended application to Barnard's, is that vessels approaching at some distance eastward or westward of the light-ship, might change their courses "a point or two without altering their lights;" and he added that a seaman of experience could, with observation, tell from the light, the course of vessels within two points. In other words there would be no certainty, within twenty-two and a half degrees, in such impressions of the most accurate observer. This uncertainty may be considered greater as to Barnard, who was not a cautious observer, but conceived opinions hastily. It must be remembered also that both Barnard and Captain Plaskett were speaking of bearings from the light-ship, and not of the bearing of the schooner from the more distant steamer. Similar considerations are more or less applicable to the course of the steamer, which may likewise have been mistaken a point or two. This increases the uncertainty, and, in effect, doubles the measure of uncertainty.

Here it perhaps becomes important to observe moreover that Captain Plaskett says he saw the green light of the schooner, and does not mention her red light at all; but Barnard says "the schooner headed southeast when I first saw her. I saw both her lights until she got almost to us," and says that she then shut in her red light. This was almost at the instant before collision. Upon a comparison of these parts of the testimony of the two witnesses, we may conceive the probability, or possibility, that the red light of the schooner may not have been exhibited to the light-ship until after Captain Plaskett went below. If such was the case, the red light probably was not discernible from the steamer, which was farther off, until somewhat later. The last suggestions are not purely conjectural. They acquire force when we recur to the other testimony, which is inconsistent with the schooner having been, when Barnard first saw her, so far to the northward of the course of the steamer that the vessels were moving on converging lines. We do not know, with sufficient certainty, where the schooner was at any time. The course of the steamer, though perhaps less uncertain, cannot be determined with geometrical precision.

The case of the libellants, founded upon the testimony of Barnard and Butler, has been presented very plausibly and argued very forcibly. But the arguments have not convinced me that I ought to disregard the testimony of Murphy, the mate of the steamer, whose means of knowledge were the best. We should weigh testimony rather than count witnesses.

The libel must therefore be dismissed, and, I regret to say, with costs. But it is hoped that payment of them will not be exacted, as the case is one of extreme hardship.

[NOTE. An appeal was subsequently taken to the circuit court, where there was a decree for the libelants and a reference made to a com-

missioner to ascertain and report the damages. 9 Fed. 169.

[This cause was also before the courts on a libel in rem filed by the widow and daughter of Silas E. Rickards, the first officer of the schooner Marietta Tilton, for damages for his death. There was a decree in the district court in favor of libelants, and damages awarded at $5,100. Case unreported. On an appeal to the circuit court the decree of the district court was affirmed. 15 Fed. 610. It was then appealed to the supreme court, where the decree of the circuit court was reversed. 119 U. S. 199, 7 Sup. Ct. 140.]

MARINE & RIVER PHOSPHATE MIN. & MANUF'G CO. OF SOUTH CAROLINA (BRADLY v.). See Case No. 1,789.

MARINE INS. CO. (BARKER v.). See Case No. 992.

MARINE INS. CO. (CARSON v.). See Case No. 2,465.

MARINE INS. CO. (CHURCH v.). See Case No. 2,711.

MARINE INS. CO. (COLES v.). See Case No. 2,988.

MARINE INS CO. (HARPER v.). See Case No. 6,088.

MARINE INS. CO. (HODGSON v.). See Case No. 6,566.

MARINE INS. CO. (POTTER v.). See Case No. 11,332.

MARINE INS. CO. (SIMMES v.). See Case No. 12,862.

MARINE INS. CO. (STRAAS v.). See Case No. 13,518.

MARINE INS. CO. OF ALEXANDRIA (HODGSON v.). See Case No. 6,567.

MARINE INS. CO. OF ALEXANDRIA (HOWLAND v.). See Case No. 6,798.

MARINE INS. CO. OF ALEXANDRIA (YOUNG v.). See Cases Nos. 18,162–18,164.

MARINE NAT. BANK (DUTCHER v.). See Case No. 4,203.

MARINER (PHILLIPS v.). See Case No. 11,105.

Case No. 9,085.

MARINERS v. The KENSINGTON.

[1 Pet. Adm. 239.] [1]

District Court, D. Pennsylvania. 1801.

SEAMEN'S WAGES — EMBEZZLEMENT OF CARGO — RESPONSIBILITY — CONTRIBUTION.

Embezzlement in a foreign port. Persons not of the crew assisted in lading, and a box plundered part of the cargo assigned to be stowed by strangers; but the crew worked occasionally with them, and were ordered by the court to contribute to the loss out of their wages.

[Cited in Spurr v. Pearson, Case No. 13,268; Edwards v. Sherman, Id. 4,298; U. S. v. Stone, 8 Fed. 251.]

[See Alexander v. Galloway, Case No. 167.]

The amount of wages was not disputed. The seamen were charged with a sum each (the whole being in the ratio of wages, averaged on the officers and crew) for a loss to the ship, in consequence of embezzlement of part of a box of cambrics and lawns, to a considerable amount. It appeared, from circumstances, that the embezzlement took place at the time of lading the ship in Liverpool, though it was not discovered until she was unlading at the port of Philadelphia. Several persons, not of the crew, were hired to assist in stowing the vessel at Liverpool; these had the part of the cargo assigned to them to stow, of which the box plundered composed an article; but the mate and some of the crew were always with them, and the case or box was in a situation to admit access of the crew, as well those who assisted the labourers, as any others of the seamen. The box was discovered to have been much injured and broken open with a crow-bar, or some such instrument, probably used at the time of stowage. It was contended, by the counsel for the owners of the ship, that if it could be even proved, that the labourers hired at Liverpool to assist the crew, had committed the embezzlement, they were, pro hac vice, part of the crew, and so the whole are answerable civilly, though not criminally.

BY THE COURT. If it could be proved that the labourers committed the embezzlement; without the participation, connivance or knowledge of the mariners, the latter would not be bound to contribute. The policy of the law which obliges mariners, engaged for a voyage, to be responsible for each other in such cases, does not apply when occasional labourers, or other strangers, commit depredations without the fault, negligence or connivance of all, or any part of the crew. The labourers, in this case, were not part of the crew. It is true, that if seamen are hired for a voyage, and work on board the ship, in the harbour of outfit, they may sue in the admiralty for their wages, though the voyage does not proceed. But this does not warrant the doctrine set up by the respondent's counsel, who contend that the labourers are, quoad hoc, a part for whom all the crew are responsible. There is no doubt but that the seamen are answerable for embezzlement, unless they can clearly shew either by positive evidence or strong circumstances, that it was committed by persons not of the crew. It is impossible for me to say, who committed the act in question in this cause; it may have been either a separate, or joint act; it may have been perpetrated by the labourers alone, or in company with some of the crew. But, under the uncertainty, I think the law throws the burthen of proof on the mariners. They are prima facie responsible. Some of them were mixed with the labourers, and all of them had access to the box plundered. It would give an opening to dangerous and ruinous collusions and frauds, if mariners were discharged from their responsibility, merely because occasional labourers were hired, to assist in loading a ship. Under all circumstances, I am of opinion, that the mariners

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

must contribute, respectively, their proportion of the loss, and I decree accordingly.

NOTE. Frequent decisions have been had, on the principles of this case. Where the crew are mixed with strangers, it behooves them to be peculiarly watchful; though, in some instances, it is severe on mariners. I have generally, however, suspected collusion, when I have enforced responsibility. One case occurred, where the theft was, by circumstances strong and convincing, fixed on those not of the crew, and I decreed against any contribution. In a cause recently decided, the mate left the vessel, in a port of St. Domingo, in possession of the blacks —went on shore without securing the hatches— some others of the crew followed his bad example—and only the cook and a sick mariner remained on board. The vessel was robbed in the night, by people from the shore, as it appeared from circumstances, to me. There was much contrariety in the testimony, but I was convinced, that part of the crew partook of the plunder. There was, beside, gross negligence, which, of itself, would incur contribution. I decreed retribution, on the usual terms. The articles lost, however, were greater in value, than the amount of wages due. I listen to testimony, to throw off responsibility, in mixed cases, in any reasonable degree satisfactory. The merchant, who increases the risk of the crew, by introducing strangers among them, cannot expect that strict and rigid proof, which is required in ordinary cases.

MARINERS (SIMS v.). See Case No. 12,893.

Case No. 9,086.

MARINERS v. The WASHINGTON.

[1 Pet. Adm. 219.] [1]

District Court, D. Pennsylvania. 1801.

SEAMEN'S WAGES — DEDUCTION — CONTRIBUTION — FOOD — QUANTITY — KIND — NAVY RATION.

[1. The vessel owner can retain wages of the crew, as a contribution for injuries from a collision alleged to have been caused by their negligence, until after the legal liability is established.]

2. The quantum or description of articles fixed for mariners in merchant ships, was not intended to be specifically according to the various kinds of esculents directed for the navy; but it was declared and agreed, that of such provisions as are ordered to be provided by merchants for their seamen, the quantities of the like kinds, furnished per diem, should be the same with those fixed for the navy. So of equivalents, where the designated species could not be obtained.

[Cited in Gardner v. The New Jersey, Case No. 5,233; The Elizabeth Frith, Id. 4,361; The Mary, Id. 9,191; The Childe Harold, Id. 2,676.]

The claim of the seamen consisted of two parts—

First. A demand for six dollars, each, retained by the owner [Ketland], to indemnify him against a suit brought against the master [Williamson], in a common law court, for running down and damaging a schooner at sea. This suit is pending and undetermined, and the captain agreed that he meant to contend the point; alleging that no negligence or misconduct on his part, or that of the crew, occasioned the accident.

BY THE COURT. It is clear to me, and must be well known to the counsel of the respondent, that the detainer of the six dollars out of each of the seamen's wages, is illegal. No contribution can legally be called for from them, until a recovery is had against the master, and the quantum ascertained. It is yet doubtful whether any damages will be recovered, for the accident mentioned. The master is satisfied that none are justly due. To withhold the payment under a bare possibility, is not warranted by law. As to what the merchant deems prudent and safe for himself, such considerations cannot control or destroy contracts. If negligence or malfeazance, on the part of the master and crew, had occasioned the accident, the mariners must, no doubt, contribute; but the fact and consequences must be legally established, before such contribution can be called for.

This point was given up, and the wages agreed to be paid.

The second demand was for a large sum, under the act of congress, for payment of additional wages, on account of short allowance, during the greater part of an East India voyage home. It was agreed that, to satisfy the words of the act of congress (designating what quantity and species of provisions should be on board at the departure of a ship destined across the Atlantic) "and so in proportion for a longer or shorter voyage," there should have been on board, previous to sailing, two hundred and fifty pounds wholesome meat, two hundred and fifty pounds good bread, and one hundred and fifty gallons of water, for each person, of whatever capacity or description, in the ship. The ration established for the navy,[2] was agreed to be that, by which the allowance of provisions to mariners should be regulated. There were eighty-four persons on board—the length of an India voyage was agreed to be equal to two and half voyages from America to an European port.

It appeared that the Washington was amply provided, previous to her departure from Philadelphia to India, not only with the requisite quantity for the voyage, of enumerated articles of provisions and water, but with a very considerable excess. In addition, there were flour, rice, and cabin-stores, in abundance. On her return, water was taken in, and provisions, though not of the specified articles, purchased. The passage was uncommonly long. Owing to over-care in the master, in putting the common ship-bread into tight casks, which happened not to be made of seasoned wood, twenty-six casks, out of thirty, were spoiled on the out passage. He therefore, gave bread of a better kind, in less quantities, making out the allowance in ample

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

[2] See Act Cong. July 1, 1797, "An act providing a naval armament" (section 7, vol. 4 [Folwell's Ed.] p. 14 [1 Stat. 524]), wherein the naval ration is established.

proportions, with other articles equivalent. At Batavia, the bread was saved, and except one biscuit per man, yams, rice and potatoes, were given in lieu thereof. But because the ration was not delivered, in the kind of esculents mentioned in the act of congress, and some precautions taken to ensure a sufficiency of provisions, the mariners now set up this demand.

BY THE COURT. The only ground for establishing a claim of the nature of the present demand, is a negligence in the master or owner, in not furnishing the ship before her departure from the port, with the quantity and species of provisions and water, required by law. Where these can be procured, no equivalents can be admitted as substitutes. But in ports, where the specific articles of provisions cannot be obtained, it would be unreasonable to suppose, that the spirit and intention of the law, do not permit equivalents, of other good and wholesome esculents, to be substituted and supplied, in place of provisions damaged or consumed. The owner or master is to take the best precautions to procure good and wholesome enumerated articles, which is often difficult in foreign ports. But they are not answerable for accidents happening to them, without negligence on their part. After the requisite quantity and species are taken in (where they can be obtained) the master is the sole judge of their expenditure. He must not wantonly deprive the crew of an ample allowance. It is not his interest, nor does it comport with his own comfort, or the safety of the ship, to produce, by unwarrantable privations, discontents, illhumour and debility, in the crew. But if the voyage is likely to be uncommonly procrastinated; if provisions are, by accidents, diminished in quantity, he may, justifiably, abridge the usual allowance. There is not the shadow of reason to complain, where other provisions are substituted, for enumerated articles, damaged, consumed, or not to be procured. It appears, in this case, that there is no reasonable or legal ground of complaint. I therefore dismiss this claim.

Case No. 9,087.

The MARION.

[1 Story, 68;[1] 3 Law Rep. 250.]

Circuit Court, D. Massachusetts. May Term, 1840.

MARITIME LIENS — REPAIRS — DOMESTIC SHIP — SHIPWRIGHT IN POSSESSION—ORIGIN OF LIEN —HOW CONSIDERED IN ADMIRALTY.

1. There is no statute law in Massachusetts, which gives a lien in rem to shipwrights for building, equipping, or repairing ships.

[Cited in Macy v. De Wolf, Case No. 8,933; The Alida, Id. 199.]

2. By the common law, no lien exists generally for repairs and work done on a domestic ship; but a shipwright has a lien for the repairs and work done on such a ship, so long as she remains in his possession. And the owner can only devest that possession by a discharge of the lien. Yet, if the owner retain possession during the repairs, or if after the repairs are made, the shipwright voluntarily yield up the possession, his lien is gone.

[Cited in Marsh v. The Minnie, Case No. 9,117; Pendergast v. The Kalorama, 10 Wall. (77 U. S.) 212; The B. F. Woolsey, 7 Fed. 110; The Two Marys, 10 Fed. 923, 16 Fed. 700.]

3. It is of no consequence, how a lien arises under the local law, whether by statute or by common or municipal law. Whenever its existence is established, the jurisdiction of the admiralty attaches to it proprio vigore.

[Cited in The Infanta, Case No. 7,030; Crapo v. Allen, Id. 3,360; Nall v. The Illinois, Id. 10,005; The Two Marys, 10 Fed. 925.]

[Cited in Tapia v. Martinez, 4 N. M. 165, 16 Pac. 274.]

4. Under the facts and circumstances of this case it was *held*, that a lien attached upon a vessel by the common law, for materials furnished and repairs made, and that it had not been devested by a voluntary surrender of the vessel by the owner.

[Cited in The Two Marys, 10 Fed. 926.]

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

Libel for repairs and materials for the schooner Marion, and work and labor done on her in the port of New Bedford, to which port the schooner belonged, in October and November, 1839, amounting in the whole to the sum of $221.49. There was no dispute about the amount due for the repairs, work, and materials. But when the repairs were undertaken, one Goodwin was the owner, and he subsequently transferred the schooner during the time of the repairs to the claimant [Lawrence] Grinnell. The answer insisted, that the libellant (McFarlin) had no lien on the schooner for repairs; but that they were a personal charge only against the owner. The original libel was jointly filed by Seth McFarlin and one William Spooner, the latter of whom asserted a distinct and independent claim for painting done by him on the schooner, amounting to the sum of $100. But an exception having been taken in the district court, that these distinct and independent claims could not, in the admiralty, be joined in one libel, it was agreed between the parties, that the libel should be severed, and that each libellant should proceed separately for his own claim. Upon the hearing in the district court, a decree was rendered in favor of the libellant (McFarlin), for the sum of $221.49; and from that decree, an appeal was taken to this court by the claimant.

Mr. Brigham, for libellant.

On the part of the libellant, it was admitted, that, by the general maritime law, shipwrights and material men had no lien upon a domestic ship for repairs or supplies. But it was contended, that, by the local law of Massachusetts, the shipwright had a lien so long as he kept possession of the ship, and that such lien could be enforced in the admiralty. In the case at bar, the claimant

[1] [Reported by William W. Story, Esq.]

had the ship in his possession, and he could no more be compelled to abandon that possession without being first paid, than a mechanic or artisan would be required to surrender any article, which he had made or repaired, without being first paid. Upon the question of lien, the counsel cited Peyroux v. Howard, 7 Pet. [32 U. S.] 324; The General Smith, 4 Wheat. [17 U. S.] 438; The Nestor [Case No. 10,126]; 3 Kent, Comm. 169; Story, Bailm. § 440; Mont. Liens; Abb. Shipp. 108. Upon the point of the jurisdiction of the admiralty, the counsel cited The Robert Fulton [Case No. 11,890]; Harper v. New Brig [Id. 6,090]; and Davis v. New Brig [Id. 3,643].

G. T. Curtis, for claimant.

For the claimant, it was admitted, that the court had full jurisdiction of the matter, and that the only question was, whether the libellant had a lien by the local law of Massachusetts. The vessel being a domestic ship, no lien is given by the general maritime law. There is no statute of this commonwealth giving such a lien; and what the libellant is to show, therefore, is, that he has a lien by the common law of Massachusetts. The common law lien is a mere right to detain the thing put into the party's possession to be repaired, until his charges are paid; a strict possessory lien founded on actual possession and a consequent right of detention. The Nestor [supra]; Abb. Shipp. p. 108, § 10. This, the counsel contended, is the unquestionable law of England; and to show, that the law of this country was the same, it was argued: 1. From the absence of all authority to show, that it was different. 2. From the recognition of this doctrine by this court in The Nestor. 3. From the various statutes passed by the state legislatures to amend the common law, and supply a lien, which should be operative out of possession. To show that the possession must be actual and exclusive, and so far as it is evidenced by locality, must be in the exclusive dominion of the party claiming the right of detention, he cited Abb. Shipp. p. 108; Story, Bailm. § 440; Story, Ag. § 352; Franklin v. Hosier, 4 Barn. & Ald. 341; Raitt v. Mitchell, 4 Camp. 146; Blake v. Nicholson, 3 Maule & S. 167; Chase v. Westmore, 5 Maule & S. 180; Ex parte Bland, 2 Rose, 91; Ex parte Hill, 1 Mad. 61; Ex parte Deeze, 1 Atk. 228; Pritchard v. The Lady Horatia [Case No. 11,438]. The idea of two concurrent liens of this sort, that is, of two concurrent rights of detention by parties having no privity of interest, is impossible. Pothier, Traité de la Possession, c. 4, § 1. For if the liens conflict, and the thing is sold without producing enough to pay both, what is to determine the apportionment? Liens, standing in the same rank of privilege, as those of different seamen for their wages, may be apportioned; because they do not depend on possession, and, therefore, do not involve the idea of exclusion. But it is otherwise with liens founded on possession, which necessarily involves exclusion. Jacobs v. Latour, 5 Bing. 130. Hence, it was argued, that, as the record here shows two parties, each claiming the possession, without any privity of interest, and the evidence tended to show an actual possession by both at the same time, neither of them had such an exclusive possession, which was indispensable to give a power to detain the vessel. It was further argued, upon the evidence, that the libellant never took the vessel into his custody; but that she lay at a public wharf, where the dockage was charged to the vessel itself, and not to the libellant, and other mechanics came on board there and worked.

STORY, Circuit Justice. This is a libel against a domestic ship, for materials furnished and repairs made upon her in the port of New Bedford, in this district, to which port she belonged at the time of the repairs. Under such circumstances, it is admitted, that no lien attaches upon the ship by the general maritime law, as far as it is recognised and enforced in the courts of England and America. But the admiralty courts of this country possess a general jurisdiction in all cases of material-men, and shipwrights, for work done, and materials furnished for ships, engaged or employed in maritime commerce and navigation, which may be exercised in personam at all times; but can be exercised in rem only upon the maritime law, or in its silence, where the local law of the state or country, where the work and materials are applied, gives a lien. This was held in the case of The General Smith, 4 Wheat. [17 U. S.] 438; and the doctrine of that case has been constantly acted upon in this court, as well as in the supreme court, whenever the question has arisen, and has been required to be decided. See Peyroux v. Howard, 7 Pet. [32 U. S.] 324. See also, The Robert Fulton [Case No. 11,890]; Davis v. New Brig [Id. 3,643]. In the present case, there is no statute of this commonwealth, which gives a lien in rem to shipwrights and others for building, equipping, or repairing ships, although in most of the commercial states of the Union such statutes do exist. They are founded in a wise protective policy, and I can only express my surprise and regret, that our state legislature has not provided the like remedy for this most important and useful class of our citizens, especially as it has given to carpenters and others a lien on houses under similar circumstances. But, although no state statute exists on this subject, yet as we all know, by the common law, which is a part of the law of Massachusetts, every shipwright has a lien for repairs and work done on a ship, while she is in his possession; and the owner or purchaser cannot devest that possession, except by a discharge of that lien. But this lien is strictly founded upon

possession; and, therefore, if the possession either remain in the owner during the repairs, or after the repairs are made, the shipwright voluntarily yield up that possession without payment of his charges, his lien is gone, and is no longer capable of being enforced in any manner whatsoever.

These being the undisputed principles regulating this subject, two questions have been argued at the bar in the present case. The first is, whether, upon the whole evidence, there was any such possession of the schooner claimed by the libellant in this case, as created a lien for the repairs and the materials sued for, at the time when the libel was filed. The second is, whether, assuming such possessory lien then to exist, it is such a lien as can be enforced in the admiralty jurisdiction, considering the schooner to be a vessel employed (as without doubt she was) in maritime trade and navigation. Upon this last point, I do not think, that the slightest doubt can now be entertained. Since the decisions made in the supreme court, the question is not, how the lien arises under the local law, whether it be by statute, or by the common or by the municipal law. That is wholly immaterial. The lien is enforced, because it is of a maritime nature; and the moment its existence is established, the jurisdiction of the admiralty attaches to it proprio vigore. Such, as far as I know, has been the uniform understanding and practice, in all the admiralty courts of the Union. In respect to the other question, it involves rather the consideration of matters of fact, than of law. I pass over, without remark, every thing, which has been suggested at the argument, in respect to the joint possession, asserted in the original libel, by Spooner and the libellant (McFarlin), and their joinder, in one suit, of their respective independent claims for work, and labor, and materials. After the severance of the suit in the court below, the present appeal brings nothing, but McFarlin's claim, before the court; and the sole question is, not whether he and Spooner had, or could have, a joint possession upon their separate and independent claims and liens; but whether McFarlin had such a possession and lien, as he now asserts in his own libel, to sustain his separate suit.

The facts, as they appear in the evidence, are these. McFarlin is a shipwright by trade, and has his ship-yard, where he repairs ships, on a small island, about one half of which he hires of the owners in fee, Messrs. Randall & Haskell, who have also a wharf on the premises. McFarlin has been accustomed to use this ship-yard, and make repairs at or near the wharf, for about seven years. By a contract and understanding between Randall & Haskell and the libellant, the libellant is at liberty to repair any vessels at their wharf, and fasten them there; and the wharfage during the repairs, instead of being charged to the libellant, is charged to the owner of the vessel repaired. In this very case, the schooner Marion was brought from a wharf on the other side of the channel by the libellant and his workmen and certain riggers, and fastened at the wharf during the repairs. The wharfage was charged to the Marion, and has not yet been paid by any person. During the time of the repairs by the libellant, from the 28th of October to the 21st of November, 1839, when they were completed, the libellant and his workmen were on board every day. One David Field also, during a part of the time, while these repairs were going on, was on board doing work as joiner, in the cabin; and his work was not completed until about the beginning of January, 1840. Spooner was doing the work of a painter on board during a part of the same period. While the repairs were making, Goodwin, the owner, having become embarrassed and in doubtful circumstances, the libellant became solicitous about his pay; and accordingly he constantly told Field, that he should insist upon his retaining possession of the schooner, until he was paid in full. He also directed one of his workmen, who was employed by him in a neighbouring shop, to keep a constant watch upon the vessel by day and by night, and if any person attempted to remove her without his leave, to prohibit him. The libel was filed in the district court, on the 19th of December, 1839; up to which time, and afterwards, the schooner remained fastened at the wharf, the libellant going constantly on board, and asserting his intention of holding the possession, to Field, who was at work on board; and during all this period no person attempted to remove the schooner. So far, then, as any evidence exists in the case, the original possession taken by the libellant, when he undertook to repair the schooner, and for this purpose carried and fastened her to the wharf near his ship-yard, was never disturbed or interfered with.

Now, upon this posture of the facts, it seems to me, that the possession of the schooner must be deemed to have been originally taken and held by the libellant from the time, when he fastened her to the wharf, until the time, when she was libelled. He took, and held all the possession, which, in the critical circumstances, he was able to take; and he asserted his right of possession openly. It is not necessary to say, that this possession was to be treated as to all intents and purposes a possession exclusive of the owner. In one sense, it was the possession of the owner, and under him, and not adverse to him, and in the nature of a bailment. But it was such a possession, as is, in my judgment, sufficient to found a lien upon that possession with the consent of the owner. If the schooner had been hauled up within the known limits of a ship-yard, owned or hired on a lease by the libellant, no one could doubt, that the possession of

the schooner there would be such a possession as would found a lien, even though other workmen for other purposes were admitted to be on board, such as ship joiners, and riggers, and painters. The possession for some purposes may well be deemed the possession of the owner, as for example, to entitle him to an action for any tort done to the vessel. But for the purpose of founding a lien in the shipwright, the possession must be deemed in the shipwright; as much so, as if the repairs had been made in an enclosed dock-yard of the ship-wright.

Then, does the fact, that the wharfage was to be charged to the owner of the schooner make any difference? I think not. It was a mere arrangement between Randall & Haskell and the libellant, for their mutual benefit, with which the owner, as such, had nothing to do. It amounted to an agreement on the part of Randall & Haskell, that they would look for their pay to the owner, and not to the libellant; but was not any waiver of the possession by the libellant, founded on his general use of that wharf for the purposes of his business. Under the arrangement between Randall & Haskell and the libellant, the wharf was as much to be deemed in his possession and under his control, for the purpose of the repairs, as, under his lease, were the neighbouring ship-yard and other grounds. Whoever seeks to devest an apparent possession of a shipwright, should, as I think, show, by incontestable proofs, that the real possession was understood between the parties to remain in the owner. That would naturally be inferred, if the ship should be repaired at the wharf or dock of the owner, or at the wharf or dock of a third person, by a direct contract between the owner of the wharf and the owner of the ship, with which the shipwright had no privity or connexion. But, here, the only arrangement actually made, is between the shipwright and the owner of the wharf; and this not for one vessel, but for all vessels, which the shipwright should or might repair there. The license was to him generally, and not for repairs for any owner in particular.

Upon the whole, my judgment is, that the decree ought to be affirmed with costs.

MARION COUNTY (MORELAND v.). See Case No. 9,794.

Case No. 9,088.

MARIONNEAUX'S CASE.

[1 Woods, 37;[1] 13 N. B. R. 222.]

Circuit Court, D. Louisiana. April Term, 1870.

BANKRUPTCY—SETTING ASIDE DISCHARGE—FRAUD KNOWN BEFORE DISCHARGE—IMMATERIAL ERRORS ON APPEAL.

1. A bankrupt's discharge will not be set aside where the fraudulent acts on which petitioning creditors rely for the annulling of the discharge were suspected and believed to exist before the discharge, and when the evidence (discovered after the discharge) to prove such fraudulent acts is incompeten, and inadmissible.

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

2. When upon the whole record it appears that the petitioner had no case, the judgment of the court below will not be reversed, even though the court may have erred in some of its rulings.

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

This was a petition filed in the district court by certain creditors of A. P. Marionneaux, a bankrupt, to annul his discharge, on the ground that it was fraudulently obtained.

Chas. E. Fenner, for petitioners.

E. C. Billings and A. de B. Hughes, for bankrupt.

WOODS, Circuit Judge. The petition alleges in substance that the order of discharge was granted on February 24, 1869; that the bankrupt fraudulently concealed and failed to surrender for the benefit of his creditors a certain judgment in the case of Pointer v. Mutual Ins. Co. [unreported], rendered in the sixth district court of New Orleans parish. That said judgment was really the property of the bankrupt, but the consideration on which it was founded was fraudulently conveyed to Pointer; that for the purpose of giving value to the transfer, Marionneaux took from Pointer a note or notes, which he held prior to and at the time of the adjudication in bankruptcy, and that he neither surrendered the property in the judgment, nor the notes. That the petitioners have long suspected and believed the said facts to be true; they were always stoutly denied by Marionneaux and by Pointer, and petitioners had no knowledge of the same until after the discharge of Marionneaux, when, from the dying declarations of Pointer, who died on February 20, 1869, and certain provisions in his will, they did ascertain that the facts in reference to said judgment were as stated by them in their petition.

I have been unable to determine how this case comes into this court. It is called an appeal, but there is no testimony submitted to the court, and the agreed statement of facts does not cover all the questions of fact in dispute in the court below. There are two bills of exceptions incorporated in the record, which would indicate that the case is here on error, but there is no writ of error, assignment of error, prayer of reversal or joinder in error. If the case is considered as an appeal, it is sufficient to say that there is no testimony whatever submitted to the court, and the agreed facts do not prove or tend to prove that the discharge in bankruptcy of Marionneaux was fraudulently obtained. On the contrary, the agreed facts do not touch that question at all. This court cannot, of course, say that the discharge ought to be set aside for fraud when there is no testimony whatever showing fraud.

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

Regarding the case as here upon error, we might affirm the judgment of the court below, because no errors are assigned. I have, however, looked into the record to ascertain whether the court below fell into any error for which its judgment should be reversed. I think it very clear that if the petitioning creditors relied solely upon testimony to prove that Marionneaux obtained his discharge by fraud, which was known to them before the discharge, and which in fact they had used in a judicial proceeding to establish the identical act of fraud set up in this petition, they have no standing in court. If we look into the record we find that they did rely on other testimony, namely, the dying declarations of Pointer, and certain provisions in his will which could be considered as nothing more than dying declarations reduced to writing.

It is a well settled rule of evidence that dying declarations are admissible only in criminal cases, and when the death of the deceased is the subject of the change and the circumstances of the death are the subject of the dying declarations. Rex v. Mead, 2 Barn. & C. 605; 1 Greenl. Ev. § 156. As dying declarations, the statements of Pointer were clearly inadmissible. Nor could they be admitted as the declarations of one of two conspirators, for to make such proof competent, it must be preceded by proof of the conspiracy. 1 Greenl. Ev. § 111. They cannot be given as a part of the res gestae, for the declarations were long subsequent to the transactions to which they relate. Rawson v. Haigh, 2 Bing. 99, 104; 9 E. C. L. 335; Marsh v. Davis, 24 Vt. 363; New Milford v. Sherman, 21 Conn. 101; Johnson v. Sherwin, 3 Gray, 374. This additional proof, then, on which petitioning creditors relied, was the merest hearsay evidence, and not admissible; and, in fact, was no evidence at all. This testimony, when offered, would have been properly excluded, and that would have left the petitioning creditors to rely solely on facts which were well known to them long before the discharge of Marionneaux, to prove fraud in obtaining his discharge. So that, even if the court below erred in its rulings, it did not err to the damage of petitioning creditors. They had no case, and could not by any possibility have succeeded had the rulings of the court been in their favor upon all the points reviewed. In their petition they set out the nature of the new evidence that they have discovered since the discharge of Marionneaux. It is the dying declarations of Pointer. The record shows that they had no case, and that their petition should have been dismissed. A writ of error brings up the whole record, and the plaintiff in error may take advantage of a fatal defect in the declaration. Bank of U. S. v. Smith, 11 Wheat. [24 U. S.] 171. There is no error in this record for which the judgment should be reversed.

Case No. 9,089.

MARIPOSA CO. v. BOWMAN.

[Deady, 228.] [1]

Circuit Court, D. California. April 24, 1867.

DURESS—ILLEGAL DEMAND—PROPERTY—PERSON MAKING DEMAND.

An illegal demand paid under duress of property may be recovered back; but real property is not in duress unless there be an illegal demand made against the owner, coupled with a present power or authority, in the person making such demand, to sell or dispose of the same, if payment is not made as demanded.

[Cited in Hendy v. Soule, Case No. 6,359; Balfour v. City of Portland, 28 Fed. 739; The Nicanor, 40 Fed. 364.]

[Cited in Stephan v. Daniels, 27 Ohio St. 540.]

[This was a suit by the Mariposa Company against C. C. Bowman.]

John B. Felton, for plaintiff.

Clarke & Carpentier, for defendant.

DEADY, District Judge. The complaint states that on November 18, 1862, Cyrus A. Eastman obtained a decree in the proper court of the state of California for foreclosure and order of sale of a portion of the real property known as the Mariposa estate; and that such portion of said property was then owned by John C. Fremont and others, but that for a year prior to the commencement of this action —September 24, 1866—such estate, including the mortgaged premises, was the property of the plaintiff—a foreign corporation, formed under the laws of the state of New York, for the purpose of mining on such estate. That while such order of sale was in the hands of the sheriff, and before a sale of the premises was made thereunder, the decree of foreclosure was duly paid and satisfied, but the sheriff afterwards sold the property in question under such order, and wholly disregarded the fact that the amount due upon said decree had been fully paid. That at such sale the defendant became the purchaser, and received from the sheriff a certificate of sale, dated March 22, 1866, and was about to receive a deed from him therefor, and that the proceedings were a cloud upon the title of the plaintiff and impaired the value of its stock. That a deed from the sheriff in pursuance of such proceedings would have been a further cloud upon such title, and that the plaintiff for the purpose of dispelling this cloud and "preventing the injury done to it by the acts and proceedings aforesaid," on September 18, 1866, paid to defendant the sum which he pretended to have paid for the property at the sale —namely, $38,003.60, together with 12 per centum thereon, and the fee for the certificate —$2. That there was collusion between said Eastman and the defendant in this—that defendant did not pay any money on account of the purchase, but by an arrangement with Eastman the amount bid was credited on the

[1] [Reported by Hon. Matthew P. Deady, District Judge, and here reprinted by permission.]

decree, and that the defendant then knew that the decree had been fully paid.

Although the fact is not explicitly stated in the complaint, it must be inferred from what appears therein, that the plaintiff, after the order of sale was issued, succeeded in some way to the interest of Fremont and others, and thereby became entitled to redeem the property from the purchaser, at the sale aforesaid.

On this state of facts the plaintiff claims that the payment by it to the defendant was made under such compulsion as entitles it to maintain this action to recover back the amount so paid.

The case of the plaintiff has been presented with great zeal and ability by counsel, but my judgment is not convinced. The leading case cited for the plaintiff (Boston & S. Glass Co. v. City of Boston, 4 Metc. [Mass.] 187) gives the rule on this subject as follows: "If a party with a full knowledge of all the facts of the case, voluntarily pays money in satisfaction or discharge of a demand unjustly made on him, he cannot afterwards allege such payment to have been made by compulsion, and recover back the money, even though he should protest, at the time of such payment, that he was not legally bound to pay the same. The reason of the rule, and its propriety, are quite obvious, when applied to a case of payment upon a mere demand of money, unaccompanied with any power or authority to enforce such demand except by a suit at law. In such case, if a party would resist such demand, he must do so at the threshold. The parties treat with each other on equal terms, and if litigation is intended by the party of whom the money is demanded, it should precede payment. If it were not so, the effect would be to leave the party who pays the money the privilege of selecting his own time and convenience for litigation; delaying it, as the case may be, until the evidence, which the other party would have relied upon to sustain his claim, may be lost by the lapse of time and the various casualties to which human affairs are exposed. "The rule alluded to, when properly applied, is doubtless a salutary one, and is not to be departed from, but in cases resting in a plain and obvious distinction from such as are ordinarily and familiarly known as embraced within it."

The court then states the exception as follows: "If there be a controlling necessity in the case, arising from the peculiar circumstances under which the money is demanded, the rule does not apply." The cases cited in support of this exception to the general rule, are, where money is extorted by duress of goods as where a party having the plate of another in pawn, refuses to deliver it to the owner, except upon the payment of an illegal demand; or where tonnage or light money is illegally demanded by a collector as a condition precedent to granting a clearance to a vessel, or to liberate a raft of lumber detained to exact an illegal toll; "and generally where money is paid to obtain possession of property which the party, making the illegal demand, has under his control, such payment will be considered compulsory." Astley v. Reynolds, 2 Strange, 916; Ripley v. Gelston, 9 Johns. 201; Chase v. Dwinal, 7 Greenl. 134; Shaw v. Woodcock, 7 Barn. & C. 73; Morgan v. Palmer, 2 Barn. & C. 729.

In the case at bar, the facts were all known to the plaintiff at the time of payment. The property alleged to be in duress, was in its possession and still remains so. No demand was made upon the plaintiff for money whatever. But on the contrary, the plaintiff as a volunteer came forward and paid this money to the defendant, for the purpose, at most, of removing what it deemed a cloud upon its title, or preventing a further cloud from settling thereon.

While I do not admit the doctrine contended for by defendant's counsel, that the duress of real property is never a sufficient compulsion to justify the payment of an illegal demand, I think it will be found, that a mere cloud upon the title, or of a threat to create one, has never been held to produce such compulsion. Suppose a case: a mechanic files a lien upon the property of A. The demand for which the lien is filed is an illegal one in whole or in part. So long as this claim remains of record unsatisfied, it may be said to be a cloud upon the title of the owner. But that is not a controlling necessity which compels the owner to pay the illegal demand, and if he does pay it with knowledge of the facts, he cannot recover back the amount. To make it a case of payment under compulsion, there must be an illegal demand, coupled with a present power or authority in the person making such demand, to sell or dispose of the property, if payment is not made as demanded. The case of a mortgage with a power of sale by the mortgagor without judicial proceedings, or of a mortgagor in possession after condition broken, or of a tax collector armed with a warrant which authorizes him to distrain property for taxes, are the leading instances given in the books of duress of real property which excuses the payment of an illegal demand with knowledge of the fact.

Hays v. Hogan, 5 Cal. 241, is cited by plaintiff to show that a party paying money to prevent a cloud upon his title to real property, may recover the amount, because paid under compulsion. In that case the defendant was proceeding to sell the property of the plaintiff for municipal taxes, upon a warrant authorizing him to distrain for the same. The court held that the tax was illegally assessed; and this was sufficient to justify the conclusion that the plaintiff was entitled to recover back the money. It is true that the court in the course of its opinion say, that the plaintiff paid his money "to protect his property from a clouded title;" but it appears to me that the expression was a mere inadvertence.

The illegal collection or exaction of taxes,

tolls or fees, by persons having official position or under color of office, are placed upon peculiar grounds, and for obvious reasons. Money paid upon a demand made under such circumstances, has been recovered back, when as between private parties, dealing upon equal terms, the action could not have been maintained. In this case the plaintiff was under no such compulsion. At most, there was but a cloud upon his title, by reason of the sale and sheriff's certificate. The money was not paid to prevent this, for it was already a fact accomplished. True a conveyance from the sheriff to the defendant would follow in six months, unless the plaintiff redeemed, by the payment to the former of the purchase money. But the defendant did not demand this money of the plaintiff and could not collect it by law. The plaintiff having volunteered to become the successor in interest to the judgment debtor, sought to redeem the property from the effects of the sale. This was a privilege which the law gave it, to be exercised or not at its own option. The plaintiff was the actor. Under these circumstances, one of two courses was open to it; either to resist the proceedings founded on the sale, on the ground of its illegality, or to submit to them and redeem. In the former case the plaintiff could have had the sale set aside and the order therefor returned. The court, where the proceedings were pending, had control over its officer and process, and upon the facts alleged would undoubtedly have given the plaintiff relief. And, in any event, it might have brought a suit in equity to set aside the conveyance and sale as illegal and a cloud upon its title. But the plaintiff, instead of resisting this claim at the threshold, chose to pay the defendant the purchase money and redeem. Having made its election, without such compulsion as makes the payment in contemplation of law involuntary, it must abide the result, and cannot recover the money back.

The demurrer to the complaint is sustained.

MARIPOSA LAND & MINING CO. (DONOHOE v.). See Case No. 3,989.

MARIS (MOTT v.). See Case No. 9,880.

Case No. 9,090.

MARKET BANK OF TROY v. SMITH et al.

[7 Am. Law Reg. 667; 4 Wkly. Law Gaz. 407.]

District Court, D. Wisconsin. March 23, 1858.

USURY—NEW YORK STATUTE AS TO CORPORATIONS—ACCOMMODATION ENDORSERS—EFFECT OF USURY ON CONTRACT.

1. The statute of the state of New York, that no corporation shall interpose the defence of usury, does not extend to suits against accommodation endorsers for corporations.

2. Where the law of a state forbids a corporation taking over a certain amount of interest, is a contract for a greater amount void? If not void, the surplus interest paid should be credited to the debtor, as not collectible.

MILLER, District Judge. This suit is against the defendants as endorsers of a promissory note, of which the following is a copy:

"Office of the Milwaukee & Horicon R. R. Co., Milwaukee, Wis., March 23d, 1858. $20,000. Three months after date for value received, the Milwaukee and Horicon Railroad Company promise to pay to the order of J. B. Smith, Jasper Vliet, Garret Vliet and Daniel H. Richards, with interest, twenty thousand dollars, payable at the American Exchange Bank, in New York; having deposited herewith as collateral security with authority to sell the same on the non-performance of their promise, in such manner as the holder hereof may deem proper, either at public or private sale, and apply the proceeds hereon, sixty of the first mortgage bonds of this company of one thousand dollars each, payable in 1878, with the coupons that fall due November 1, 1857, attached. Milwaukee & Horicon Railroad Company, by J. B. Smith, President.

"Endorsed: J. B. Smith. Jasper Vliet. Garret Vliet. D. H. Richards."

This note was given to the Market Bank in lieu of other notes, amounting in the aggregate to the sum of twenty thousand dollars, that had been previously negotiated at the bank. The negotiation for a loan on those notes to the company was commenced at the instance of the company, through a resident of Milwaukee, who was a relative of the cashier of the bank. By a private agreement, interest at the rate of seven per cent. was paid, and exchange, and also a bonus to the agent, which was divided between the agent and the cashier of the bank. The exchange was charged and paid, at the rate of exchange between Milwaukee and New York, which was much higher than that between Troy and New York. On the giving of the note in suit, the same conditions were contemplated, but they were not carried out. The agent received the collaterals and the bank holds them. The plaintiff is a banking association under the general banking law of the state of New York, located in the city of Troy, where it can do business, and not elsewhere. This was a contract made and executed in the state of New York; and it must be controlled by the laws of that state. By those laws, the rate of interest upon the loan or forbearance of money is seven per cent. And no person or corporation shall directly or indirectly take or receive, in money, or in any other way, any greater sum. And all bonds, bills, notes, assurances, conveyances, and all other contracts or securities whatsoever, (except bottomry and respondentia bonds or contracts,) and all deposits of goods, or other things whatsoever, whereupon or whereby there shall be reserved or taken, or secured, or agreed to be reserved or taken any greater sum or greater value for the loan or forbearance of any money, &c., shall be void; and any person receiving interest in violation of the law, shall be deemed guilty of a misdemeanor, and on

conviction shall be punished by a fine or imprisonment. In April, 1850, an act was passed, that no corporation shall hereafter interpose the defense of usury in any action. [Laws N. Y. 1850, p. 334.] Associations formed under the general banking law of the state of New York, according to decisions of the courts of that state, are not bodies corporate and politic within the spirit and meaning of the constitution of the state; but they are nevertheless corporations for all practical purposes. And they are subject to the general laws of the state regulating the rate of interest. The books of reports of the state contain many cases in favor of and against banks and banking institutions involving the question of usury. The proof shows that the original notes were given to the bank by the railroad company, endorsed by these defendants as payees, on a loan of money by the bank to the company. If the original notes were void for usury, the note in suit is to be considered void. Armstrong v. Toler, 11 Wheat. [24 U. S.] 258; Jackson v. Packard, 6 Wend. 415; Tuthill v. Davis, 20 Johns. 285; Andrews v. Pond, 13 Pet. [38 U. S.] 65; Walker v. Bank of Washington, 3 How. [44 U. S.] 62. If the charge for exchange was a cover for usury, the contract was usurious and void.

In the case of Leavitt v. Curtis, 15 N. Y. 9, it is decided, in effect, that under the act of April, 1850, a corporation cannot set up usury in any way to defeat a contract otherwise valid. And in Southern Life Insurance & Trust Co. v. Packer, 17 N. Y. 51, it is decided that the act applies to foreign corporations litigating in the courts of that state. In the opinion, the court use, in reference to the act, the words "this partial repeal of the usury laws." The act is not to be considered a repeal of those laws, but merely a prohibition of the defense of usury, on the part of corporations, in the courts of the state. It is not intimated in either of the cases, that the act was intended to include accommodation endorsers for corporations. The contract or transaction may be usurious; but that shall not be allowed to be pleaded in the courts of the state by a corporation. Corporations alone are prohibited from interposing the defense of usury. The system of the usury laws of New York, for the protection of individuals makes usurious contracts void; but the contracts of corporations are made an exception, by the act, merely to the extent of their interposing the plea of usury in the courts. The act declares it to be the policy of the state to withhold protection only from corporations. The act does not make contracts of corporations, to give more than seven per cent. interest, valid. It merely withdraws protection from corporations. The usury laws are left in full force against the lender. The note of the railroad company, and the endorsement of the defendant, were but one transaction. The endorsers were essential parties to the transaction. If the act had prohibited the defense on all contracts of corporations, then the defendants might be included in the prohibition. The defendants are so far parties to the note, as accommodation endorsers, that they may object to its payment for usury. Jones v. Hake, 2 Johns. Cas. 60; Wilkie v. Roosevelt, 3 Johns. Cas. 206; 11 Wend. 329; 8 Paige. 641; 9 Paige, 187; 7 Paige, 602. In the case of Bock v. Lauman, 24 Pa. St. 435, it is decided that a bill of exchange drawn at Buffalo, by the agent of a railroad company, to the order of the president of the company, and endorsed by the defendant, when it was negotiated in New York, on usurious loan, was void as to the endorsers; although by the act of 1850, it should be valid against the company. That is the only adjudicated case on this subject. And, although it is not of equal authority with a decision of the court of appeals of New York upon the construction and force of a statute of that state, yet it is a decision of a highly respectable court, and worthy of favorable consideration. The law of the state of New York in the most positive terms forbids corporations from receiving a greater amount of interest than seven per cent.

It was argued by counsel that, independent of the penalty for usury, the note in suit should be considered void as a contract for a greater amount of interest than a corporation was allowed by law to receive. In the case of Fleckner v. Bank of U. S., 8 Wheat. [21 U. S.] 338, the court say: "The act incorporating the Bank of the United States does not avoid securities, on which usurious interest may have been taken; and the usury laws of the state cannot be set up as a defense to a note, on which it is taken. It is merely a violation of the charter for which a remedy may be applied by the government." But in the subsequent case of Bank of U. S. v. Owens, 2 Pet. [27 U. S.] 527, the court decide that such a contract and loan on the part of the bank are void on general principles. The court remark: "Courts of justice are instituted to carry into effect the laws of a country and they cannot become auxiliary to the violation of these laws. There can be no civil right, where there can be no legal remedy; and there can be no legal remedy for that which is in itself illegal." Such has also been the ruling of the supreme court of Ohio. Bank of Chillicothe v. Swayne, 8 Ohio, 257; Creed v. Commercial Bank of Cincinnati, 11 Ohio, 489; Miami Exporting Co. v. Clark, 13 Ohio, 1. Also in 5 Conn. 560. It is well understood that a corporation created by statute is a mere creature of the law; and can exercise no powers, except those which the law confers upon it, or which are incident to its existence. Head v. Providence Ins. Co., 2 Cranch [6 U. S.] 127; Bank of U. S. v. Dandridge, 12 Wheat. [25 U. S.] 64; Bank of Augusta v. Earle, 13 Pet. [38 U. S.] 587; Perrine v. Chesapeake & D. Canal Co., 9 How. [50 U. S.] 172; Pearce v. Madison & I. R. Co., 21 How. [62 U. S.] 441. Whenever

a corporation makes a contract, it is a contract of the legal entity of the artificial being created by its charter. The only right it can claim are the rights which are given to it in that character. A corporation can make no contracts and do no acts, except such as are authorized by its charter, and those acts must be done by such officers or agents, and in such manner as the charter authorizes. The public have an interest, that banks shall not impose upon the necessities of their customers. Banks are created for the accommodation of the public, and they should not be allowed to assume a power of oppression. It is not the duty of the courts to lend their aid in carrying out contracts of banks, prohibited by their charter, or the laws of their state. Public policy as well as public interest require that usurious contracts, or loans of banks upon an amount of interest forbidden by law, should not be enforced by the courts. But as I have come to the conclusion that these defendants can plead, in their discharge, the law of the state of New York against usury, it is not necessary to consider further this last subject. At all events, the surplus interest paid over the legal rate, should be credited to the debtor, as not collectible.

Case No. 9,091.

MARKEY v. MUTUAL BEN. LIFE INS. CO.

[3 Law & Eq. Rep. 647; [1] 6 Ins. Law J. 537.]

Circuit Court, D. Massachusetts. April 13, 1877.

DISCOVERY—POLICY OF INSURANCE—SPECIFIC PERFORMANCE—MISJOINDER—LACHES—DEMURRER.

[1. A bill which seeks, firstly, the discovery and production of an application for a policy of insurance and of the policy made thereon, and, secondly, a decree requiring the delivery of the policy and a specific performance of a contract to deliver it, is bad for multifariousness.]

[2. A bill for discovery in aid of a suit at law cannot be maintained in the absence of allegations that it is material that the discovery should be had, and that the court of law in which the case is pending cannot compel the discovery.]

[3. A bill for specific performance of an agreement to deliver a contract of insurance cannot be maintained when the same is not filed for more than ten years after the cause of action accrued. Under such circumstances the suit is barred, both on the ground of laches and by the statute of limitations.]

Bill in equity for the discovery and production of the original application for a policy of insurance, and of a policy of insurance alleged to have been made by the defendants in accordance with the application, such discovery and production being sought to enable the complainant to maintain a suit at law; and also for the specific performance of an alleged agreement to deliver a policy of insurance and a decree for the delivery of the policy to the complainant. There was a demurrer to the bill.

[1] [Reprinted from 3 Law & Eq. Rep. 647, by permission.]

[2] [Dwight Foster, for defendant.

[This bill was filed May 20, 1876. It alleges (1) That James W. Hoyt, the plaintiff's late husband, on Sept. 21, 1865, made a written application for a policy of insurance on his life for the benefit of the plaintiff, for the sum of three thousand dollars; (2) that said application was delivered to Chas. F. Wells, the duly authorized agent of the defendant corporation; (3), that the defendant, by Wells, its duly authorized agent, agreed, if it should accept said application, to make and deliver to the plaintiff a policy of insurance according to the terms of the application and of the policy then in use by the defendant, upon the payment of a certain premium therefor by the plaintiff; (4) that the defendant accepted the application and made and signed a policy of insurance in accordance with the application, and in the form of a policy then in use by the defendant; (5) that Hoyt made an agreement with one Banks that the said Banks should pay the premium due on the policy, in behalf of the plaintiff; (6) that early in November, 1865, Wells, agent for the defendant, brought the policy of insurance to the house of Hoyt, and notified the plaintiff that the defendant had accepted the application, and made, written, and executed the policy; (7) and thereupon Wells agreed to go to Banks and obtain from him the premium, which premium Banks was ready, on behalf of the plaintiff, to pay to Wells, the defendant's agent, and to leave with Banks the policy; but Wells did not call upon Banks as he had agreed to, and did not demand of him the premium nor deliver to him the policy, but returned the same to the defendant; (8) that plaintiff the next day learned of Banks' neglect, and at once tendered the premium to the defendant at its office in Boston and demanded the policy, but the defendant refused to receive the premium or to deliver to her the policy; (9) that Hoyt died November 23, 1865; (10) that plaintiff notified defendant of his death, and demanded payment of said sum of three thousand dollars, which defendant refused to pay, or deliver said policy; (11) that plaintiff commenced a suit at law to recover said sum of three thousand dollars, returnable at the superior court of Essex county on the first Monday of June, A. D. 1866 [103 Mass. 78]; (12) that the plaintiff is advised "that in accordance with the decisions of the supreme judicial court of Massachusetts, she cannot safely proceed in said suit without a delivery to her of said policy, which she has demanded, but defendant refuses to deliver to her." (13) Then follow the interrogatories: 1. Did not Hoyt make a written application for a policy of $3,000? 2. Did not defendant accept it? 3. Did not defendant make and sign a policy? 4. Did not defendant, upon tender of the premium during the life of Hoyt, refuse to deliver the policy? 5. Does not defendant still refuse to deliver

[2] [From 6 Ins. Law J. 537.]

the policy? (15) Next is a prayer that defendant may discover and produce the original application, and the policy of insurance so made by it; (16) and may be decreed to deliver this said policy and that the terms of the agreement for a policy of insurance may be specially performed; (18) and for other and further relief. The present bill is an attempt to transfer wholly or in part to this court a litigation which has been pending for eleven years in the courts of Massachusetts, and on the merits of which its supreme court has pronounced three opinions adverse to the plaintiff. Hoyt v. Mutual Ben. Life Ins. Co., 98 Mass. 541; Markey v. Mutual Ben. Life Ins. Co., 103 Mass. 78, 118 Mass. 179.

[I. Assuming the present bill to be intended as one for discovery ancillary to the suit at law, it cannot be maintained. 1. There is no allegation that the discovery cannot equally well be obtained in the pending legal action. Hare, Disc. (2d Ed.) pp. 80, 88. Kerr, Disc. pp. 9, 10; Dunn v. Coates (1738) 1 Atk. 288; Bent v. Young (1838) 9 Sim. 180; Gelston v. Hoyt (1815) 1 Johns. Ch. 547; Mitchell v. Smith (1828) 1 Paige, 287; Heath v. Erie Ry. Co. [Case No. 6,307]. 2. This court takes judicial notice of the public statutes of Massachusetts. Covington Drawbridge Co. v. Shepherd, 20 How. [61 U. S.] 234. It therefore knows that by interrogatories in an action at law the defendant could have obtained all the discovery of facts and production of documents that she asks for by this bill. Gen. St. Mass. c. 129, §§ 46–57. 3. No delivery of the policy now made, whether voluntary or by decree of court, could assist the plaintiff in her pending action at law. (a) If she had when the action was brought a valid agreement to insure or to make and deliver the policy, she can recover for a breach of that contract, in damages, the amount agreed to be insured. Insurance Co. v. Colt, 20 Wall. 560. (b) If on the other hand, she has brought her suit on a policy which had not then been delivered to her, nothing which can be done by herself or by the defendant, or by the decree of a court of equity, will enable her to maintain such an action. A right of action can never be created after the action is commenced. Evans v. Bagshaw, 5 Ch. App. 340.

[II. The bill is not maintainable as one for specific performance of a contract to insure. On its face it shows that the alleged contract was made and broken more than ten years before the bill was filed. It is barred by limitation and the plaintiff has been guilty of laches. Gen. St. Mass. c. 155, § 1; St. N. J. tit. 4, c. 8; Miller v. McIntyre, 6 Pet. [31 U. S.] 61; Com. v. Cochituate Bank, 3 Allen 42; Rhode Island v. Massachusetts, 15 Pet. [40 U. S.] 233; Harwood v. Cincinnati & C. A. R. Co., 17 Wall. [84 U. S.] 78; Peabody v. Flint, 6 Allen, 57; 1 Daniell, Ch. Prac. 587.

[III. The bill is bad for multifariousness; the plaintiff should be required to elect between the action at law and the bill in equity. 2 Daniell, Ch. Prac. 817; Pieters v. Thomson, Coop. 294; Tillotson v. Ganson, 1 Vern. 103; Hogue v. Curtis, 1 Jac. & W. 449; Jones v. Earl of Strafford, 3 P. Wms. 90, note; Connihan v. Thompson, 111 Mass. 270.] [2]

D. Saunders, for complainant.

SHEPLEY, Circuit Judge. The frame of the bill does not sustain the position that it was brought for a single object, namely, the delivery to the complainant of the policy of insurance to enable her to maintain a suit at law. [The bill is two-fold. It seeks discovery and production of the original application for a policy of insurance and also of a policy of insurance alleged to have been made by the defendants in accordance with the application, such discovery and production being sought to enable her to maintain her suit at law. It seeks, secondly, not the mere discovery and production of the policy of insurance to be used as evidence in the suit at law, but a specific performance of an alleged agreement to deliver a policy of insurance, and a decree for a delivery of the policy to the complainant.][2] This sufficiently appears from the prayers of the bill, which are, first, that the said defendants may discover and produce the original application for a policy of insurance and the policy of insurance made by them; second, that the said defendants may be decreed to deliver the said policy of insurance, and that the terms of the agreement for a policy of insurance may be specifically performed, etc., and a prayer for general relief. Such a misjoinder of a bill for discovery in aid of a suit at law, and a bill for the specific performance of a contract to deliver a policy and a decree for such delivery, constitutes multifariousness, and is fatal to the bill, [upon demurrer, even if there were not other fatal objections to the bill in each of its branches, separately considered.][2] Where a bill contains several distinct grounds of a suit in equity, which cannot properly be joined, it is bad for multifariousness, and one test of this is, that the bill prays for multifarious relief. Daniell, Ch. Prac. 342, and notes; Story, Eq. Pl. § 280; Shackell v. Macaulay, 2 Sim. & S. 79; Dew v. Clarke, 1 Sim. & S. 108.

2. The bill cannot be maintained as a bill for discovery in aid of a suit at law, for two reasons: First, that there is no allegation that it is material that the complainant should have the discovery, which allegation is material. Gelston v. Hoyt, 1 Johns. Ch. 547; Heath v. Erie Ry. Co. [Case No. 6,307]. [The allegation in the bill is not of any inability to prove the contents of the application or policy, or of any inability to have them produced in evidence in the court below, but only that the orator "is advised that in accordance with the decisions of the supreme judicial court of the commonwealth of Mass-

[2] [From 6 Ins. Law J. 537.]

achusetts, she cannot safely proceed in said suit without a delivery to her of the said policy; and your orator has requested the said defendants to deliver to her the said policy, but they have refused, and still refuse, to deliver to her the same." The allegation that defendants have refused, and still refuse to deliver to her the policy, is not inconsistent with their entire willingness to produce and discover the paper in evidence. On the contrary, the allegations in the bill tend to show that there would be no difficulty on the part of the plaintiff in proving the contents of the application and policy, and no reason is perceived why, if the papers are in existence, their production in evidence might not be enforced by any court of common law jurisdiction without the intervention of a court of equity. This allegation in the bill that the plaintiff is advised that she cannot safely proceed in the suit at law without a delivery of the policy, seems not to refer to any supposed need of production and discovery, but is evidently inserted as a necessary averment to sustain that other distinct ground of relief sought in the bill, namely the specific performance of a contract to deliver a policy of insurance.][2] Secondly, there is no allegation in the bill that the court of law in which the case is pending cannot compel the discovery. Courts of equity do not interfere when discovery is scught in aid of proceedings in some other court, and the court itself in which the trial is to be had can itself compel the discovery required. Kerr, Disc. pp. 9, 10; Dunn v. Coates, 1 Atk. 288. [There is not only no allegation that the production of the application and the policy is withheld or resisted, but][2] the statutes of Massachusetts afford to the complainant every opportunity to obtain production of these papers that is asked for by the present bill.

3. The bill cannot be maintained for the specific performance of an agreement to deliver the contract of insurance. The agreement to make and deliver the policy is alleged to have been made early in the month of November, 1865, and the breach of the agreement and the death of the party whose life was to have been insured by the policy to have both happened during the same month. This bill was filed May 20, 1876, more than ten years after the cause of action accrued. These facts showed such laches as [aside from the express bar of the statute of limitations][2] would deprive the complainant of any right to the discretionary relief prayed for, and this objection may be taken on demurrer. Story, Eq. Pl. §§ 484, 503; Maxwell v. Kennedy, 8 How. [49 U. S.] 210, 217. The defendants, though a foreign corporation, by the provisions of the general statutes of Massachusetts have an agent in the commonwealth on whom service might have been made. Under these circumstances, the bar of the statute of limitations, which binds courts of equity as well as law, also applied to this case. [The object of this bill seems to be after a lapse of ten years to transfer to this court a litigation which has long been pending, and three times tried in the courts of the commonwealth, and which after this lapse of time and in this manner cannot thus be transferred to this tribunal.][2]

Demurrer sustained; bill dismissed.

MARKLEY (GARRISON v.). See Case No. 5,256.

Case No. 9,092.

MARKOE v. COXE et al.

[5 Cranch, C. C. 537.][1]

Circuit Court, District of Columbia. March Term, 1839.

TRUST DEED—SALE BY TRUSTEE — INVESTIGATION OF TITLE—RENTS AND PROFITS—RESALE.

1. A purchaser at a trustee's sale for money payable by instalments with interest from the day of sale, and with leave to take immediate possession, is bound to pay interest from that day, although he should decline to take possession until some months thereafter, while investigating the title and waiting for the vendor to clear it; but is entitled to the rents and profits accruing during the same time.

2. If the purchaser pays the money into court under the order of the judge granting the injunction to stay a resale by the trustee, the interest ceases to run from the time of such payment.

Bill in equity to stay a resale of the property sold by the defendants [R. S. Coxe and others] to the plaintiff [Francis Markoe, Jr.] under a deed of trust from Timothy Caldwell, and to obtain a clear title.

This cause came before the court upon a motion to dissolve the injunction which had been granted by a judge of this court, upon condition of paying the purchase-money, and so much of the interest as the plaintiff admitted to be due, namely, from the day on which he took possession of the property, until the payment into court; which was done accordingly.

The facts upon the bill and answer of the defendant Coxe, appeared to be as follows: On the 8th of December, 1837, the defendants, as trustees under a deed of trust from Timothy Caldwell to secure a debt due to Mr. Joseph Walter, sold a house and lot in square 78, in the city of Washington, to the plaintiff, at public auction, for $4,075, one-fourth to be paid in cash and the residue in six, twelve, and eighteen months, on interest; and the purchaser to be entitled to immediate possession. That before the sale the plaintiff inquired of the defendants as to the title, and was informed by them that they could give no warranty as to title; but that as a friend

2 [From 6 Ins. Law J. 537.]

2 [From 6 Ins. Law J. 537.]

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

they had no hesitation in saying that they believed the title good, and that, with the exception of an incumbrance to Mr. Fischer of Philadelphia, they were not aware of any incumbrance, other than that under which this sale was made. That the debt due to Mrs. Fischer should be paid out of the purchase-money, and that the purchaser might pay it, and would be allowed credit therefor. The deed of trust from Caldwell to Mr. Coxe, was acknowledged in Philadelphia before Mr. Justice Baldwin of the supreme court of the United States, who was also ex officio a judge of the circuit court of the United States for the Eastern district of Pennsylvania; but there was no certificate of the clerk of that court, that he was such judge at the time of the execution and acknowledgment of the deed, as required by the act of congress of the 31st of May, 1832 (4 Stat. 520), "for quieting possessions, enrolling conveyances," &c., "within the District of Columbia." The deed had been duly enrolled within the six months allowed by law, and the six months had now expired. There was no written evidence of a request by Mr. Walker to Mr. Coxe to make the sale under the deed of trust, or to receive the purchase-money. Under these circumstances, Mr. Markoe declined to take possession, or intermeddle with the property until the 8th of August, 1838, when Mr. Coxe invited the plaintiff to take possession of the property, promising that it should not injure his rights; upon which the plaintiff took possession, supposing it to be understood that no back interest would be claimed. Mr. Coxe claimed interest upon the purchase-money from the day of sale. Some rent accrued in the meantime, a part of which had been expended in repairs, and the residue had been received by Mr. Caldwell. Mr. Coxe threatened to resell the property, unless the purchase-money and full interest should be paid up; and to prevent such resale, the injunction was granted.

CRANCH, Chief Judge. The defendant, Mr. Coxe, having answered the bill, has moved the court to dissolve the injunction, which restrains him from reselling the property for the default of the plaintiff in not paying the instalments due, and the interest thereon from the 8th of December, 1837, according to the terms of the sale. The plaintiff contends that, as he did not take possession of the property until the 8th of August, 1838, he is not bound to pay interest for any period before that day. The sale was made on the 8th day of December, 1837, and the purchaser was to be entitled to immediate possession. The plaintiff admits that he declined to take possession.

The plaintiff's counsel cited the cases of Blount v. Blount, 3 Atk. 636, and Fludyer v. Cocker, 12 Ves. 25, to show that interest is not payable upon purchase-money until the purchaser is in possession. But those cases were decided merely upon the general principles of equity. There had been no express promise to pay interest from the day of sale, as there was in the present case. If there had been, there can be no doubt that the chancellor would have decided according to the contract of the parties.

The plaintiff does not seek to be relieved from the contract, but contends that he has a right to be relieved from the interest while he was investigating the title, &c. I see nothing, in his own statement of his case, which can justify the court in rescinding the contract in part, and not in the whole; in permitting the plaintiff to avail himself of the benefit of the contract without taking upon himself the whole of its burdens. It was not the defendant's fault, that the plaintiff did not take possession of the property immediately after the sale.

I think the plaintiff must pay the interest from the 8th of December, 1837, the date of the sale, to the time of payment. But the plaintiff has a right to have the title cleared from the objections which have been made to the deed from the defendant Caldwell to the defendant Coxe, and from want of evidence that the sale was made at the request of the defendant Walter, and from the want of a release of Mrs. Fischer's mortgage, and therefore the injunction must be continued until those things are done; and the motion to dissolve it must be overruled.

MORSELL, Circuit Judge, concurred in overruling the motion to dissolve the injunction; but was of opinion that the plaintiff was not bound to pay interest until he took possession of the property.

THRUSTON, Circuit Judge, absent.

This cause came to final hearing at November term, 1839, when THE COURT (MORSELL, Circuit Judge, contra) was of opinion, and so decreed, that the plaintiff was liable for interest on the purchase-money from the day of sale, until it was brought into court, but not afterwards; and that the plaintiff was entitled to the rents and profits accruing between the day of sale and his taking possession, (deducting what was expended in repairs;) and his costs to be deducted from the purchase-money and interest. A trustee was appointed to convey to the plaintiff all the rights of all the other parties to the suit; and the injunction was made perpetual.

Case No. 9,093.

MARKOE et ux. v. MAXCY et al.

HUGHES et ux. v. SAME.

[5 Cranch, C. C. 306.] [1]

Circuit Court, District of Columbia. March Term, 1837.

REAL PROPERTY—APPOINTMENT—TRUSTEE — SUIT TO COMPEL CONVEYANCE.

When property is conveyed in trust for the sole and separate use of the wife during the term of her life; and after the expiration of such term, for the use of such person or persons and for such purpose as she, by her last will and testament, shall appoint and direct; and in default of such appointment, to the use of her next of kin and personal representatives; a court of equity cannot authorize the trustees to convey the property to the husband, upon a bill filed by him and his wife against the trustees, for that purpose.

[Suits by Francis Markoe and wife against Virgil Maxcy and James Chester, Jr., and by George W. Hughes and wife against the same parties.]

These were bills in equity by husband and wife against trustees; stating, that before marriage, the wife conveyed certain personal property to the defendants in trust for the sole and separate use of the wife. That she is desirous to settle it all on her husband, and has requested the trustees to convey it to him accordingly, but they refuse because they have not the power, under the trust, to do so. The trustees, by their answer, admit the facts of the bill, but deny that they can, under the trust, convey the property absolutely to the husband.

The trust is, "to and for the use and benefit of the said Mary G. Maxcy, for and during the term of her natural life. And if the said Mary G. Maxcy shall, at any time hereafter, marry, then that she may have and enjoy, and take the use and profits of the aforesaid property, for and during the term aforesaid, to her sole and separate use, and not to be subject, in any manner, to the control or debts of her husband; and from and after the expiration of the term aforesaid, then in trust to and for the use of such person and persons, and for such purpose as the said Mary G. Maxcy, by her last will and testament, or by any instrument of writing, in the nature of a last will and testament, shall appoint and direct; and in default of such appointment, then to the use of such person or persons as, at the time of the death of the said Mary G. Maxcy, may be her next of kin and personal representatives;" and in further trust that the trustees might, at her request, and in their discretion, sell the property, and re-invest the proceeds in other property, "to be held subject to the aforesaid trusts, and with the like power of disposition," with full power, at her request, "to change the nature of the trust property and securities, whenever, and as often as it shall become necessary and expedient so to do."

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

The case was submitted to the court without argument, and, after great consideration,

THE COURT (THRUSTON, Circuit Judge, absent) was of opinion that the wives had no power to convey but by last will and testament, or by an instrument in the nature of a last will and testament, as provided for in the deed of trust; and that the court could not enable them to do so.

See 2 Kent, Comm. 163, 165, 166, 170, and the cases by him cited; Lowry v. Tierman, 2 Har. & G. 34–40; Methodist Episcopal Church v. Jacques, 3 Johns. Ch. 90, 102, 103–113; Ewing v. Smith, 3 Desaus. Eq. 417. See, also, Sperling v. Rochfort, 8 Ves. 170; Chesslyn v. Smith, Id. 183; Frederick v. Hartwell, 1 Cox, Ch. 193; Barford v. Street, 16 Ves. 135; Pybus v. Smith, 3 Brown, Ch. 346; Nieman v. Cartony, 3 Brown, Ch. 346, note; Sockett v. Wray, 4 Brown, Ch. 483; Anderson v. Dawson, 15 Ves. 536; Richards v. Chambers, 10 Ves. 580; Reid v. Shergold, Id. 370; Lee v. Muggeridge, 1 Ves. & B. 118; Fettiplace v. Gorges, 1 Ves. Jr. 46, 3 Brown, Ch. 8; Rich v. Cockell, 9 Ves. 369; Fenner v. Taylor, 1 Sim. 169; Methodist Episcopal Church v. Jaques, 1 Johns. Ch. 450, 3 Johns. Ch. 77; Lancaster v. Dolan, 1 Rawle, 231, 248; Acton v. White, 1 Sim. & S. 429; Ritchie v. Broadbent, 2 Jac. & W. 456, and the case of Gullan v. Trimbey, in a note; Howard v. Damiani, Id. 458; Ball v. Montgomery, 2 Ves. Jr. 199; West v. West, 3 Rand. [Va.] 373; Emery v. Neighbour, 2 Halst. [7 N. J. Law] 142.

Case No. 9,094.

In re MARKS.[1]

District Court, D. New Jersey. May 29, 1877.

BANKRUPTCY—PARTNERSHIP—DISCHARGE OF PARTNER.

[Where there are no partnership assets to be collected and distributed, an individual member of a former partnership may, upon his own petition, be discharged from all his debts, both partnership and private.]

[Cited in Re Plumb, Case No. 11,231.]

[On specifications against the discharge of Charles P. Marks, a bankrupt.]

BY THE COURT. The second specification against the discharge would have been fatal, if it did not appear by the affidavit of the assignee and the report of the register that there were no assets remaining of the partnership. The applicant is one of the late firm of Marks, Palmer & Cushman. He applies for a discharge from his debts, partnership as well as personal. If there were assets of the partnership to be collected, it would be necessary to have the firm adjudicated bankrupts, and an assignee appointed to collect and distribute the same, before any individual member of the firm could be discharged. In re Little [Case No. 8,390]; In re

[1] [Not previously reported.]

Bidwell [Id. 1,392]; In re Grady [Id. 5,654]. But this principle only applies to partnerships actually existing, or where there are assets belonging to the firms. In re Winkens [Id. 17,875]. Where there are no partnership assets to be collected and paid out, one member of a former partnership may, upon his individual petition, be discharged from all his debts, partnership and private. In re Abbe [Id. 4]. It is not necessary to consider the third specification, because no assent of creditors need be asked for in regard to debts contracted before January 1, 1869, and it does not appear that the bankrupt has contracted any since that date. A discharge will be granted to the bankrupt from all his debts, partnership and individual, incurred previous to January 1, 1869.

Case No. 9,095.

In re MARKS.

[2 N. B. R. 575 (Quarto, 175);[1] 16 Pittsb. Leg. J. 12; 1 Chi. Leg. News, 245.]

District Court, D. Minnesota. April, 1869.

BANKRUPTCY—SEIZURE BY MARSHAL—INDEMNIFICATION—SUIT BY CLAIMANT—ASSIGNEE—INJUNCTION SOUGHT.

1. The United States marshal, under provisional warrant to seize the effects of the bankrupt, took goods claimed by one W., and being indemnified under G. O. No. 13, delivered the same to the assignee in bankruptcy. W. sued the marshal upon the tort in the state court. The assignee claimed the lawful possession of the property; alleged the claim of W. thereto to be illegal, and that he disposed of a portion thereof while in his possession, and prayed that W. be ordered to account therefor, and be permanently enjoined from prosecuting his action against the marshal. *Held*, that the facts do not warrant the granting of such injunction; the marshal is responsible if he seized property not belonging to the bankrupt, and the petitioning creditors are bound to defend him in the suit by the claimant.

[Cited in Marsh v. Armstrong, 20 Minn. 81 (Gil. 66); Clark v. Binninger, 38 How. Pr. 342.]

2. But the summary mode instituted by the assignee, by the petition, to collect the portion of the bankrupt's assets withheld, is not objectionable. Sale of the property ordered, and proceeds to await further order of the court.

In bankruptcy.

NELSON, District Judge. It appears from the petition filed by the assignee, that, at the time proceedings in bankruptcy, were instituted, a provisional warrant was issued to the marshal, under section forty of the act, commanding him to seize the property and effects of the debtor. The marshal, by virtue of the warrant, seized a certain stock of goods claimed by one Asa White, and being indemnified, under general order No. 13, delivered the stock to the assignee, as the property of the bankrupt. White has commenced a suit against the marshal, in the district court of the state, for the value of the property taken by him, and for damages for its detention. The assignee claims the property by virtue of the assignment, and alleges the claim of White to be illegal, and charges him with having disposed of some of the property when in his possession, and demands that he account for the same, and deliver over the proceeds of all sales and claims arising therefrom.

Upon this statement of facts an injunction was asked for, to restrain White from prosecuting his suit against the marshal, in the state court. An order was entered that White show cause why the prayer of the petition should not be granted, and a preliminary injunction was issued. On granting the injunction we suggested that a motion to dissolve be argued on the return day of the order to show cause, if the counsel for the respondent desired. This motion has been argued, and also one for a dismissal of the petition. We are satisfied upon an examination of the case that the facts presented by the petition will not authorize us to interfere with the proceedings against the marshal in the state court. The warrant to take possession provisionally of property, referred only to the property and effects of the debtor. The marshal proceeds to execute this writ at his peril, and if he seizes property belonging to a person other than the debtor, he cannot justify his conduct under the warrant; he is liable to the injured party, and we can neither protect him, nor compel the party so injured to submit his claim for damages to this court for adjudication. There is no contest in regard to the possession of the property. The assignee has not been interfered with in the discharge of his duties, and no claim has been made upon him for any of the property in his possession. He is not responsible for the acts of the marshal, and until there is some direct interference, tending to harass him, and prevent the due administration of the estate, we cannot interpose. The marshal has been indemnified by the petitioning creditors, and they are bound to defend him in any action that may be brought by the claimant of the property seized by him under such writ. In the language of the United States supreme court (Buck v. Colbath, 3 Wall. [70 U. S.] 347): "We see nothing, therefore, in the mere fact that the writ issued from the federal court, to prevent the marshal from being sued in the state court in trespass for his own tort, in levying it upon the property of a man against whom the writ did not run, and on property which was not liable to it." We deny the motion, however, to dismiss the petition, for the reason that there is an allegation that White has disposed of certain property belonging to the estate of the bankrupt, and retains the proceeds of the sale. The assignee is authorized by suit, if necessary, to collect the assets of the bankrupt, and there can be no objection to the summary mode instituted by the assignee for that purpose. We also

[1] [Reprinted from 2 N. B. R. 575 (Quarto, 175) by permission.]

order the property to be sold in the manner prescribed by general order No. 21, and the proceeds held subject to the further order of the court. Injunction dissolved.

Case No. 9,096.

MARKS et al. v. BARKER et al.

[1 Wash. C. C. 178.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1804.

BANKRUPTCY — ENDORSER FOR BANKRUPT — DEBT NOT YET DUE—RIGHT OF OFFSET—CONSIGNEE —OWNER'S LIEN—AFTER SALE.

1. No debt, but such as is due and owing at the time of the bankruptcy, can be proved under the commission; and, consequently, an endorser or acceptor of a bill of exchange, drawn by the bankrupt, who has not paid it before the bankruptcy, cannot prove the debt.

[Cited in Pogue v. Joyner, 6 Ark. 241.]

2. The acceptor or endorser of a bill of exchange, who pays the bill, after the bankruptcy of the drawer, may offset the same against the bankrupt's assignees; but, he must show the debt to be a subsisting one in him, at the time the action was brought; for this is a case of mutual credit, given before the bankruptcy, although the money was not paid until after.

[Cited in Re City Bank of Savings, Loan & Discount, Case No. 2,742; Catlin v. Foster, Id. 2,519; Ex parte Whiting, Id. 17,573.]

3. Set-off. Where it will be allowed, in relation to claims upon the bankrupt's estate, arising from transactions not completed, before the bankruptcy.

4. Whatever lien might have existed upon goods unsold, in the hands of a consignee, shipped to him upon a particular account, and under an agreement, which he has not kept; when these goods have been sold, the lien is at an end; and the proceeds of the goods will become the subject of mutual accounts, and of set-off between the parties.

Action of indebitatus assumpsit, for money had and received to use of bankrupts, and goods sold and delivered by them. Plea, non assumpsit, and notice to offset. The case was—Anthony & Pleasants, having shipped a cargo of tobacco and flour to John Waring, in Bristol, and intending to ship more; drew bills, as they were permitted to do, on Waring, for two-thirds the cost of those cargoes; which they got the defendants in Philadelphia, to endorse, and negotiate for them on the usual commission. One of the bills having returned protested; and, the defendants [Barker & Ansley,] entertaining apprehensions for the fate of the others; they requested Anthony to come on from Richmond, in Virginia, where his house was settled, to Philadelphia, on this business. He did so; and then the defendants insisted, that Anthony should give them security, to indemnify them against their endorsements on the bills drawn on Waring. This, Anthony declared he could not do; and, if it were insisted upon, his house would be obliged to stop. The defendants objected to this step, lest it should decide the fate of the bills, not then protested; and would, in other respects, be injurious not only to Anthony & Pleasants, but to the defendants. To prevent this measure, and, at the same time, to secure the defendants; they, on the 1st of April, 1802, committed to writing, but it was not signed, the following proposition, in substance, viz. that they would accept a bill, drawn by Anthony & Pleasants, on them, for 2000 dollars, in favour of H. Gilpin, on condition, that Anthony & Pleasants would ship them forty or fifty hogsheads of tobacco; and that Anthony & Pleasants should ship them other cargoes, which they would sell to the best advantage, and would accept their bills, for the amount to be drawn, on advice received by Anthony & Pleasants, that the cargoes had come to hand. Anthony; (who, having executed a release of any benefit by an increase of the funds, in consequence of this suit, was admitted as a witness,) deposed; that a parol agreement was made, that Anthony & Pleasants might draw on the defendants, on forwarding them bills of lading of the cargoes to be shipped them; and that no part of the proceeds were to be appropriated to the discharge of the European bills, drawn on Waring. At the time this negotiation was going on, and, to secure the defendants against their endorsements of the bills on Waring; Anthony, for his house, assigned over to the defendants the cargoes shipped to Waring, for securing the defendants as endorsers; and the balance to be for the benefit of Anthony & Pleasants. Anthony & Pleasants, accordingly, shipped to the defendants different cargoes of tobacco; but, having drawn upon them before they came to hand, those bills were protested. The cargoes of tobacco shipped to the defendants, were sold prior to the 27th July, 1802. On the 26th August, a commission of bankruptcy was taken out against Anthony & Pleasants, and an assignment made to the plaintiffs. The bills drawn on Waring were all protested, before the bankruptcy of Anthony & Pleasants. The defendants paid those protested bills after the bankruptcy. The cargoes in England, were sold for so much less than was calculated upon, as to induce Waring to protest so many of the bills drawn upon him, as to oblige the defendants to take them up, to a larger amount than the proceeds of the tobacco shipped to them, and which they did pay, after the bankruptcy of Anthony & Pleasants, but before the bringing of this suit.

It was contended by the plaintiffs' counsel that, from the evidence in the cause, it appeared, that the tobacco shipped to the defendants, was appropriated to a particular purpose; and, that the defendants had bound themselves not to make use of it,

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

to discharge any prior claims against Anthony & Pleasants, for which they were secured by the assignment. That this amounted to a waiver of their lien on those cargoes, and, consequently, of their right to offset those debts against this demand for the proceeds of the cargoes. They cited 2 Vern. 129; 2 W. Bl. 1269; 6 Term R. 258. On the other side it was insisted, that the contract was that which was reduced to writing; and circumstances were relied upon to discredit Anthony. That, at any rate, there was no evidence against the defendants of a waiver of their right to set off. That the fund provided in England, for the security of the defendants, having failed, they were not bound by their promise to Anthony & Pleasants, however strong it might be against them. Cases cited, 1 Term R. 285; 1 East, 98, 375; Cowp. 135; 3 East, 325.

The plaintiffs' counsel, when near concluding, started this point; that the defendants, not having paid the protested bill, on which they were endorsers, and which formed the mass of their claim, now attempted to be offset, until after the commission of bankruptcy, could not, under the bankrupt law, be entitled to set off those payments. He laid down the following propositions: 1st. That nothing but a subsisting debt, or a balance on a general account, or a liability to pay at all events, at the time of the bankruptcy, could be set off. 2d. That a debt depending upon a contingency, which does not happen until after the bankruptcy, cannot be set off. 3d. That no debt can be set off, which might not be proved under the commission. The conclusion from the premises is, that an endorser, who has not paid the bill before the bankruptcy, is only liable upon a contingency. He could not, in such case, prove under the commission, and consequently cannot set off. He cited Coke, Bank. Law, 565, 198, 201, 202; 1 Atk. 119; 8 Term R. 199; 3 Term R. 437; 4 Term R. 714.

THE COURT informed Mr. Dallas, the concluding counsel, that this was quite a new point, which the counsel who had opened, and argued on the part of the plaintiff, had never started; that this was an irregularity. But the point being important, the counsel for the defendant would be at liberty to discuss it.

Rawle and Lewis, for defendant, insisted that the credit having been given prior to the bankruptcy, it came within the 42d section of the bankrupt law [of 1800 (2 Stat. 33)], respecting offsets, and they cited Coke, Bank. Law, 579; Cowp. 251; 4 Term R. 211; 2 East, 227; 7 Term R. 378; Coke, Bank. Law, 572.

Upon the last point, WASHINGTON, Circuit Justice, delivered the opinion of the court. The proposition that no debt can be set off, which cannot be proved under the commission, if true, would settle this point. But it is not. The two questions depend on different sections of the law, very differently expressed. The cases cited to show what debts cannot be proved under the commission, go upon the words of the statute; which declare, that the certificate shall protect the bankrupt against all debts due and owing at the time of the bankruptcy. Consequently, the endorser or acceptor of a bill, who has not paid before the bankruptcy, cannot say that it was due, and owing from the bankrupt, at that time. But the question of offset depends upon the construction of the words, "mutual credit," in the section where they are found. I was at first struck with the propriety of giving them a limited construction, extending them no further than to debts payable at a future day; so as to assimilate, as nearly as possible, the case of offsets to that of debts, proveable under the commission; but, after reflecting that, by thus narrowing the construction, a man who had given credit, by endorsements or otherwise, in confidence of the security he possessed, in retaining what he might owe to that amount, I should take from him a plank on which he had intended to save himself; I thought I should be more likely to fulfil the intention of the legislature, by extending it to all cases of credit, given before the bankruptcy, though not to be terminated at a particular day. In this case, the defendants, by endorsing the bills of Anthony & Pleasants, in order to give them credit, did most certainly give credit to Anthony & Pleasants; and, therefore, the words "mutual credit," are broad enough to comprehend this case, if their meaning is not narrowed by construction. This section of our law is copied almost verbatim from the British statute.

The argument urged by the plaintiff's counsel, that if the section in question be construed to extend to this case, the estate of the bankrupt might be twice charged, viz. by the defendant and by the holder, is without foundation; because, clearly, before the offset is allowed, the defendant must show the debt to be subsisting in him alone. This is the doctrine in common cases of offset, that the debt attempted to be set off, must be a good and subsisting one, at the time the action is brought. The bankrupt law permits such an offset on a credit given before the bankruptcy, which, without this section, would not have been allowed. I consider the case of Smith v. Hodson, 4 Term R. 211, as no ways distinguishable from the present; because, in this case, the bills having been protested before the bankruptcy, the defendants, as endorsers, were as much the principal debtors, as the acceptor in the case cited; and in both, the bills were, at the time of the bankruptcy, in the hands of third persons. We are, therefore, of opinion, that the defendants are not deprived of the right of set-off, on account of their not having taken up the bills before the bankruptcy of Anthony & Pleasants.

WASHINGTON, Circuit Justice (after stating the facts, charged the jury). It is perfectly immaterial to this cause, whether the agreement of the 1st of April be such as the defendants contend it was, or such as is proved by Anthony; for except as to the time, at which Anthony & Pleasants were to be at liberty to draw, which is quite unimportant to the question in this cause, the two contracts are substantially the same; the declaration, which Anthony says was made by the defendants, that they would not appropriate the cargoes to be sent to them towards the European bills, was only expressing what necessarily resulted from the written promise, to appropriate them to another purpose, viz. to the taking up the bills which Anthony & Pleasants should draw on the defendants, to the amount of those cargoes. What, then, by this contract, were the defendants bound to do? To accept Anthony & Pleasants' bills, drawn upon them, either when the bills of lading for the tobacco were sent on, or on the arrival of the cargoes. But instead of this, those bills were protested. What then? The holders might possibly have sued the defendants, as acceptors, in consequence of their previous engagement to accept. But they protested the bills and returned them. Suppose Anthony & Pleasants had sued the defendants for a breach of their contract, in protesting their bills, having funds with which to take them up. They might have recovered damages, unless the defence now set up to justify their conduct, would have protected them. And most certainly, if the insufficiency of the funds assigned to the defendants, in Waring's hands, be made out, it would be a sufficient defence. Because that assignment was the consideration for the promise of the defendants; and if that failed, though without the default of Anthony & Pleasants, yet the defendants were thereby released from their promise. For what could have induced the defendants to agree to relinquish their lien, on future cargoes coming into their hands; but a belief that the indemnity they had received, against their prior engagements, was sufficient? This, I have no doubt, was the belief of all the parties at the time, but they were unfortunately mistaken. This, then, would have been the fate of such an action, as the one I have mentioned. But this is indebitatus assumpsit, for the value of the cargoes sold by the defendants. In answer to this, the defendants say, the bankrupts owe us more than you demand. Whatever construction may be given to the contract, it will not be pretended that the defendants, by agreeing not to appropriate the proceeds of the tobacco to the English bills, gave up their right to claim from Anthony & Pleasants, whatever sums of money they might be compelled to pay, on account of those bills. Now suppose Anthony & Pleasants were plaintiffs in this cause, and were defendants in a cross action to recover the amount of those protested bills, and judgments should be rendered on both actions. If the defendants' judgment exceeded that of Anthony & Pleasants, would not a court of chancery enjoin Anthony & Pleasants from proceeding on their judgment; particularly if it were stated that they would not, after receiving the defendants' money, be able to satisfy their judgment? Surely they would; and if so, the whole of the cause has dwindled down into a mere question of form; viz. whether the defendants shall be paid a demand, to which they are clearly entitled, in the way of a set-off, or a cross action, or an application to a court of chancery.

The plaintiffs' counsel have clearly been misled by applying the doctrine of lien to this case. When the defendants, by their agreement of the 1st of April, waived their lien on the tobacco, in consideration of a security for their engagements, on account of the English bills; they had another security, which they never waived, and that was, the personal responsibility of Anthony & Pleasants. Had Anthony & Pleasants, or the plaintiffs, brought trover and conversion for the tobacco, that being yet unsold; they might then have argued against the defendants' claim of lien, that it was waived. But the lien was gone by the sale, and the whole becomes now a question of personal responsibility, that is, to offset a debt admitted to be personally due, from Anthony & Pleasants, to the defendant, which debt never was given up, nor the right to set off expressly or impliedly waived.

The jury were out two or three days, and, on being called, the plaintiff suffered a nonsuit.

NOTE. During the trial, it was ruled, that what either of the bankrupts had acknowledged before bankruptcy, might be given in evidence against their assignees. An acknowledgment by the bankrupt, that he was indebted to the petitioning creditor, if made before suing out the commission, is good evidence to support it. 2 Esp. 592; N. P. Cas. 168. A man cannot be a witness to prove an act of bankruptcy, committed by himself; but his confession to a third person at the time, that he went out of the way to prevent an arrest, or to such like facts as are acts of bankruptcy, is admissible. 5 Term R. 512. Neither can a bankrupt be a witness, to prove the petitioning creditor's debt, or any other fact to support the commission; though he has a certificate. 2 H. Bl. 279. After his certificate is allowed, he may be a witness to any thing relating to the bankruptcy, except only to the act of bankruptcy (Id., note), though he releases (2 Strange, 829). The bankrupt is an admissible witness to explain a doubtful act, which may or may not be an act of bankruptcy; as whether an arrest, relied on as a concerted and fraudulent one, was so or not. 1 Esp. 287.

MARKS (DEPOSIT SAV. ASS'N v.). See Case No. 3,812.

MARKS (DISTRICT SAV. ASS'N v.). See Case No. 3,812.

MARKS (GREGORY v.). See Case No. 5,802.

MARKS (UNITED STATES v.). See Case No. 15,721.

MARKS (WALKER v.). See Case No. 17,078.

MARKS (WATTSON v.). See Case No. 17,296.

MARKS (WOOSTER v.). See Case No. 18,038.

Case No. 9,097.

MARKSON v. FIRST NAT. BANK.

[9 Chi. Leg. News, 108.]

Circuit Court, W. D. Missouri. 1876.

BANKRUPTCY—USURY — SUIT TO RECOVER BY ASSIGNEE—AMOUNT RECOVERABLE.

[1. An assignee in bankruptcy is the "legal representative" of a bankrupt within the meaning of the term in section 5198, Rev. St., empowering a person or his legal representative to recover by action usurious interest paid to national banks.]

[2. Where usurious interest has been actually paid, double the amount thereof may be recovered from a national bank under the provisions of section 5198, Rev. St.]

Usury.

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

KREKEL, District Judge. This suit is brought by the assignees of the King Wrought Iron Bridge Company, of Iola, Kansas, against the First National Bank, of Kansas City, Missouri, to recover under the statute of the United States usurious interest alleged to have been charged and paid. The national bank act, after providing that national banks may charge the highest rate of interest allowed by the state where the bank is located, enacts in section 5198, Rev. St., as follows:

"The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest, which the note, bill, or other evidence of debt, carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representative, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid, from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred."

The assignees seek to recover, under this section of the act, double the amount of interest paid. The answer is a simple denial of the allegations of the petition. The evidence tends to show that during the years of 1872 and 1873, the bankrupt company from time to time obtained loans from the First National Bank of Kansas City, for which a rate of interest of not less than 18 per cent. was paid. The charging and payment of this interest is undisputed, but it is denied that the right to recover the usurious interest passed to the assignees. This, and the question as to the amount of recovery, were both decided in the case of Crocker v. National Bank of Chetopa [Case No. 3,397], district of Kansas, by Judge Dillon. The statute under which the suit is brought, provides, as we have seen, that "in case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back in an action in the nature of an action of debt, twice the amount of the interest thus paid." Who is the legal representative of a bankrupt? This question was fully considered in the case cited.

The 14th section of the bankrupt law [of 1867 (14 Stat. 522)] provides for an assignment of the estate of the bankrupt to the assignee, and declares that upon such assignment by operation of law, all the property and estate of the bankrupt, including all choses in action, shall pass to the assignee. By section 16 it is provided "that the assignee shall have the like remedy to recover all said estate debts and effects in his own name, as the debtor might have had, if the decree in bankruptcy had not been rendered, and no assignment had been made." These provisions, as well as the general tenor of the bankrupt law, indicated that all right to sue for, and recover property, effects or choses in action of the bankrupt, by virtue of the bankruptcy assignment and the operation of the bankrupt law, pass to the assignee, who becomes the legal representative, one who stands in place of, the bankrupt. The effect of a differing holding strengthens the view here taken. Suppose it should be determined, as the defendant insists, that the right to sue under the statute for the recovery of usurious interest, is a personal right, and remains in the bankrupt, notwithstanding the bankruptcy. The bankrupt might sue and recover for his own use and benefit the usurious interest paid. which may have caused his bankruptcy, having by means of paying usurious interest so converted his estate that creditors could not, but he himself could recover and hold it against them. A construction working such results is not favored, to say the least. But the idea of a personal right, as contended for by defendant, loses sight of the distinction between what pertains to the person, and what to the estate. Usury affects the property and estate, and not the person of the bankrupt. The question of usury has lately been before the federal court, in the case of Tiffany v. National Bank of Missouri, 18 Wall. [85 U. S.] 409. The question was as to the amount of interest a national bank was authorized to charge in Missouri. That a trustee had a right to sue was never questioned. In the case of Darby v. Boatmen's Sav. Inst. [Case No. 3,571], the question as to a trustee recovering usurious interest, was determined affirmatively. These cases could not have been sustained by the trustees if

the sueing for and recovering usurious interest was a personal action.

As to the amount of recovery the defendant makes the points that, if a recovery can be had, it is the amount paid over and above the legal rate (10 per per cent.) in Missouri, and relies on the wording of the statute to sustain this construction. Section 5198, already fully quoted, in the first place, declares forfeited the entire interest agreed to be paid, and next provides for a recovery of double the amount of such as has been paid. Reading the first part of the section "the taking, receiving, reserving, or charging a rate of interest greater then is allowed," in connection with the part providing for the recovery of "twice the amount thus" paid, gives countenance to the construction sought to be placed upon it by defendant. Reading the whole of the section together is adverse to this construction.

The forfeiture of the entire unpaid interest is no doubt intended to defeat the recovery of unpaid interest, and may be set up in defence. The recovery of paid interest, however, requires a suit on part of the debtor, or his legal representative, and the recovery of double the amount paid may recompense him for his trouble. To construe the act as contended for by the defendant would favor the usurer who had obtained payment of his usury by allowing him to retain the legal interest, while he who had only contracted for illegal interest forfeits the entire interest, a favor difficult to account for. The plaintiff is entitled to recover double the amount of the usurious interest paid, and judgment will be rendered accordingly.

Case No. 9,098.

MARKSON et al. v. HEANEY.

[1 Dill. 497;[1] 4 N. B. R. 510 (Quarto, 165); 3 Chi. Leg. News, 153.]

Circuit Court, D. Minnesota. Feb. 6, 1871.

BANKRUPTCY—JURISDICTION OF STATE AND FEDERAL COURTS.

1. A debtor residing in Kansas was adjudged a bankrupt on the petition of creditors, by the United States district court for Kansas, and assignees appointed. After the bankruptcy proceedings were instituted, a mortgage creditor commenced suit to foreclose in one of the state courts of Indiana without permission of the bankrupt court, making the assignees defendants. The mortgagee was a resident and a citizen of Minnesota. The assignees in bankruptcy filed a bill in the circuit court of the United States for the district of Minnesota against the mortgagee, charging that the mortgage was fraudulent both in fact and under the bankrupt law, and asking a decree to have it declared void, and for an injunction to restrain the defendant from further prosecuting his foreclosure suit in Indiana. *Held*, 1. That the district court in which the bankruptcy proceedings are pending, or the circuit court for that district, can, in cases where the suit in the state court is commenced after the proceedings in bankruptcy are instituted, enjoin the plaintiff therein from further prosecuting the same. *Held*, 2. That in this case the circuit court for the Minnesota district had no bankruptcy jurisdiction, and could exercise only its ordinary equity powers, and for this reason the injunction asked for was refused.

[Cited in Sherman v. Bingham, Case No. 12,733; Jobbins v. Montague, Id. 7,330; Re Stansell, Id. 13,293; Paine v. Caldwell, Id. 10,674. Criticised in Goodall v. Tuttle, Id. 5,533. Cited in Re Brinkman, Id. 1,884. Followed in Lamb v. Damron, Id. 8,014. Cited in Re California Pac. R. Co., Id. 2,315; Re Sabin, Id. 12,195.]

2. Whether in such a case the assignee may not, by an application to the bankrupt court, be authorized to sell the mortgaged property free of incumbrance, substitute the proceeds in the place of the property, giving the mortgagee notice wherever residing, and whether process in bankruptcy can, when necessary to exercise powers conferred by the bankrupt act [of 1867 (14 Stat. 517)], be rightfully served on parties interested outside of the district in which the bankruptcy proceedings are pending, are questions discussed, but left open.

[Cited in Re Rhodes, Case No. 11,746; Sutherland v. Lake Superior Ship Canal Railroad & Iron Co., Id. 13,643.]

3. Powers of bankrupt courts and of the circuit courts, and the purpose of congress in establishing bankruptcy tribunals, considered.

4. Petition for a review of a subsequent order of sale made by the district court, and steps taken thereunder, see note at foot of the opinion.

[Cited in Re Sacchi, Case No. 12,201; Re Rhodes, Id. 11,746.]

This is a bill in equity filed in the circuit court of the United States for the district of Minnesota, praying for an injunction, and relief. The plaintiffs [Herman Markson and Hugh M. Spaulding] are assignees in bankruptcy of one Antipas Thomas, and bring this bill in that capacity, alleging themselves to be citizens of the state of Kansas. The defendant [Daniel Heaney] is alleged to be a citizen of Minnesota, which is admitted in the answer to be true, and he was served in that state with process issued upon the bill. From the bill, answer, and exhibits, the following facts appear: On the 16th day of December, 1869, Antipas Thomas was, by the district court of the United States for the district of Kansas (of which he was a resident), adjudged a bankrupt, upon the petition of creditors filed on the 3d day of that month. In May, 1870, the plaintiffs were duly appointed assignees in bankruptcy of Thomas, and a deed of assignment has been made to them of all the property and estate of the bankrupt, save such as the law exempts. The bill alleges, and the answer admits that, prior to the commencement of the bankruptcy proceedings against Thomas, to wit: on the 25th day of October, 1869, he, the said Thomas, executed a promissory note to the defendant, Daniel Heaney, for the sum of $26,500, and at the same time executed to secure it a mortgage upon lands belonging to him and situate in Kosciusko county, Indiana. The bill charges that this mortgage is fraudulent, 1. Because there was only a

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

real debt due from Thomas to Heaney of $4,000, and because it was made to hinder, delay, and defraud creditors. 2. Because it was made in violation of the bankrupt act, since Thomas was insolvent, and Heaney, when he received the mortgage, knew, or had reasonable cause to believe, that Thomas was insolvent, and that the mortgage was made in fraud of the provisions of the bankrupt act. It may here be observed that the answer of the defendant in effect denies these charges of fraud. The bill avers, and the answer admits, that after the proceedings in bankruptcy were commenced, and after the date of the plaintiffs' appointment as assignees, to-wit: On the 14th day of September, 1870, the defendant, Heaney, commenced in the circuit court of the state of Indiana for the county of Kosciusko (where the mortgaged lands are situate) a bill to foreclose the above mentioned mortgage, making as defendants thereto, not only the said Thomas, but the present plaintiffs (the assignees in bankruptcy of his estate.) The bill alleges that on the 19th day of November, 1870, the plaintiffs filed a bill in the circuit court of the United States for the district of Indiana, against the defendant, setting up in substance, the same facts as in the present bill, and praying the same relief, and an injunction against further steps by the defendant in his foreclosure proceeding in the state court, but the defendant not being a citizen of, or found in, the district of Indiana could not be served, and the bill was consequently dismissed. It appears from the pleadings that in the foreclosure suit in Indiana, the present plaintiffs (being made defendants thereto), were notified of its pendency by publication, pursuant to the law and the practice of the state courts; and that at the next term, to-wit, on the 29th day of November, 1870, the assignees appeared in the said state court and setting up the said adjudication of the mortgagor as a bankrupt, and their appointment as his assignees by the United States district court for Kansas, pleaded to the jurisdiction of the state court, which plea was decided to be insufficient, and exceptions taken. Afterwards, on the 1st day of December, 1870, the plaintiffs filed an answer setting up against the mortgage, in effect, the same matters pleaded in the present bill, to-wit, that it is both fraudulent in fact, and under the bankrupt law. Afterwards, on the application of the present plaintiffs, a change of venue was ordered to the circuit court of the state for the county of Steuben, in which court the cause is now pending, and stands for trial at an early day. The bill prays that on the final hearing the mortgage may be declared void, and meanwhile that a writ of injunction issue to restrain the defendant from proceeding further in prosecution of his foreclosure suit in the state court in Indiana, or from taking or obtaining judgment against the said Thomas on the note, and for general relief. The bill was presented to the circuit judge at his chambers, January 7, 1871, for the allowance of the temporary injunction therein prayed for, and he directed notice to be given to the defendant, which has been done. The defendant appeared and filed an answer to the bill denying the fraud alleged, and produced, on the hearing of the motion for an injunction, certain affidavits showing the value of the mortgaged estate to be about $41,000, or about $10,000 or $12,000 more than the sum named in the mortgage, and tending to show that he did not have cause to believe when he received the mortgage that Thomas was insolvent. The plaintiffs produced affidavits and documentary evidence showing that Thomas and one Edwards were bankers in Kansas; that the firm suspended payment in a few days after the mortgage in question was executed; that they were insolvent, and the property mortgaged constitutes a large portion of the available assets of the bankrupt, and also tending to show notice or the insolvency, etc., on the part of the defendant when he received the mortgage.

Z. E. Britton and Morris Lamprey, for the motion.

Jas. T. Lane and Davison & True, contra.

DILLON, Circuit Judge. The adjudication of bankruptcy was made by the United States district court for the district of Kansas, where the bankrupt resided. The property mortgaged to the defendant is situate in Indiana; and the defendant himself is a citizen of and resides in Minnesota. He has never proved, or offered to prove, his debt in bankruptcy; but after the proceedings in bankruptcy were instituted, and the assignees appointed, and while those proceedings were pending in the bankruptcy court in Kansas, the defendant commenced and is prosecuting in one of the state courts of Indiana a bill to foreclose his mortgage, making the assignees defendants thereto, and constructively serving them by notice of publication, pursuant to the laws of the state, and practice of the state tribunals. The present bill is filed by the assignees, not in the circuit court of the United States for the district of Kansas, but in the circuit court for the district of Minnesota, and the suit was thus commenced because service of process could not be had upon the defendant in the former district. A similar suit was brought by the assignees in the United States circuit court for Indiana; but because the defendant could not be there served it was withdrawn.

The bill charges that the mortgage made by the bankrupt to the defendant, a few days before the former suspended payment, and which the latter is seeking to have foreclosed in the state court in Indiana, is both fraudulent in fact and under the bankrupt act; and it seeks a decree to have it so adjudged, and meanwhile asks for a writ of

injunction to restrain the defendant from the further prosecution of the foreclosure suit. The case is now before me on the application for the injunction. In support of the application, it is argued by the counsel for the assignees that the bankruptcy court in Kansas, in which the proceedings in bankruptcy were commenced and are pending, has exclusive jurisdiction over the estate of the bankrupt wherever situate, and over the claims of creditors, secured and unsecured, wherever residing; that the assignees are officers of the bankruptcy court; that since the adjudication in bankruptcy was had before the defendant commenced his suit to foreclose, it follows that the bankrupt court first acquired jurisdiction, and if so, it could not be interfered with by proceedings in any other court, and if such proceedings be commenced, the federal courts not only have the power, but it is their duty to enjoin litigants in the state courts, whenever necessary, to give full effect to the bankrupt act.

On the other hand, the defendant's counsel argue that a mortgage creditor is not bound to, nor can he be compelled to prove up his claim in the bankrupt court; that the only effect of not proving it up is that he waives or loses all right to share in dividends in respect to any balance of his debt which the mortgaged estate may prove insufficient to pay; that such a creditor, notwithstanding the mortgagor shall have been adjudged a bankrupt, may rightfully file his bill in any state court, having jurisdiction, to foreclose his mortgage; that the defendant did so file his bill in this instance, and that the assignees, having appeared thereto and answered, setting up as a defence the same matters which are made the basis of the present bill, the result is that the state court in Indiana first acquired jurisdiction of the matter in controversy, to-wit, the validity of the mortgage; and if so, then on acknowledged principles of law, no other court can arrest or interfere with the exercise of such jurisdiction.

Section 1 of the bankrupt act constitutes the district courts of the United States courts of bankruptcy, and confers and defines their jurisdiction: "That the several district courts of the United States be, and they are hereby, constituted courts of bankruptcy, and they shall have original jurisdiction in their respective districts, in all matters and proceedings in bankruptcy; and they are hereby authorized to hear and adjudicate upon the same, according to the provisions of this act. * * * And the jurisdiction hereby conferred shall extend to all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; *to the collection of the assets of the bankrupt; to the ascertainment and liquidation of the liens and other specific claims thereon; to the adjustment of the various priorities and conflicting interests of all parties; and to the marshaling and disposition of the different funds and assets so as to secure the rights of all parties and due distribution of the assets among all the creditors;* and to all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy," etc.

The language of this section is taken in part from the sixth section of the bankrupt act of 1841, and the part above, placed in italics, from Judge Story's opinion in Ex parte Christy, 3 How. [44 U. S.] 221, expounding the policy and purpose of that act. I shall again refer to this opinion, after calling attention to the provisions contained in the second section of the bankrupt act of 1867, respecting the jurisdiction and powers of the circuit courts of the United States.

This section, after giving "the several circuit courts of the United States within and for the districts where the proceedings in bankruptcy shall be pending, a general superintendence and jurisdiction," revisory of all cases and questions in the district court arising under the act, adds that, "said circuit courts shall also have concurrent jurisdiction with the district courts of the same district of all suits at law or in equity which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against the assignee, touching any property or rights of property of said bankrupt transferrable to, or vested in, such assignee."

It is not my purpose to recite in detail the various provisions of the bankrupt act; but a review of them would clearly show, as I think, that congress in passing the act, in pursuance of its constitutional power, not only intended to make it uniform, but operative throughout the United States. It does not stop at state lines, and the bankruptcy tribunal it establishes not only acts independently of state tribunals, but it would be destructive of the system itself to permit suitors by resorting to state tribunals to withdraw, against the will of the bankruptcy court, property or cases which belong to its jurisdiction.

Property, wherever situate, which is not exempted from the operation of the act, passes to the assignee, who is an officer of the bankrupt court, and thus is in the custody or under the control of that court. This is equally true of property under mortgage as of that which is unincumbered. See sections 14, 20, 22, 25. Debts, whenever payable, and creditors wherever residing in the United States, are within the operation of the act. The bankrupt court is invested with this jurisdiction over the bankrupt and his estate, and over creditors who are brought involuntarily into it, in order to administer the estate for the benefit of all the creditors according to their respective rights. The priorities of bona fide mortgagees and lien holders are protected by the bankrupt act, and will

be respected by the bankrupt court in the final settlement and distribution of the estate. "By operation of law, the deed to the assignee conveys to him all the estate, real and personal of the bankrupt" (section 14), and "the assignee has authority, under the order and direction of the court, to redeem or discharge any mortgage, * * * real or personal, whenever payable, or to sell the property subject to such mortgage" (section 14). And see sections 15, 20, 22, 25.

Thus, it is plain beyond controversy, that the property of the bankrupt, though situate, as in this case, in another state, and although mortgaged by the bankrupt prior to the institution of proceedings in bankruptcy against him, is within the jurisdiction and under the control of the bankrupt court in Kansas. I think that to be an erroneous construction of the bankrupt act, which holds under the somewhat inapt phraseology of section 20, that mortgage creditors have absolutely the election to stand outside of the operation of the bankrupt act. Their debts are required to be scheduled, and the mortgaged estate to be inventoried by the bankrupt (section 11); the title thereto passes to the assignee, subject to the mortgage, and the assignee may sell, sue for, and manage the property (section 14); the debt of the mortgagee is provable, and such proof does not waive the lien (sections 19, 20, 22); the assignee may redeem the mortgage debt, or sell the equity of redemption vested in him (Id.); and it follows from these various provisions that the assignee has a right to call the mortgage creditor into the bankruptcy court, or into the proper circuit court, and test the validity of his mortgage or the amount due thereon. Ex parte Christy, 3 How. [44 U. S.] 221, and cases cited, infra.

It is not necessary in this case to say that the mortgage creditor is bound at all events to go into the bankrupt court and prove his debt, or ask to foreclose, or to have the property sold and his debt paid from the proceeds. See In re Davis [Case No. 3,618]; Foster v. Ames [Id. 4,965].

It is clear that the assignee has at all events the right to bring the mortgage creditor into the court of bankruptcy (unless he prefers to file a bill in equity in the proper circuit court), and contest the amount of his debt and the validity of his mortgage, and to have the court make such equitable orders as to the disposition of the property as seem best.

The powers to "ascertain and liquidate liens" on the property of the bankrupt, "to adjust the various priorities and conflicting interests of all parties, and to marshal and dispose of the different funds and assets," and the other express powers of disposition and sale of property, confer upon the bankrupt court the right of control over mortgaged estates and the mortgagees, and by implication give the right to prevent its control from being taken away by the resort on the part of the creditor to other tribunals against the will of the bankrupt court.

This view of the law is sustained by the opinion of Mr. Justice Nelson, in the case of the Kerosene Oil Co. [Cases Nos. 7,725 and 7,726]. In that case the oil company were adjudged bankrupts on the 16th day of June, 1868. The New York Guaranty and Indemnity Company held a mortgage on the realty of the oil company, and on the 10th day of October, 1868 (after the adjudication in bankruptcy), commenced a foreclosure suit in the state court. A bill was filed by the assignee in the bankruptcy court alleging the invalidity of the mortgage, and praying that it be declared void, the property sold, and the proceeds brought into court and disposed of, according to the rights of the several parties, and for an injunction enjoining the Guaranty and Indemnity Company from taking any further proceedings in the foreclosure suit. The injunction was granted by the district court, and on review this action was sustained by Mr. Justice Nelson, who directly affirmed the jurisdiction of the district court to entertain such a bill and grant such relief, and asserted a concurrent jurisdiction in the circuit court of the same district.

The right in a proper case to enjoin proceedings in state courts which contravene the bankrupt act, is declared by the circuit court of the United States, in the case of Irving v. Hughes [Case No. 7,076], heard before Grier and Cadwallader, JJ. The court says: "The state court cannot be enjoined, but the litigants in it may be restrained from doing what would frustrate, or directly impede, the jurisdiction expressly conferred by the bankrupt act." And it is the opinion of Chase, C. J., that after the bankruptcy, liens must be enforced under the superintendence of the national tribunals. In re Wynne [Id. 18,117]. A similar view of the bankrupt act of 1841 [5 Stat. 440] was taken by Mr. Justice Story, in Ex parte Christy, 3 How. [44 U. S.] 221. "Its success was dependent upon the national machinery being made adequate to all the exigencies of the act. Prompt and ready action without heavy charges and expenses, could be safely relied on where the jurisdiction was confided to a single court in the collection of assets, in the ascertainment and liquidation of liens, and other specific claims thereon; in adjusting the various priorities and conflicting interests; in marshaling the different funds and assets; in directing sales at such time and in such manner as should best subserve the interests of all concerned; in preventing, by injunction, or otherwise, any particular creditor from obtaining an unjust and inequitable preference over the general creditors by an improper use of his rights and remedies in the state tribunals, and finally in making a due distribution of the assets, and bringing to a close within a

reasonable time, the whole proceedings in bankruptcy."

This language was quoted and approved by Justice Swayne, as applicable to the present bankrupt act (Bill v. Beckwith [Case No. 1,406]), and by Durell, J. (In re Barrow [Id. 1,057]). If the present bill had been filed in the circuit court for the district of Kansas, and service could have been had on the defendant in that district, I should for the reasons above stated, feel quite clear that I would have the power to award the writ of injunction against the defendant, and that under the circumstances it would be my duty to do so. But this bill is filed in the circuit court for the Minnesota district, and was so filed because the defendant resided in that district, and could be served with process therein, and it proceeds upon the assumption that the federal courts in Kansas by reason of the inability to serve the defendant therein, would be unable to take jurisdiction of the suit, had it been there instituted.

I am inclined to the opinion that the circuit court for the Minnesota district has no jurisdiction over this controversy conferred upon it by the bankrupt act; and that whatever powers it has and can exercise in the present case will be in virtue of its ordinary equity jurisdiction.

By recurring to the first section of the bankrupt act, it will be seen that the "several district courts are constituted courts of bankruptcy with original jurisdiction in their respective districts in all matters and proceedings in bankruptcy." The powers which this section confers upon district courts are limited to cases of bankruptcy pending therein, as was very properly held by Mr. District Judge Blatchford in Re Richardson [Case No. 11,774]. In that case the petitioners had been adjudged bankrupts in Louisiana, and applied to the United States district court for the Southern district of New York for an injunction to restrain certain creditors from prosecuting a suit against them in the state courts of New York. It was denied for want of jurisdiction, the judge alluding to, but expressing no opinion upon, the question, whether the circuit court for the New York district, under its general equity powers, or the bankrupt court, or circuit court of Louisiana could, without further legislation, give relief. The provision of the bankrupt act as to the jurisdiction of the circuit courts is that, "the several circuit courts of the United States within and for the districts where the proceedings in bankruptcy shall be pending, shall have concurrent jurisdiction with the district courts of the same district of all suits," etc. Under this provision the circuit court of Minnesota has no bankruptcy jurisdiction in the present case, since the bankruptcy proceedings are pending in the district of Kansas. It can only exercise its ordinary equity powers, and I think it cannot be claimed, aside from its jurisdiction in bankruptcy, that a court of the United States would be warranted in enjoining a foreclosure proceeding in the state court. A state court of equity in Minnesota would scarcely look with favor on an application, because the defendant resided there, to stay him from prosecuting a foreclosure suit in another state, but would leave the parties in the court which had, or was asserting, jurisdiction over them. If the bankrupt act confers no bankrupt powers with respect to the case on the circuit court for the district of Minnesota, it seems to me that it can only award an injunction on the same principle that would apply were the application made to a chancellor in the state tribunals. This point as to the jurisdiction of the Minnesota circuit court has not been prosecuted by counsel, and I therefore express only my first impressions concerning it.

Since I refuse for the present, the injunction on this ground alone, I will allow the counsel to be heard upon it if they think my impressions erroneous. In this view of the case, it is unnecessary to give any decided opinion respecting the question, whether on a similar bill filed in the circuit court for the district of Kansas, service can rightfully be made on the defendant without the limits of the district. Under the judiciary act which limits the powers of the federal courts to their respective districts, service within the district, or a voluntary appearance, is necessary to jurisdiction. If this limitation obtains in all suits and proceedings arising under the bankrupt act, it certainly will fail in many instances without further legislation, to meet the exigencies of particular cases, or to enable the courts to carry into effect the provisions of the statute. The power to bring creditors outside of the district within the operation of the bankruptcy court is often necessary to the exercise of the jurisdiction and powers conferred by the act; but at present, I refrain from giving any opinion upon the right to serve bankruptcy process, or process in bankruptcy suits, beyond the limits of the district in which the bankruptcy proceeding is pending.

The question may be presented on an application by the assignees to the bankrupt court, to sell the mortgaged estate free of incumbrance, substituting the proceeds in the place of the property sold. See Bankrupt Act, § 25; Foster v. Ames [Case No. 4,965]; Bill v. Beckwith [supra]; In re Barrow [supra]. If this section applies to such a case as the present, the provision is that, "The court may, upon the petition of the assignee after such notice to the claimant, his agent, or attorney, as the court shall deem reasonable, order the property to be sold under the direction of the assignee, who shall hold the funds received in the place of the estate disposed of;" not, in terms, at least, limiting the notice to claimants residing in this district. Or the question may be presented by a bill like the present, filed in the circuit court for the district of Kansas, to impeach the mortgage, and asking for an injunction against further proceeding

by the defendant in his foreclosure suit in Indiana. But until it arises in such a shape as to require disposition, and has been fully argued, it will be better to decline its examination or discussion. The injunction is refused, but the bill may be retained for final disposition, or dismissed, as the plaintiff's counsel may be advised. Injunction denied.

NOTE. After the foregoing opinion was delivered, the foreclosure suit proceeded in the state court of Indiana, and that court rendered a decree in favor of Heaney for the full amount of his mortgage, from which the assignees took an appeal to the supreme court of the state, which is yet pending,—the assignees throughout resisting and objecting to the foreclosure proceedings in the state court, on the ground of the alleged exclusive jurisdiction of the bankrupt court. After the foreclosure decree was entered, the assignees filed their petition in the district court of the United States for the district of Kansas, under the 25th section of the bankrupt act, stating, in substance, the existence of the Heaney mortgage, that it was fraudulent both in fact and under the bankrupt act; that Heaney resided in Minnesota, and asking an order to sell the real estate free of the mortgage, and have the proceeds substituted in the place thereof. Notice of this application was served upon Heaney by the marshal of Minnesota in that state, and he appeared in the bankrupt court in Kansas, and filed an answer denying the fraud alleged against him, and pleaded the proceedings and decree in Indiana to estop the assignees to re-litigate the question of fraud, that question having been, as he claimed, settled and adjudicated in state court. After hearing both parties the United States district court, on July 12, 1871, entered an order authorizing the assignees to sell the real estate in Indiana free from all liens, including the mortgage of Heaney, at public sale, after notice, and ordering them to bring the proceeds into court to be held in the place of the land, and subject to the further order of the court as to the distribution thereof, all rights of the said Heaney to the proceeds of such sale or any part thereof, being reserved for further hearing. To this order Heaney objected; and the assignees having subsequently thereunder advertised the land for sale, to take place on the 3d day of September, 1871, Heaney filed his petition in the circuit court of the United States for the district of Kansas, under the second section of the bankrupt act, to review the aforementioned order of the district court, authorizing the assignees to sell the land. This petition was presented to the circuit judge in vacation; notice thereof was given to the assignees; the parties appeared before the circuit judge at chambers, August 28, 1871, and after argument it was there held: 1. That the order complained of was one which the circuit court could review or revise under the second section of the bankrupt act. 2. That the circuit judge had power in vacation, at his chambers, though outside of the district of Kansas, to entertain and act upon the petition of review. 3. That under the circumstances, the order of the district court would be modified as follows: The sale of the land by the assignees shall be postponed until the 30th day of October, 1871, but may then take place pursuant to the order of the district court, unless Heaney shall, before September 25, file his claim in that court or exhibit his bill therein or in this court, or institute proper proceedings in the one court or the other, to have settled between him and the assignees the question of the validity of his mortgage and the amount due thereon; this being done no sale shall take place during the pendency of such proceedings, either by the assignees, under the order of the district court, or by Heaney, under his decree.

The circuit judge reiterated the views expressed in the foregoing opinion as to the power and rightful jurisdiction of the federal courts to superintend the enforcement of all claims against the bankrupt after the adjudication of bankruptcy; but expressed no opinion as to the effect of the assignees entering an appearance in the state court, nor upon the question whether the decree therein concluded them from attacking the mortgage for fraud.

As to jurisdiction of state and federal courts: Johnson v. Bishop [Case No. 7,373]; Clark v. Binninger [38 How. Prac. 341], and note; same controversy, In re Bininger [Case No. 1,417]; Sharman v. Howell, 40 Ga. 257; In re Schnepf [Case No. 12,471]; Irving v. Hughes [Id. 7,076].

[For subsequent proceedings in this litigation, see Cases Nos. 6,555 and 9,099.]

Case No. 9,099.

MARKSON v. HOBSON et al.

[2 Dill. 327; [1] 4 Chi. Leg. News, 75.]

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

BANKRUPT ACT—SUSPENSION OF PAYMENT BY A BANK—ILLEGAL PREFERENCE.

A banker who allows his drafts to go to protest, suspends payment and closes his doors against depositors, proclaims to the world that he is insolvent, and a creditor who, with knowledge of these facts, receives payment of his debt secures an illegal preference, and is liable to the assignee for the amount thus received.

[Cited in brief in Larkin v. Batchelder, 56 Vt. 417. Cited in Mathews v. Riggs, 80 Me. 107, 13 Atl. 49; Stone v. Dodge, 96 Mich. 524, 56 N. W. 78.]

The plaintiff [Herman Markson], as assignee in bankruptcy of A. Thomas & Co. recovered at this term against the defendants, in six actions, verdicts for the sums severally received by them as creditors of A. Thomas & Co. A motion was made by the defendants for a new trial.

[For prior proceedings in this litigation, see Case No. 9,098.]

Messrs. Wheat, Britton, Royce, and Hoag, for assignee.

Messrs. Wagstaff, Simpson, Williams, and Pratt, for defendants.

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

DILLON, Circuit Judge. These are actions by the assignee under section 35, of the bankrupt act [of 1867 (14 Stat. 534)], to recover from the defendants moneys severally received by them on the 16th day of November, 1869, in payment for debts due them from the late firm of A. Thomas & Co. The firm of A. Thomas & Co. were private bankers, doing business at Paola, in this state. About the 1st day of November, 1869, a "run" was made upon their bank, and on the 2d day of November they were obliged to close their doors, which were not afterwards opened. In the month of December following, proceedings in bankruptcy were instituted against them. The defendants, all of whom resided in Paola, were creditors of

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

Thomas & Co. some of them holding protested drafts, and others being depositors. All of the defendants as witnesses admitted on the stand that they knew of the suspension of Thomas & Co. and the closing of their doors at and prior to the time they received payment. The immediate circumstances surrounding the receipt of payment by the defendants are these: After the doors of the bank were closed, Thomas & Co. who held considerable real estate, gave out that they would be able to resume in a few days, and that to this end they were negotiating for, and were about to secure, by mortgaging their real estate, a large sum of money. On the 16th day of November the negotiations for a loan to them of $20,000 were closed, the business being done in the office of Mr. Simpson, an attorney. This loan was secured by mortgage on a business block in Paola, then not quite finished. Of the above sum, about $3,000 were deposited in the hands of a trustee to provide for the completion of the building, and $7,700 deposited on the same day by or for Thomas & Co. not in their own bank, but in the Miami Savings Bank, in the same place. What was done with the rest of the money borrowed by Thomas & Co. does not clearly appear, but they never resumed business, nor did they attempt to do so. As stated, the borrowing was completed on the 16th day of November, in Mr. Simpson's office, late in the day, and the money deposited in the savings bank. Most of the defendants had been pressing Thomas & Co. for payment. When the transaction for the loan was consummated, Thomas & Co. being present, it was agreed that the $7,700 should be deposited in the savings bank, and the checks were then and there drawn by Thomas & Co. on the savings bank in favor of various creditors, including the defendants, for the amount of the $7,700. To recover payment received on these checks, the present actions were brought by the assignee. One of the checks so drawn was made payable to Mr. Simpson, the attorney in whose office the papers relating to the loan were executed, and was for the sum of $3,450. This was done after dark, on the 16th of November, and out of the proceeds of this check Mr. Simpson, being authorized and directed to do so by Thomas & Co., paid the debts of three of the defendants. Checks for the residue of the $7,700 were delivered to the other defendants, and to one or two other creditors of Thomas & Co. on the next day, and the money received thereon. All the defendants knew when payment was received by them that Thomas & Co. had suspended, and that their bank was then closed, and the circumstances are such that those who received payment through Mr. Simpson not only knew this, but must have known that Thomas & Co. had no intention to resume business. The defendants constituted and were known to constitute but a small portion of the creditors. Mr. Simpson was authorized to act for two of the defendants in thus receiving payment for them, and he assumed to act as the friend and attorney for the other, although without any express and specific authority in this instance, but his act was ratified and the money received. Of course the defendants thus receiving payment through Mr. Simpson are affected with knowledge of the facts known to him respecting the manner in which the money was obtained and disposed of by Thomas & Co.

A bank suspending payment and closing its doors against its creditors makes to the world a proclamation of its insolvency. The bank was thus suspended and closed when each of the defendants received payment on the checks drawn on the savings bank, and this fact was personally known to each of the defendants. The payments were not received in the usual course, but in checks drawn by bankers whose doors were closed upon another bank in the same place. The jury have properly found that payments thus made and received are in violation of the bankrupt law, because intended to give, and, if sustained, would give, a preference. The evidence fully convinces us that Thomas & Co. did not intend to resume business, and that they selected the defendants and a few others from the mass of their creditors to favor or prefer them by paying them hastily and secretly, in full, out of the $20,000 loan, and that the defendants, in receiving their pay, must have known, and certainly had reasonable cause to believe, that they were thereby securing an advantage over the other creditors. If payments received under such circumstances could be held against the assignee, the bankrupt act ought to be repealed, since its practical operation and effect would be to give to resident and favored creditors the very preference which the act in so many of its provisions professes to invalidate. The act disarms the vigilance of creditors generally by declaring that no vigilance can be rewarded by a preference, if obtained contrary to its provisions within four months prior to filing of the petition in bankruptcy. It undertakes to disable creditors from procuring preferences within that period by attachment, mortgage, or confession of judgment. What preference can be more unjust than that which would result from this prohibition to creditors to run the race of vigilance, and then to sustain payments made by a known insolvent to local creditors from importunity or personal considerations?

The bankrupt act must be so administered as to suppress illegal preferences, or it necessarily operates as a fraud upon the rights of the mass of creditors, who in good faith refrain from seeking advantages contrary to its provisions and policy. If preferences cannot in general be effectually suppressed, because of the sympathy of jurors in favor of the creditor who has simply been vigilant, or fortunate, in securing a just debt, and their disinclination to render a verdict, which, while it

makes such a creditor pay back the amount, also disentitles him to prove his debt in bankruptcy or receive dividends, the professional and the popular voice will soon demand the repeal of the law, so as to allow, as before its enactment, creditors to strive for and hold if fairly obtained, the fruits of their vigilance. I have found jurors in general somewhat disinclined to hold preferences to be such, and I find it necessary to prevent the bankrupt law from being evaded, to state with clearness to juries, as I did in these cases, the purpose of the law, and that no prejudice against it, or sympathy with defendants, should prevent them from fairly and impartially applying its principles and provisions. Their verdicts in the cases under consideration were not only supported by the evidence, but if they had been otherwise, I should have regarded it as my duty to have set them aside. The motion for a new trial is in each case denied. Judgment for the plaintiff.

See Borland v. Phillips [Case No. 1,661.]

MARKSON (HOBSON v.). See Case No. 6,555.

MARK'S SURETIES (UNITED STATES v.). See Case No. 15,722.

MARLBORO (HUNTER v.). See Case No. 6,908.

MARNEY v. The SYLVESTER HALE. See Case No. 13,712.

MARONEY (DINSMORE v.). See Case No. 3,920.

Case No. 9,100.

Ex parte MARQUAND.

[2 Gall. 552.] [1]

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

FINES—VIOLATION OF CUSTOMS LAWS—TO WHOM PAYABLE.

"Fines" imposed for obstructing officers of the customs, as well as "penalties," under Act March 2, 1799, c. 128 [1 Story's Laws, 573; 1 Stat. 627, c. 22], are to be received and distributed by the collector of the customs.

[Cited in Matthews v. Offley, Case No. 9,290; U. S. v. Tilden, Id. 16,523; U. S. v. Chapel, Id. 14,781; U. S. v. Fanjul, Id. 15,069.]

[Cited in Ransdell v. Patterson, 1 App. D. C. 491.]

At this term, N. Hobson, and others, were convicted on an indictment for forcibly resisting and impeding certain officers of the customs at Rowley, within the collection district of Newburyport, against the 71st section of the act of the 2d of March, 1799, c. 128 [c. 22]. The fines imposed by the court having been paid into the hands of the marshal, a motion was made in behalf of Mr. Marquand, collector of Newburyport, to have the same paid over to him for distribution, pursuant to the 91st section of the same act.

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

G. Blake, Dist Atty., stated, that he had been requested by the collector to make the motion; but should submit it to the court without argument. The practice had uniformly prevailed, in cases of fines under this act, to pay them directly into the treasury, and no instance has heretofore occurred, in which they had been claimed or received by a collector for distribution.

BY THE COURT. It is not a little extraordinary, that this question should have slept in silence during so long a period. The 91st section of the act of March 2, 1799, c. 128 [c. 22], provides, that all fines, penalties and forfeitures, recovered by virtue of that act, and not otherwise appropriated, shall, after deducting all proper costs and charges, be disposed of as follows, one moiety shall be for the use of the United States, and be paid into the treasury thereof by the collector receiving the same; the other moiety shall be divided between, and paid in equal proportions to, the collector and other officers of the customs specified in the act, with a proviso giving a moiety of such moiety to the informer, by whose information to the collector the same fines, penalties and forfeitures shall be recovered. The 89th section of the same act authorizes the collector to receive all penalties, recovered under the act, from the court or the proper officer thereof, and further enacts, that "on receipt thereof the said collector shall pay and distribute the same without delay according to law, and transmit quarter yearly to the treasury an account of all moneys, by him received for fines, penalties and forfeitures, during such quarter." The former act for the collection of duties Aug. 4, 1790, c. 35 [1 Story's Laws, 83; 1 Stat. 112, c. 8]), which was repealed by the act of 1799, contains similar provisions as to distribution of fines, penalties and forfeitures (section 69), and as to the receipt and distribution of penalties by the collector (section 67); but there is no clause respecting the transmission of quarterly accounts of moneys received for fines, penalties and forfeitures. As the 89th section of the act of 1799 is, with the exception of this clause, a substantial re-enactment of the 67th section of the act of 1790, it is highly probable, that a doubt had arisen, whether the right of the collector to receive and distribute "penalties," included that of receiving and distributing "fines," and that this clause, among other objects, was meant to obviate that doubt. This explanation, if correct, will in part account for the unsettled state of the present question.

On looking at the language of the act of 1799, it seems difficult to resist the impression, that "fines" in the technical sense of the word, as well as "penalties," are to be received and distributed by the collector. There are indeed but two cases, in which, technically speaking, fines are contemplated to be imposed by the act viz. in cases of ob-

structing officers of the customs (section 71) and of perjury (section 88). In all other pecuniary forfeitures within the act, the legislature seem to have directed, not the process of indictment, where a fine might be imposed, but an action or information of debt; for, at common law, wherever a penalty is given, and no appropriation or method of recovery is prescribed by the act, an action or information of debt lies, and not an indictment. Rex v. Malland, 2 Strange, 828; Adams v. Woods, 2 Cranch [6 U. S.] 336. There may be good reason for this distinction, for penalties and forfeitures may be remitted by the secretary of the treasury under the act of March 3, 1797, c. 67 [1 Story's Laws, 458; 1 Stat. 506, c. 13]; but, notwithstanding the language of that act, it is extremely doubtful if fines for offences, technically speaking, can be so remitted, since the constitution has committed to the president the power to grant reprieves and pardons for offences, against the United States. U. S. v. Mann [Case No. 15,718]. It is singular, that bribery of officers of the customs should, by the act of 1799, be punishable only by a pecuniary forfeiture; and still more singular, that, as no other appropriation of the penalty is made, half of that penalty might, following the letter of the act, be received by the very party bribed.

Of the policy of a distribution of fines imposed for public offences, or of allowing them to be received and distributed by collectors of the customs, in cases within the express purview of the act of 1799, we do not pretend to judge. It is sufficient for us, that the legislature have expressed their will in direct and unequivocal terms; and we accordingly direct, that the fines imposed upon the defendants, and now in the hands of the marshal, after deducting the proper charges allowed by the court, be paid over to the collector.

Case No. 9,101.

The MARQUETTE.

[Brown, Adm. 364; 4 Chi. Leg. News, 241; 6 Alb. Law J. 292.] [1]

District Court, E. D. Michigan. Feb. 13, 1872.

SALVAGE—SPECIAL CONTRACT FOR PROPORTION OF PROPERTY SAVED—HOW FAR A SALVOR IS AN AGENT OF THE OWNER.

1. A wrecking company which had undertaken to raise a sunken schooner and deliver her at Detroit for six-tenths of her value when so delivered, hired of libellant, for a fixed compensation, certain divers, diving armor, and wrecking apparatus. *Held*, that libellant, having knowledge of the contract between the wrecking company and the owners of the schooner, could not maintain a libel in rem, and that the subsequent ownership of six-tenths of the schooner by the wrecking company could not relate back to the time of its contract with the owners, so as to affect their interests.

[Distinguished in The Louisa Jane, Case No. 8,532.]

2. A salvor by contract is not an agent of the owners, and cannot create against them or the property saved, any liability beyond the contract price.

3. A contract for a compensation to be paid at all events, whether the property is saved or not, creates a mere personal obligation, and no lien attaches on account of it.

[Distinguished in The Louisa Jane, Case No. 8,532. Cited in The Murphy Tugs, 28 Fed. 430.]

[See Baker v. The Tros, Case No. 783.]

The Marquette was sunk in the Straits of Mackinaw by a collision, and abandoned by her owners to the underwriters, and there lay sunken in about fifteen fathoms of water. The underwriters contracted with the Northwestern Wrecking Company, a corporation organized under the laws of Ohio for the raising of sunken vessels, to raise the Marquette, and place her in Clark's dry dock, in the city of Detroit, for six-tenths of the vessel. The Northwestern Wrecking Company entered upon the performance of their contract under the charge and supervision of Milo Osborne, and after working at the wreck for several days, found that on account of the great depth of water in which the wreck lay, the services of a diver were necessary. The libellant, who was also in the wrecking business, was then engaged in raising a wreck in Beaver harbor, near Beaver island, a few miles distant from the wreck of the Marquette. He had divers in his employ, and owned and had in use the necessary diving armor and apparatus, a hand pump, a steam pump, etc., adapted to the purposes of wrecking. He was also the patentee of a new invention for raising sunken vessels, which consisted mainly in sinking casks filled with water, and then, after being fastened to the vessel, inflating them with air by the use of a steam pump and connecting tubes or pipes, and thus expelling the water and giving the casks a lifting power. Osborne, who was in charge of the work for the Northwestern Wrecking Company, applied to and obtained of the libellant a diver and the necessary armor and apparatus, including a hand pump. After working a short time it was found that the hand pump was not sufficient for the divers to operate with safety in so great a depth of water, and Osborne returned the hand pump and obtained libellant's steam pump. After working a few days longer, and not making much progress, Osborne returned to libellant with the diver, apparatus and pump, and had a settlement with him up to that time, and paid libellant what was then found to be his due, at the rate of $50 per day with the hand pump, and $75 per day with the steam pump, less a small deduction made by libellant at the request of Osborne. Osborne desired the use of the diver, etc., longer, but complained

[1] [Reported by Hon. Henry B. Brown, District Judge, and here reprinted by permission. 6 Alb. Law J. 292, gives only a partial report.]

that they could not afford it at the price charged by libellant. A new arrangement was then entered into, and Osborne returned to the Marquette, with two divers who were in the employ of the libellant, the necessary armor and apparatus, and the steam pump, and taking with him, also, some of libellant's casks, to be used on his patented plan, and had the same for use in raising the wreck, thirty-four consecutive days, and until the vessel was finally raised. The divers, etc., were actually used twenty-eight, and were idle six out of the thirty-four days. It is for this use, under the new arrangement, that the libellant brought this suit against the vessel. During this time the libellant came along where the company were at work, on his way to Cleveland, with the vessel he had been raising, and left a small vessel called the Barbour, and his chains, anchors, additional casks, etc., and the same were used by the company to some extent, but no additional claim is made for such use. On the Marquette being raised, she was taken to Detroit by the Northwestern Wrecking Company, and placed in Clark's dry dock, in complete fulfillment of their contract with the underwriters, and its interest of six-tenths in the vessel, her boats, etc., thereupon accrued to them, and the company intervened, and put in its claim and answer for the protection of that interest.

W. A. Moore, for libellant.

Where a lien has been created it will not be released except upon the clearest proof of an intention to release it. Moore v. Newbury [Case No. 9,772]; The Kimball, 3 Wall. [70 U. S.] 37; Peyroux v. Howard, 7 Pet. [32 U. S.] 325, 345; The A. D. Patchin [Case No. 87]; Dike v. The Joseph [Id. 3,908]. Failure to prosecute by one set of salvors does not inure to the benefit of the salvors who do prosecute, but to the owners. Evans v. The Charles [Id. 4,556].

H. B. Brown, for claimant.

It is unnecessary to consider whether if libellant's contract had been made directly with the owners for a sum certain, he could sustain a lien. He certainly could have no claim for salvage as such, for that is a contingent claim, and some of the cases would indicate he could have no lien upon the vessel. The Mulgrave, 2 Hagg. 77; The Independence [Case No. 7,014]; Adams v. The Island City [Id. 55]; Bondies v. Sherwood, 22 How. [63 U. S.] 214; The Susan [Case No. 13,630]; Hennessey v. The Versailles [Id. 6,365]. Libellant was a subcontractor, and clearly had no lien. Purinton v. Hull of New Ship [Id. 11,473]; Smith v. The Eastern Railroad [Id. 13,039]; Southwick v. The Clyde, 6 Blackf. 148; Hubbell v. Denison, 20 Wend. 181; Burst v. Jackson, 10 Barb. 219; The Whitaker [Cases Nos. 17,524, 17,525]; Harper v. New Brig [Case No. 6,090]; Ames v. Swett, 33 Me. 479; Squire v. One Hundred Tons of Iron [Case No. 13,270].

LONGYEAR, District Judge. The libellant and Osborne, both of whom were sworn as witnesses and testified in the case, agree that the divers were in the employ of the libellant, and that he was to be paid for their services, as well as for the use of the armor, apparatus, pump, etc. They also agree that libellant's compensation was not dependent upon success, but that he was to be paid at all events, whether the vessel was raised or not. It is true they do not say this in so many words, but the version which each gives of what the contract was under the new arrangement, admits of no other construction. They are also agreed as to the time, viz., thirty-four days, and that twenty-eight of those were working days, and six of them they were idle. The main facts upon which there is any disagreement are as to whether there was a fixed rate of compensation agreed upon, or whether it was left to a quantum meruit, and as to whether the libellant knew or was informed of the character or capacity in which the company was operating, that is, that they were operating as contractors, and not as owners.

The libellant claims that the rate of compensation agreed upon was $75 per day when working, and half price, or $37 50, per day when idle. On this basis he claims as follows:

28 working days at $75	$2,100
6 idle " " 37 50	225
Total	$2,325
Less payment conceded	310
Leaving a balance of.....	$2,015

—For which, with interest from October 1st, 1870, libellant claims a decree in his favor against the vessel. On the other hand, the company claims that no fixed rate of compensation was agreed upon, but, on the contrary, that when Osborne complained that they could not afford to pay $75 per day, libellant told him to take the divers, etc., and use them, and he would be reasonable with them, or words to that effect, and that that was the agreement as to compensation. But, without pursuing this disputed point further now, I will proceed to the other disputed fact. And here I must hold that libellant had notice of the character or capacity in which the company was operating. Libellant, in his testimony, says, "I understood the Northwestern Wrecking Company had taken the job to raise the vessel, and had failed. I did not know how much they had taken the job for." He understood, then, that the company was not operating as owner, but had undertaken the raising of the vessel as a "job," and the only point as to which he professes not to have been informed was how much they were to receive for the service. This is sufficient alone to settle this point. But there is further testi-

mony which I think places it beyond all doubt that libellant knew, not only that the company was operating as contractor, but also the terms of the contract. Osborne, after producing in evidence the contract (which was in writing) between the Northwestern Wrecking Company and the underwriters, testifies positively and explicitly as follows: "I made known to Captain Falcon that we had such a contract; that I deemed it a good one, and that I wished him to go in with me and share in the results, etc. That was at the time we were at Beaver harbor. He replied that he wanted nothing to do with the wreck—that he wanted the money. He said they were slow things to realize from. I told him we were to have six-tenths, and that she ought to be raised in a very short time—we deemed it a good contract." In this Osborne is not contradicted. On the libellant being recalled to the witness stand, and asked if any such conversation took place, he says, "none that I recollect;" and this is all the denial he makes, which in fact is no denial.

But it is contended, on behalf of libellant, that the Northwestern Wrecking Company were in fact part owners of the vessel to the extent of the six-tenths which they were to have under their contract with the underwriters, in case of success, and which finally accrued to it. I cannot agree to this. The company was operating precisely the same as any salvors under a contract, and the agreement as to the six-tenths was simply fixing the quantum of compensation, in lieu of leaving it for after consideration between the parties, or to be determined by the court. Besides that, it was wholly conditional upon success, and it accrued to it only from the time the contract was fully performed. By no known principle of law or in reason can it be held to relate back to any previous period so as to affect the interests of those who were owners of the vessel at the time the contract was entered into. The company must therefore be held to have sustained the relation of contractor merely at the time the agreement between libellant and Osborne was entered into.

The case, then, is that of a person having rendered a service to salvors for a compensation to be paid at all events, who were themselves operating under a contract with the owners, known to such person, claiming and seeking to enforce a lien upon the vessel saved, independently and irrespectively of such latter contract, and of the compensation as fixed by it. The learned advocate for the libellant has referred the court to no adjudicated case in which this was allowed to be done, and to no authority or even dictum to that effect; and after a careful investigation, the court has been able to find none. On the contrary, the authorities are all the other way. The case of The Whitaker [Cases Nos. 17,524, 17,525] and that of Squire v. One Hundred Tons of Iron [Case No. 13,270], are quite analogous to the present case. Both cases were in fact more favorable to the libellant than the present. In the case of The Whitaker, Holbrook, the original contractor, after vain efforts to get the vessel off, gave the job over entirely to one Otis, who knew of the contract. Otis, at an expense largely beyond the contract price, succeeded in getting the vessel off, and then libeled her for his pay. Judge Sprague dismissed the libel, for the reason that Holbrook, the original contractor, was not made a party. Afterwards, upon a new libel, in which Holbrook was joined, the court granted a decree to Holbrook and Otis, jointly, limiting them to the original contract price, although it was less than half what Otis had expended. In that case also Otis' compensation was dependent upon success, while in the present case, as we have seen, libellant was to be compensated at all events. In the case of One Hundred Tons of Iron [supra], libellant had loaned to the owners seven large blocks, to be used by them in endeavoring to get their vessel off the beach, at $5 per day, with an express stipulation that the vessel should be responsible for hire and damage and for the return of the blocks. The hire not having been paid, and the blocks having been lost, libellant brought his suit, in rem, against 100 tons of iron which was of the cargo, and had been recovered from the vessel. Judge Blatchford dismissed the libel, not only on the ground that a pledging of the vessel was not a pledging of the cargo, but mainly on the broad ground that the libellant had no claim whatever as a salvor, giving as a reason that the hire of the blocks was for a fixed compensation, which was to be paid at all events, whether the vessel was saved or not, which is exactly the present case, according to the libellant's own theory. In that case also, it is to be observed, the contract was made with the master of the vessel, and it purported to pledge the vessel for its fulfillment, and yet the court held that the libellant could not recover in the admiralty, either in rem or in personam. In this case, not only was the contract not made with master or owner, but the libellant expressly refused to have anything to do with the wreck.

I think both of these cases are sustained by authority, as well as on principle. The case of The Whitaker [supra] was decided on the principle that a salvor by contract, like the Northwestern Wrecking Company in this case, is not an agent for the owners, and cannot create against the owners or the property saved any obligation or liability beyond the contract price, or, it may be added as applicable to this case, a different mode of payment than that expressed in the contract; and I think there can be no dispute as to the soundness of that doctrine. The most that the court could do, in any event, would be to let the libellant in to

share the contract price with the original contractor. But the court cannot do that in this case without making a new contract for the parties, because, as we have seen, libellant expressly refused to share the contract price or have anything to do with the wreck at the time the agreement between him and the company was made. The case of One Hundred Tons of Iron was decided on the principle that the hiring, as in the present case, was for a compensation to be paid at all events, whether the vessel was saved or not. The same principle was also stated and acted on by Judge Sprague in the case of The Whitaker in deciding another branch of the case than that above alluded to. See, also, The Independence [Case No. 7,014], where the same doctrine is enunciated by Judge Curtis in the following language: "In my judgment, a contract to be paid at all events, either a sum certain, or a reasonable sum, for work, labor, and the hire of a steamer or other vessel in attempting to relieve a vessel in distress, without regard to the success or failure of the efforts thus procured, is inconsistent with a claim for salvage; and when such a contract has been fairly made, it must be held binding by a court of admiralty, and any claim for salvage disallowed." See, also, The Camanche, 8 Wall. [75 U. S.] 448, 477.

It must be understood that the nature of the claim as a salvage claim is not changed simply because the service was rendered by contract. It is well settled that the nature of the service as a salvage service is not changed for that reason alone (see the opinion of the court in the case of The Silver Spray [Case No. 12,857], decided by this court at the present term, and the cases there cited). It is because that by the contract the compensation is to be paid at all events, whether the property is saved or not, that a claim for salvage cannot be maintained. Such a contract creates a mere personal obligation, and no lien attaches on account of it.

I hold, therefore, that the libellant in this case cannot maintain a suit in rem in this court, for the reasons: 1st. That the services having been rendered under an agreement with a contractor itself operating for a specific compensation, and not with the master or owner of the vessel, he cannot, in any event, maintain a suit against the vessel, except by joining with such original contractor and sharing with it the compensation so agreed upon between it and the owners. 2d. That he could not maintain such suit in this case, because, by the very terms of his agreement, he was not so to share. 3d. That he was to be paid at all events, whether the vessel was saved or not. The libellant undoubtedly has a remedy against the Northwestern Wrecking Company in some form of action, but not in this.

Having arrived at these conclusions, it is unnecessary to determine the specific compensation the libellant was to receive, whether a per diem, or a quantum meruit, or how much. The libel must be dismissed, with costs; but, inasmuch as the merits of the case as between the libellant and the Northwestern Wrecking Company are not decided, it must be without prejudice as between them. Libel dismissed.

See The Williams [Id. 17,710].

Case No. 9,102.

MARRETT v. ATTERBURY.

[3 Dill. 444; [1] 11 N. B. R. 225; 2 Cent. Law J. 11.]

Circuit Court, D. Minnesota. Dec. Term, 1874.

BANKRUPT ACT, § 22—FRAUDULENT PROOF OF DEBT —EFFECT ON RIGHT TO DIVIDENDS.

A creditor of a bankrupt included in his proof of debt claims against a bankrupt's estate, part of which was invalid and the rest valid, and made the claim in this manner intentionally, knowing that only part of it was legal, and supported the claim for the whole amount by a false oath: *Held*, that the effect of this fraudulent conduct on the part of the claimant was to disentitle him to any dividends whatever on any part of his claim.

Appeal from the district court of the United States for the district of Minnesota.

[This case was before the court in October, 1874, upon another point. See Case No. 9,103.]

A motion was made in the district court by [Thomas B. Marrett] the assignee in bankruptcy of John W. Baker, surviving partner of Atterbury, Baker & Co., that the proof of the claim or debt of Edward J. C. Atterbury be declared fraudulent as to creditors, and that no dividends be paid thereon. This motion was resisted by the said E. J. C. Atterbury. The claim of said Atterbury, as filed and proved against the estate, was for the sum of $19,155.25, for moneys advanced to the firm at various times from December 30, 1872, to April 13, 1873, as per statement or account annexed to claim. The claimant swore to the correctness of his entire claim in making proof of his debt, and that he held only a note for $10,000 and one for $363. The district court found upon the testimony that the first $10,000 of the amount claimed by E. J. C. Atterbury was intended as an advance to his son (the deceased member of the firm of Atterbury, Baker & Co.), and not provable as against creditors, and that the note for $363, interest thereon, fell in the same category. The district court held that the subsequent advances by the father were made to the firm as loans, and that court, accordingly, made an order reducing the amount of E. J. C. Atterbury's claim to $9,155.25, and allowing it to stand as a valid claim against the estate to that extent. As Baker, the surviving partner, had given

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

his note for the controverted amount of $10,000, and had placed the entire claim for $19,155.25 in the schedule of firm debts, the district court did not, under the circumstances, consider the claim of E. J. C. Atterbury as one so founded in fraud as to taint and vitiate it entirely, and accordingly allowed the amount which was loaned, $9,155.25, to stand as a claim against the estate, and rejected the balance, as having been made as an advance or gift by the claimant to his son.

The following is the opinion of the district judge:

NELSON, District Judge. I think the evidence fully establishes the fact that there should be a diminution of the debt proved by E. J. C. Atterbury. Although he held the note of the firm of Atterbury, Baker & Co. for $10,000, given in January, 1873, it clearly appears that so far as the other creditors of the late firm are concerned it cannot be considered as a valid claim entitled to be entered on the list of debts recorded for dividends. This creditor had many times previous to the execution and delivery of the note to him informed the other creditors of the firm, that the amount specified in this note, and for which it undoubtedly was given, had been advanced to his son who was a member of the late firm of Atterbury, Baker & Co. as capital to carry on the business. Now he cannot be permitted to assert any claim against the assets at this time even upon the theory that they considered their financial condition so improved as to justify their consent to a withdrawal of this capital at any time, and had executed a note for it payable on demand. Baker, the surviving partner, in making up his schedule, has placed the note among the debts of the firm, and in his testimony states that he consented to the execution and delivery of it to the creditor. I think, therefore, under these circumstances, it cannot be considered as a claim founded in fraud which should taint the whole indebtedness proved up by the creditor against the estate. I do not think any collusion between the surviving bankrupt partner and this creditor has been shown, and no deliberate fraud has been attempted to be practiced upon the other creditors which would authorize me to reject the whole debt. The note for $363 given for the interest upon the various drafts which were included to make up the $10,000 advanced as above stated, must also be rejected. This will reduce the debt to that extent in addition to the $10,000.

An order will be entered in accordance with form No. 66, reducing the amount to nine thousand one hundred and fifty-five dollars and twenty-five cents ($9,155.25), which includes the interest up to May 22, 1873.

From this order the assignee in bankruptcy appealed to the circuit court, and there urged that the district court should have disallowed the whole claim, and prohibited it from sharing to any extent in the dividends of the bankrupt estate, at least until the other general creditors were paid in full, for the reason that the claim was founded in fraud, and that the proof of it was fraudulent, and false, and known to be so by the claimant.

The motion of the assignee was made under a provision in section 22 of the bankrupt act [of 1867 (14 Stat. 527)], to the effect that the court shall reject claims founded in fraud, illegality, or mistake. On the appeal, the assignee's counsel, in their brief, "admitted that the amount allowed E. J. C. Atterbury by the district court, to-wit, $9,155.25 was justly due to him from Atterbury, Baker & Co. or the bankrupt, as the surviving partner at the time he made and filed his proof of debt against the bankrupt's estate, but submits that the attempt of said claimant to sustain his proof of debt for the full amount claimed, $19,155.25, by the false and fraudulent testimony of the claimant himself, has the effect to deprive him of any right to dividends until the other general creditors are paid in full." The appeal was argued before Mr. Justice Miller, at the June term, 1874, and by him taken under advisement. Subsequently, after much consideration, he made the findings of facts and conclusion of law below given.

E. C. Palmer and J. A. Marvin, for assignee.

Morris Lamprey, for E. J. C. Atterbury.

MILLER, Circuit Justice. I find the following facts:

1. That Atterbury, the father, advanced to his son, the partner of Baker, the sum of $10,000, which was not intended as a loan to the partnership, but as an advance to the son by the father, which was no just claim against the insolvent partnership.

2. I find that said Atterbury, the father, also loaned the partnership the further sum of $9,155.25, which was intended by both the father and the members of the partnership as a loan of money to the firm, and which, but for the next finding of fact, would now be a valid claim against the assets of the bankrupt firm in the hands of the assignee.

3. I find that the appellee, Edward J. C. Atterbury, the father, with full knowledge that the sum of $10,000 aforesaid was an advance to his son, and well knowing that he had induced some of the creditors of the firm to extend credit by his statement that this $10,000 was such an advance, and was not claimed by him as a debt against the firm, did, nevertheless, claim that sum and the $9,155.25, also, in all the sum of $19,155.25, against the estate of the bankrupts, and did file that claim with the assignee, and did support that claim by a false oath, and did, in support of it, in this suit falsely swear that it was not an advance to his son, but was a just claim against the assets of the firm in the hands of the assignee.

Conclusion of law: And I am of opinion

as a conclusion of law from the foregoing facts, that said Edward J. C. Atterbury, is not entitled to receive from the assignee of said bankrupt partnership any part of said sum of $19,155.25, neither the $10,000, advanced to the son, nor the $9,155.25 actually loaned to the partnership.

The result is that the decree of the district court is reversed, and a decree entered here disallowing said Atterbury's claim as a creditor, and dismissing his claim with costs. Let a decree be entered accordingly.

Decree accordingly.

As to single and entire debts, and divisible demands, see In re Richter [Case No. 11,803].

Case No. 9,103.

MARRETT v. MURPHY et al.

[11 N. B. R. 131; [1] 1 Cent. Law J. 554.]

District Court, D. Minnesota. Oct. 16, 1874.

BANKRUPTCY — SURVIVING PARTNER — JUDGMENT AGAINST FIRM—HOW REAL ESTATE TREATED.

B., as the surviving partner of the firm of A., B. & Co., was adjudged a bankrupt, and an assignee was duly appointed, who received the proper instrument of assignment, which included certain real estate mentioned in the schedules of the bankrupt as the property of the firm, which firm is wholly insolvent. M. claimed the better right to A.'s interest by virtue of two judgments obtained against A. & B. as partners. The assignee claims that the property was purchased with partnership funds by the firm of A., B. & Co., as partnership property, and that A.'s interest is first subject to the debts of the creditors of the firm, before the individual creditors of A. can assert their claims, whether they are in the nature of judgments or otherwise. *Held*, that the rule in relation to real property purchased with partnership funds, so far as their creditors are concerned, is that it is to be treated as personalty of the partnership, and is charged with the debts of the partnership. If there is a survivor, the share of the deceased partner in the surplus of the partnership real estate, remaining after the payment of the partnership debts, and the adjustment of the claims between the individual members of the firm, is considered as real estate only in any controversy between the heirs-at-law and the personal representatives of the deceased; that the real estate in question as against this judgment-creditor must be first subject to the payment of the firm debts. Decree for the assignee.

The bill of complaint in this case is filed by [Thomas B. Marrett] the assignee, to determine which party to this suit has the right to the real estate mentioned therein, standing of record in the name of Livingston Atterbury and John W. Baker. The defendant [William] Murphy claims the better right to the interest of Atterbury in the real estate, by virtue of two judgments and executions levied. The first judgment was rendered and docketed October 11, 1872, in the district court of Ramsey county, Minnesota, in a suit pending between Murphy and Livingston Atterbury, and Crawford Livingston, partners; the second was rendered in the supreme court of said state, August 18, 1873, and docketed in the Ramsey county district court, August 20, 1873, in a suit pending between the same parties. The sheriff [John Grace] had levied upon the interest of Atterbury in the real estate owned by Atterbury and Baker, and was proceeding to sell the same, when an injunction was issued by this court. The assignee claims that the property was purchased with partnership funds by the firm of Atterbury, Baker & Co., as partnership property, and that Atterbury's interest is first subject to the debts of the creditors of the firm, before the individual creditors of Atterbury can assert their claims, whether they are in the nature of judgments or otherwise. The undisputed facts show that Baker, as surviving partner, was adjudicated bankrupt May 23, 1873; that Marrett was appointed assignee June 10, 1873, and received the proper instrument of assignment, which included the real estate in controversy, mentioned in the schedules of the bankrupt as the property of the firm; also, that the firm of Atterbury, Baker & Co., commenced business in May, 1872, and continued until March 3, 1873, when Atterbury died, and that during the existence of the firm the property in dispute was purchased, and the firm notes given for the purchase price of a portion of it, which were taken up and paid at maturity or shortly after; that for two of the city lots payment was made by deducting the amount out of the contract price for certain materials furnished and work performed by the firm in the line of its business. The deeds were executed to Livingston Atterbury and John W. Baker. The firm is wholly insolvent.

E. C. Palmer, for plaintiff.

I. V. D. Heard and H. J. Horn, for defendants.

NELSON, District Judge. The rule in relation to real property purchased with partnership funds, at least, so far as the partners and their creditors are concerned, is pretty well settled. Equity treats such real estate, without reference to the situation of the record title, as the personalty of the partnership. The tenure of real estate, applied to partners, is that they become tenants in common, and each partner can only convey his own share, but the general current of authority, although there is some conflict, in equity, charges such real estate with the debts of the partnership. If there is a survivor, the share of the deceased partner in the surplus of the partnership real estate remaining after the payment of the partnership debts, and the adjustment of claims between the individual members of the firm, is considered as real estate only, in any controversy between the heirs-at-law and the personal representatives of the deceased. Story, Partn. (3d Ed.) pp. 136, 137, § 93; 2 Barb. Ch. 165. The doctrine establishing by an equitable fiction partnership real estate as personalty, is in favor of trade, and for

[1] [Reprinted from 11 N. B. R. 131, by permission.]

the benefit of surviving partners and firm creditors. I do not understand, or so interpret, the statutes of Minnesota that they change in any respect the equitable doctrine above stated. The claim here is not a secret trust, or secret equitable right. If it exists at all, it is the result of the operation of law, and nothing in the statutes of this state defeats it. I do not mean to assert that, as an abstract proposition, partners cannot with partnership funds purchase real estate, and hold it otherwise than as partnership property. If it was not the intention of the partners to so purchase and hold it, there can be no objection to a purchase, in good faith, for their individual account. In this case, however, the testimony shows that it was the intention to hold it as partnership property. The surviving partner so states in his evidence, and has so returned it in the schedules. It must, therefore, as against this judgment-creditor, be first subject to the payment of the firm debts.

Decree will be entered for the complainant.

[This case was again heard in the district court upon motion of assignee to strike out claim of E. J. C. Atterbury as fraudulent. A part of the claim was allowed. Upon appeal to the circuit court, however, the entire claim was stricken out. Case No. 9,102.]

Case No. 9,104.

MARRINER et al. v. LUTING.

[N. Y. Times. Oct. 25, 1863.]

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

CONTRACTS—AGREEMENT ON INTERPRETATION—ESTOPPEL.

[An agreement as to the proper interpretation of a contract bars each party from thereafter claiming a construction inconsistent therewith.]

[This was a libel by George W. Marriner and others against Charles Luting.]

This was an action to recover a balance of charter money. The vessel was, by the charter, to have "a full cargo of molasses, with 10 per cent. on the number of pieces for small stowage." The charterers did not furnish a full cargo, and on her arrival a dispute arose between the parties as to her capacity. They agreed to leave it to two stevedores to determine, and the stevedores made their report that she would carry 576 hogsheads, 20 tierces, and 56 barrels, and libellants presented a bill made out in that way. The respondent, however, was not satisfied with this award, and the parties met again. He claimed that she would not carry more than 552 hogsheads, and they finally agreed to split the difference on the hogsheads. The respondent, when the bill was again presented next morning, claimed that he should not pay freight on more than 564 hogsheads and 56 barrels, being 10 per cent. on the number of hogsheads. The libellants, however, claimed that they had agreed to settle the bill as it was now made out, deducting the twelve hogsheads agreed to be thrown off.

Beebe, Dean & Donohue, for libellants.

Benedict, Burr & Benedict, for respondent.

SHIPMAN, District Judge, without hearing the counsel for the libellants said he was inclined to the opinion that the respondent was correct in his construction of the charter party, but that as he had not objected to the bill on that ground when first presented, the transaction between the parties was a fixing of the amount to be paid as in the bill stated, less the hogsheads to be deducted, and he gave a decree for the amount claimed by the libellants.

MARRIOTT (BRUNE v.). See Case No. 2,052.

Case No. 9,105.

The MARS.

[Blatchf. Pr. Cas. 150.] [1]

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

PRIZE—BLOCKADE—PAPERS THROWN OVERBOARD.

Vessel and cargo condemned for an attempt to violate the blockade.

In admiralty.

BETTS, District Judge. The vessel and cargo in this case were neutral, owned by a British subject residing in Halifax, and were captured as prize on the 5th of February, 1862, within a few miles of Fernandina, in Florida, by the United States steamer Keystone State. The schooner was running directly for that port, with a cargo of salt for Inguana, in the West Indies. When the master found that his vessel was pursued by the public ship, he threw overboard some letters or papers, as did also another of the ship's company, — the steward, or a passenger on board. The master and owner of the vessel and cargo knew, as did all the crew, that the ports of the Southern states were in a state of blockade. The vessel purported to be to Halifax; the vessel was kept purposely wide of the true course for that port, under the suggestion that she designed to speak a blockading vessel and inquire if the blockade was still maintained. It is manifest, on the papers taken with the schooner and the preparatory proofs, that the outward and return voyages were planned and set out on foot with intent to evade the blockade and run a cargo of salt into some port of the enemy. Wheat. Mar. Capt. c. 6; Halleck, Int. Law, c. 23. This is so palpable and irrefragable that no appearance or claim has been interposed in behalf of any claimant, but the proceedings have been suffered to go to a decree without contestation.

The interlocutory decree of condemnation having been regularly taken by default against the vessel and cargo, final judgment of condemnation and sale of the vessel and cargo is ordered accordingly.

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

Case No. 9,106.

The MARS.

[1 Gall. 192.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1812.[2]

EMBARGO — FORFEITURE — BONA FIDE PURCHASER WITHOUT NOTICE.

A bona fide purchaser without notice is protected against an antecedent forfeiture to the United States.

[Cited in The Florenzo, Case No. 4,886; Clark v. Protection Ins. Co., Id. 2,832; U. S. v. The Paryntha Davis, Id. 16,004.]

[Cited in Williams v. Delano, 155 Mass. 14, 28 N. E. 1123.]

[See The Ploughboy, Case No. 11,230; U. S. v. 1,960 Bags of Coffee, 8 Cranch (12 U. S.) 398, 416.]

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

The information in this case proceeded for a forfeiture of the brig Mars, upon the allegation that the brig departed from the United States, bound to a permitted port, without giving bond pursuant to the act of 1st March, 1809, c. 91, § 16. There were other counts in the information, which were not considered by the court, because it was admitted, that there was a forfeiture under the first count, and the answer of the claimant set up, as a justification of his title, that he was a bona fide purchaser for a valuable consideration, without notice of the offence; and it was admitted that this justification was true in point of fact, and that there had been no laches, either as to the United States, or as to the purchaser.

G. Blake, Dist. Atty., for the United States, contended that the title of the United States related back to the time of the offence committed, and was not affected by the intermediate sale.[3]

Wm. Prescott, for the claimant [Daniel Hewes, Jr.]

In all forfeitures at common law, it is believed, without an exception, the forfeiture relates to the conviction, and not the commission of the offence; and, pending the indictment, the person accused may dispose of his chattels. 3 Bac. Abr. "Forfeiture," D; 4 Com. Dig. "Forfeiture," B, 6; 4 Bl. Comm. 387; 1 Hawk. P. C. bk. 2, c. 49; Co. Litt. 391. It is said, the forfeitures by this statute are sui generis, and that, on the commission of the offence, the property in the thing is devested from the former owner, and vested in the government and its officers. But we contend, 1. That from the authorities cited, it does not appear, that the property vests on the commission of the offence; but, on the contrary, that it does not vest until seizure. 12 Mod. 92; 5 Mod. 193; 2 Bl. Comm. 93. 2. If the property does vest on commission of the offence, yet the former owner, so long as the government suffer him to keep possession of the chattel, can give a good title to a bona fide purchaser.

STORY, Circuit Justice. The question presented to the court is, whether property, which has become forfeited to the United States, and afterwards and before seizure, while remaining in the possession of the vendor, is sold to a bona fide purchaser for a valuable consideration, without notice, is protected against the claim of the United States. This question is peculiarly delicate and interesting, in whatever way it is considered. On the one hand, it strikes at the root of almost all the forfeitures in rem, which the legislature has provided, to guard the revenue laws from abuse; and, if the decision be against the United States, it may open a fertile field for fraud and colorable transfers, to the encouragement of offenders. On the other hand, if the secret taint of forfeiture be indissolubly attached to the property, so that, at any time and under any circumstances within the limitations of law, the United States may enforce their rights against innocent purchasers, it is easy to foresee, that great embarrassments will arise to the commercial interests of the country, and no man, whatever may be his caution or diligence, can guard himself from injury, and perhaps ruin.

Considerations of this nature have pressed heavily upon my mind, and I have therefore been solicitous to avoid a discussion involving so much public, as well as private importance. I could have wished to have reserved this question for the consideration of all the judges in the highest tribunal; that in forming my opinion I might have had the light reflected from their minds, and the benefit of their acknowledged learning. The parties have however seen fit to pursue another course, and I shall meet the question, as my duty requires, without asking for shelter under any authority, though not without extreme diffidence.

Before I proceed to the principal question, it will be necessary to clear the way by adverting to some considerations, which have grown out of the argument on each side. It should be remembered, that this is not a case where the vendor was out of possession, and of course where the law might infer a want of due diligence in the purchaser. To such a case the maxim caveat emptor would certainly apply. Nor is the present a case, where the sale was made at the first moment when the property came within the jurisdiction or grasp of the United States, for I should have little doubt, that such a hurried sale could hardly be the foundation of a solid title. It is not a case of a voluntary gift, or collusive transfer, which would

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

[2] [Reversed in 8 Cranch (12 U. S.) 417.]

[3] He cited, among other cases, Wilkins v. Despard, 5 Term R. 112; Lockyer v. Offley, 1 Term R. 252.

probably share the fate of all bounties in fraud or exclusion of public rights. Jones v. Ashurt, Skin. 357. It is admitted, that the sale is bona fide, for a valuable consideration, and without any express or implied notice.

Further: The statute, on which the information is founded, has declared that the property shall be wholly forfeited, if the offence be committed. But it has not declared at what time it shall take effect, to what time it shall relate, nor whether it shall be incapable of being purged by subsequent events. The forfeitures under the statute are to be distributed in the same manner, as forfeitures under the collection act, March 2, 1799, § 91, by which informers and officers of the customs, as well as the government, may acquire vested interests; and it follows, therefore, that these interests, as to informers and officers of the customs, cannot vest until their rights are ascertained by seizure or condemnation.

It has been argued on the part of the United States, that the forfeiture is by the statute made absolute on the commission of the offence, and as it was competent for the legislature to enact such a law, the title cannot be devested by any subsequent event—that the cases of forfeitures at the common law are not applicable, because they depend upon the qualifications annexed to them by the common law, which make them conditional only, and not absolute forfeitures, whereas the present statute has annexed no qualification. And in support of this distinction, the opinion of the chief justice in U. S. v. Grundy, 3 Cranch [7 U. S.] 337, has been quoted, where he says (Id. 350): "It has been proved, that in all forfeitures accruing at common law, nothing vests in the government, until some legal step shall be taken for the assertion of its right, after which for many purposes the doctrine of relation carries back the title to the commission of the offence, but the distinction taken by the counsel for the United States between forfeitures at common law, and those accruing under a statute, is certainly a sound one. Where a forfeiture is given by a statute, the rules of the common law may be dispensed with, and the thing forfeited may either vest immediately, or on the performance of some particular act, as shall be the will of the legislature. This must depend upon the construction of the statute." I entirely subscribe to the doctrine here stated by the chief justice. There can be no doubt, that the legislature may provide, that its forfeitures shall take effect differently from the course prescribed by the common law. But the question will always be, have the legislature so done? If they have not, shall the rules of the common law govern in the absence of any positive declaration? It should be remembered also, that the chief justice is here speaking in a case, where the main question before him rested, in a considerable degree, upon the point, whether the legislature had not given an election of remedy, and suspended the vesting of any interest until the determination of that election. But I apprehend that the words of the chief justice by no means imply, that when a forfeiture in rem is attached to a statute offence, the rules of the common law are of course excluded. They do not in my judgment import more than the opinion, which I have already expressed. Now, in the case at bar, I cannot perceive in the language of the legislature any systematic exclusion of the common law as to forfeitures. They have declared no more, than that the commission of an act shall induce a forfeiture, and so has the common law. But the question, as to the nature and extent of the operation of this forfeiture, is nowhere, that I can perceive, touched. This view of the subject leads me to deny another position assumed by the counsel for the United States, namely, that the doctrine of relation has nothing to with the present controversy. In the progress of this examination, I think, if not already shown, it will sufficiently appear, that the doctrine of relation has a very powerful influence in every essential view of the subject.

I will now consider the main question, which perhaps may be divided into two branches. 1. What is the interest or right, which attaches to the government in forfeitures of property, before any act done to vindicate its claims? 2. What is the operation of such act, done to vindicate its claims, as to the offender and as to strangers?

As to the first point; in all cases at common law, where lands are forfeited for the personal offence of the party, I take the rule to be universally true, that until the offence is ascertained by conviction and attainder, no title vests in the sovereign. Before that time, the party is entitled to the possession and profits of his lands, and the government have no right vested in them, either to enter or dispose of the estate. 2 Inst. 48; Staund. P. C. 192. Nay, even after attainder, until office found, the sovereign is considered as having but a possession in law, and an office is necessary to complete the title. Staund. P. C. 198. The offender therefore has, until conviction, full power and authority to alien his lands, and to convey to the purchaser a complete and legal, though defeasible seizin, and unless such conviction follow the offence, the alienation is good against all the world. For as Bracton says (liber 2, c. 13, p. 30): "Ea vero quae post feloniam facta sunt, semper valent et tenent, nisi fuerit condemnatio subsecuta, et si fuerit subsecuta, non valent." If this be true, and there seems no reason to doubt it, it follows that the estate of the offender is rightful, that he has both jus ad rem and jus in re, and consequently, that the crown hath but a mere possibility, which in no wise restrains the exercise of ownership over the property. See 4 Bl. Comm. 382. The same

doctrine is also in general true, as to like forfeitures of goods and chattels. Bract. lib. 2, c. 13; Co. Litt. 391a; Staund. P. C. 193; Id. 52; 2 Inst. 48; 2 Hawk. P. C. c. 49. Nor do the cases of deodand and suicide form any exceptions, for the authorities all concur, that the forfeiture does not vest a property until the fact is found of record. Foxley's Case, 5 Coke, 109; Hales v. Petit, Plowd. 260, 262. It has been supposed, that goods waived, vested ipso facto in the crown upon waiver; but on a careful examination of the authorities it will be found, that the owner retains his full property, until an absolute seizure by the crown. Staund. Prerog. lib. 3, c. 25, p. 136; Fitzh. Abr. Estray, 2; 21 Edw. IV. c. 16. For all purposes of alienation and sale, therefore, the property in goods and chattels remains in the owner, notwithstanding the commission of an offence subjecting it to forfeiture, and consequently he may convey a good title against every person but the crown, and against the crown also, unless in cases where the anterior relation applies. Jones v. Ashurt, Skin. 357.

I think, therefore, it may be assumed as a settled principle, that in forfeitures for personal offences, before seizure or prosecution, the sovereign has no vested title. Can the case be distinguished, where the forfeiture is made to attach to the instrument itself by means whereof the offence is committed? It seems to me, that the most favorable cases for the United States, viz. deodands and waifs, conclusively show, that no such distinction anciently prevailed, for whatever may be the effect of relation, it is certain that no property vested in the crown until seizure or inquisition. I infer, therefore, that no absolute property vested in the United States, in the case at bar, until actual seizure was made, and the decision in the king's bench in Lockyer v. Offley, 1 Term R. 252, seems to me fully to support the inference. It has indeed been supposed by the counsel for the United States, that Roberts v. Wetherall, 1 Salk. 223, 12 Mod. 92, and Wilkins v. Despard, 5 Term R. 112, support a contrary doctrine. But on examination they appear to me to confirm it. In the first, the action was detinue for property forfeited under the navigation act of Car. II., and the court held, that the action well lay, because the bringing the action amounted to a seizure. In the latter case, there had been an actual seizure made for the forfeiture, and the sole question was, if condemnation were not necessary to devest the property of the owner.

If I am right in the view, which I have already taken of the subject, there can be little doubt, that the title of the United States, so far as affects third persons, rests mainly on the doctrine of relation; and that the counsel for the United States must call in the aid of the common law to enforce the present claim. For if no title vests until seizure, there must at the time of seizure be a title in the offending party capable of being devested, and of vesting in the United States. But at the time of the present seizure, that title had been transferred to the present claimant, and nothing was left in the vendor capable of transfer.

This leads me to the examination of the second point, viz. what is the operation of the acts done by the sovereign to vindicate his title by forfeiture? At common law, in case of attainder for treason or felony, the forfeiture of lands relates back to the time of the offence committed, so as to avoid all intermediate charges and conveyances (4 Bl. Comm. 481, 487; Co. Litt. 390b; Staund. P. C. 192); but in general, in like cases, the forfeiture of goods and chattels relates back only to the time of conviction, so that all previous charges and alienations, and even bona fide gifts, are protected (4 Bl. Comm. 387; Co. Litt. 391; Staund. P. C. 192; Perk. § 29; Skin. 357). There are some cases, in which the relation is carried back to the time of the inquisition made; but, unless that of suicide form an exception, there is no case, where the relation is pressed beyond the time of the prosecution. According to the decision in Plowd. 260, a felo de se forfeits all his goods and chattels from the time of committing the act, which occasions the death, and the doctrine seems supported by Rex v. Ward, 1 Lev. 8. The general ground assigned for it is, that otherwise the offender would go wholly unpunished, and it is compared to the case of flight after felony. Now admitting that this is a solid reason, and a sufficient foundation for a legal adjudication, it may well be doubted, if the doctrine of the decision in Plowden required the forfeiture to relate back further than the death of the party. The case was, that Sir James Hales, the offender, was joint tenant with his wife of a term for years, and the question made was, whether after inquisition, the forfeiture should not relate back, so as to over-reach the right of survivorship, which accrued to the wife. Now one of the judges (Weston) held that the forfeiture should only have relation to the death, at which time the title of the wife accrued, yet, in this concourse of titles, the king's title by prerogative should be preferred (Plowd. 204); and I find that Lord Hale (1 Hale, P. C. 414) expresses great doubt whether, for all purposes, the relation could be carried back to the stroke, which occasioned the death. Be this case as it may, it is the only exception to the general doctrine, and inter apices juris. A case so unjust, as that which robbed an unfortunate woman, not only of the moiety, which vested in her by survivorship from her husband, but of the other moiety absolutely vested in her by grant, I am glad to find is a juridical anomaly.

I have said, that the case of a felo de se forms the only exception to the rule. There

are authorities to show, that in case of flight for felony, the forfeiture, after it is found by inquisition, verdict or indictment, relates back to the time of the flight, so as to avoid all mesne acts. Rex v. Wendman, Cro. Jac. 82. But I think the better opinion, notwithstanding, is, that it relates only to the time of finding the flight. Co. Litt. 390; Staund. P. C. 192; 5 Coke, 109b; Bro. Forfeiture des Terres, 119; Id. Relation. But it has been argued, that admitting the rule, that the forfeiture of goods and chattels in general relates back to the time of conviction, yet it is inapplicable to a case, where a specific thing is declared forfeited by law; for in such case, the corpus delicti attaches to the thing, into whose hands soever it may come, and the case of a deodand, put by counsel in Plowd. 262, is cited in illustration. "If my horse strike a man, and afterwards I sell my horse, and after that the man dies, the horse shall be forfeited." I do not find any authority to support this position, although it is cited as law in 1 Hawk. P. C. c. 26, § 7, and in Terms de la Ley, Deodand. It seems a peculiar case, growing out of the avarice of the church and the superstition of the laity in ancient times.

The distinction seems also countenanced by the court in Lockyer v. Offley, 1 Term R. 252. The counsel for the plaintiff there argued, that the ship was forfeited the moment the smuggling was committed, even though she had afterwards come into the hands of a bona fide purchaser, and Mr. Justice Willes, in delivering the opinion of the court, in alluding to the argument that the forfeiture attached the moment the act was done, said "it may be so, as to some purposes, as to prevent intermediate alienations and incumbrances." To be sure, this expression carries with it a pretty strong implication, but in the same case, returning to the argument, the same learned judge says: "I do not know that it has ever been so decided. It may depend upon circumstances, such as length of possession, laches in seizing, or other matters;" and the decision of the court went ultimately upon other grounds. I must therefore consider the authority, as not fairly extending to this point, and indeed as rather leaning the other way. On the other hand, the case of lord and villein has been cited from Co. Litt. p. 118, § 117, to show that even where a right to seize property exists in the lord, it is not forfeited by seizure, so as to over-reach prior alienations, for until seizure, it is said, that he has neither jus in re nor jus ad rem, but a mere possibility. And the conclusion drawn from this example is not materially affected by the consideration, that a contrary doctrine prevails in the case of the sovereign (Id. § 118) because the reason assigned is perfectly consistent with it, viz. that the property is in the sovereign before any seizure or office. I do not think much reliance can in general be placed upon analogies borrowed from the feudal tenures, because they were governed by peculiar and technical niceties, the reasons of which have long since ceased, and perhaps cannot now be well understood. But if the principle of the case put be, that where the absolute property is not vested before the alienation, a subsequent seizure will not avoid such alienation, if made bona fide, it is directly applicable to the case at bar. I have already endeavored to show, that the absolute property did not vest in the United States until seizure, and I think it would be a bold assertion, that the United States could, before such seizure, have conveyed the property to a purchaser, or have clothed it with a national character.

I consider a passage in Lord Hale's treatise on the customs as corroborating the view which I have already taken of this case. He says: "Though a title of forfeiture be given by the lading or unlading, the custom not paid, yet the king's title is not complete till he hath judgment of record to ascertain his title, for otherwise there would be endless suits and vexations; for it may be, ten or twenty years hence, that there might be a pretence of forfeiture now incurred." Harg. Law Tracts, 226. According to Lord Hale, even seizure would not be sufficient to fix the title in the king, but it must be consummated by a judgment of record.

But the point of difficulty is, to decide whether the United States had not such an inchoate title, as, connected with a subsequent seizure, would, by a retroactive effect, defeat the intermediate purchase. Now, it is precisely in this view, that the case of the villein may admit an unfavorable distinction. For until seizure, the lord has not even an inchoate title, but a mere possibility, and though the property is, in the like case of the sovereign, said to be in him without seizure or office, yet, I apprehend, the title is not consummate until seizure or office; for until that time, it could hardly be held, that a purchaser under the villein, or even the villein himself, had a tortious possession and user of the property. The case of villeinage then, even supposing it to apply, does not go quatuor pedibus with the present. The case of Attorney General v. Freeman, Hardr. 101, has also been relied on by the claimant. In that case, the party, after outlawry, and before inquisition, made a bona fide lease of his lands, and it was held, that the forfeiture did not over-reach the title of the purchaser. But I do not think that much reliance can be placed on this case, because it turned on a settled distinction, that until inquisition, the king has no title in the real chattels, or free-holds of the out-law; but in personal chattels, the title is in the king without inquisition (1 Ld. Raym. 305; Salk. 395; 12 Mod. 176), and the relation does not extend beyond the time of the commencement of the title. The case of The Anthony Mangin, 3 Cranch [7 U. S.] 356, note, before Mr. Justice Winchester, is the only other author-

ity, that I recollect, which has been thought materially to bear on the question. I entertain the most entire respect for the opinions of that truly able and learned judge, and although the decision of that case did not rest upon the present question, it is but justice to acknowledge, that it has thrown great light on the subject, and enabled us all to meet the stress of this cause with more certainty, than could otherwise have been done. It was very clearly the opinion of the learned judge, that a seizure did not relate back to the time of forfeiture, so as to over-reach an immediate bona fide conveyance, and he has certainly offered cogent reasons in support of that opinion. But after a diligent examination of the authorities cited by him, I am well satisfied that the point has never been solemnly adjudged, and must now be decided upon principle.

It seems to be a rule founded in common sense, as well as strict justice, that fictions of law shall not be permitted to work any wrong, but shall be used ut res magis valeat quam pereat. 3 Coke, 28b. And this rule, so equitable in itself, seems recognized in the common law. 13 Coke, 21; 2 Vent. 200. And in respect to the doctrine of relation, this rule has been admitted in its fullest extent in civil cases. Brooke, Abr. "Relation," 18; 1 Hen. VII. c. 17; Brooke, Abr. Dett. 139; 6 Coke, 76b; 3 Coke, 28b. For it has been repeatedly adjudged, that relation shall never work an injury, "and shall never be strained to the prejudice of a third person, who is not a privy or party to the act," and further, that "in destruction of a lawful estate vested, the law will never make any fiction." 3 Coke, 29; 2 Vent. 200. It is true, as we have already seen, that a different rule prevails, as to forfeitures of lands in treason and felony, founded probably on feudal principles, or the barbaric character of the times. Yet even as to cases of treason and felony, a striking distinction is admitted in favor of goods and chattels; mesne acts before conviction or inquisition are suffered to retain their actual validity. Looking to the vast extent of commercial transfers, the favor with which navigation and trade are fostered in modern times and the extreme difficulty of ascertaining latent defects of title, it seems difficult to resist the impression, that the present is a case, which requires the application of the milder rule of the law. If the principle contended for by the government be admitted in its full extent, and it will be found very difficult to bound it, a bale of goods, which is once contaminated with a forfeiture, will retain its noxious quality, through every successive transfer, even until it has assumed, under the hands of the artisan, its ultimate application to domestic use. Yet such a position would strike us all as monstrous. If we say, that the forfeiture shall cease with the change of the identity of the whole package as such, still an intrinsic difficulty remains. The object of the government would be completely evaded by the offender, and the innocent purchaser would sink under the pressure of frauds, which he could never know, nor by any diligence avert.

On the whole, I have come to the result, not, however, without much diffidence of my opinion, that a forfeiture attached to a thing, conveys no property to the government in the thing, until seizure made, or suit brought. That previous to that time the owner has the exclusive right of possession and property, though the government may be considered as having an inchoate title or possibility. That as against the offender or his representatives, upon seizure or suit, the title by operation of law, relates back to the time of the offence, so as to avoid all mesne acts; but as to a bona fide purchaser for a valuable consideration, and without notice of the offence, the doctrine of relation does not apply, so as to devest his legitimate title. Considering, as I do, that this question is of very great importance, I trust that it will receive the decision of the highest tribunal, and I shall not feel humbled, if, upon better examination, a different doctrine shall prevail by the judgment of that court.

Decree affirmed.

[Subsequently, on appeal to the supreme court, the decree of the circuit court was reversed, and a decree entered forfeiting the brig to the United States. 8 Cranch (12 U. S.) 417.]

MARS, The (UNITED STATES v.). See Case No. 15,723.

MARSELIS (UNITED STATES v.). See Cases Nos. 15,724 and 15,725.

Case No. 9,107.

Ex parte MARSH.

[3 App. Com'r Pat. 291.]

Circuit Court, District of Columbia. March 28, 1860.

PATENTS — GRAIN VENTILATOR — TUBES — SIDE WALLS.

[A device consisting of perforated tubes set vertically in a grain-bin so as to allow a free circulation of air through the grain, thus preventing overheating, is anticipated by a prior invention of hollow perforated side walls, for the same purpose.]

[Application by Sylvester Marsh for a patent for improvements in grain-bins. The commissioner refused a patent. Applicant appeals.]

MORSELL, Circuit Judge. The appellant states his claim thus: "First. I claim grain-bins constructed with a series of perforated tubes open at both ends, the same being secured in the bottom of said bin so as to occupy a vertical position whereby the atmospheric air is permitted to penetrate into and evacuate from the bin by its natural ascent substantially as described. Second. I claim constructing grain-bins, with outer and inner

walls, the latter being perforated and stayed from the former so as to admit of fresh air circulating around and through the mass of grain in the manner and for the purposes set forth. Third. In grain-bins of otherwise ordinary construction and suitable form I claim the combination of perforated tubes with perforated side walls arranged within the box or chest as described." The commissioner adopted for his decision the report of the examiners dated 24th Oct., 1859, in which report it is said: "The invention which Marsh presents consists of a bin having a series of tubes passing vertically from the top to the bottom of the bin at which points they are open at the bottom for the admission of atmospheric air, and at the top for its exit. The tubes are made of wire gause or of thin metal sheets perforated with numerous holes, and they may be made, it is suggested, funnel shaped at their lower ends, for the purpose of affording a means of securing them more perfectly to the bottom of the bin. It is also suggested in the specifications that in order to insure a thorough circulation not only through the mass of grain but also around it, the bin may be provided with double side walls leaving a free space between them for the passage of a current of air. The inner sides W being formed of metallic sheets perforated with holes in a like manner as the tubes c."

Upon this invention three claims are based, —the first to the tubes, the second to the double walls, and the third to the combinations of the tubes and the walls with each other. In each of these claims, the applicant limits himself to the especial construction he specifies as well when he claims the tubes and the double-walls as separate and distinct devices as when he claims the two in combination. Most of the references are grain kilns, so called because artificial heat and not atmospheric air is used in them to dry the grain subjected to their action; and upon this fact great stress is laid by the counsel for the applicant. Accepting this, for the sake of argument, although in point of fact we do not perceive the force of any such distinction that there is a substantial difference between the references in question because they are kilns, and his invention, because it is a bin, we still find in one of the references a device against which this objection does not lie. We allude to Noah Seitz's corn-house, an exact anticipation of the double wall as claimed in the second claim of the applicant and therefore in the light in which we find ourselves obliged to regard his invention, an answer also to it as presented in both his other claims. We will state the reasons which lead us to this conclusion as briefly as we can.

The double walls accomplish precisely the same functions that the tubes accomplish, only the quantity of air which may be introduced in this way into any given space or into any given bulk of grain is not so great as would follow the employment of the tubes in addition thereto. Nothing therefore else than a mere difference of degree does or can follow the use of tubes superadded to double walls, a result which would follow equally from a series of double perforated walls, or any other form of open spaces surrounded or enclosed by walls perforated to permit the external air to find its way into the grain. Considered in this aspect, the tubes then are nothing more than an amplification or extension of the idea involved in the use of the double walls, a duplication in other words, and as such they are not patentable as a substantive device. This view of the case as effectually disposes of the third claim as of the first, because the tubes and the double walls being practically the same thing, there can be no patentable combination between them any more than there could be between any two tubes of the series or between the opposite double walls constituting the sides of the bin. These reasons, independent of others which we do not consider it necessary to specify, satisfy us that the decision of the examiner upon the case was correct and hence we recommend the final refusal of a patent.

This report was confirmed and a patent refused by the commissioner on the 25th of Oct., 1859. To which decision there were six reasons of appeal filed. The first in substance is, that it was not shown that the applicant's claim or discovery had been invented by any other person prior to the applicant's discovery thereof, or that it had been printed or described, &c. Secondly: That Noah Seitz's patent for a corn house does not cover in substance or detail each or all of the several things or peculiarities, construction and combination of parts comprised in the applicant's claim, that neither separately nor in combination does the corn house of Seitz comprise a like use, construction or arrangement, &c. The third: Commissioner fails to show that the same special construction of which appellant's bin consists is found in Seitz's corn house, &c. The fourth: Because, that the tubes are something more than an amplification or extension of the idea, in the use of the double walls, at least in any ordinary signification, and do not in Marsh's invention either confine the grain as walls, nor restrict as walls, the diffusion of air, throughout the mass, but permit of its more general distribution at numerous points to the surrounding grain and as a substantive device widely differs from walls. The fifth: Because the commissioner has said he had other reasons, which were not stated as required by section 7 of the act of 1837 [5 Stat. 193]. The sixth and last: Because of a variance between the decision of the examiner and the commissioner, &c.

The commissioner's report in answer to the foregoing reasons, as to the first, is simply a denial of what is alleged by appellant; as to the second, the distinction between a grain-bin and a corn house is merely formal, as to the distinction of applicant's invention in the

construction in the manner described of such a chamber with double walls, the inner wall or that next to the grain being perforated so as to allow the air which circulates between the two walls to come in contact with the grain. The construction has the further peculiarity that perforated tubes open at the extremities pass vertically from the top to the bottom of said chamber for the same purpose of ventilating the grain. An inspection of the case of Seitz shows identically (differing only in the size and form of the perforations in the inner wall) the provision for ventilating the grain which is exhibited in the application. This reference furnishes a substantial anticipation of all the three claims. The first of these is the construction of grain-bins with vertical perforated tubes open at the extremities passing through the space occupied by the grain. It is true, however, that the essence of the invention is a perforated ventilating duct or canal and whether this be rectangular or circular involves but a formal difference. It is still the same substantive invention. Four such ventilating passages appear in the section of Seitz's corn house, two of which may be regarded as passing through the body of the grain. Those two, however, are but the extension or multiplication of the same device, and if this be so the position taken by the office on final examination appears to be tenable,—that there is no combination between the tubes and the double walls which is the subject matter of the third claim, such combination resolving itself into a duplication of the same device. The third is supposed to have been substantially answered. The fourth, an explanation as to the distinction between tubes and walls. The fifth, no law compelling the commissioner to state all his reasons for rejection, &c. The sixth, unimportant. Thus the case appeared to be when all the papers and documents were laid before me by the commissioner according to previous due notice given of the time and place appointed for the hearing, at which time and place also the appellant appeared by his attorney, filed his argument and submitted his case.

The general question to be considered is whether the discovery claimed by the appellant to be new has not substantially been known and used before. The nature and object of the improvement as claimed is to secure and preserve from decay or injury stored cereals, and to keep the same sound and healthy by producing the circulation of fresh air through and around the grain by a peculiar manner of arranging the space in which the grain is to be deposited, so that a constant circulation of air will pass through and around the grain, and more economically by saving the expense of repeatedly stirring and moving the grain. The mode is by openings in a number of tubes, open at both ends, made of wire gauze or metallic sheets perforated with numerous holes of a size too small to suffer the grain to pass through, providing also side walls, leaving a free space between them for the passage of a current of air, the inner sides being formed of metallic sheets perforated with holes, as the tubes. To show the absence of novelty, the commissioner has referred to drawings showing the invention of Noah Seitz, by comparison of which with the one in question, as stated in his report in answer to the second and third reasons of appeal, he says that they are identical, and that the appellant's claim is fully covered by that of Sietz. The nature and object of each appear to be the same,—by a full and thorough circulation of air to prevent the heating and destruction of stored grain, the one in what he calls a bin, the other a corn house with cribs. I think, for the purpose of the issue in this case, there is no essential difference from the circumstances of one being known as a corn house and the other a bin. The arrangement in each by which the object was to be attained, though somewhat different in form, appears to me also to be substantially the same, and so with respect to all the other leading features, nor is there anything to show any material saving of expense. From aught that appears the contrivances of Seitz, by a full circulation of air, is amply sufficient for the protection of the grain, and although more might be an addition, it would not be a patentable improvement.

As to the authorities referred to, by a careful examination, it will be found that the main principle upon which the decisions turned was (whether singularly or in combination the different parts of the arrangements were presented)—the important matter was that a new and valuable result was produced. In this case I do not think that either the means or result were new and valuable according to the established principles of patent law. The decision of the commissioner is therefore hereby affirmed.

Case No. 9,108.

In re MARSH.

[6 Law Rep. 67.]

Circuit Court, D. New Hampshire. April, 1843.

BANKRUPTCY—SETTING ASIDE VERDICT OF JURY—NEW TRIAL.

1. Whether the propriety of granting or refusing a motion for a new trial is a question, which, under the bankrupt act [of 1841 (5 Stat. 440)], can be adjourned into the circuit court, quaere.

2. But if it can be, then all the evidence and circumstances of the whole case must be brought fully before the circuit court, in order to enable it to form an opinion upon the question, whether a new trial ought to be granted or not.

3. The mere admission of incompetent testimony, or the mere misdirection of the court in a matter of law, is not of itself sufficient to establish, that a new trial ought to be granted, if in point of fact the verdict ought to be exactly what it has been upon the whole evidence and law properly applicable to the case, and the party moving for a new trial has suffered no injustice or prejudice thereby.

[Cited in U. S. v. Hudson, Case No. 15,412.]

4. *Held*, that the present case was too imperfectly stated to enable the circuit court to give

any opinion upon the adjourned questions, inasmuch as the certified proceedings did not state what was the issue before the jury for trial, nor what the whole evidence was, which was submitted to the jury.

This case came before this court, upon a question adjourned from the district court of New Hampshire, as follows: "Whether the verdict of the jury may be set aside and a new trial may be granted upon the accompanying petition and statement." The case was submitted without argument.

STORY, Circuit Justice. I entertain the most serious doubts, whether the present question, adjourned into this court, is within the purview of the sixth section of the bankrupt act of 1841, c. 9. That section declares, that "the district judge may adjourn any point or question, arising in any case in bankruptcy, into the circuit court for the district, in his discretion to be there heard and determined." Now, the granting or refusing a motion for a new trial is a matter resting in the sound discretion of the court, under all the circumstances of the case; and it by no means necessarily follows, that a new trial is to be granted for every mistake or misdirection of the judge at the trial, however trivial or unimportant it may be, if upon reviewing the whole evidence, so far as it is unobjectionable, and the law growing out of it, it is clear that no injustice has been done to the party, and that the merits are unequivocally against him, and the verdict just such as it ought to be. So, if the direction of the judge is objectionable in a particular passage, or on account of particular expressions, if, taking the whole together, it be such in substance, as will lead to a just conclusion, there is no ground to set aside the verdict for that cause only. The like result arises, where evidence has been admitted, which ought not to have been received, provided there be sufficient without it to authorize the finding of the jury. In short, in all these cases, the question is not, whether the ruling of evidence and the directions given by the judge at the trial have been entirely correct, but whether, upon the whole case, the party moving for a new trial has suffered any wrong or prejudice or injustice. The books are crowded with cases in support of the doctrines which I have stated. It is sufficient to refer to Edmondson v. Machell, 2 Term R. 4; Horford v. Wilson, 1 Taunt. 12; Pulley v. Hilton, 12 Price, 625; Cox v. Kitchin, 1 Bros. & P. 338; Gascoyne v. Smith, 1 McClel. & Y. 338; Wickes v. Clutterbuck, 2 Bing. 483; Teynham v. Tyler, 6 Bing. 561; Brazier v. Clap, 5 Mass. 1; Remington v. Congdon, 2 Pick. 310; Dole v. Lyon, 10 Johns. 447; and Woodbeck v. Keller, 6 Cow. 118. Nor do the recent cases of Crease v. Barrett, 1 Cromp., M. & R. 919; Baron de Rutzen v. Farr, 4 Adol. & E. 53; Wright v. Tatham, 7 Adol. & E. 313,—properly considered, overturn the doctrine as to the admission of improper evidence, although they certainly show an inclination of the courts to restrict its application to very clear cases. See, also, Estwick v. Caillaud, 5 Term R. 425, per Buller, J.; Grah. & W., New Trials, c. 9, pp. 301–310; 2 Tidd. Prac. (9th Ed., 1828) 907, 908; Tyrwhitt v. Wynne, 2 Barn. & Ald. 559, per Lord Tenterden. Considerations of this sort go very far to show, that the question, whether a new trial ought to be granted or not, being a matter exclusively in the discretion of the court, can most properly be disposed of by the district court before which the trial is had, and by which the whole circumstances of the case are fully understood, and can be best weighed; and that the bankrupt act was intended to provide for the adjournment of such questions only into the circuit court, as are mere questions of law, and not questions of discretion.

But without dwelling upon this matter in this view, it is obvious, that if the circuit court is to act at all upon the question, whether a new trial ought or ought not to be granted, all the evidence, which was given at the trial, and all the circumstances of the whole case ought to be brought by a complete report before the circuit court. That has not been done in the present case; and the want of it constitutes an insurmountable obstacle to any satisfactory decision upon the adjourned question by this court. It is not stated, what was the issue before the court upon which the trial was had, and the verdict of the jury was given; nor when or at what stage of the proceedings in bankruptcy the issue was directed. For aught that appears on the certified papers, it may have occurred before any decree, declaring the party a bankrupt, or upon some question occurring incidentally afterwards. In respect to the evidence admitted by the district judge at the trial, it is proper to state, that neither the deposition of Daniels or Gerrish is before this court, and, therefore, it is impracticable for me to say, what were the facts to which they testified. The same objection applies to the admission of the testimony of Osgood. It is not stated, what were the facts to which he was called to testify, or to which he actually did testify. So that the relevancy and materiality of the testimony of all these witnesses to the merits of the case, are beyond the power of this court to ascertain or weigh. In respect to Daniels, it is plain, that the admission of his deposition would be productive of no mischief to the petitioner, for he was present in court, and produced by the petitioner as ready to testify; so that it was the petitioner's own fault, if he was not examined by him to control, qualify, or explain any of the statements in his deposition. The objection now taken is strictissimi juris, and upon a motion for a new trial, I should think it entitled to very little regard. In respect to Gerrish, there might be a stronger ground for the objection to his competency; but it is difficult, if not absolutely impracticable to say, whether he was incompetent or not to testify,

unless the point at issue between the parties, and the nature of his testimony was fully disclosed in the proceedings certified to this court. A creditor of a bankrupt petitioner is not in all cases incompetent to give evidence touching questions arising in bankruptcy; for in many cases he may not have any direct interest whatsoever in the point to be decided. In other cases his interest may be remote or contingent; as for example, upon the question, whether the petitioner shall be declared a bankrupt or not; for a party may be declared a bankrupt, and yet not be entitled to his discharge; and it is necessarily a matter resting in contingency, whether he ever obtains a discharge or not. Now, I take it, that to render a witness incompetent, it is not sufficient, that he has an interest in the question, but he must have a direct and positive interest in the result of the issue, and not a mere remote or contingent interest. How, then, can the court decide upon the question of incompetency, unless it knows, what the issue is?

In respect to the rulings of the district court at the trial, in matters of law, it is impossible for me, absolutely, to say, from the defects in the proceedings certified to this court and before alluded to, whether there was any misdirection of the court or not. Most of them, upon general principles, if I were at liberty to look at them in that view only, would seem to have been correctly decided; and as to the others, they might be perfectly maintainable upon all the facts and circumstances in evidence, or if unmaintainable in point of law, they may have had no legal effect upon the verdict, nor have in any manner been prejudicial or injurious to the petitioners. The case must therefore be sent back with a declaration, that upon these proceedings, now before this court, it is unable to give any opinion, whether a new trial ought to be granted or not.

Case No. 9,109.

In re MARSH et al.

[19 N. B. R. 297.] [1]

District Court, D. Vermont. Oct. 20, 1879.

BANKRUPTCY—BANKRUPT'S BOOKS—HOW KEPT—CASH BOOK—BANK BOOK.

The statute (section 5110, subd. 7) requires that the books kept by the bankrupt shall be proper,—that is, for their purpose, which includes being honest,—but does not go so far as to require that they shall show where losses accrued, or how. The bankrupts were engaged in buying and selling hemlock bark and lumber, each taking charge of each branch. They kept no cash book, but kept bank accounts showing the amount received, and each kept a book professing to show what amounts and to whom each paid. There was no claim that money had been paid by either and not entered on his book, or that any had been entered which had not been paid. *Held*, that the books kept were proper for the business done.

[In the matter of Marsh and Burnett, bankrupts.]

J. J. Wilson, for opposing creditors.

Hunton & Stickney, for bankrupts.

WHEELER, District Judge. This cause has been heard upon the application of the bankrupts for a discharge, and the specifications in opposition thereto. The specifications are, that the bankrupts did not keep proper books of account, because their books did not "show what moneys were received, or what disposition was made of the same," and that they did not keep a cash book. No question can properly be considered except such as arises with reference to these specific grounds. The grounds are confined to whether they kept proper books in respect to the receipt and payment of cash. What would be proper in this behalf must depend upon the nature of the business and the mode in which it was conducted. They bought hemlock bark and lumber, each taking charge of each branch, and forwarded it to customers by public conveyance. They kept bank accounts showing what money each received, and each kept a book professing to show what amounts and to whom each paid.

The counsel for the opposing creditor frankly states that they show no instance in which either paid money which he did not enter on his book, and none in which either entered money as paid which he did not pay; but claims that, by averaging the profits on what of the business they can trace with the result of the whole, they show a large proportion of business not to have been entered.

This method has too long a range to hit the object of the provision of the statute relating to books of account. The statute requires that they should be proper,—that is, for their purpose, which includes being honest,—but does not go so far as to require that books shall show where losses accrued, or how. The same provision was in the act of 1841 [5 Stat. 440], and in the English statutes, and was construed as requiring that the books should not, in what they showed, or failed to show, be fraudulent. The same provision, when adopted in the act of 1867 [14 Stat. 517], must be considered as having been adopted in view of the construction which it had received.

In this view, it cannot be justly held that the books shown to have been kept in this case were not proper for the business done.

Discharges granted.

[1] [Reprinted by permission.]

Case No. 9,110.

MARSH et al. v. BENNETT et al.

[5 McLean, 117.] [1]

Circuit Court, D. Michigan. June Term, 1850.

PARTNERSHIP—PROVISION FOR CREDITORS ON DISSOLUTION — PURCHASING PARTNER — TRUSTEE FOR CREDITORS — ASSIGNMENT — HINDER AND DELAY.

1. By the dissolution of a partnership, provision being made in the articles of dissolution for the payment, equally, of all the creditors of the firm, by the partner who purchases the interest of the retiring partner, and continues the business, such partner is a trustee for the creditors of the firm; and a subsequent assignment, by such partner, of the partnership effects, preferring certain creditors to others, and contrary to the stipulation in the articles of dissolution, is fraudulent and void.

[Cited in Darby v. Gilligan, 33 W. Va. 249, 10 S. E. 401.]

2. A provisional stipulation in a deed of assignment, coercing the creditors of a partnership "to delay their suits" against the firm, or else forfeit their claims upon the fund assigned, is fraudulent.

3. Such stipulation hinders the lawful process to which the creditors are entitled, tends to delay, and jeopards the right of creditors.

4. The notice required by the 5th section of the act of congress, of March, 1793 [1 Stat. 334], of an application for an injunction, may be waived by an appearance.

[This was a suit by Marsh and Compton against Bennett, Gilbert, and others. Heard on motion to dissolve an injunction.]

Romeyn & Wilson, for complainants.
Walker & Campbell, for defendants.

WILKINS, District Judge. Motion of Mr. Romeyn, of counsel for defendant Hill, to dissolve injunction heretofore allowed in this case, founded on the bill of complaint, and the allowance of the injunction by the court, without notice, according to the indorsement on the bill, and the records, files and entries in the case, and on the answer filed by the said defendant, George W. Hill.

The bill was filed on the 7th day of July, 1846, and the injunction allowed on the same day. There does not appear to have been any notice given to the defendants, or either of them, according to the provisions of the 5th section of the act of congress, of the 2nd of March, 1793, which provides that the writ of injunction "shall not be granted in any case, without reasonable previous notice to the adverse party, or his attorney, of the time and place of moving the same." And the 55th rule of practice for the courts of equity of the United States, incorporating this provision of the statute, enjoins due notice on the adverse party, prior to granting any special injunction. There is no proof of notice on the files, and no proof exhibited now that notice was ever given. The injunction, therefore, would now be dissolved, had not all the parties waived the proof of such notice by their voluntary appearance. The provision of the statute being designed for the benefit of defendants, the proof of the notice required by the statute may be waived either before or after injunction issued; and regular reasonable notice will be presumed after an appearance.

This defendant, George D. Hill, by his solicitors, Miles and Wilson, entered his appearance on the 29th of July, 1846; and the other defendants, Henry D. Bennett and George N. Gilbert, likewise voluntarily entered their appearance, by O. Hawkins, their solicitor, on the 14th day of July, 1846. On the 31st of August following, this defendant, Hill, filed his first separate answer to the bill of complaint, and on the 20th of October, 1846, his second separate answer. The other defendants never have answered.

These several acts upon the part of the defendant Hill, and the appearance of the other defendants, supply the want of proof of the reasonable notice required by the statute for the protection of the rights of defendants.

But the defendant Hill, in order to sustain this motion, further relies upon the equities exhibited in his answer, which chiefly sets forth an assignment to him, by Henry D. Bennett, on the 19th day of January, 1846, of all the goods, chattels, book accounts, claims and demands, and personal estate of every kind, of the late firm of Bennett & Ford, then (by the previous dissolution of the said firm) the property of the said Bennett, for the purpose expressed in the transfer to him, and including therein a note of the defendant, George W. Gilbert, for $3125, with interest from the 15th of January, 1846. This assignment to Hill is on certain conditions, and for certain uses and purposes, and upon certain trusts therein expressed. The assignor first provides for the payment of certain domestic creditors, in the order in which they are named in the first class, absolutely, and to the whole amount of their respective claims. And after the full payment of these creditors, provision is then made for the pro rata distribution, among the foreign creditors of the firm of B. & F., from the residue of the fund assigned; providing and expressly declaring, that the assignee or trustee "shall first appropriate all the proceeds of the trust to the payment, in the order previously prescribed and set forth, of all the creditors therein provided for, who shall not, at the time of making any payment or dividend, have made, by themselves or attorneys, any costs or expenses upon their claims; and that the claim or claims of any creditor or creditors of the said firm, who shall, at the time of making any payment or dividend, have made or occasioned any cost or expense upon their claims, by any resort to any proceeding having a tendency to interfere in any manner with, or prevent or obstruct the easy and economical execution of the trust, shall be postponed, and no payment whatever thereafter be made there-

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

upon, until all the other creditors shall have been paid in full; after which, the remaining proceeds shall be first applied towards the payment, pro rata, of all such claims upon which costs have been made, in proportion to the present amount of said claims, exclusive of costs, so far as the same may be sufficient or necessary to satisfy such claims."

The answers disclose the material facts of the case.

On the first day of January, 1846, the firm of Bennett & Ford, being largely indebted to certain New York merchants, for merchandise purchased during the previous summer and fall, and also indebted to certain persons residing in their vicinage, dissolved their co-partnership; Ford, the retiring partner, on the same day, assigning and selling to Bennett all his interest in the stock of goods, books of account, &c., the property of the said co-partnership, "for the purpose of paying off" the creditors of the said firm, and closing the concern. On the 15th of the same month, the said Bennett sold and delivered to George W. Gilbert the stock of merchandise in the store lately owned by the said co-partners, for the sum of $3125, and took his note of the same date for that sum, payable in one year. On the 19th of January, but a few days after the dissolution of the partnership, and the sale to Gilbert (all within three weeks), Bennett makes the assignment to the defendant Hill, as set forth in his answer, with the preferences, and limitations, and trusts. therein contained.

No period is fixed in the assignment, when the trust is to be closed. It comprehends the co-partnership estate of the firm of B. & F., viz., "the claims, demands, and personal estate of every kind, which recently were the property of said co-partners, and then the property of said Bennett." The assignor Bennett, divides the creditors of Bennett & Ford into two classes, and designates a preference for the first class in payment. Annexed to the assignment, and forming a part of the same, is the schedule of property assigned, estimated by the assignor at $4749 19, inclusive of Gilbert's note for $3125, given expressly for the stock of goods, which had been, "during the previous summer and fall," purchased on credit by B. & F., from the foreign creditors, composing the second class. The first class of creditors are those who reside in Ann Arbor and its vicinity, and are directed to be paid first, the full amount of their claims, in the order in which they are named. Their claims are stated at $849 19; which amount, with the claims of the other creditors, not enumerated by name, but designated generally, as "residing in the neighboring towns," together with the expenses of the trust, will, at a reasonable estimate, bring the first payment to at least $1200; leaving, for pro rata distribution among the second class of creditors, (chiefly—yea, with one exception—merchants residing in the city of New York, who had, "the previous summer and fall," furnished the firm of B. & F. with their stock of goods, on credit,) the sum of $3549 19.

The amount stated to be due, in schedule 3, to these foreign creditors, is $6205 84; to meet which, the above balance of $3549 19, (if it ever could reach even that amount,) was designed for pro rata distribution; but, with the express provision, by the assignor, Bennett, that if any of this last list of creditors should commence, or have commenced, any legal proceedings for the recovery of their claims, such creditors should be postponed from any payment out of the trust fund, until all the other creditors, domestic and foreign, should have been paid in full; which, from the character of the assignment, and the amount appropriated for distribution, would of course be forever; or, in other language, such of the creditors who might bring suit, unless they all did so in second class, are excluded from the fund.

This assignment is, on its face, in law, fraudulent and void, as against the statute of frauds, being made with intent to delay, hinder or defraud creditors of their just and legal actions. Because,—

1st. By the transfer of his interest in the store, by Ford, to Bennett, it is expressly declared for the purpose "of paying off" the creditors of B. & F., without designating any preference between such creditors. By this transfer and assignment, Bennett became the trustee of all the creditors of B. & F., and had no authority to create another trust in the same effects, contrary to the provisions of the first trust, and therein prefer in payment one class of creditors to another class. Bennett was bound, in closing the concern of B. &. F., according to the trust conferred upon him by his retiring partner, "to pay off the creditors," without discrimination or preference; which, if the funds were insufficient to pay all, would of course demand a pro rata distribution amongst all. He had no right to prefer any of the creditors of B. & F., because, however B. & F. might have originally preferred one class of their creditors to another, yet, the terms of the dissolution, as set forth, and the original transfer to Bennett, by Ford, of the effects of B. & F., conferred no such power upon Bennett. The previous summer and fall, this firm (by the defendant's own showing) obtained credit for merchandise in New York, for better than $8000. They pass out of their hands, in the short time of a few months, on or before the 15th of January following, better than $5000 of this property, and then assign the remainder, by the act of Bennett alone, to a trustee of Bennett—not to pay all the creditors a fair proportion of their respective claims, so recently incurred to the foreign creditors, but absolutely devoting the means of these very foreign creditors—First, to pay other creditors residing on the spot, and then, to distribute among these foreign creditors the remnant, under the threatened penalty of losing all, should they

seek a lawful remedy to recover a part of their own. The retiring partner conferred no such authority upon Bennett; and under the sale and transfer to Bennett, for the purposes indicated, he was clearly the trustee of all the creditors of B. & F., without the power of discrimination, and could not subsequently violate the original agreement with Ford.

2d. The creditors of B. & F. had a just right to legal process, at law or in equity, in order to reach either the effects of the co-partnership, or, the individual effects of either of the partners. The provisional stipulation in the assignment of Bennett to Hill, coercing the creditors to "delay their lawful suits" against the firm of B. & F., and so jeopard their claims, is therefore invalid, and a fraud upon the creditors. It "hinders" such lawful process; and, from the character of the assignment, and the powers conferred upon the assignee, as to time, would so tend to delay, as to carry beyond the statute of limitations such claims and demands. Partners contemplating bankruptcy could thus evade the salutary restraint of the statute of frauds, might make individual investments out of the partnership funds and partnership credit, and thus compel creditors to avoid and delay suit, until it would be too late by legal process to search out such hidden investments. The stipulation in the assignment to Hill, postponing those creditors who bring suit, until all the rest are paid, thus "hinders and delays" them, and is calculated to defraud them "of their lawful suit," as against the firm of B. & F., to reach the partnership effects, and also the individual effects of each of the partners. To reach either Ford's estate, or Bennett's estate, as the debt was joint, the judgment must be against both, and the prohibition to sue is general, as to the firm of B. & F. The stipulation is two-fold. 1st. Prohibiting payment to any litigant creditor, until all the others are fully paid; and, 2dly. In paying them, if ever,—confirming such payment to the "present" existing claim, exclusive of costs. By this, the debtor defines who shall be considered as his creditor, and closes all objection on the part of any one, as to the amount of the claim; for, should the matter be contested by any creditor enumerated in the schedules, or not, the sole arbitor is the debtor himself; for, if the disputant resorts to his "lawful suit" to ascertain his right, his whole claim is perilled, and by the amount of the fund appropriated, excluded from payment. This certainly tends "to hinder, and delay, and defraud."

The statute of this state, following the provisions of 13 Eliz. c. 5, declares every assignment or conveyance made with intent to hinder, delay or defraud creditors or other persons of their lawful suits, damages, forfeitures, or demands, as against the persons so hindered, delayed, or defrauded, shall be void.

As exhibited in the bill, the complainants recovered judgment in the court of U. S. for this district, at the last June term, against B. & F., for $1020 77, and $41 92 costs. They are placed in the 3d list, seventh in order, at $993 25. Having brought suit, then, the terms and provisions of the trust, postpones the complainants from any participation in the fund assigned, until every other creditor, domestic and foreign, who has not sued, is fully paid. This cannot be sanctioned. Nor can its features be well assimilated to those cases of assignments by debtors in failing circumstances, in which (after surrendering all their property for the benefit of all their creditors, placing them all upon one common footing, without predilection or prejudice to any one creditor) they require the execution of a release by their creditors in their favor, and excluding those who do not execute such release from any participation in the trust fund. In such cases, the clause stipulating a release, is not a condition imposed upon the estate, but a mere designation of preference of those creditors who are to enjoy it, and for whom the trust is created. A debtor may prefer one class of creditors to another, and such a measure would be neither illegal nor immoral, per se: for, as is observed by Chief Justice Marshall in Brashear v. West [7 Pet. (32 U. S.) 608], "the right to make such an assignment results from the absolute ownership which every man claims over that which is his own." Whether creditors would come in under such a clause of release depends upon themselves, and not upon the debtor creating the trust. But, in the case under consideration, the trusts of the deed are, that the trustee should convert the assigned effects into money, or, that which would answer the creditors as money, —pay in full the 1st class of creditors designated, and distribute the residue pro rata among the 2d class of creditors, postponing such creditors who should bring their lawful suits, for the recovery of their claims, until all those in the 1st and 2d class, who had refrained from suit, were fully paid the whole amount of their claims. The 2d class, with or without suit, are postponed for an indefinite period, contingent on the full payment of the 1st class; an event altogether uncertain, thereby "sheltering from the claims of creditors" the estate of the debtor, in the language of Mr. Justice Washington, in Pearpoint v. Graham [Case No. 10,877], and "in the meantime the estate to be enjoyed by a mere volunteer, not the choice of the creditors." This is providing "for a future preference," contingent upon a future event, not under the control of the debtor or the trustee, namely, the solvency at the end of one year, of one of the principal debtors of the estate, whose indebtedness composes the chief portion of the assets, out of which the creditors of B. & F., are to be paid. By such a provision thus controlling the trust, the debtor, in fact, coerces his creditors to refrain and desist from their legal right to bring suit for the recovery of their claims against him; and what other intent could the debtor entertain, in thus contingently postponing one set of creditors to another,

(and, in fact, excluding them) than "to hinder and delay them in their lawful suits." He who is but a trustee of their property, virtually declares by such a provision, that they shall not have the remnant of their own, unless they shall refrain and delay from suit. The debtor thus enacts a law for his creditors, and withdraws his effects from their executions and the reach of the common law, in order to compel his creditors, under the apprehension of losing all their claims, to comply with a law of his own enactment. Without such a provision controlling the trust, any creditor suing subsequent to the assignment, would only be entitled to a ratable proportion of his claim existing at the date of the assignment, independent of costs of suit, such costs forming no part of the claims provided for; and, as to suits instituted prior to the assignment, such a provision would clearly be invalid, as calculated and designed expressly to hinder and delay,—for, if valid, such suits must at once be discontinued, and costs paid, in order to entitle the creditor to distribution. What other design, therefore, could prompt the debtor, in thus clogging the trust, than reserving an ultimate benefit to himself in the prevention of suits by his creditors? And what other intention can be gathered, than that of "hindering them" in the prosecution of their claims? No such provision was necessary to protect the fund from being wasted in litigation, and a debtor overwhelmed with debt, and with effects remaining confessedly insufficient to meet more than one third of his engagements, professedly assigning all for the benefit of his creditors, but also expressly excluding all who bring suit or have brought suit, from any benefit in the trust, can have no other object in view, than to defraud some one or more of his creditors, who have either already brought, or, to his knowledge, have contemplated bringing suit.

Such an assignment, by thus confining the distribution of the proceeds of the trust, to such of the creditors as should refrain from their lawful suits, in order to reach either partnership or individual effects, and making the payment of one class depend upon a contingency in future, uncertain as to occurrence and as to time, is a species of unfair coercion, prescribing unreasonable and illegal terms, upon creditors, thereby delaying and hindering them in their lawful suits, and, therefore, fraudulent and void as to such creditors.

In Brashear v. West [7 Pet. (32 U. S.) 608], which was a case, where the indenture contained a clause of release as a provision entitling creditors to come in, Mr. Chief Justice Marshall remarks as follows: "If this release were voluntary, it would be unexceptionable. But it is induced by the necessity arising from the certainty of being postponed to all those creditors who shall accept the terms by giving the release. It is not therefore voluntary. . . . . The objection is certainly powerful, that its tendency is to delay creditors. . . . . The weight of this argument is felt. . . . . We are far from being satisfied, that, upon general principles, such a deed ought to be sustained."

If an involuntary release, or, rather a compulsory release be exceptionable, and tends to delay and hinder creditors of their lawful suits, much more exceptionable, certainly, is a provision absolutely prohibiting suit, under the peril of losing the whole claim. If the one tends to delay, surely the other does. In the one case, within a specified period, a release must be executed; in the other, the last must wait the uncertain contingency of the payment of the first in full, and if suit be brought, and that fact is made apparent to the trustee at the time of a declaration of a dividend out of the remnant of the trust funds, the litigant creditor is further postponed until all the non-litigants are fully paid. If the objection be of "intrinsic weight" in the one case, it loses no force when applied to the other. In the one case, there is a present preference, and, in the other, in the language of Senator Tracy, in Grove & Wakeman, "there is a preference on a future contingency." In this case of Brashear v. West, the venerated and beloved chief justice expressly places the decision of the supreme court of the United States on the ground, that the court follows the construction of a local law of the state of Pennsylvania, and that the construction which the courts of that state had put on their own statute of frauds, must be received in the courts of the United States. The argument and expressed opinion of the chief justice on the point considered, is adverse to the decision pronounced.

The statute of Michigan has as yet received no judicial construction in this state, the case of Fox v. Clarke [1 Mich. 321] not applying to the point raised in this case, so that the question here is entirely new.

In Halsey v. Fairbanks [Case No. 5,964], which was also a case where the debtor stipulated for release, the learned Justice Story observes: "The question never can be whether a remedy exists for the creditors, but, whether the debtor has not endeavored fraudulently to delay or defeat them. Where the debtor stipulates for a release, he surrenders nothing except upon his own terms. He attempts to coerce his creditors, by withholding from them all his property, unless they are willing to take what he pleases to give. This is certainly a delay, and if the assignment be valid, to some extent a defeating of their rights. Has it not a tendency to obstruct the common rights of the creditors? The question is, whether the intent apparent upon the deed itself, be not to coerce them to a settlement, by embarrassing or delaying their remedy. Such an intent is of itself illegal."

And after reciting and commenting on several decisions in Massachusetts, Pennsylvania, and New York, this profound jurist and honest judge further observes: "The weight of authority is then in favor of the stipula-

tion of release," and, "I am free to say that, if the question were entirely new, and many estates had not passed upon the faith of such assignment, the strong inclination of my mind would be against the validity of them. As it is, I yield without reluctance, to what seems the tone of authority in favor of them."

In this state, as has been already observed, the question is still open, both as regards an assignment containing a provision postponing the litigant creditor to others, and the validity of such a stipulation of release; the objection alluded to by Justice Story does not exist here, and his reasoning, therefore, in favor of sustaining the clause of release, instead of supporting the peculiar trust in this case, is conclusive against validity. What is the intent apparent upon the deed itself? Is it not to coerce the creditors to a settlement on the debtor's own terms, by embarrassing and delaying their remedy? In the simple interpretation of the language employed in the trust, is it any more or less than this: a surrender of all the property of the co-partnership, for the ostensible benefit of all the creditors, but, at the same time locking it up, from all such as shall bring suit, and without suit making the partial payment of the great body of the creditors dependent upon a distant and an uncertain contingency. Is not this exacting a stipulation in favor of himself and his co-partner, protecting their future acquisitions from future suits, by shielding them until the lapse of time would bar the claims of their creditors? Does not such a provision, if held valid, defeat their rights, unless they are willing to take what the debtor pleases—await the contingency of the trust, and delay and refrain from bringing suit?

In Austin v. Bell [20 Johns. 442], the supreme court of New York held: "That a deed which does not fairly devote all the property, but reserves a favor to the assigning debtor, unless the creditors shall assent to his terms, is void, as against the statute of frauds."

It is not, it would seem, the reservation of a portion to himself, that alone constitutes the fraud, although it constitutes a prominent badge of fraud; but, the prescription of the terms by the creditor, showing the intent to hinder and delay. But in this case, Judge Spencer approbates the decision of Hyslop v. Clarke [14 Johns. 458], which was an assignment of all the property, without such reservation, but with a stipulation of release; and in Seaving v. Brinkerhoff [5 Johns. Ch. 329], Chancellor Kent held: "That such an assignment with such a stipulation of release was, on that account, fraudulent and void." If a stipulation reserving a portion of the estate to himself is a badge of fraud, as connected with the prescription of terms upon the creditors, compelling their assent, certainly a stipulation which protects his future acquisitions from suit, is obnoxious to a like objection. In the one case, he locks up a portion of what he now has. In the other, he locks up all that he may ever acquire, from the just demands of his creditors.

In the case of Grover v. Wakeman [11 Wend. 187, Judge Sutherland, in a very elaborate, learned, and conclusive opinion, in which he reviews all the preceding cases in New York, Pennsylvania, and Massachusetts, pronounces the decision of the court of errors of New York, that such assignments, containing a provision of release by creditors, in order to entitle them to share in the assigned property, are void. Mr. Justice Sutherland's opinion is rightly considered the opinion of the court, as the resolution declaring the assignment void, incorporating the decision of, and adopted by the court, was proposed by him, after solemn consideration, and his views sustained by Judges Nelson and Savage, who, with him, then composed the supreme court of New York, as also by Senator Tracy, in a most lucid exposition of the whole doctrine.

In the case of Ingraham v. Wheeler [6 Conn. 277], the supreme court of Connecticut pronounced such a stipulation fraudulent and void, mainly on the principle that it confined the distribution of the property to the releasing creditors. The same principle was also decided in Ohio.

From a review of all these cases, and the careful consideration of the character and object of the assignment of Bennett, of the effects of Bennett & Ford, to the defendant Hill, exhibited in his answer of the 20th October, 1846, I cannot arrive at any other conclusion, but that the assignment was made with the intent to hinder, and delay, and defraud creditors of their lawful suits, and especially Marsh & Compton, the complainants, and is therefore void.

Motion refused.

Case No. 9,111.

MARSH et al. v. BURROUGHS et al.

SCOTT v. SAME.

[1 Cent. Law J. 125.] [1]

Circuit Court, S. D. Georgia. Nov. Term, 1873.

COMPUTATION OF TIME UNDER STATUTE OF LIMITATIONS — LIMITATION IN FAVOR OF ADMINISTRATORS — STATUTE FIXING BAR WHERE CAUSE OF ACTION HAS ALREADY ACCRUED — TWELVE MONTHS EXEMPTION IN FAVOR OF ADMINISTRATORS — COMPUTATION OF TIME UNDER THE TWO STATUTES.

1. On the 16th day of March, 1869, the legislature of Georgia passed an act providing that all suits of whatever nature, in which the cause of action accrued prior to the 1st day of June, 1865, should be barred unless brought by the 1st day of January, 1870. [Laws 1869, p. 133.] The period thus allowed for bringing suits was nine months and fifteen days. This is held to be a reasonable period in ordinary cases.

2. By the Georgia Code, § 2548, an administrator is not liable to suit until one year from the date of his qualification. It is held that this

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exemption is not repealed by the act of March 16, 1869. If the latter act has such an effect, it would probably be in contravention of the constitution of the United States; but as it does not, it is a valid enactment.

3. In computing the time which will bar an action with reference to these two statutes, it is held that the administrator is entitled, first to the one year's exemption allowed by section 2548 of the Code, and then that the creditor of the estate is entitled to the nine months and fifteen days of the act of March 16, 1869, added thereto, in which to bring his suit; although the time within which suit may be brought may thereby be extended beyond the 1st day of January, 1870.

[These were suits by William N. Marsh and others against Burroughs and others, and Thomas R. Mills, Jr., administrator with the will annexed of George Hall, deceased, and by Levi H. B. Scott against the same. For two similar cases by the same plaintiffs, previously decided, see Cases Nos. 6,203 and 9,112.]

A. W. Stone and A. T. Akerman, for plaintiffs.

Hartridge & Chisholm, for defendants.

ERSKINE, District Judge. The questions presented being similar, the cases were argued in connection with each other. These suits are two of the numerous cases which have, under various phases, been pending here for years, and known as the "Bank Cases." Many of these cases have from time to time been disposed of by decrees, judgments or compromises. But the question now presented is quite different from any which has hitherto come before the court for determination. No special statement of the contents of the bill or the declaration is necessary to an understanding of the questions given for decision. Suffice it to say that the bill prays a decree for seventy-five thousand dollars against the estate of the deceased for unpaid subscription upon his stock in the Merchants' and Planters' Bank; and in the common law action, the plaintiff demands one hundred thousand dollars as due to him as a holder of notes or bills of this bank—the estate of the deceased being, as is alleged, liable for the same.

All questions except the precise one presented for adjudication may be left out of view. Two pleas in bar are before me,—one to the bill, and the other to the declaration. They are substantially alike, and are based upon the act of the general assembly of this state, approved March 16, 1869. The statute is entitled: "An act in relation to the statute of limitations, and other purposes." The complainant (Marsh) filed exceptions to the plea put in to the bill, and Scott demurred to the plea in bar to his action. The pleas allege that the supposed causes of action accrued prior to the 1st of June, 1865, and that they did not accrue subsequently to that period; and this allegation is not controverted by Marsh or by Scott in their pleadings.

The third section of the act is as follows: "That all actions on bonds or other instruments under seal, and all suits for the enforcement of rights accruing to individuals or corporations, under the statutes or acts of incorporations, or in any way by operation of law, which have accrued prior to 1st of June, 1865, not now barred, shall be brought by the 1st of January, 1870; or the right of the party plaintiff or claimant, and all right of action for its enforcement, shall be forever barred."

Section 4. "That all actions on promissory notes, bills of exchange or other simple contracts in writing, and all actions upon open accounts, or for breach of any contract, not under the hand of the party sought to be charged, or upon any implied assumpsit or undertaking, which accrued on a contract which was made prior to 1st June, 1865, not now barred, shall be brought by 1st January, (1870) next after the passage of this act, or the right of the party, plaintiff or claimant, and all right of action for its enforcement, shall be forever barred."

Section 5 relates to all actions against administrators, trustees, etc., which accrued prior to 1st June, 1865, and enacts that they shall be brought by 1st January, 1870; and section 6 declares that there shall be no recovery on any liability whatsoever which accrued prior to 1st June, 1865, where the action is not brought by 1st January, 1870. Section 9 repeals conflicting laws.

Turning to section 2530 of the Code, there it is declared that "the administrator shall be allowed twelve months from the date of his qualification to ascertain the condition of the estate." Section 2548 enacts that, "No suit to recover a debt due by the decedent shall be commenced against the administrator until the expiration of twelve months from his qualification."

Hall, domiciled in Connecticut, died there in the autumn of 1868, testate, leaving real estate in Georgia disposed of by his will. There was no representation here until the 8th of April, 1869, when the defendant Mills, was appointed temporary administrator and he held this office until the 7th of June, 1869, when permanent letters were granted to him as administrator with the will annexed. The bill in equity referred to was filed by Marsh, against one Burroughs and others, on the 24th of September, 1868, but Mills was not made a party to the bill until the 7th of August, 1871. On the 30th of December, 1870, Scott brought the action at law against Mills, as administrator, as aforesaid.

Adverting to the act of March 16, 1869, it will be seen that from its date to the 1st of January, 1870, the time prefixed by the statute for the closing of the limitation is nine months and fifteen days, and this court has (per ERSKINE, J.) ruled, on more than one occasion, that this is a reasonable period of time within which a creditor, whose right of action accrued anterior to the 1st of June, 1865, and which was current on the 16th of March,

1869, may institute his suit. Whether the general rule as laid down by the court, is attended with exceptions, I will endeavor to indicate. As just mentioned, Mills received his permanent appointment on the 7th of June, 1869, two months and twenty-one days after the passage of the limitation act, and, consequently, nearly seven months before the 1st of January, 1870; and it was not, until the 7th of August, 1871, that he was brought before this court as a defendant in the equity suit. This was two years and two months subsequent to the granting of the permanent letters, and fourteen months subsequent to the expiration of the time of exemption from suit given to an administrator by section 2548 of the Code.

It was insisted by defendant that the twelve months' protection from pursuit by action, allowed to an administrator, was repealed by act of March 16, 1869; but if not so, still the cause of complaint, alleged in the bill against Mills, was nevertheless barred on the 7th of August, 1871, the date on which he was made a defendant. Because, as was contended, the twelve months barred to the administrator expired on the 7th of June, 1870, and allowing nine months and fifteen days to be added to the twelve months, that still the complainant was not within time, for he did not proceed against Mills until the 7th of August, 1871, some four or five months after the bar had attached.

For the complainant it was argued that the twelve months' exemption was not repealed by the act of March 16, 1869; but, if repealed such repeal is ineffectual to bar the suit of complainant, for this would impair the obligation of contracts. And it was correctly said that no state constitution or statute had authority to impair the obligation of antecedent contracts.

I will first direct my attention to the constitutional question made by the counsel for complainant. As already shown, Hall was deceased when the act of March 16, 1869, was passed, and no administration was taken out until nearly three months after the date of this enactment. It cannot, I apprehend, be safely contended that when a party has a subsisting right of action which will be barred by a certain time, that he is compellable to institute proceedings to recover its fruits before the last day of the limitation. Assuming the legal correctness of this, it follows that Marsh had at least to the last day of 1869 in which to bring his suit against Mills. Now suppose Hall had not died until, say, the middle of December, 1869, and the twelve months' exemption stood repealed, Marsh would be environed with unsurmountable evils and difficulties, which he could not have foreseen, and so avoided. As no administrator could have been qualified by the ordinary intermediate the death of Hall and the period fixed for the bar, Marsh's dilemma would have been this: The statute says, sue by the 1st of January, 1870, and the only reply he could make is, there is no one subject by law to answer the writ of subpoena. If the case under consideration was like the suppositive one, I should be inclined to hold a state statute that produced such a consequence violative of the constitution of the United States; for by thus depriving a party of all remedy, it works a forfeiture of his rights, without fault on his part. But there was a legal representative of Hall, in Mills, the administrator with the will annexed, and who had qualified as such seven months or a little less anterior to the 1st of January, 1870; and if the twelve months' exemption from suit has been repealed by the act of March 16, 1869, he could have been sued before the right of action would have been barred. This fact, however, in its result, would be very much like class legislation, so far, at least as Marsh would be affected; for as there was no representative of the estate of Hall for nearly three months after the passage of the act of March 16, 1869, the nine months and fifteen days allowed to sue in would be diminished to less than seven. Const. Ga. art. 1, § 26. Moreover, whether this would be reasonable time in which to bring civil suits or be barred, I am not called upon to determine. But has the twelve months exempted to an administrator by section 2548 of the Code been repealed? This is the prime question. Mr. Justice McLean, in delivering the opinion of the supreme court of the United States in McClung v. Silliman, 3 Pet. [28 U. S.] 270, said: "Under this statute (section 24 of the judiciary act of 1789 [1 Stat. 85]) the acts of limitations of the several states, where no special provision has been made by congress form a rule of decision in the courts of the United States, and the same effect is given to them as is given in the state courts." The rule of action is formed in the different states as it may have been adopted by legislation or a course of judicial decisions. The rule of decision must be found in the local laws, written or unwritten.

If the act of March 16, 1869, does not repeal the twelve months' exemption from suit, allowed to administrators, and after a careful consideration of the entire statute, I think it does not repeal the exemption given to administrators; therefore, I am of the opinion that it is a valid law, and in consonance with the constitution of the United States. The following case—Moravian Seminary v. Atwood et al.—was recently decided by the supreme court of Georgia, Tripp, J., pronouncing the opinion: "An account was contracted and due in September, 1862. Administration was granted on the estate of the debtor in September, 1869, it not appearing on the record when he died. Suit was instituted on the account in October, 1871. Held, that the plaintiff was barred by the statute of limitations of March 16, 1869."

Even though the plaintiff may not have been entitled to have brought suit against the administrator by the 1st of January, 1870, which we do not determine, the spirit and equity of the statute required that it should have been commenced within a period after twelve months from the grant of administration which was equal to the time allowed by the statute for bringing suits on such debts to wit: from the date of the passage of the act to the 1st of January, 1870. Mills, not having been made a party defendant to the bill filed on the 24th September, 1868, by Marsh against Burroughs and others, until after the expiration of the nine months and fifteen days immediately following the twelve months' exemption from suit given an administrator by the Code, I overrule the exceptions filed by the complainant, and decree the plea to be a full bar to the bill; and it is further ordered that the bill be dismissed as to Mills at cost of complainant.

The common law action having been instituted by Scott against Mills on the 30th of December, 1870, and within the nine months and fifteen days immediately following the twelve months' exemption from action allowed to an administrator by the Code, it is ordered and adjudged that the demurrer to the plea in bar be sustained.

[NOTE. From the judgment rendered in the action at law the defendants sued out a writ of error in the supreme court. Here an order was entered remanding the case, with directions to grant a new trial unless the plaintiff consent to remit from the judgment the excess over $40,000. Mills v. Scott, 99 U. S. 25.]

Case No. 9,112.

MARSH et al. v. BURROUGHS et al.

[1 Woods, 463; [1] 10 Am. Law Reg. (N. S.) 718.]

Circuit Court, S. D. Georgia. April Term, 1871.

CREDITOR'S BILL — CORPORATIONS — UNPAID SUBSCRIPTIONS—JUDGMENT—WHEN CONCLUSIVE—CONSTITUTION OF STATE—HOW VIEWED.

1. A judgment creditor, who has exhausted his legal remedy by execution returned nulla bona, may alone, or with other judgment creditors, file a bill against persons holding property of the debtor, which on account of fraud, or the existence of a trust, cannot be reached by the execution.

[Cited in Thompson v. Reno Sav. Bank, 19 Nev. 103, 7 Pac. 72; Tatum v. Rosenthal, 95 Cal. 129, 30 Pac. 137.]

2. In case a fund can only be divided satisfactorily amongst a certain class of persons, it is necessary to frame the decree in such a manner as that all those persons may be brought in for their destributive shares; but even then the bill may often be filed by any one of them on his own behalf.

[Cited in Tatum v. Rosenthal, 95 Cal. 129, 30 Pac. 137.]

3. It is only when it appears that a distribution of such fund must be made, that a decree will be entered for the benefit of all.

[Cited in Shackelford's Adm'r v. Clark, 78 Mo. 490.]

4. A judgment creditor, who has exhausted his legal remedy, may pursue in a court of equity any equitable interest, trust or demand of his debtor, in whosesoever hands it may be. If a party thus reached has a remedy over against others for contribution or indemnity, it will be no defense to the primary suit against him, that they are not parties.

[Cited in Hatch v. Dana, 101 U. S. 212; Holmes v. Sherwood, 16 Fed. 729; Mann v. Appel, 31 Fed. 383.]

[Cited in Clapp v. Peterson, 104 Ill. 35; Thompson v. Reno Sav. Bank, 19 Nev. 103, 7 Pac. 72; Brundage v. Monumental G. & S. Min. Co., 12 Or. 322, 7 Pac. 317.]

5. Where a debtor, as in case of a bank, has a right to call for payment of stock subscriptions, and does not choose to exercise it, equity, at the instance of creditors, will exercise it for him.

6. When a person subscribes stock, and his subscription is accepted, it is not a mere power in the bank, but its right to call in the money, and it is the right of the stockholder to pay it; he is not obliged to wait until a call is made.

7. Unpaid subscriptions to the capital stock of a company are corporate property, constituting a trust fund which can be reached by the creditors in a court of equity.

[Cited in Lewis' Adm'r v. Glenn, 84 Va. 971, 6 S. E. 878.]

8. The amount subscribed, and not the sums actually paid in, is the capital stock of the company.

9. The equity of the right in the bank to sue is attendant on the legal right vested in the holder of the bills as such; it goes with it as an incident.

10. When a judgment creditor of a bank has exhausted his remedy at law, and seeks in equity to enforce payment of stock subscriptions, the stockholders cannot go behind the judgment rendered against the bank and question the original cause of action, unless they can show collusion between the creditor and the bank, for the purpose of defrauding them.

[Cited in Wetherbee v. Baker, 35 N. J. Eq. 507; Baines v. Babcock, 95 Cal. 583, 592, 27 Pac. 676, and 30 Pac. 776.]

11. The fact, that when the state of Georgia applied for readmission to the Union, under the constitution of 1868, congress imposed certain conditions, does not make that constitution an act of congress, or tantamount to such an act. See Hatch v. Burroughs [Case No. 6,203].

12. The question, as to whether the adoption of the constitution of the state of Georgia of 1868 was the act of the people of the state, is a political one, in which the courts must follow the action of the political department of the government.

13. A state can no more pass a law violating a contract by means of a convention, than it can by means of a legislature; and a constitution adopted by a state, with a view to its admission or readmission, or after its admission into the Union, must be regarded as a law of the state, and amenable to the prohibitory clauses of the constitution of the United States. See Gray v. Davis [Case No. 5,715].

14. The final portion of article 5, § 16, subd. 1, of the constitution of Georgia, of 1868, which throws the burden of proof on the plaintiff to show that bills sued on have never been used in aid of the Rebellion, if only the defendant swears that he has reason to believe that they were so used, is not constitutional.

15. The fact, that holders of unpaid stock may have severally redeemed their share of the bills of the bank, does not release them from liability for the amount due on their stock subscriptions.

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

In equity. Submitted for final decree upon the pleadings and evidence.

[This was one of a number of proceedings brought both at law and in equity by William N. Marsh and others against the stockholders of the Merchants' & Planters' Bank of Savannah to enforce the payment of claims against the bank. For a suit at law involving nearly the same questions as in this case, but brought under the Georgia statute against a stockholder fully paid up, see Case No. 6,203.]

Wm. Daugherty and A. W. Stone, for complainants.

Wm. Law, T. E. Lloyd, and W. S. Basinger, for defendants.

BRADLEY, Circuit Justice. This bill is filed by certain billholders of the Merchants' and Planters' Bank of Savannah, who have obtained judgments against the bank for the amount of bills held by them against certain stockholders of the bank, who have not paid in full their subscriptions of stock, seeking a decree against the defendants to the amount of their unpaid subscriptions, for the payment of the said judgment. The bank was chartered by an act of the assembly of the state of Georgia, approved February 13, 1854, by which certain persons therein named, their associates and successors, were incorporated by the name of the Merchants' and Planters' Bank, to be located at Savannah, with the usual powers given to such institutions. By the second section of the charter it was declared that the capital of the bank should be two millions of dollars, to be divided into twenty thousand shares of one hundred dollars each, and that so soon as ten per cent. of said capital was subscribed and paid in in specie, or specie funds, it should be the duty of the commissioners named in the act to call a meeting and organize the bank by the election of directors. The directors were empowered to appoint a president and other officers. By the seventh section the president and directors, after the first installment on subscriptions to the amount of two hundred thousand dollars had been paid in, were empowered to call in further installments of not over twenty per cent. at any one time, by giving at least sixty days' notice of said call. On failure to pay up a call the shares might be forfeited. By the 9th section, it was declared that the total amount of the debts should not, at any time, exceed three times the amount of the capital stock actually paid in, over and above the amount of specie actually deposited in the vaults for safe keeping. By the 15th section, it was declared that the persons and property of the stockholders should at all times be liable, pledged and bound for the redemption of bills and notes at any time issued, in proportion to the number of shares that each individual and corporation might hold and possess.

The bill alleges that the capital stock of the bank was all duly subscribed and the bank duly organized shortly after its incorporation, and that it went into operation, issued bills, received deposits and carried on a general banking business; that the complainants severally became lawful owners and holders of the bills of the bank, to wit: Scott, Zerega & Co., to the amount of $62,500, which were presented to the president and cashier in March, 1867, and were not paid, and the other complainants other amounts, which were presented at or about the same time with like result; that thereupon the complainants separately instituted actions at law on their bills against the bank, and on the 25th of November, 1867, recovered judgments as follows: Scott, Zerega & Co., for $71,789.35; Frisbee & Roberts, for $33,134.75; Wm. N. Marsh, for $57,600.63; George W. Hatch, for $81,271.20; Levi H. B. Scott, for $120,789.36; and that executions were issued in all the judgments and returned "nulla bona" on the 23d of May, 1868. The bill alleges that the bank had become insolvent, and had assigned its assets to Hiram Roberts, the president, in trust for the benefit of its creditors; but that the assets assigned would not pay more than ten cents on the dollar of its indebtedness, which amounted to a million of dollars or thereabouts. As an excuse for not joining other complainants, the bill alleges that the circulation of the bank was held in every state of the Union by innumerable unknown persons; and as an excuse for not making all the stockholders defendants, it alleges that there are 20,000 shares of stock held by a great number of stockholders residing in different states—some insolvent, some dead, etc. The bill then alleges that the defendants are stockholders, and states the number of shares held by each, and the amount paid thereon, and the amount still unpaid, and claims that the unpaid stock is a trust fund applicable to the payment of the debts of the bank, inasmuch as the debts cannot be paid by the assets. The bill prays that this may be so decreed, and that the defendants may be required to pay to the complainants, or into court, or in some other manner, the several amounts so in their hands respectively, and that the same may be applied to the payment and satisfaction of the bills held by the complainants.

By an amended bill, they allege that they purchased the bills prior to January 1, 1867, in a fair course of trade, for a valuable consideration, and without any notice that they had been used in aid of the rebellion or for any other illegal purpose. The principal facts stated in the bill are not disputed. The defendants, by their answers and in argument, set up various grounds of defense, which I will proceed to examine.

1. It is objected that the bill is defective for want of parties, both complainant and defendant; that it should have been filed by, or in behalf of, all the creditors, because all are interested in the funds—and against all the stockholders, because all are bound to con-

tribute pro rata. As to the complainants, it has long been settled that a judgment creditor who has exhausted his legal remedy, by execution returned "nulla bona," may alone, or with other judgment creditors, file a bill against persons holding property of the debtor which, on account of fraud or the existence of a trust, cannot be reached by execution. 2 Kent, Comm. 443, and notes; McDermutt v. Strong, 4 Johns. Ch. 687; [Hadden v. Spader, 20 Johns. 554;] [2] Spader v. Davis, 5 Johns. Ch. 280; Lentilhon v. Moffat, 1 Edw. Ch. 451; Dix v. Briggs, 9 Paige, 595; Storm v. Waddell, 2 Sandf. Ch. 494; [Tappan v. Evans, 11 N. H. 311;] [2] Ogilvie v. Knox Ins. Co., 22 How. [63 U. S.] 380; Dunphy v. Kleinschmidt, 11 Wall. [78 U. S.] 610. Where a case exists in which a fund can only be divided satisfactorily among a certain class of persons, it is necessary to frame the decree in such a manner as that all those persons may be brought in for their distributive shares; but even then, the bill may often be filed by any one of them on his own behalf. It is only when it appears to the court by the subsequent pleadings, or otherwise, that a distribution must be made (as where an executor pleads want of sufficient assets), that a decree will be made for the benefit of all. In this case, what law compels an equal distribution of the fund sought to be reached amongst all the creditors? The assets in the hands of the assignee are subjected to such a law, because they have been granted to him in trust for all creditors equally. But it is conceded that the unpaid capital stock is not subject to the assignment. If subjected to the demands of the complainants as judgment creditors, it will be exonerated, pro tanto, from all further demands. As to the nonjoinder of necessary defendants, the same authorities above quoted may be cited. A judgment creditor, who has exhausted his legal remedy, may pursue, in a court of equity, any equitable interest, trust or demand of his debtor, in whosesoever hands it may be. And if the party thus reached has a remedy over against other parties for contribution or indemnity, it will be no defense to the primary suit against him that they are not parties. If a creditor were to be stayed until all such parties could be made to contribute their proportionate shares of the liability, he might never get his money.

2. It is contended that the unpaid subscriptions of capital stock are not assets for the payment of debts, either legal or equitable; that they exist merely as possibilities; that they are not a debt due, having never been called in; that no one can call them in but the directors; and in them it is a mere discretionary power, which cannot be exercised, either by the assignee, the receiver, or the court itself, and cannot be assigned; that said unpaid subscriptions are no part of the capital stock of the bank; and that the real capital stock is what has been called in, namely $535,000, and not $2,000,000. This position may be somewhat plausible, but it is not sound. It is not a mere power vested in the bank to make further calls. It is a right; and where a debtor has such a right and does not choose to exercise it, equity, at the instance of creditors, will exercise it for him. When a stockholder subscribes stock, and his subscription is accepted, it is not only the right of the bank to call in the money, but it is the right of the stockholder to pay it. The mode of calling it in, prescribed by the charter, is a mere form of remedy given to the bank to enforce the subscription, usually followed by forfeiture for nonpayment, if the bank so choose. But the stockholder is not obliged to wait until a call is made upon him. He may pay in at any time; and if the business of the bank were very profitable, no doubt he would avail himself of the opportunity. Such a right cannot be described as a mere power on the part of the bank, to be exercised or not, as it chooses, and dependent for its existence on the personal discretion of the directors. The same objections were made in the case of the Planters' and Mechanics' Bank of Columbus, and were overruled by the supreme court of this state in Hightower v. Thornton, 8 Ga. 486, and it was there held that unpaid subscriptions to the capital stock of a company are corporate property, constituting a trust fund, which can be reached by the creditors in a court of equity; and that the amount subscribed, and not the sums actually paid in, is the capital stock of a company. As to the position that the equity of the creditor is a mere right to sue, and is not therefore assignable, and could not be assigned to complainants, it is sufficient to say that the equity is attendant upon the legal right vested in the holder of the bills as such. It goes with that as an incident, and does not belong to that class of mere rights of action which become separated from the thing out of which they grew, and attach to the person only—as the right to sue for a trespass committed and the like.

3. The next point made is, that if the unpaid subscriptions are indeed assets for the payment of debts, then they have been assigned, and are in the receiver's hands, and must be collected and administered by him for the equal benefit of all the creditors under the trust of the assignment. But an examination of the assignment will show that it does not assume to convey these subscriptions; but on the contrary specifically assigns those things which are set out in a schedule annexed to the assignment, and does not contain any general words sufficiently comprehensive to cover stock subscriptions. And as the assignment is a common law instrument, deriving no extraneous efficacy from the statute law of Georgia, except the general statute which gives assignability to bonds, specialties and other contracts in writing for the payment of money, or any

[2] [From 10 Am. Law Reg. (N. S.) 718.]

article of property, judgments and executions (Code, § 2725), it cannot be construed to reach the claims in question. Besides, the attitude of the bank, its directors and stockholders, from the first, has been inconsistent with the idea that these unpaid subscriptions were embraced in the assignment. It is just what they always have opposed and denied.

4. Another point quite strenuously urged by the defendants is, that the bills held by the complainants were issued directly to the Confederate States government, and to the state of Georgia during the Rebellion, and in aid thereof. The answers severally allege this fact, and the only evidence offered by complainants to rebut it is proof that they purchased the bills in open market, in regular course for value paid, without any notice or suspicion that they were issued for any illegal purpose. The defendants, therefore, rely on the article 5, § 16, subd. 1, of the constitution of 1868, which not only nullifies all contracts made during the rebellion, in aid thereof, but all bonds, deeds, promissory notes, bills or other evidences of debt, made in connection with such contracts, or as the consideration therefor, or in furtherance thereof; and declares that when the defendant will make a plea, supported by his affidavit, that he has good reason to believe that the obligation or evidence of the indebtedness on which the suit is predicated, or some part thereof, has been given or used for the illegal purpose aforesaid, the burden of proof shall be upon the plaintiff to satisfy the court and jury that it is not founded upon, or in any way connected with, any such illegal contract, and has not been used in aid of the Rebellion; and the date of the bill, etc., shall not be evidence that it has or has not, since its date, been issued, transferred or used in aid of the Rebellion.

Now, in reference to this point, it is to be observed that it does not fairly arise in the case. The bill of complaint is founded on certain judgments and executions in favor of the complainants, which were recovered in 1867. Had any such defense, as is indicated by the answers existed, it should have been made to the actions at law; for, although the constitution did not then exist, yet it would have been a good defense to have shown that the bills were issued in aid of the Rebellion, and that the plaintiffs knew it, or had reason to know it. Not being set up then, it cannot be set up now. The stockholders of the bank cannot ask to go behind the judgments rendered against the bank, and question the original cause of action, unless they can show collusion between the plaintiffs and the bank, entered into for the purpose of defrauding the stockholders. But even if the question were open I could not yield to the force of the defendants' argument. They contend that the constitution of 1868 has all the force and effect of an act of congress, and, therefore, is not obnoxious to that clause of the constitution of the United States which declares that no state shall pass any law impairing the obligation of a contract; that the constitution of 1868 has the force and effect of an act of congress, they insist, because it was adopted under the reconstruction acts, under military supervision, and not by the free consent and express will of the people of Georgia, and because, after its adoption by the convention, it was revised by congress and certain parts were struck out—or, at least, congress made it a condition of admission that they should be struck out—and that the legislature should ratify the fourteenth amendment to the constitution of the United States (see Act June 25, 1868; 15 Stat. 73); and that this was, in effect, an approval and adoption by congress of the parts not excepted to.

I cannot concur in this view. What was the precise status of Georgia after the war, and before its readmission into the Union, with all the normal relations of a state, will, perhaps, never be defined to the satisfaction of all. But that some sort of rehabilitation was necessary in order that Georgia might occupy her old position in the Union—that the adoption of a new constitution was one of the necessary things to be done, and that an act of the national authority, admitting Georgia to the representation and status of a state in harmonious relations with the Union, was also a necessary thing to be done—seem to be propositions that can hardly admit of a doubt. This conceded, how can it be said that the adoption of the constitution of 1868 was not the act of the people of Georgia? The courts cannot do otherwise than regard it as such. This is a political question in which the courts must follow the action of the political department of the government. To adopt any other course would be to introduce the greatest confusion. Congress, as was its right, regulated the elective franchise. There was no other legal authority to do it. The executive had no such authority. The state government of Georgia was a mere provisional one, and could not legally do it. No interference with the freedom of elections was interposed; on the contrary, the general government took measures to prevent any such interference. All that congress had to do, in relation to the constitution, when the state applied for readmission, was to impose certain conditions, to wit: That certain unwise clauses should be left out of the constitution, and that the legislature should ratify the fourteenth amendment. This was done. But Georgia was not compelled to do it. She could do as she pleased. It was at her own option. How can this possibly make the constitution an act of congress, or tantamount to such an act?

Then, is a provision in a state constitution which impairs the obligation of a contract void? I have no doubt on the subject. A state can no more pass a law violating a contract, by means of a convention than it can by means of a legislature; and a consti-

tution adopted by a state, either after its admission, or with a view to its admission or readmission into the Union, must be regarded as a law of the state, and amenable to the prohibitory clauses of the constitution of the United States. Then, looking at the constitution of 1868, does the clause relied on impair the obligation of a contract? The first part of the clause, which declares void all contracts made in aid of the Rebellion, only expresses what would be the law without any declaration on the subject. The second part, which avoids the instruments in whosesoever hands they may come, when applied to such instruments as bank bills, is more questionable. But the final portion, which throws the burden of proof on the plaintiff to show that the bills have never been used in aid of the Rebellion, if only the defendant will swear that he has reason to believe that they were so used, imposes upon the plaintiff an impossibility, and is tantamount to destroying the contract on the simple oath of the defendant as to his belief. I cannot think that such a provision is constitutional.

5. But the defendants make still another point, namely: that they have severally redeemed their shares of the bills of the bank, and have them ready to show as offsets to their liability as stockholders. This part of the answer relates only to the personal liability of all stockholders for the debts of the bank, under the fifteenth section of the charter, and not to their liability for unpaid subscriptions to stock. But, supposing the answer was right in form, could the defendants set up this defense to the bill? They do not show how they procured the bills. They have not recovered judgment on them. They may be unable to do so. The bills they hold may be open to the very objections they raise against the bills held by the complainants. They would not be permitted to pay up their subscriptions, if called on by the bank, in its old, depreciated currency. The most they can do with these bills, it seems to me, is to present them to the receiver for their pro rata share of the assets of the bank; or, if they can recover judgment on them, to pursue the course which has been pursued by the complainants, if it is competent for them to sue other stockholders when they themselves are owing the bank.

For these reasons, I think a decree must be made in favor of the complainants, the form of which, on reflection, I think should be that the defendants should severally pay to the complainants the amounts due by them for unpaid stock, so far as may be necessary to satisfy the amount of the complainants' judgments, interest and costs. It was suggested that those who had paid the least per centage on their stock should be first called upon, but I think all are equally liable to pay what they have not paid on their subscriptions; and, although the directors might be required to pursue that order, I do not think the court is bound to follow the directions marked out for the directors. It was also suggested that the decree should be based on a settlement and distribution of the fund in the hands of the receiver, and should make the defendants liable only for such balance as might be due to the complainants after receiving their share of that fund; but this would postpone the complainants indefinitely, and it seems to be generally conceded that the assets in the receiver's hands are not sufficient to pay the other creditors.

Decree for the complainants.

[NOTE. At a later date the court heard two of these cases together,—a case at law and one in equity. They were heard upon demurrer to plea in bar in both cases. The plea to the bill was sustained, but the plea to the declaration was held not sufficient. Case No. 9,111. In the law case the defendants sued out a writ of error in the supreme court, when the judgment of the circuit court was reversed, and a new trial nisi ordered. Mills v. Scott, 99 U. S. 25.]

Case No. 9,113.

MARSH v. CHARLESTON.

[1 Hughes, 288.] [1]

Circuit Court, E. D. South Carolina. 1877.

CORPORATIONS—UNPAID STOCK—CREDITOR—STATUTORY LIABILITY—SUIT AT LAW—JOINDER OF CREDITORS.

Where the charter of a bank makes each stockholder liable to twice the amount of his shares for its debts, and a judgment creditor sues at law a single shareholder who owns nearly all the shares, and it does not appear from the complaint that there are any other creditors besides the complainant, *held*, on demurrer, that although the case might be different if there were more than this one creditor, yet, it not appearing that there were other creditors, the demurrer must be overruled.

[This was an action by Fennimore C. Marsh against the city council of Charleston. Heard on demurrer.]

Before WAITE, Circuit Justice, and BOND, Circuit Judge.

WAITE, Circuit Justice. The plaintiff is a judgment creditor of the State Bank in the sum of $40,127.25, and the defendant a stockholder to the amount of $39,800. The charter of the bank provides, that "in case of the failure of the bank, each stockholder . . . . shall be liable and held bound individually for any sum not exceeding twice the amount of his . . . . share or shares." The bank has failed, and the plaintiff seeks in this action at law to charge the defendant, under this provision of the charter, with the payment of his judgment. It does not appear in the case as presented, that there are any other creditors of the bank or any other stockholders.

The defendant has demurred to the complaint, and, in support of his demurrer, contends that the individual liability of stock-

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

holders, as defined and created by this charter, cannot be enforced by one creditor for his own exclusive use to the injury of others.

If it anywhere appeared in the complaint, either by direct averment or fair legal inference, that there were other creditors of the bank, and that the assets, including the liabilities of the stockholders, were not sufficient to pay all in full, we should sustain the demurrer. In our opinion, it was not the intention of the legislature, by this provision, to create a liability to the separate creditors, which one could enforce to the injury of another. The undertaking assumed by the stockholders is not to pay debts, but to such sums, not exceeding the amounts of their respective shares, as should be necessary under the circumstances. Undoubtedly the object was to furnish the creditors with additional security, and to have the payments, when made, applied to the discharge of the debts. The obligation, too, is one that may be enforced by the creditors, but as it is to or for all the creditors, and not any one alone, it must, as we think, be enforced by or for all. The form of action employed, therefore, should be one adapted to the protection of all.

As it does not now appear that there is any creditor of the bank except the one who sues, we cannot say that this form of action is not adapted to the circumstances of this case. The demurrer is therefore overruled, with leave to the defendant to avail himself of his proposed defence by answer.

Case No. 9,114.

MARSH v. COMMISSIONER OF PATENTS.

[The case reported under above title in 3 Biss. 321, is the same as Case No. 9,119.]

Case No. 9,115.

MARSH v. DODGE & STEVENSON MANUF'G CO.

[6 Fish. Pat. Cas. 562;[1] 5 O. G. 398; Merw. Pat. Inv. 213.]

Circuit Court, N. D. New York. 1873.

PATENTS — CLAIM TO RESULT — LOCATION OF APPARATUS — COMBINATION — NEW DEVICES — NEW AND USEFUL RESULT — REVOLVING RAKE.

1. A claim to a result is not in itself patentable.

2. A claim can not be sustained which covers every mode or means by which certain advantages can be secured in a harvester.

3. The mere location of an old apparatus on a machine is not patentable.

[Cited in Gilbert & Barker Manuf'g Co. v. Tirrell, Case No. 5,417; Gilbert & Barker Manuf'g Co. v. Walworth Manuf'g Co., Id. 5,418.]

4. If such new location produced a new combination of devices, producing a new result, it is patentable.

[Cited in Carstaedt v. U. S. Corset Co., Case No. 2,467; Gilbert & Barker Manuf'g Co. v. Tirrell, Id. 5,417; Gilbert & Barker Manuf'g Co. v. Walworth Manuf'g Co., Id. 5,418.]

5. If such change of location requires new devices, and a new and useful result is produced, then the location in combination with the devices—the means by which the result is produced, not the result itself—is patentable.

[Cited in Gilbert & Barker Manuf'g Co. v. Tirrell, Case No. 5,417; Gilbert & Barker Manuf'g Co. v. Walworth Manuf'g Co., Id. 5,418.]

6. In these cases there is no infringement, unless the devices, by which the result is produced, are used.

7. The revolving-rake made by the Dodge-Stevenson Company does not infringe the Marsh patent.

Final hearing on pleadings and proofs.

Suit brought on reissued letters patent, granted James S. Marsh, for "improvement in harvesters," September 11, 1866, No. 2,354, as a reissue of the patent [No. 37,630] granted him February 10, 1863.

The first engraving shows the machine as patented by Marsh. The second shows the machine as afterward improved by him, and described in a later patent.

Jas. O. Parker and D. Wright, for complainant.

Geo. Harding, for defendant.

WOODRUFF, Circuit Judge. Upon a careful and protracted examination of the evidence, and consideration of the views exhibited in the elaborate printed arguments of the counsel for the respective parties, my conclusion is, that the defendants do not infringe the patent of the complainant for a raking and reeling apparatus for a reaping-machine in any feature which was new, and which the patent, properly construed, legally secures to the patentee.

The claims which it is alleged that the defendant impinges are the first, second, third, fourth, seventh, seventeenth, and eighteenth.

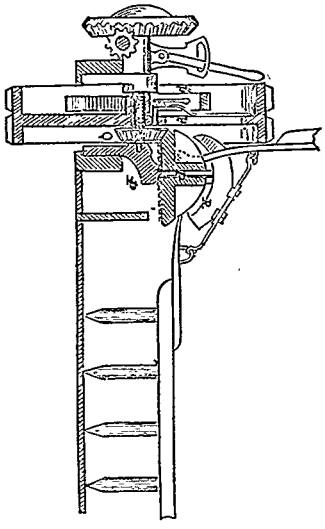
"1. The combined raking and reeling apparatus which rotates around a vertical shaft, when its arms adjust themselves successively from a horizontal to a vertical position, and when the combined apparatus is so located that its arms swing on hinges, which are below the highest point of the drive-wheel, and the extent of the sweep of any one of the arms does not interfere with a driver seated upon any part of the draft-frame, which is outside of the drive-wheel, substantially as described.

"2. The construction and adaptation of a combined rake and reel, which revolves entirely around a vertical center, so that it may be applied to the harvester at a point which is on the inner side of the drive-wheel, and below the highest point of said wheel, substantially as described.

"3. Locating the hinges of the respective arms of the combined rake and reel around a center, which is on the inner side of the drive-wheel and below the top of said wheel, substantially as described.

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

No. 1.



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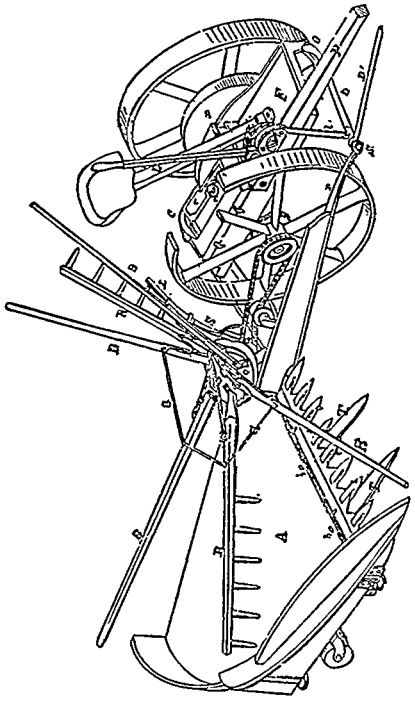

"4. Attaching each of the respective arms of the combined rake and reel to a hinge or pivot, which is on the inner side of the drive-wheel and below the top of the same, substantially as described."

"7. The construction of the crown-wheel with boxes for a series of rake and reel arms, in the manner described and shown."

"17. So arranging a revolving, raking, and reeling device, having two or more arms, including the rake as one arm, that the driver can sit on the machine and drive the team, the shaft of the rake and reel being at or nearly at right angles with the grain-platform, and the arms of the rake and reel not sweeping over the frame on which the driver is located, so as to interfere with the driver on his seat, substantially as described.

"18. The combination of a central shaft, a revolving hub or crown-wheel, a cam and hinged rake and reel arm, which are bent or curved near the hinging ends, as described, whereby the rake and reel arms, although hinged in rear of the cutting apparatus, are capable of reeling in and raking off grain at the inner front corner of the platform, as well as at the outer front corner thereof, and whereby, also, these arms are caused to incline over toward the grain side of the platform, when they rise to their greatest altitude, substantially as described."

Examination of these claims at once suggests, not only that they are largely repetitions, but that, if accepted in their broad generality, they are liable to two criticisms. They are very largely claims to a result which is not, per se, patentable; or, secondly, they are, most of them, in their terms, broad enough to cover any and every mode or means by which certain specified advantages, or alleged advantages, in the construction of a combined raker and reeler can be secured, which is too broad to be sustained. If this construction of the claims is to be avoided, it must be by construing the claims in the light of the previous specification, and modified by the words in each claim, "substantially as described."

By this view of these claims, they must be held to be either for the specific combination of the devices employed, described in the specification, or for the location of the devices in the place designated, with such changes, if any, as were devised to adapt the apparatus to that location.

In view of the disclaimers contained in the specification, and the description and office of the devices therein described, I am of opinion that one or both of the constructions last named is all that can be asserted in support of the claims, considered apart from the evidence, and upon the face of the patent itself. And when the evidence showing the state of the art is considered, in connection with the specification and its admissions, these restrictions of the several claims seem to me inevitable, if they can be sustained at all.

The testimony and the language of the claims, and especially the argument of the counsel for the complainant, show that the chief feature in the alleged invention of the patentee is the location of the apparatus. The counsel for the parties do not agree as to the construction of the patent in this respect. The counsel for the defendants insists that the patentee is restricted to a location below the top of the driving wheel of the principal machine, and within the limits of the circumference of that wheel; and in behalf of

the defendants, it is insisted that the patent includes any location which is nearer the ground than a horizontal plane passing through the top of such driving-wheel.

But in either view, location is a chief feature in the complainant's claims. This, of course, suggests the question: Is the mere location of devices, such devices not being new, patentable? To this the answer must be that it is not. If the result is the same, and nothing new is required to adapt an apparatus to operate in its new location, nothing has been done which can be called invention. If such change of location produced a new combination of devices, producing a new result, then, indeed, something patentable may have been devised; but mere change of location is not invention.

On the other hand, where change of location involves the employment of new devices to adapt an apparatus for use in the new position, and a beneficial result is produced, then this location, in its connection with such new devices—that is, the means by which the result is produced, and not the result itself—is patentable. And where such change of location brings into existence a new combination of devices, operating by reason of such new combination to produce a new and useful result, such new combination is patentable. But in the former case there is no infringement, unless the new devices, or their equivalent, are used; and in the latter there is no infringement, unless all the material parts of the combination are used, or their equivalents.

In the present case the complainant's specification itself declares that a continuously revolving rake and reel is not new; that a continuously revolving rake and reel, mounted on an auxiliary frame within the draft-frame, or upon the rear right-hand corner of the platform, are not new, though revolving around a vertical center; that a continuously revolving rake and reel on such auxiliary frame within the draft-frame, having its arms separately hinged, is not new; that rake and reel arms which, during their united revolution around a vertical shaft, are turned up by segments, are not new, but have been mounted on a standard or post of the platform. This latter statement describes with great accuracy, though in general terms, the defendant's apparatus now claimed to infringe the complainant's patent. It also declares that a pair of arms has been formed by uniting the two parts which form the pair in such a manner that these parts form a stiff and non-adjustable right angle, and that a continuously revolving combined rake and reel has been combined with a driver's seat so that the driver would ride on the machine.

It further declares that the patentee does not claim a single rake-arm revolving around a center, nor broadly a rake and reel combined, which is composed of a series of rake and reel bars arranged around a center, nor a series of such arms hinged independently to the hub, nor a series of such arms hinged to a horizontal shaft, in which particulars he again describes the series of arms and rake used by the defendants, which are not only hinged independently of each other, and without any linked connection in pairs, but their relation to each other is non-adjustable. And, finally, he does not claim all cams in connection with such arms for producing or controlling their motion.

I find from the evidence a prior revolving-rake combined with reel-bars revolving around a vertical shaft hinged at the center, turned by a crown-wheel, acted on by a bevel-wheel connected with the main axle of the driving-wheel, and having the rake and reel arms in pairs, connected or linked crosswise together, so that each linked pair formed a right angle, or nearly so, and so that when the rake-head or reel-bar of one pair is horizontal, the other or fellow thereto is vertical, or nearly so, and in the construction or arrangement of which an elliptical curve or segment was placed around and partially over the crown-wheel, so that in the revolution of the arms they are successively lowered and held down by the linked connection, to perform the office of reeling and raking from the platform, and then raised to nearly a vertical position until again lowered to perform their office.

All this appears in the machine of Whitenack, of which a model is produced, and which was in actual public use prior to the alleged invention by the complainant.

I find also what, after the concession in the complainant's specification, might have been assumed without further proof, that the elevation of the arms, as they left the platform in their ascending revolution, enabled the driver to sit in his proper seat on the main frame while the apparatus was in motion.

Hinging the arms of a revolving rake and reel at the center of their motion had been done before in other machines; raising them in the course of their revolution by means of a cam or an equivalent to the cam, also appears in Mears' machine, in which the revolving raking device was located on the platform, below the plane of the top of the driving-wheel, and the like device appears in McClintock Young's machine. Both of these had the arms hinged at the center of motion, were revolved by means of a crown-wheel and beveled gear-wheel, not, as in the complainant's machine, attached to or operated directly by the revolving axle of the driving-wheel, but mediately through a flexible connection therewith. In these respects the defendants' apparatus more nearly resembles them than it does the complainant's; and what are called boxes, constituting hinges in which the arms were pivoted or hinged to the crown-wheel—referred to in the seventh claim—were neither new in

themselves nor as hinges for the arms of a revolving rake and reel.

Under these circumstances, little remained which the complainant could claim as new, except the location and such specific devices as adapted the apparatus to operate in its new location, or such combination as resulted from the change of location, if any new combination was produced, and new location, or the result of the new location, was mainly urged by the counsel for the complainant on the hearing.

The location described by the complainant is upon the main frame and upon the grain side thereof, over the axle-box of the driving-wheel. The new devices which he seems to have employed to operate the apparatus in its new location, so far as any of the parts were new, were bending the revolving arms; and, what he states as his preference, casting the inner segment or axle-box of the driving-wheel and the upright vertical shaft upon which the crown-wheel (to which the arms are hinged) revolves in one piece; and, viewed as a combination, these features are included with the other parts of the apparatus already referred to.

It is true that the patentee, in his specification, says: "I have laid importance to the location of the rake and reel directly over the axle of the drive-wheel; and, while I regard this an important feature of my invention, I do not wish to limit myself to this location, where my other improvements in the combined rake and reel are found useful in other locations."

This language must be construed with reference to the entire specification and to the state of the art already adverted to.

Apart from the change of location specifically named, and the devices to operate the apparatus there, there were no improvements which were new. He points out in his specification no mode of operating the machinery in any other location. By elongation of the axle of the driving-wheel it would project the bevel-wheel and the crown-wheel to a greater lateral distance from the side of the driving-wheel, so that the latter would not be directly over the axle; or, by placing it on either side, forward or back of the axle, but adjacent to the bevel-wheel on the axle, it would still be operated by it, and yet not be directly over such axle.

That the specification contemplated a location upon or firmly attached to the frame of the principal machine, and contemplated no other location, is, I think, clear, from the specification and from other considerations. Within that range, although the patentee pointed out no mode of operating it except where he placed it, he may have contemplated location, not "directly over the axle of the drive-wheel," as I have above suggested. Still more clear it is that he did not conceive or contemplate, as within the purview of either his specification or claims, a location on the grain platform. That location he, in terms, condemns as of doubtful practicability, and in nowise suggests the possibility of placing his alleged invention there. Such rigid attachment to the main frame was alone contemplated, as I think, is clear. The details of the specification show it, wherein he proposes and prefers to cast the segment or axle-box of the driving-wheel and the vertical shaft of the crown-wheel in one piece; not that it must be so cast, but when the location is directly over the axle, he prefers it, though when placed elsewhere within the reach of the bevel-wheel it may not be possible.

The cam, which is to raise the arms in their revolution, "may be bolted firmly to the inner side timber or part of the draft-frame, as represented in fig. 1," and no other mode of securing it is pointed out or suggested. If it be said that this secures him against the use of any equivalent mode of securing it, it nevertheless indicates its firm attachment to the main frame.

His further language is still more specific, and altogether unequivocal. "I also think I have made an important improvement in being able to adjust the combined rake and reel by the same means which adjust the cutting apparatus. This end I have attained by having the rake and reel a fixture with the draft-frame, and locating it with reference to the drive-wheel, as shown."

It was hardly possible for him to be more explicit on this point. The alleged invention of the complainant was made for a one-wheeled machine. The machine which he described was a one-wheeled machine. Such a machine necessarily had its platform rigidly attached to the frame of the machine. This, it is true, would not be a conclusive fact if an infringer could have placed the same apparatus on the side of, or attached it as a fixture to, the draft-frame of a two-wheeled machine, and that would be possible if the platform was rigidly attached thereto. But it is, nevertheless, a fact of some significance, where the patentee claims that the defendants infringe by the location of an apparatus, embracing similar features not new, on the platform of a machine, such platform being flexibly connected with the principal machine and the location being where the use of the apparatus, arranged as the patentee describes it, is impracticable.

If attention be paid to what may be claimed to be the specific devices by which the patentee adapted the apparatus to the location described, or to what may be claimed to constitute in that location a new combination (if, in fact, there was any new combination), I must find that the defendants have not used them, or any of them, in the designated location; nor, in fact, have they used any of which the complainant had acquired any monopoly or exclusive right, either by the evidence or by the declaration of the paten-

tee in the specification. Some are shown to be old, both as separate devices and in combination. Others are unlike the complainant's in their structure and mechanical operation.

There are many other particulars embraced in the argument in behalf of the defendants, upon which, though I do not disaffirm them, I express no opinion. What I have said seems to me to render it necessary to add that the defendants infringe no right secured to the complainant.

To hold otherwise would be to give the patent a construction which would render the patent itself invalid, or, on the other hand, to give it an interpretation, which, in view of the language of the specification, the state of the art, and the evidence in the case, it does not bear.

I add, moreover, without going into the details of the testimony and proofs, that the defendants have used nothing which they were not at liberty to use. In some of the details, their specific devices may, where they differ from the complainant's, be new. They have adapted known devices for raking and reeling, to use, in a location upon the platform of a reaper attached by flexible connection to the frame of the main machine. If, in adapting the combined raker and reaper to the location described in his patent, the complainant Marsh made any patentable invention, if he did anything more than yield to those mechanical changes which mere judgment or mechanical necessity imposed, the defendants, in adapting their apparatus to use upon the platform of a two-wheeled machine, flexibly connected therewith, used no device of which the complainant had an exclusive monopoly.

It will be seen that the patentee neither claims nor has any exclusive right to four arms, as well because his claims are not to four or any other specific number, but to a rake and reel arm, and to two or more arms, as because one, two, and four had been previously used, and the proof shows that increasing or diminishing the number is a mere matter of judgment, not requiring invention. So, also, it should be observed, that, except in the seventh claim, the patentee makes no claim to any of the separate distinct devices used as new.

The defendants do not use the location designated. They do not use the same device for guiding the arms and bringing the rake and reel down to the platform, but a device much more nearly resembling that shown in the Mears machine. They do not use arms linked in pairs, and if the arms can be said to be arranged so that, when in motion, they assume a similar relation to each other at any like angle, that relation is fixed or unchanging, and non-adjustable. The complainant's arrangement for operating the apparatus would be impossible applied to the defendants' machine, with its platform flexibly connected to the main frame. The mode of hinging the arms to the crown-wheel is not identical with that of the complainant's mentioned in the seventh claim, and if it could be considered equivalent, it differs more than the complainant's differs from what, as before observed, was already in use. So that, in no view of the subject, can the defendants be held infringers of the complainant's patent, even if it be held to cover a specific combination, or to embrace a new location, with specific devices to adapt the apparatus to operate therein.

The bill of complaint must be dismissed, with costs.

MARSH (DORSEY HARVESTER REVOLVING RAKE CO. v.). See Case No. 4,014.

MARSH (FOLSOM v.). See Case No. 4,901.

Case No. 9,116.

MARSH et al. v. HULBERT et al.

[4 McLean, 364.] [1]

Circuit Court, D. Illinois. June Term, 1848.

CONTINUANCE—DEPOSITION EXPECTED—DILIGENCE.

A deposition expected which may be material on the merits, and where proper diligence has been used, is a ground for the continuance of a cause.

[Cited in brief in Fisher v. Greene, 95 Ill. 95.]

[This was a suit by Marsh and Compton against Hulbert and Trumble.]

Mr. Edwards, for plaintiffs.

Mr. Kating, for defendants.

OPINION OF THE COURT. A motion for a continuance of this case is made on an affidavit that the goods sold by the plaintiffs to the defendants, for which the present action is brought, were of an inferior quality, were overcharged and not worth the prices charged. Also that a deposition is expected which will prove that one of the plaintiffs' witnesses denied what he has sworn to in his deposition.

This is opposed as there was no offer to return the goods—no special warranty, nor is fraud alleged. The object of the defendants is not to disaffirm the contract, but to show that more was charged for the goods than they were worth. We know not under what circumstances the goods were received, or whether the defects alleged were perceptible on a slight examination. It is said that a court will not grant a new trial on the ground that a witness examined can be impeached. Upon the whole, however, in this case, we think justice requires a continuance of the cause, unless the expected deposition shall be received so that the trial may be had at the present term.

MARSH (LORING v.). See Cases Nos. 8,514 and 8,515.

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

Case No. 9,117.

MARSH et al. v. The MINNIE. COMMINS v. SAME. BEE et al. v. SAME. SMYZER v. SAME.

[6 Am. Law Reg. 328.]

District Court, E. D. South Carolina. 1858.

MARITIME LIENS—SUPPLIES—HOME PORT—CONFLICT OF LIENS—MORTGAGE—REPAIRS.

1. By the maritime law there is no lien for supplies in the home port. The credit is supposed to be given to the owner, and not the ship.

2. J. C. owned the brig M. and sold to T., who secured the purchase money by a mortgage duly executed and recorded. Subsequent to the sale and execution of the mortgage, J. M. & Son repaired the brig and kept her in their custody until the marshal attached her; B. & T. furnished ship chandlery, but were at no time in possession; H. S. did the joiner work, but was at no time in possession: *Held*, that these liens must be marshaled, as follows: First, J. M. & Son, the shipwrights, must be paid, because they had a strict maritime lien, and had possession, and no act of the owner can defeat a lien which the law creates; second, the mortgagee; and third, the balance ratably to the other libelants.

[Cited in The St. Joseph, Case No. 12,229. Cited in note in The Skylark, Id. 12,928. Cited in brief in The Illinois, Id. 7,005.]

3. The mortgage act of 1850 [9 Stat. 440] considered and interpreted.

[Cited in Srodes v. The Collier, Case No. 13,272.]

4. Where the vessel is in her home port, and the material men are not in possession, and no local law recognizes their claims as privileged, they must be postponed to the mortgage creditor who has an interest in rem.

In admiralty.

Wm. D. Porter, for James Marsh & Son.

Edwd. M'Cready, for Bee & Tylee and Henry Smyzer.

M. P. O'Conner, for John Commins.

MAGRATH, District Judge. In these cases libels have been filed to recover certain sums of money, and for which, it is contended in each case, that there is a lien. John Commins, being the owner of the brig Minnie, sold her to W. H. Trott, the purchase being altogether on credit. W. H. Trott gave his promissory note to John Commins, dated the 19th May, 1856, at sixty days, for $1,400, and to secure its payment, executed a mortgage of the brig, dated the 4th June, 1856. The mortgage is duly executed, and recorded in the office of the collector of customs for the port of Charleston, where the brig is registered. The note is still unpaid. On the 7th June, 1856, James Marsh & Son, who have also libeled, and are shipwrights, commenced repairing the brig. They continued to work upon her until the 7th August, 1856, at which time, having completed their work, they now claim that there is due for it $2,808 30. Before they commenced, they took the brig into their possession, and so kept her until they surrendered her to the process of this court. They also claim the further sum of $131 for the services of a ship-keeper. Bee & Tylee, ship chandlers, have also libeled the brig for $1,994 38, the value of materials and supplies furnished by them. They have not been in possession. Henry Smyzer, ship joiner, has also libeled for $372, the value of work done by him. He has not been in possession.

The lien claimed by James Marsh & Son, is derived from the possession, which, as shipwrights, they had. The lien claimed by John Commins is derived from his mortgage. The lien claimed by Bee & Tylee and Henry Smyzer, is derived from the allegation that the brig was owned out of the limits of this state. Had such proof been made as satisfied me that this allegation was supported, it would have led me to decree the payment of these claims, in an order different from that which I will now direct. In such a case, liens under the rule of the maritime law, would have been implied (in the absence of the owner) for the benefit of all material men. But this has not been proved. W. H. Trott may be a citizen of New York and not resident within the limits of this state; but if so, it admits of higher and stronger proof than has been made, and which consists of idle discourse in which he indulged. If his declarations concerning his residence in New York are entitled to weight, as proof of that fact, then would his declarations as to his residence in Charleston, be also entitled to weight. In the mortgage to Commins he declares himself a citizen of Charleston, and he must have sworn to the same statement. I cannot, then, under such circumstances, declare him to be a citizen of New York, or resident of any other place than Charleston, particularly when the consequences to him might be so very serious. Had the non-residence here of W. H. Trott been proved, it would not have availed the parties who, from it, if proved, supposed that a lien would arise in their favor. For he is here, and has been here, and might have been sued. And when the owner is present, the reason for the maritime lien ceases, and the contract is inferred to be with him, on his ordinary personal responsibility, without a view to the vessel itself as security. St. Jago de Cuba, 9 Wheat. [22 U. S.] 409, Fland. Mar. Law, 186. The brig is then before me, as in her home port, where her owner resides, and upon this I will now proceed to determine the relative positions of the lien claimed against her.

A lien arising under the maritime law is neither derived from, nor governed by the same principle as relates to a lien at common law. By the common law "a lien is the right in the possessor of property to hold it for the satisfaction of some demand." Mont. Liens. The right to retain the possession, and the fact that it is retained, are essential to a lien in every case. Lickbarrow v. Mason, 6 East, 27. But, in the maritime law, possession is not material in a question of lien. By that law, the benefit of the lien may be preserved, consistently with the enjoyment by the debtor of the right of ownership, including in this,

the possession and control of the vessel. In countries which admit the rule of the civil law, which is also the rule in the admiralty, repairs and necessaries form a lien upon the ship. Such was the law in England, until reversed by the house of lords in the time of Charles II. The Zodiac, 1 Hagg. Adm. 325.

It is, perhaps, too late for us to inquire with what reason the rule of the maritime law, which followed that of the civil law, in regard to liens, was modified in England. A sense of natural justice is satisfied in declaring, that he who expends labor for the benefit of another shall be entitled to look to the thing benefited by such labor, as the primary source of such payment. No equivalent is afforded for the denial of this, in remitting the creditor as in the case of a material man to his personal action against the owner. A remedy operating wholly in personam is very seldom an efficient substitute for a proceeding in rem. But if it is no longer of use to examine the reasons for which, in former days, essential modifications and, in some cases, positive prohibitions were adopted in relation to the admiralty, there is still great use in understanding how a spirit of rivalry, permitted to interfere, falsified the great issue of determining a question between courts of auxiliary and, in some cases, of concurrent jurisdiction, by reference to the public good, and made every thing subordinate to a desire for success. Without the jealousy, and with little, if any, of the acrimony which marked the discussion in England; but nevertheless with great interest and ability, has the question been discussed in the United States, of the meaning in the constitution of the United States, of "all cases of admiralty and maritime jurisdiction." De Lovio v. Boit [Case No. 3,776]; Ramsay v. The Allegro, 12 Wheat. [25 U. S.] 611; Bains v. The James and Catharine [Case No. 756]; The Huntress [Id. 6,914]. And without introducing here anything not pertinent to the case before me, I may very well observe, that the admiralty and maritime jurisdiction of the United States is not determined by the narrow construction which in England served to define it; but embraces a larger number of cases, recognized as properly within its spirit and jurisdiction.

When, in the time of Charles II., it was resolved, that the jurisdiction of the admiralty did not extend to cases in rem where the common law courts would afford a remedy in personam, the lien, which until then belonged to the material man, was lost. In all cases, therefore, where the ship was in her home port, or the person of the owner could be served, the lien of the material man was divested, and the remedy was by action against the owner. With foreign ships the lien was preserved, but from necessity; and it is only with such vessels that the material man enjoyed that security which once applied to all vessels. But in England, and in many of the United States, the wisdom of the maritime law as formerly enforced, has been vindicated by recent legislation. New York, Pennsylvania, Louisiana, Illinois, Indiana, Massachusetts, Maine, Connecticut, and perhaps others, have provided, that on all vessels, whether foreign or domestic, in the home port or abroad, material men shall have the benefit of a lien to the extent of work done or supplies furnished. In South Carolina there has not been any corresponding legislation; and the general rule applicable is that laid down in The General Smith, 4 Wheat. [17 U. S.] 438. To this rule in England, and in the United States, there has been always an exception in favor of the shipwright who may be in possession. Abb. Shipp. 178; 3 Kent, Comm. 169; The Vibilia, 1 W. Rob. Adm. 7. For him a lien arises from the common law. Bland. Mar. Law, 186, 4 Barn. & Ald. 341. And the contract for repairs being a maritime contract, the lien may be enforced in the admiralty. Peyroux v. Howard, 7 Pet. [32 U. S.] 340. The lien claimed by James Marsh & Son, is of this kind, and corresponds to the lien which they would have under the general maritime law. But its value when enforced in this court, depends on the solution of another question; and that is, whether it will be here considered, as it would be in a court of law; or whether it will be here treated as a maritime lien in the proper sense of that term. And this question involves an important issue, as between James Marsh & Son and John Commins. If they have but the naked lien of the common law, they must be postponed to John Commins; but if, as material men in possession, they have a lien which can be enforced in the admiralty; and it is enforced here, as a maritime lien, then they will be preferred.

At the common law, a lien implies a power to hold, nothing more. He who has a lien, may hold; but except in certain cases, which need not be here considered, he cannot sell. The sale of the property to satisfy the lien can only be accomplished through an execution, following the judgment in a personal action against the owner. He who holds a lien, detains the thing which it affects, until he gets his judgment; and then sues out his execution under which he sells. In the admiralty, as has been already said, possession is not essential to the lien. The Marion [Case No. 9,087]. The lien is in rem; not only against the thing, but in the thing. Adhering to it, from its equitable properties; following it, into the hands of third persons; and never divested, but by payment; destruction of the thing; or consent of parties. Although wide in its operation, and liberal in its spirit, it can never do injustice. It is closely watched; and is ever defeated by that evidence which would be sufficient to establish the conclusion of personal credit to the owner. It cannot be used for fraud; because it cannot be kept secret, by being delayed; for it would be unsafe in him who

claims it, to allow it to remain not enforced longer than the end of the voyage then in progress. The Carter, 4 Cranch [8 U. S.] 332; The Boston [Case No. 1,669].

In the admiralty, when a lien arising from some other source than the maritime law is enforced, it will be, according to the rule of the maritime law, and to the same extent, with a general maritime lien of that class, unless its operation is otherwise limited. If there is no limitation or qualification of the lien, by the law creating it, then this court will not undertake to affix to it, limitation or qualification. As it comes without either, so will it be enforced. The Marion [supra]. A material man, who acquires a lien, either by the common law or statute, under a maritime contract, and enforces it in this court, must enforce it in the same manner as a pure maritime lien, unless made subject to some qualification under the law which creates it. Davis v. A New Brig [Id. 3,643]; Fland. Mar. Law, 187. These general principles must now be applied in deciding to what rank shall this lien of James Marsh & Son be assigned in the distribution of the proceeds of this vessel. Is it preferred—held to be equal—or postponed to the mortgage held by John Commins, and which is prior in date to this lien? I have established it, when adopted in this court, as a maritime lien. It is enforced here, because it is connected with a maritime contract, and is in consistency with the principles of the general maritime law, which give a lien in all such cases. And the admiralty court, when it enforces this lien, must do so upon the same principles that it applies to the lien under the general maritime law, and to the same end; which is to have a preference for a debt which it holds as privileged. Boone v. The Hornet [Case No. 1,640]. The sale is the mode in which this court gives value to the lien, and secures the preference. By it the lien, whether operating as a power to hold, or in any other manner, becomes converted into money, out of which creditors may be paid. The contract out of which it arises is, as I have said, a maritime contract; and to such a contract the maritime law gives a lien. That lien is not allowed here, in the home port of the vessel, to exist; but another lien, by another code of laws, may arise: and such a lien this court is competent to enforce, but only because, growing out of a maritime contract, it is here still regarded as a maritime lien. There is no rule concerning its enforcement, in the local law out of which it arises. This court, then, has to consider it as it would its own lien, in a similar case, if it were operative. And the priority which it would give to that lien, it will give to this.

The mortgage held by John Commins is not a maritime hypothecation, and cannot, as an original proceeding, be maintained in this court. Bogart v. John Jay, 17 How. [58 U. S.] 399. In the maritime law it is not compared with those contracts which furnish the means by which a vessel is aided on her voyage. Ships, in the quaint language of the law, were made to plough the seas, and not to rot in the docks. And the contracts which are instrumental in aiding them to accomplish their mission, are preferred, to such as detain them. A mortgage, when compared with a bottomry, is called a dry security; it imparts no vigor to the thing to which it is attached.

Much has been said of the notice which James Marsh & Son had of the mortgage, when they were doing this work. I do not think that a question of notice has any place in a discussion involving the operation and effect of maritime liens. They do not arise by agreement—are not created by the act of parties—but are in themselves legal consequences. No one can, by his act, prevent a creditor, having a lien on his property, from enforcing it. But he is equally disqualified from defeating a lien which the law creates. If James Marsh & Son were not in possession, no person could give them a preference over the mortgagee. If the general maritime rule prevailed here, (and I have decided that it is considered as prevailing here, pro hac vice, through this lien of these material men,) no act of an owner, whether prior or posterior in time, could give any one a preference over the material man. Their contract is with the vessel itself, not with the owner; and to it a fixed place is allotted in the maritime law, which no one can disturb. Nor is there in this rule any hardship which may, at the first view, appear as any objection. Let it not be said that by it the owner can at any time extinguish the mortgage by a contract for repairs, which create a lien prior to the mortgagee. If an owner should attempt to make a contract for which a lien arises, and which in its operation supersedes the claim of the mortgagee, that mortgagee, if he were entitled to it, would have a right in equity to enjoin the progress of the work, until such measures might be adopted as would stay the progress of the work. However it may be in cases which the law cannot reach, yet, in all cases which it can reach, it enforces the principle that no one shall indirectly do, that which he cannot do directly. A mortgagee cannot waste or destroy that which he has made the subject of security to another.

Before leaving this part of the case, I must add, that I cannot consider the equity of the mortgagor comparable with that of the shipwright. This is not the vessel which the mortgagee took as security for a debt. Much work has been done, much labor expended, much material supplied. If in this case the shipwright did not have a lien, by virtue of his possession, all would be lost to him. The mortgagee would have power to sell, and unless the material man is able to protect himself, by buying or bidding, the debt of a mortgagee, secured by a hull, may

be paid by the bill of sale of a vessel, repaired and refitted at a heavy expense.

I proceed now to inquire how far the priority claimed by James Marsh & Son is affected by the act of congress passed in the year 1850, and which provides that no bill of sale, mortgage, hypothecation, or conveyance, shall be valid against any other person than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof; unless such bill of sale, mortgage, hypothecation, or conveyance, be recorded in the office of the collector of customs where such vessel is registered and enrolled. And to this is added the proviso, "that the lien by bottomry, on any vessel created during her voyage, by a loan of money or materials necessary to repair, or enable such vessel to prosecute a voyage, shall not lose its priority, or be in any way affected by the provisions of this act." If the act of 1850 had been passed to marshal the liens which arise under the maritime law, or to classify maritime contracts, then it might be that the omission of a certain claim, in the enumeration of such as shall constitute a prior class, would be equivalent to its postponement. But that which congress intended to regulate was of a very different kind. The rights and liabilities of a mortgagee of a vessel had been a matter of doubt and controversy, often submitted to courts, and not unfrequently resulting in contrary decisions. To prevent this, and settle all doubt, by not allowing any interest to affect third persons, of which they did not have actual notice, congress declared that no transfers of a vessel, absolute or qualified, should be valid, except as against the grantor or mortgagor, his heirs and devisees, unless recorded. The only possible ground for the opinion that this question is affected by the act of 1850, is from the use of the general term, "hypothecation." But it is quite clear that "hypothecation," as used in the act, must refer to that class of hypothecations which are proved by some instrument in writing, and are created by the act of the parties. In the maritime law, all maritime contracts imply hypothecation; but the cases in which these hypothecations arise are clearly such as never could be in the contemplation of those who framed that act, as proper to be recorded, or that it should be essential to their validity. It is well that he who has a lien created by the act of parties, should not hold it so that it may be injurious to others. If the law does not require the transfer of a vessel to be recorded, it is as good without the record as with it. No wider field could be opened for fraud, than the privilege of having liens, and keeping them secret and concealed. This mischief is met by the act of 1850. And its operation would seem to include every case, where a transfer, absolute or qualified, is made in writing, and therefore capable of being recorded.

The general rule being thus laid down, a bottomry bond must be specially excepted; for that is an hypothecation created by the act of parties, and exists in writing. It would thus, unless excepted, be governed by the act, for there is no test of priority under the act, except that arising from recording. Whatever transfer is first recorded, passed the interest, absolute or qualified, which it professes to convey. But nothing could be more unjust than the operation of that rule in relation to a bottomry bond. Such hypothecations arise abroad: the act of the master in a foreign port, where he can have, or is supposed to have, no other resource, with which to prosecute his voyage or repair his vessel. To be foreign has been considered so essential a characteristic, that it has been doubted whether the owner in her home port can make a valid hypothecation in a security of this kind. The St. Jago de Cuba, 9 Wheat. [22 U. S.] 416. If a stranger, far away, makes with the master a bottomry contract, by which the vessel is floated and speeded on her course, shall such a contract be postponed to some other, made by the owner, and for which priority is claimed, because it is recorded? Such would be the consequence, if bottomry bonds were not excepted. To obviate this difficulty, the exception is made in the manner already stated. But a bottomry bond is simply excepted, it is not preferred by the act; it is left where it would be, if the act had not been passed. If the bottomry holder had a priority before the act, he will still have it. But he did have a priority given by the maritime law: to it, then, we must refer for the nature and extent of that priority. Whatever is the relation which a bottomry contract bears to other maritime contracts, according to the maritime law, determines the relation which such maritime contracts would bear to those mentioned in the act of 1850. If such maritime contracts are preferred by the maritime law to a bottomry contract, and a bottomry contract is entitled to a priority over the contracts mentioned in the act of 1850, of course the preference of such maritime contracts as those mentioned in the act of 1850 is at once necessary and clear.

There is no mode of considering maritime hypothecations in which the impossibility of regarding them as necessarily to be recorded, does not become apparent. I have said that they often arise from circumstances, often suddenly developed; and their nature and extent, in most cases, is not known until they are perfected, and capable of being enforced. The extent of repairs is generally uncertain, and the amount of the debt continues uncertain until the work is done. The wages of a seaman can never be calculated until the voyage is ended. The claim of a freighter for damage does not arise until, the damage being done, the vessel arrives in port. If a ship from New York, being damaged, is in this port refitted and repaired, can a mortgagee from that city take her out

of the hands of the shipwright? Can he extinguish a claim for damage under affreightment, by exhibiting his mortgage? Can he deprive a seaman of wages, because the contract for his services has not been recorded? No one will affirm either of these as results which the law would accomplish; yet they are, if the act is not read with the qualifications I have suggested.

But the public mischief which would arise from any other construction of the act, than that which I have suggested, would be deplorable. The rule under which maritime hypothecations are protected, is peculiar to no clime, bounded by no territory, confined to no locality. They operate as security for the material man, and as security for the owner of the ship. To the one, it gives the vessel as security for the work he may do; to the other, it offers the assurance that, if disaster shall befall his vessel, she will be refitted and despatched on her voyage. It is a common covenant, to which the commercial nations of the world are parties, and in which each secures for its citizens or subjects, indemnity and succor. Its cardinal principle, therefore, is that a maritime contract implies hypothecation: work done and supplies furnished create a special security in the vessel. No evidence is required of the assent of the owner: the maritime law implies it from the necessity, and supplies it. It gives it for him, and makes the security prior to others. In the strong language of Judge Johnson, "the vessel must get on: this is the consideration that controls every other." "The whole object of giving admiralty process and priority of payment to privileged creditors, is to furnish wings and legs to the forfeited hull to get back, for the benefit of all concerned." The St. Jago de Cuba, 9 Wheat. [22 U. S.] 416. If this contract is broken or disturbed, so that the security implied in a maritime contract is denied or made doubtful, and the lien of the foreign mechanic or merchant is made subordinate to contracts in the home port, a blow will be struck at commerce productive of the most ruinous consequences. The lien of James Marsh & Son I hold, therefore, prior to that claimed by the mortgagee.

I come now to the consideration of the claim of the mortgagee. Freed from the questions which have been considered, he would have a right to a sale of the vessel in default of payment, and the surplus would belong to the mortgagor. But his right to any priority is contested; and it is a matter of importance to him, as it is supposed that the vessel will not be sold for as much as is necessary to discharge all the claims made against her. After seamen's wages, which are favored in admiralty and held sacred as long as a plank of the ship remains, the claims of material men receive the consideration of the court. But in this case, as this is the home port of the vessel, these material men have no lien. They are not in possession, the vessel is in her home port, and no local law recognizes their claim as privileged. They are in this court because they are parties to a maritime contract, which entitles them to pursue their remedy in personam, although they have no lien; and they may intervene in the distribution of the surplus after liens are satisfied. On the other hand, the mortgagee has no maritime contract for which he can seek a remedy here; yet he has an interest in the thing itself. The question is between two kinds of creditors, the one never having had a lien, and the other having had, at one time, a lien, which has been diverted in consequence of the extinguishment of the thing in specie, by the action of the court in its order for a sale. The right which the mortgagee had he cannot enforce, because the court has assumed jurisdiction of the subject matter; and being competent to do so, no other court would interfere. Had the mortgagee seized the vessel, it would not have ousted the court of its jurisdiction. And a sale if made by him, would not affect a subsisting maritime lien. not waived or lost from want of diligence. Filing a bill for foreclosure would have involved the question how far it was a proceeding in rem, to determine whether the material man were by it deprived of the rights which are recognized in this court. Wall v. The Royal Saxon [Case No. 17,093]. It must not, however, be understood from this, that the mortgagee is affected in his proper rights in the security which he holds. It is not because in the admiralty a lien paramount to his mortgage is enforced, which lien could not be adjudicated in a court of law or equity, that his rights are thereby diminished. His rights are determined not only according to principles administered in a court of law or equity; but are also held by him subordinate, to such also as are enforced in a court of admiralty and maritime jurisdiction. The proper measure of any right is determined by the combined operation and effect of all laws which are of force in relation to it. It would, therefore, be extremely incorrect to say, that had the mortgagee sued in this, or that court, or pursued this or that course of conduct, that his rights would be properly any other, than such as they will be under the decree of this court, or of any other court of competent jurisdiction. It would argue but little for the excellence of our system of jurisprudence, if it depended on the court to which a party appealed, to determine whether he would obtain the whole or the half of that which he claimed. Such a rule would measure the rights of parties by the pleasure of the suitor, for having choice of the forum, he would seek that most favorable to him. If the mortgagee here had prosecuted his claim in another forum, to which it would appear, that under another code of laws, not administered by it, there were other rights in the same subject matter; it would be the duty, as it has been always

the custom of judicial tribunals in such cases, to allow the question to be decided in that tribunal where all the rights of all the parties could be considered and adjudged.

I have made these remarks, because in the course of the argument, much was said of what was done, and of what might have been done. But no court will enforce a right to the prejudice of some other right, which can only be enforced in another court. If in a court of law, its proceedings are likely to be perverted by suitors to purposes of wrong, a court of equity is open to afford relief. When the judgment of a court has been pronounced, with all parties before it, and the court has competent jurisdiction, it is presumed to be right. But if parties have been excluded, or could not be heard; or a question has been passed over; or could not be decided; and in consequence of this, injustice has been done; then I should be slow to doubt, what so far from doubting I affirm, that there is always a mode open and available by which error may be corrected, omissions supplied, and right and justice administered in the most complete manner. It is not then, because the mortgagee has been stopped, that this indicates more than the authority of a court has been substituted for that of an individual. His rights are still to be determined. He has now no claim in rem; but the proceeds of the sale represent the vessel. His claim is postponed to the shipwrights', because they had a lien which I have sustained as a maritime lien, and prior. But the other material men have no lien; and therefore no remedy in rem. Of course, they cannot have an equity against the proceeds of sale, except as against the owner. Their admission here to be paid from the surplus, is a doctrine at first slowly received; and concerning the true source of which there is not even now the certainty that we might expect and desire. Their claim upon the surplus is worked out through the debtor; and their equity as against him, in the proceeds of a sale, is admitted. But that cannot be compared with the claim of a mortgagee, which existed as a lien affecting the vessel itself, was divested by the action of the court, and postponed to another lien; but which by the plainest principles of equity survives against the proceeds, or the surplus which remains, to the exclusion of all others who are but general creditors.

I have no hesitation in holding, that after the payment to James Marsh & Son, John Commins is entitled to be paid the amount due him under his mortgage. The balance then remaining will be divided ratably between Bee & Tylee and Henry Smyzer. The decree will be so entered.

MARSH (MOLYNEAUX v.). See Case No. 9,703.

MARSH (MURRAY v.). See Case No. 9,965.

Case No. 9,118.

MARSH v. N. W. NAT. INS. CO.

[3 Biss. 351.] [1]

District Court, E. D. Wisconsin. Oct. Term, 1872.

INSURANCE—POLICY CANCELLED BY MISTAKE—PREMIUM NOT PAID—MUTUAL ACCOUNTS—PARTNERSHIP.

1. An insurance company is liable to the legal holder of a policy, though the person who procured it had, by mistake, ordered it cancelled.

2. The fact that the premium had not been actually paid is no defense against a bona fide holder Mutual accounts have, in such case, the effect of payment.

3. A man who buys and ships for a firm in another city, whose funds are used, the profits or loss to be divided, and each shipment to be a distinct venture, is not a partner, and the firm can sustain a libel on a policy indorsed to them, without prejudice from his orders or mistakes.

This was a libel in personam on a policy of insurance.

The libellants, Marsh & Sternberg, partners in trade in the city of Buffalo, made an agreement with William B. Hibbard, of Milwaukee, to purchase wheat for them at Milwaukee and ship it to Buffalo, libellants to pay for each cargo, and if there should be a profit on a cargo Hibbard was to have half the profit, and if there were a loss on a cargo he was to pay half the loss. Libellants were to transact the business in Buffalo, and Hibbard in Milwaukee. Under this arrangement Hibbard, with three persons associated with him, purchased and shipped several cargoes, each purchase and shipment being a distinct venture.

Wheat was purchased by Hibbard and his associates with funds advanced by the Wisconsin Marine and Fire Insurance Company Bank, of which David Ferguson was cashier, and shipped on board the schooner Excelsior, in the name of D. Ferguson as shipper, for Marsh & Sternberg, Buffalo. A certificate of insurance was issued by the respondent on the 7th day of October, 1871, to William B. Hibbard, for the amount of $7,500, "loss, if any, to be paid to D. Ferguson, cashier, or order hereon, on return of this certificate." Hibbard and his associates were agents of Eastern insurance companies, and, as such agents, issued certificates of insurance on the same cargo. October 9th Hibbard forwarded to libellants a statement of the purchase of the wheat, of the shipment, of the expenses of shipping and of insuring, and on the same day he gave Ferguson his draft, in favor of Ferguson, with the bill of lading and certificates of insurance. Ferguson indorsed the draft, bill of lading and certificate of insurance, and forwarded them to Buffalo, where Marsh & Sternberg honored the draft on the 12th of October, and received the bill of lading and certificate of insurance. October 11th Marsh & Sternberg sent to Hibbard a tele-

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

graph dispatch: "Security, Western, City Marine, probably all used up. Have cancelled policies on Athenium, Excelsior, Clayton Belle, renewed in New York, where we insured. Monterey will get it here if not in good companies." Hibbard, mistaking the purport of this dispatch, gave notice in the office of respondent on the 12th October that their policy on the cargo of the Excelsior was cancelled. The vessel foundered on Lake Huron on the 15th October, and the cargo became a total loss. Hibbard and the officers of the respondent considered the risk cancelled. When Hibbard gave notice of the cancellation the officers of the respondent demanded return of the certificate and the adjustment of a portion of the premium. October 11th Marsh & Sternberg wrote to Hibbard stating: "We have secured insurance in New York in place of Security, Buffalo Fire and Marine, and Buffalo City, for fear they might not be able to pay loss, should any occur." These are the companies of which Hibbard and his associates were the agents. Notice was given to the respondent of the mistake forty-eight hours after the loss. October 21st Marsh & Sternberg wrote to Hibbard repudiating his notice of cancellation, as done without their knowledge or authority. The certificate of insurance had not been returned to the respondent, and Marsh & Sternberg hold it and bring this libel to recover the amount of the insurance.

Proof of loss was given to respondent. Libellants never cancelled this risk, nor authorized any person to do so. They paid the draft on the faith of the bill of lading and the certificate of insurance.

The answer alleges that these libellants were partners in this business with W. B. Hibbard and his associates; that the risk was cancelled, and that the premium had not been paid.

Hibbard and his associates, as insurance agents, and the respondent did a mutual credit business, and at the end of every month they liquidated their respective accounts. The premium in this case had not been adjusted or paid, nor any attempt made to collect it; nor had the risk been cancelled on Hibbard's books. An entry of cancellation was made on the books of respondent.

The cargo of the schooner Excelsior, as well as those of the vessels previously purchased and shipped, was purchased in pursuance of the agreement for dividing profits and losses. This constituted the libellants, Marsh & Sternberg and Hibbard and his associates, partners in the transaction, and clothed each of the partners with all the powers of a partner over the business and property of the joint venture. Colly. Partn. p. 13, § 16; Story, Partn. §§ 2, 19, 21, 27; Smith, Merc. Law, 39. That a partner has power to transact the whole business of the firm, whatever that may be, and consequently to bind his partners in such transaction as entirely as himself, is a general principle relating to partnership transactions long since settled, and now no longer open to question. Marshall, C. J., in Winship v. Bank of U. S., 5 Pet. [30 U. S.] 552, 561; Smith, Merc. Law, 66, 72, 73; Will. Eq. Jur. 190, 191. Each partner is the agent of the other, and can make any lawful contract in relation to the business of the firm. Reid v. McNaughton, 15 Barb. 177; Tapley v. Butterfield, 1 Metc. [Mass.] 515; Locke v. Stearns, Id. 560.

When Hibbard purchased the wheat it was the property of all the parties interested. When he borrowed the money to pay for it, and pledged the wheat as security, it still remained the property of the parties jointly interested, subject to the lien upon it as security for the payment of the money loaned, and when that money was paid by Marsh & Sternberg it was paid for the partners, who still owned the wheat subject to a proper accounting as between themselves.

The policy of insurance was effected for joint benefit. It is of no consequence that it was in Hibbard's own name. The court would compel its application for the benefit of those interested. The policy was cancelled by mutual agreement in good faith on both sides, and after the premiums had been partially earned, and before a loss had occurred, and both parties were bound by it.

It is claimed that Hibbard only acted as the agent of the libellants in relation to the cancellation of the policy, and exceeded his instructions in that regard; still his act was binding on the libellants. An agent acting within the general scope of his authority binds his principal, notwithstanding he may have departed from his instructions, provided the party with whom he contracts had no knowledge of the instructions. Fland. Ins. 157; Perkins v. Washington Ins. Co., 4 Cow. 645; New York Cent. Ins. Co. v. National Protection Ins. Co., 20 Barb. 468; Lightbody v. North American Ins. Co., 23 Wend. 18.

Hibbard was then agent for transacting the general business of purchasing, shipping and insuring here. If he misunderstood the purport of the telegram of the 11th October, and in cancelling the insurance in question acted according to his then understanding of it, but in excess of his instructions, under the authorities cited above the libellants are bound by his act. Even if he stood in the position of an agent, the loss should fall upon his principals, and not upon the insurance company, the officers of which had no knowledge of what his instructions were. The telegram was not sent to the insurance office at the time of the order to cancel. It was never seen by any officer of the company until after the loss.

There is nothing in the claim of the libellants that they are assignees of the insurance to take this case out of the general rule. They are a part of the original parties to the transaction, and when they paid the draft drawn by Hibbard the transaction was remitted to precisely the position it would have

occupied if they had forwarded the money to Hibbard before the purchase and there had been no transfer of the insurance. Besides, no notice was given to the insurance company of the assignment of the certificate of insurance to the libellants, and the doctrine stated in 2 Duer, Ins. 51, 52, note, and Id. 59, 60, has no application to the case under consideration.

The libellants were not assignees of the insurance for their sole benefit. They were assignees, if at all, for the parties jointly interested—for the partners.

Emmons & Hamilton, for libellants.
Palmer, Hooker & Pitkin, for respondent.

MILLER, District Judge. Under the agreement between Marsh & Sternberg, the libellants, and William B. Hibbard, he purchased several cargoes of wheat in Milwaukee, and shipped them for Marsh & Sternberg to Buffalo. This business continued through a portion of the season of 1871. The associates of Hibbard were not known to or recognized by Marsh & Sternberg as partners. Hibbard associated these persons with him on his own account, without regard to Marsh & Sternberg. These persons were in no sense the partners of Marsh & Sternberg, nor do they in any manner change the original relations between the parties. Hibbard may have an account to settle with his associates, but Marsh & Sternberg have no connection with them, as partners or otherwise.

The purchase and shipment of each cargo was a distinct and separate venture. By the arrangement the parties mutually granted to each other a legal remedy. Hibbard acquired a legal right to prosecute an action at law against Marsh & Sternberg for his share of the profits on the respective cargoes, and they had a right of action against him for their share of each loss. Hibbard did not acquire an interest as a partner with Marsh & Sternberg in any of the cargoes. A bill in equity would not lie between these parties for an account of profit and loss, as each party had a complete remedy at law, and Hibbard had no share or interest in the wheat. His interest in the business was provided for by way of compensation, and nothing more. Independently of the agreement, one venture or transaction would not make the parties technical partners, requiring a bill in equity for adjusting their accounts. Musier v. Trumpbour, 5 Wend. 274; Brubaker v. Robinson, 3 Pen. & W. 295; Gillis v. McKinney, 6 Watts & S. 78; Coles v. Coles, 15 Johns. 159; Brigham v. Eveleth, 9 Mass. 538; Galbreath v. Moore, 2 Watts, 86; Borrell's Adm'r v. Borrell, 9 Casey [33 Pa. St.] 492; Van Amringe v. Ellmaker, 4 Barr [4 Pa. St. 281.

There are decisions to the contrary, but courts are inclined to relieve parties of the complication of proceedings in equity in this respect as far as possible. But speculation is unnecessary, as the agreement between the parties fixes their respective rights. The objection in the answer in regard to the alleged partnership raises a question of remedy and not of right; and in this case there cannot be necessity of a settlement between the libellants and Hibbard for either profit or loss, as the cargo became a total loss by the vessel foundering before reaching her port of destination.

The dispatch of Marsh & Sternberg to Hibbard, on which he ordered the risk cancelled, was dated October 11th. On that day Ferguson, in trust for the bank, held the legal title to the cargo and the beneficial interest under the insurance. On that day no person could control the insurance but himself, and neither Marsh & Sternberg nor Hibbard, nor the respondent could disturb his interest in the insurance without his consent. Any act of theirs jointly or severally in this regard, would be void as to him.

On the morning of the 12th October Marsh & Sternberg, having honored the draft, became the legal owners of the cargo by indorsement of Ferguson of the bill of lading, and the assignees of the certificate of insurance, entitled to be paid the loss, if any, on return of the certificate. They acquired the same rights as Ferguson in the insurance. The right of Ferguson or his assigns to the loss became vested in Marsh & Sternberg, who have the same power as he had to maintain this libel.

William B. Hibbard had no authority from any source to cancel, or give notice of cancellation, of the policy of insurance while it was in the hands of a bona fide holder entitled to the payment of the loss, if any. At the time he gave the notice to respondent the certificate of insurance had passed to Marsh & Sternberg. He gave the notice without their knowledge or consent; and for this reason the cancellation, if made, was void as to Marsh & Sternberg, and it was also void as to them on the ground of mistake on the part of Hibbard. It cannot be claimed that this mistake prejudiced the respondent, as the loss was total, and the company could not have prevented it. If the loss had been partial, possibly the company might, by the notice of cancellation, have been induced not to investigate the loss. By the terms of the insurance contract, in case of loss, the money was payable to Ferguson or order on return of the certificate. The company demanded the certificate, which was not returned, but was in the hands of Marsh & Sternberg. It also demanded a portion of the premium, which was not adjusted nor paid. A mere memorandum of cancellation was made on the books. It is questionable whether the liability of the company did not continue, even in the absence of the mistake, until the certificate was returned and cancelled and the rate of premium fixed.

To hold the contract of insurance rescinded

under these circumstances would sanction a very loose manner of business where the utmost strictness is called for. At all events the error of Hibbard was corrected by notice to the company, and the original rights and liabilities of the parties were not disturbed or changed. The company has not been released from its obligation to pay the amount of the insurance.

The objection that the premium had not been paid cannot avail the respondent. The company and Hibbard's insurance agency mutually credited each other, and at the end of every month they struck a balance of their accounts. This was a payment in effect; and at all events the certificate that W. B. Hibbard is insured implies a receipt of the premium, which is binding in the hands of third persons and innocent holders of the certificate. The legal presumption was that the premium had been paid.

Decree for libellants.

NOTE. That the fact that the premium had not been actually paid is not a good defense to an action on the policy, consult Trustees of First Baptist Church v. Brooklyn Fire Ins. Co., 28 N. Y. 153; Post v. Aetna Ins. Co., 43 Barb. 351; Boehen v. Williamsburgh Ins. Co., 35 N. Y. 131; Pino v. Merchants' Mut. Ins. Co., 19 La. Ann. 214; De Gaminde v. Pigou, 4 Taunt. 246.

The cancellation of a policy must be the act of the principals; a broker or agent, even though the policy may have been left in his hands, has no right to demand or consent to the cancellation. Xenos v. Wickham, 33 Law J. C. P. 13.

Case No. 9,119.

MARSH v. SAYLES et al.

[5 Fish. Pat. Cas. 610; 3 Biss. 321; 2 O. G. 340; 4 Chi. Leg. News, 461; 7 Am. Law Rev. 355.] [1]

Circuit Court, N. D. Illinois. Sept., 1872.

PATENTS—DELAY IN RENEWING APPLICATION—ABANDONMENT—REJECTION—PRESUMPTION.

1. Where an inventor, whose application was rejected and withdrawn in 1851, delayed to renew it until 1869, and meanwhile—viz., 1859—a patent on substantially the same improvement was granted to another, the existence of which patent became known to the first inventor in 1865: *Held*, that the legal inference from these facts is that he acquiesced in the action of the patent office, and abandoned whatever claim he had to the public.

[Cited in United States Rifle, etc., Co. v. Whitney Arms Co., Case No. 16,793. Distinguished in Colgate v. Western Union Tel. Co., Id. 2,995.]

2. It is not material whether the rejection of his claim was right or wrong. Even if wrong, he was obliged, if he insisted on his claim, to take some action on the subject within a reasonable time, either by an appeal from the commissioner or by a bill in equity in the proper court.

3. The simple allegation in a bill in equity, under section 52 of the patent act, that the inventor did not abandon his claim to the public, is not enough to rebut the presumption to the contrary arising from the above state of facts.

4. The first inventor ought to have a patent for his invention, if he seeks to obtain it within a reasonable time and by the methods the law points out.

5. The proviso of section 35 of the act of 1870 [16 Stat. 202], which provides for the renewal of rejected and withdrawn applications, is subject to the implied condition that the applicant has not lost his right to make the application by abandonment or surrender of the same.

6. This proviso was not intended to restore what had been voluntarily given to the public, or what had become the property of the public by the neglect or refusal for a series of years to prosecute what was originally a valid claim.

Demurrer to bill in equity. Suit brought by complainant, Hiram H. Marsh, to obtain a patent upon an "improvement in cultivators," by proceedings under section 52 of the patent act of 1870, which reads as follows: "That whenever a patent on application is refused, for any reason whatever, either by the commissioner or by the supreme court of the District of Columbia, upon appeal from the commissioner, the applicant may have remedy by bill in equity; and the court having cognizance thereof, on notice to adverse parties, and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear. And such adjudication, if it be in favor of the right of the applicant, shall authorize the commissioner to issue such patent, on the applicant filing in the patent office a copy of the adjudication, and otherwise complying with the requisitions of law. And in all cases where there is no opposing party, a copy of the bill shall be served on the commissioner, and all the expenses of the proceeding shall be paid by the applicant, whether the final decision is in his favor or not." In addition to Thomas Sayles and the other parties interested in what was alleged to be a conflicting patent, granted to James Dundas Feb. 8, 1859 [No. 22,859], and reissued Oct. 16, 1866 [No. 2,380], a copy of the bill was served upon the commissioner of patents, who thereupon filed a demurrer to the bill. The case came up for argument upon the demurrer, which was based upon several distinct points, the most prominent among which were, first, that the facts, as set forth in the bill, showed that the plaintiff had abandoned the invention, and therefore was not entitled to the relief sought; second, that inasmuch as Marsh's proceedings before the patent office were, in contemplation of law, ex parte, he had a right, under section 48 of the act of July 8, 1870, to appeal from the adverse decision of the commissioner to the supreme court of the District of Columbia, sitting in banc, and that he was bound to exhaust his remedy in that direction before proceeding by a bill in equity, as provided in section 52, this latter section, it was urged, being de-

[1] [Reported by Samuel S. Fisher, Esq., and by Josiah H. Bissell, Esq., and here compiled and reprinted by permission.]

signed to furnish a remedy immediately upon a refusal by the commissioner to grant a patent only in those cases—e. g., in interferences—in which his action is made final. Only one of the various grounds of demurrer was considered by the court in its opinion.

Goodwin, Larned & Towle, for complainant.

Fisher & Duncan, for commissioner of patents.

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

DRUMMOND, Circuit Judge. This is a bill filed under section 52 of the revised patent law of July 8, 1870, which authorizes a bill to be filed in equity when a patent has been refused. A demurrer has been put into the bill by the commissioner of patents; and, so far as it is necessary to state the facts of the case, they here follow:

In July, 1851, Marsh, the plaintiff, made application for a patent for an "improvement in cultivators." The same month his claim for a patent was rejected by the office. In November, 1851, he made application for, and there was refunded to him, twenty dollars of the duty fee which he had paid previously.

In August, 1851, James Dundas applied for a patent for substantially the same improvement. In December, 1852, this application was rejected by the patent office. This rejection, some years after, was reconsidered, and in February, 1859, a patent was granted to Dundas.

In October, 1866, Dundas obtained a reissue; and very soon after, Thomas Sayles, one of these defendants, as assignee of the Dundas patent, filed a bill in this court against one Hapgood and others, to restrain them from infringing the letters patent of Dundas. In October, 1869, this court decided the Dundas patent invalid, because Marsh was the prior inventor. The case is reported [Case No. 12,420].

Marsh did not know of the application and issuing of the patent to Dundas till 1865. He waited for the determination of the suit of Sayles v. Hapgood [supra], and in December, 1869, renewed his application, and in November, 1870, his claim was rejected. Decisions of Commissioner of Patents, 1870, p. 151.

In addition to these facts set forth in the bill, it alleges that Marsh never abandoned his invention to the public. There is no explanation whatever given, than as above, of the long delay, except that he supposed the decision of the commissioner in 1851 was conclusive, and that he was wholly uninformed of his rights. And he insists the patent office is estopped from setting up, in bar of his renewed application, the wrongful rejection of his claim and the issuing of a patent to another.

Various objections are taken in the demurrer to the bill, but we will consider only one, viz., that the bill does not make such a case as to entitle the plaintiff to the relief he seeks. And it seems to us that the legal result from the facts stated in the bill is, notwithstanding his denial to the contrary, that he did acquiesce in the action of the patent office in 1851, and therefore did abandon whatever claim he might have to the public; and, according to the view we take, it is not material whether the rejection of his claim was right or wrong. Concede that it was wrongful: if he insisted on his claim he was obliged, within a reasonable time, to take some action on the subject, either by an appeal from the commissioner or by a bill in equity in the proper court.

In this case he made no motion for more than eighteen years after the rejection of his claim, during all which time his invention remained in the patent office with such description as he had chosen to give. We think the simple allegation that he did not abandon his claim to the public is not enough to rebut the presumption arising from this state of facts. It is not necessary to decide whether any satisfactory explanation could be given of so long a delay. It is not furnished in this bill.

It is plain that, in consequence of the decision in the case of Sayles v. Hapgood [supra], an attempt was afterwards made to recall an abandoned claim. To sustain this bill would be to vitalize many an old forgotten claim that now lies buried under the rubbish of the patent office. We think it no answer to say that for his invention Marsh ought to have had a patent; because the meaning of that is, he ought to have had it, if he, within a reasonable time, and by the methods the law points out, sought to obtain it.

Section 35 of the patent law of 1870, declares "that any person who has an interest in an invention where a patent was ordered to issue, on the payment of the final fee, and who has failed to make payment within six months from the time when it was allowed, * * * shall have a right to make an application for a patent the same as in an original application: "Provided, that the second application be made within two years after the allowance of the original application;" * * * "And provided further, that when an application for a patent has been rejected or withdrawn prior to the passage of this act, the applicant shall have six months from the date of such passage to renew his application, or to file a new one; and, if he omit to do either, his application shall be held to have been abandoned."

It is argued that the plaintiff is within the terms of this section, and that the second proviso applies literally to the facts of this case. It is true that the application of the plaintiff for a patent was rejected prior to the passage of the act, and it is insisted that the sequence to this is that the applicant has six months from the date of its passage to

renew his application. This is in fact the letter of the proviso, and yet it must be true that it is subject to the implied condition that the applicant has not lost his right to make the application, by abandonment or surrender of the same. It could not have been intended to restore what had already been voluntarily given to the public, or what had become the property of the public by the neglect or refusal for a series of years to prosecute what was originally a valid claim. Here the neglect or refusal had continued for more than eighteen years, and we can not think that the proviso in section 35 was intended to include so stale a claim as this. It may be admitted that, as stated in the last clause of section 35, abandonment is a question of fact, and we hold, notwithstanding the denial and pretexts to the contrary stated, that Marsh did in fact abandon his claim to the public; that such is the necessary conclusion from the allegations contained in the bill.

The demurrer will, therefore, be sustained.

[For another case involving this patent, see Sayles v. Hapgood, Case No. 12,420.]

MARSH (SEYMOUR v.). See Case No. 12,687.

Case No. 9,120.

MARSH v. UNITED STATES.

[Hoff. Land Cas. 301.] [1]

District Court, N. D. California. Dec. Term, 1857.

MEXICAN LAND GRANT—LIMITATION OF QUANTITY.

The limitation of quantity in the fourth condition of the grant must govern, and the claimant confirmed to the precise quantity of three square leagues.

Claim for twelve leagues of land in Contra Costa county, rejected by the board, and appealed by the claimant.

Horace Hawes, for appellant.

P. Della Torre, U. S. Atty., for appellees.

HOFFMAN, District Judge. The claim in this case is for a tract of land called "Los Meganos," granted to José Noriega, October 13th, 1835, and approved by the territorial deputation, October 15th, 1835. The final documento and titulo issued December 2d, of the same year. The original grant was not produced to the board, nor was any satisfactory evidence of its contents given. The expediente, however, containing the petition, informes and decree of concession, was found duly archived, and on these documents, together with parol proof that the titulo had in fact issued, the claimant relied for confirmation. In his petition, Noriega set out the boundaries of the land solicited with some particularity, and states its extent to be four leagues from south to north, and three from east to west. Inasmuch as the decree of concession and the approval of the deputation showed that the land of "Los Meganos" had been granted, it was contended that the lost titulo must have embraced the land solicited in the petition. It was not, however, urged that all the land embraced within the boundaries had been granted, and the claim was confined to a tract of twelve square leagues which had been, at the instance of the claimant, surveyed by the surveyor general. By this survey, the last line which enclosed the rancho had been so run as to include the precise quantity of twelve leagues. Had the surveyor's lines been extended so as to embrace the entire tract according to the principles on which the survey was founded, the land would have been found to be about fifteen square leagues in extent. A survey, according to the description contained in the petition, would, it is observed by Mr. Commissioner Felch, embrace some twenty or twenty-five square leagues of land. Since the cause has been pending on appeal, the original record of the titulo has been produced from the archives, where it is set out at length. The fourth condition states the extent of the granted land to be a little more than three square leagues, and it contains the usual direction for a judicial measurement and a reservation of the sobrante.

It is urged that this limitation should be disregarded as being repugnant to the obvious intention of the grantor, and probably introduced by mistake. It is not, perhaps, very clear what the claimant [Alice Marsh] supposes herself entitled to. Whether she contends that the grant should be treated as a grant by metes and bounds, and the whole tract embraced within the boundaries mentioned in the petition should be confirmed to her, to the extent of twenty or twenty-five leagues, or whether, as it appears to have been admitted before the board, she should be restricted to the quantity of twelve leagues, according to the survey procured to be made. It is presumed, however, that independently of the limitation contained in the fourth condition, it would not be contended that the governor could have intended to grant a tract of twenty or twenty-five leagues in extent, when the petitioner himself stated it to contain only twelve leagues, and two of the witnesses a much smaller quantity; and such seems to have been the view taken of the grant by the counsel for the claimant. The grant cannot, therefore, be treated as a grant by metes and bounds, and the only question is, which of the specifications of quantity shall govern—that contained in the petition, or that contained in the grant?

It is urged that the governor by his decree of concession, and the deputation by confirming the title to "Los Meganos," clearly indicated their intention to grant the tract as described in the petition, and of the extent therein mentioned. Had the boundaries of this tract been found to embrace only the quantity stated in the petition; had the at-

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

tention of the governor been particularly directed to the question of its extent; had he been apprised of its extent by the testimony of witnesses, and with these facts before him, repeated in his concession, and in the title, the boundaries as set forth in the petition; and had the deputation confirmed with express reference to those boundaries, we might have supposed, as in the case of Rosa Pacheco, that the limitation in the condition was the result of a clerical error—provided that in attributing to the governor the intention to grant by metes and bounds, we did not suppose him to have exceeded the quantity of eleven leagues to which his granting power was limited. But in this case the proceedings show, that in all probability the limitation in the condition accurately expressed the intention of the governor and of the assembly.

The petition was referred to the alcalde of the capital to take information, by the oaths of three competent witnesses, as to the qualifications, etc., of the petitioner, and the extent and character of the land. One of them states that the tract petitioned for may be three leagues long, and in width from two leagues to less than one-half a league. The second witness states its extent to be about two and one-half or three leagues in length, and from one-half to two leagues in width. The third witness states it to be four or five leagues in length, and three in breadth. It thus appears that by the evidence of two out of three witnesses the governor and the deputation were apprised that the extent of the land of "Los Meganos" was about three leagues. When, therefore, they granted the land by that name, it is at least as probable that they intended a tract of the extent sworn to by the two witnesses, as of the larger extent sworn to by the third or as represented by the petition. The limitation in the condition of the grant removes all doubt upon the subject, and unequivocally expresses the intention which, without it, we might well have attributed to the grantor.

The claim to twelve leagues rests entirely upon the supposition that the governor intended, by the term "Los Meganos," a tract of the extent represented by the petitioner. But when we find him informed by the depositions of two witnesses that the land of that name only included about three leagues, there is surely as much reason to suppose that he meant a tract of the smaller extent as of the larger. There is therefore nothing repugnant to the apparent intention of the governor or the deputation in the introduction of the limitation of quantity in the fourth condition. Nor can I perceive on what grounds the court would be authorized to strike from the grant so important a part of it. As the grant can in no case be deemed a grant by metes and bounds, the words "a little more than," which precede the words "three leagues," are not susceptible of any definite construction. They were probably inserted as an authority to the judicial officer, slightly to increase the quantity for convenience of boundary, or similar reasons. As no such discretion can be confided to the surveyor general, those words must be rejected for uncertainty, and the claimant confirmed to the precise quantity of three square leagues, to be located within the boundaries described in the petition, in the form and divisions prescribed by law for surveys in California, and embracing the entire grant in one tract.

Case No. 9,121.

MARSH et al. v. WARREN et al.

[14 Blatchf. 263;[1] 13 O. G. 7; 14 O. G. 678; 24 Pittsb. Leg. J. 207; 9 Chi. Leg. News, 395; 4 Am. Law T. 126; 23 Int. Rev. Rec. 282, 288; 2 Cin. Law Bul. 203.]

Circuit Court, S. D. New York. June 19, 1877.

COPYRIGHT—PRINTS—LABELS—REGISTRATION.

The statutory provisions which confer the rights and regulate the remedies of persons who register in the patent office, under the act of June 18, 1874 (18 Stat. 78), prints or labels designed to be used for any other articles of manufacture than pictorial illustrations and works connected with the fine arts, are those which are contained in sections 4948–4971 of the Revised Statutes, in regard to copyrights.

[Cited in Rosenbach v. Dreyfuss, 2 Fed. 223; Higgins v. Keuffel, 30 Fed. 627.]

[This was a motion for an injunction by James L. Marsh and others against George Warren and Alexander L. Fairweather.]

Amos Broadnax, for plaintiffs.
Hall & Blandy, for defendants.

BLATCHFORD, District Judge. The statutory provisions which confer the rights and regulate the remedies of persons who register in the patent office, under the act of June 18, 1874 (18 Stat. 78), prints or labels designed to be used for any other articles of manufacture than pictorial illustrations and works connected with the fine arts, are those which are contained in sections 4948–4971 of the Revised Statutes, in regard to copyrights. The exclusive right of printing and publishing, given by section 4952, is given to the author or proprietor only on complying with the provisions of sections 4948–4971. One of those provisions (section 4956) is, that no person shall be entitled to a copyright unless he shall, "before publication," deliver at the proper office, (in this case the patent office,) a printed copy of the title of the article in respect of which the copyright is to be claimed. In the present case the first label and its title were registered September 24th, 1875. I understand the bill to state that this label was used by the plaintiffs' assignors, in the sale of their mixture, and of the bottles containing it, to which such label was affixed, before that date, and as early as the mixture itself was sold, to wit, June or July, 1875. The sale

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

of the bottles of the mixture, with the label on it, was a publication of the label. At all events, the bill does not allege that the title and label were deposited before the publication of the label. Such averment is necessary. As to the other three labels, they and their titles were registered March 20th, 1877, and I understand the bill to state that those labels were used by the plaintiffs before that date, in the sale of the mixture.

The motion for an injunction is denied.

Case No. 9,122.

MARSH v. WHITMORE.

[1 Hask. 391.] [1]

Circuit Court, D. Maine. Feb., 1872.[2]

PLEADING IN EQUITY — WEIGHT OF ANSWER — PLEDGE BONDS—SALE AT AUCTION — PURCHASE BY PLEDGEE—VOIDABLE—LACHES — NEGLECT BY ATTORNEY—INDEMNITY.

1. The answer to a bill in equity, so far as responsive, is to be taken as true, unless disproved by evidence of greater weight than the testimony of a single witness.

2. Bonds, pledged as security for liability incurred by the pledgee, cannot be purchased by him, even though they are sold at public auction.

3. Bonds, purchased by the pledgee at such sale, may be redeemed by the pledgor at his pleasure within a reasonable time.

4. Such purchase is voidable by the pledgor, and not absolutely void.

5. The pledgor, having knowledge of all the circumstances of the sale, after the lapse of eleven years is barred in equity from avoiding the sale by his own laches.

6. If such pledgor would avoid the effect of each lapse of time in equity, on the ground of concealed fraud, he must set forth in his bill with particularity, when and by what means the fraud was discovered.

7. Neglect, by an attorney at law of his duty in collecting demands left with him for collection, is not a subject of equity jurisdiction, as the parties have a full and complete remedy at law.

8. An officer has a right to require indemnity from the plaintiff before he is compelled to attach property of the debtor.

9. An attorney at law is justified in acting according to the decision of the supreme court of a state, although it be afterwards reversed by the supreme court of the United States.

In equity. Bill by a pledgor [George S. Marsh], charging that the respondent [Nathaniel W. Whitmore] fraudulently converted to his own use bonds given him as a pledge, and asking that he account for the same. The answer denied all fraud, and alleged that the bonds were lawfully sold and applied to the payment of the pledgor's debt, the payment of which they were pledged to secure.

Hanno W. Gage, A. G. Stinchfield, and Sewall C. Strout, for orator.

Artemas Libbey, for respondent.

[1] [Reported by Thomas Hawes Haskell, Esq., and here reprinted by permission.]

[2] [Affirmed in 21 Wall. (88 U. S.) 178.]

FOX, District Judge. The rule being well established in equity, that all the allegations of the answer, which are responsive to the bill, shall be taken as true, unless they are disproved by evidence of greater weight than the testimony of a single witness, it becomes important to compare the bill and answer to ascertain how far the latter is to be deemed evidence in the case, as the only evidence produced by the complainant in support of his bill is his own testimony, and some few exhibits which are not very material.

The bill was filed March 12, 1869, and charges, that in 1855 the complainant owned $6,500 of bonds of the Kennebec and Portland Railroad, issued in October, 1852, and $2,000 of notes of said corporation; that being indebted to certain parties in the state of Maine, he retained the respondent, a counsellor at law, as his counsel and attorney to effect a compromise with his creditors, the respondent agreeing to advance money for that purpose, if the complainant would entrust and deliver to him the bonds and notes as security and indemnity for his advances and a fair and reasonable compensation for his services; that confiding in the respondent as his counsel and agent, he delivered to him the bonds and notes, who received the same upon the trust aforesaid, and agreed not to sell or dispose of said securities without complainant's consent, and not to claim or demand thereof more than was fair or sufficient to fully indemnify him for his advances and services, and when indemnified, to return to complainant on demand so much and such parts thereof as were not necessary to indemnify him; that at the time the securities were delivered to Whitmore, complainant instructed him to sue the notes and attach certain personal property of the corporation pointed out by complainant, and if not thus paid to collect the same from the stockholders who were personally liable, and that Whitmore agreed to attend diligently to the collection of the same. The bill further charges as follows:

"That on or about the first day of October, A. D. 1856, at said Gardiner, your orator not consenting thereto, the said Whitmore, in violation of said trust and of his duty as counsel, attorney, and agent of your orator as aforesaid, caused said bonds to be sold at auction.

"And your orator further shows unto your honors that the said Whitmore, as well before as after said sale, pretended and represented to your orator that he had expended large sums of money and incurred great expense for and on account of your orator in the premises, and that his said advances and services, together with the amount due and owing him for his said advances to your orator, greatly exceeded the fair value of said securities entrusted to him as aforesaid; that the sale of said bonds as aforesaid was a bona fide sale

after due and sufficient notice and advertisement thereof; that said bonds brought all they were fairly worth in the market; that the purchaser was a bona fide purchaser thereof at said sale; that said notes were of no value and were not collectible of said company or of the stockholders of said company, and that your orator was largely indebted to him for his said advances and services after he had fairly and faithfully realized out of said securities so entrusted to him, all they were fairly worth; and your orator confiding in him as his counsel, attorney, and agent as aforesaid, believed such representations to be true.

"And your orator is now informed and believes and charges, that the amount due and owing the said Whitmore by your orator, for his said advances to your orator and on his account, and for services rendered as aforesaid, was the sum of twenty-five hundred dollars or thereabouts, and no more; that the representation of the said Whitmore, that there was due him from your orator a much larger sum than said securities were fairly worth, or than could be fairly realized therefrom, were and are untrue; that the sale of said bonds as aforesaid was not a bona fide sale upon due notice and sufficient advertisement thereof; that Robert Thompson, who attended said sale and became the purchaser of said bonds, did so by the procurement of said Whitmore; that said Thompson bid in said bonds not for himself or on his own account, but for and on account of said Whitmore, and for much less than the real value therefor, viz.: for and at the rate of five cents on a dollar or thereabouts, as your orator is informed and believes; that the said bonds were never delivered to the said Thompson after said pretended sale, and he paid nothing therefor; that said bonds were at the time of the sale and representations aforesaid, as the said Whitmore well knew, of the fair value of $6,500 or thereabouts, and said sale was so made in order to deceive, defraud, and injure your orator in the premises, and for the purpose of defeating and extinguishing said trust and your orator's right to reclaim and redeem said securities, and that said Whitmore might obtain the title to the same for much less than the real value thereof; that said notes were at the time they were received by said Whitmore and long afterwards collectible of said company and of the stockholders of said company, as the said Whitmore well knew; and that if said notes had not been collected by said Whitmore, the failure to collect them is attributable solely to his gross neglect, by reason whereof he has become and is justly chargeable with the full amount of said notes and interest thereon.

"And your orator further alleges, that he did not, until lately, by reason of the fraudulent concealments of said Whitmore in the premises, come to a knowledge of the matters and things alleged; that he was ignorant touching the fraudulent conduct and practices of said Whitmore; and that he was wholly ignorant of his rights in this regard, or that he could have redress at law or in equity touching the premises, and remained so till he had consulted counsel and been advised just previous to filing this bill of complaint; that within two years he had demanded of said Whitmore an account of said trust property and of the amount received by him on account of the same which he unreasonably neglected and refused to render.

"Wherefore he prays, that he may be required to make full, true and direct answer to all and singular the matters therein before stated and charged, and also to the several interrogatories thereunder written, and that he may be required to account, &c., and surrender the stock received by him in exchange for said bonds, or pay the value thereof in money, &c."

The second specific interrogatory contained in the bill is:

"Whether you caused said bonds or notes to be sold at auction about October 1, 1856, and what advertisement of such sale you gave? Whether they were bid in by one Robert Thompson, and if so, whether he purchased for himself and on his own account, or for you and your account. Whether you delivered the same to him after said sale, and at what price were they struck off to him? If not bid in by said Thompson, then by whom and for how much?"

And the fifth is:

"Whether you represented to the plaintiff after the sale of said bonds, that you had made such sale at public auction after duly advertising the same, and such sale was bona fide?"

The respondent in his answer admits he was an attorney at law, but denies that he was ever employed by the complainant as his attorney or agent, or in any capacity to adjust and compromise his liabilities with his creditors, and avers:

"That he never undertook to effect such a compromise, or to advance money for that purpose, and that the bonds and notes mentioned in the bill were not entrusted to him for any such purpose as is alleged in the bill; but that it is true, that on July 13, 1855, he did receive of the complainant $6,500 of the bonds to secure H. W. Paine and himself against any and all liabilities which they or either of them had or might incur for or on account of said complainant, and especially to secure the payment of three notes of that date, given by complainant to respondent, and amounting to $3,481.57, and also to secure the payment of a note of $90 given by complainant to C. Danforth on which said Whitmore was surety.

"That complainant never paid either of said notes, although repeatedly urged so to do, and that Aug. 27, 1856, he and Paine notified complainant that the bonds would

be sold at auction Oct. 1, 1856, at Gardiner, if the notes were not paid, but at the earnest solicitation of complainant and his promise that he would soon adjust the whole matter, the sale was waived; that complainant paid no further attention to the matter, and on March 20, 1857, respondent notified him he should sell the bonds on the 4th of April, but hoping that the matter might be adjusted the sale was again waived till May 26, 1857, when he advertised the bonds for sale June 20, 1857, at ten o'clock, at the Gardiner Hotel, and notified the complainant in writing of the time and place of sale, and the complainant replied in writing that the respondent must do with said bonds what he thought was best for all concerned, and he fully believed it was best then to sell the same.

"That notice of the sale was published three weeks successively in the Saturday Evening Transcript, a paper published in Gardiner; that he sold $4,500 of said bonds at auction at the time and place appointed for $950, when the sale was adjourned by the auctioneer to the 23d day of said June, at the same place, when the balance of said bonds, being $2,000, were sold at auction for $410.

"That $500 of said bonds were purchased by E. A. Chadwick for $100.50, and $1,000 by W. L. Lewis for $204, and the balance was purchased by the respondent, and immediately after said sale, he sent said Marsh the auctioneer's account of the sale, containing the names of the purchasers and the prices paid, and endorsed the proceeds of said sale on the said notes of the complainant. That the respondent afterwards bought of said Chadwick and Lewis the bonds purchased by them, at the same prices they were sold for, and that the prices for which said bonds sold were the full and fair value of said bonds at that time, and more than he could get offered him at private sale, on enquiry for a purchaser.

"That after that, in 1858 and 1859, said bonds of said railroad depreciated in value so that they sold in the market at ten dollars on the hundred and thereabouts. That in 1858 he sought an interview with the complainant at Augusta in this state, for the purpose of trying to get a full settlement of his matters with him, and the complainant then stated to him that he received the account of the sales sent him by respondent. That he then represented to the complainant that there was considerable due him over and above the proceeds of said bonds and his securities, and urged him to pay, saying to him, that though he was not the owner of the bonds, he could get them, and would do so and give up all if he would pay, but the complainant answered, in substance, that he did not think the bonds worth so much as they sold for, that he must keep what repondent had got, and if complainant ever got able he would pay the balance.

"That he was never guilty of any fraudulent practices towards the complainant in any way, nor did he in any way conceal any facts in regard to the premises from the complainant, but on the contrary, the sale of said bonds was fair, in good faith, after due notice, made for the purpose of realizing the most possible for the complainant from the same, and when they were depreciating in the market, and continued to do so for some years after, till they were worth but half as much as they were sold for at the sale; that all the facts were fully stated to the complainant and he fully approved and ratified the proceedings in regard to the sale of said bonds, and he submits, that if he had not so ratified and approved said proceedings, he has been guilty of such laches, after having a full knowledge of the facts, that he is not entitled to the relief prayed for in his bill of complaint."

To the second interrogatory propounded to him the respondent makes answer:

"He did cause the bonds to be advertised and sold, as is fully set forth in the answer. * * * The complainant was personally notified as early as the first day of June, 1857, or thereabouts, of the time and place of sale. Robert Thompson was not the purchaser of any of the bonds. The names of the purchasers and the prices for which they sold are hereinbefore fully specified."

The main groundwork of the bill is an alleged sale of these bonds by the respondent in violation of his duty as trustee, and a purchase of them by himself, through the intervention of one Thompson, in fraud of complainant's rights, of which acts of the respondent the complainant avers he had no knowledge by reason of the fraudulent concealment of Whitmore, till a short time before the suit was instituted. These matters are charged with fullness and particularity, and the respondent is called upon to make full, true, and direct answer thereto.

In his answer, the respondent denies that any fraudulent practices were committed by him in the sale, but states, that the sale was at public auction after due notice to complainant; that the larger portion of the bonds were bid in by the respondent, and the balance by Chadwick & Lewis, from whom the respondent purchased them at the prices they were sold for at the auction; that the full cash value of the bonds was then realized, viz.: about twenty per cent. and that in a year they fell to ten per cent.

To that portion of the bill which alleges complainant had no notice of the sale, and that respondent was the purchaser, he answers, that immediately after the sale he sent complainant the auctioneer's account of the sale, containing the names of the purchasers and the prices at which the bonds sold, which account the next year at Augusta complainant acknowledged the receipt of.

The complainant in his bill sets forth statements made to him by the respondent,

"that the sale was bona fide, after due and sufficient notice and advertisement thereof; that said bonds brought all they were fairly worth in the market; that the purchaser was a bona fide purchaser thereof;" and also propounds to him interrogatory five on the same subject.

The respondent was thus called upon not only to answer the specific interrogatory, but also the allegations in the bill as to statements and admissions made by him on this matter. In reply thereto he states, that at Augusta in 1858 the complainant admitted he had received the account of sales sent him by respondent, and that respondent told him there was considerable due on the notes over and beyond the proceeds of said bonds, and that though he was not the owner of the bonds he could get them, and would do so, and give up all if he would pay; but that complainant replied that he did not think the bonds worth so much as they sold for and that respondent must keep what he got, and if he ever got able he would pay the balance.

To the fifth specific interrogatory respondent's reply is:

"I did after said sale send to the complainant the auctioneer's account of the sale, giving names of purchasers and prices for which the bonds sold, and afterwards, at the interview in Augusta, in 1858, I did state to the complainant, in substance, but not in the precise words, that I made the sale at auction after duly advertising the same, and that the sale was a good sale. I did not, to my recollection, use the words bona fide. I then stated to the complainant the gross amount of the sale and that it had been applied on the notes."

The court is of opinion that the answer is so far responsive to the charges and substance of the bill as to be evidence in behalf of the respondent, and to prove that the bonds were sold at public auction after due notice to complainant and advertisement in the public prints, and that soon after the sale the complainant had full information as to the prices realized and by whom the bonds were purchased. Is this evidence overcome by satisfactory evidence of the witnesses, or by the testimony of one witness corroborated by facts and circumstances which give it greater weight than the answer?

All the testimony in contradiction of the answer is found in the complainant's deposition; and in that he does state that the first he knew of the bonds being bid in by respondent was in 1869, and that he had a conversation with him a few years before, and he then said, he had no interest in the bonds, and that it was a bona fide sale. But to the seventh cross interrogatory which is: "State whether the respondent met you in the court house in Augusta in 1858 and explained to you the sale of the bonds and the situation of the notes, and what you said to him, if anything?" He answers: "I have some faint recollection of meeting him some time, but can't say when or where. The substance of the conversation I cannot recollect." This answer certainly does not afford much support to the statements found in his bill, which was sworn to by him March 9, 1869, and which purports to give with some detail the admissions made to him by the respondent. The complainant does not present himself as a witness in all respects worthy of entire reliance and confidence as to the truth and accuracy of his statements. The averments made by him in his bill as to the motives and purpose of this pledge of these securities is most clearly shown by the receipt given at the time to be erroneous, and that, on the contrary, the respondent's statement in his answer upon this point is true and correct; and it is equally manifest that the complainant must have been aware, prior to 1869, that the bonds were bid in by respondent, as the bill was filed in March, 1869, and the demand for an account was made by his attorney on the respondent on the 7th of the preceding January, while in his bill he states that he did not until lately come to a knowledge of these matters, and that within two years of the filing of the bill he had demanded an account of his trust from the respondent.

The evidence produced by the complainant is not sufficient, in the opinion of the court, to overcome the effect of the answer according to the well-established rules in equity.

Two causes of action are set forth in the complainant's bill; one on account of the bonds, and the other on account of the notes; and although the bill charges that both bonds and notes were at the same time pledged to the respondent, it is quite certain that such was not the case. The memorandum given July 13, 1855, at the time the bonds were deposited with respondent, does not mention the notes, and the answer states that they were not received by respondent until the next year. "They were left with him for collection with authority to retain them as security for his claims on the complainant;" and the bill charges that "the complainant pointed out certain personal property of the corporation, which he directed to be attached, and if the notes were not thus paid, to proceed against the stockholders on their personal liability, and that if the same are not collected, it has been owing to the gross neglect and willful default of said Whitmore."

This abstract from the bill demonstrates that so far as any claim is made against the respondent on account of the notes, it is solely founded on the neglect of his duty as an attorney at law. There is no charge of any fraud in this respect, but the whole gravamen is neglect; and this portion of the bill is nothing more than inserting in a bill in equity a count in case for neglect of duty as an attorney at law, in collection of demands entrusted to him for that purpose. A full and

complete remedy at law exists, and may be had by complainant, if the facts would sustain such a suit, and it is clear that this court, as a court of equity, should not sanction such an attempt to confound the jurisdiction of the courts.

It is equally clear on the evidence, that the respondent has not been guilty of any negligence in this behalf. From his letter of March 20, 1856, to complainant, it appears "that the officer would not attach the property unless he had a bond of indemnity," which security he had a right to require, and it was the complainant's duty to furnish, if he desired the attachment to be made. It is shown by the testimony of Mr. Bradbury, "that the corporation failed and became insolvent in the latter part of 1855, and has continued insolvent ever since, and that all its property, so far as he knew, was covered by mortgages; that he had many demands in his office for collection which he was unable to collect or secure, could discover no means of securing them, and that in a suit against the stockholders, the supreme court of Maine held they were not liable." This decision was made in 1858, and was almost universally acquiesced in by the profession. Hundreds of actions were decided in accordance with it, and it was not until December, 1864, that the decision was reversed by the supreme court of the United States. An attorney certainly cannot be chargeable with negligence, when he accepts as a correct exposition of the law, a solemn decision of the supreme court of the state.

The memorandum of July 13, 1855, shows, that the bonds were deposited with Whitmore to secure to him the payment of complainant's notes and the note to Danforth, on which Whitmore was surety, and that "the coupons of said bonds may be applied by Whitmore towards said notes." The notes were not paid at maturity, and payment was repeatedly demanded without avail until the bonds were sold at public auction after notice to the complainant. The full market value of the bonds was realized, but the respondent himself purchased $5,000 of the amount at the sale, and was recognized as the purchaser by the auctioneer, and $1,500 were bid off by other parties from whom the respondent purchased them at the price they were sold for at auction. It does not appear that those parties at the sale acted in behalf of, or by any understanding with Whitmore, although it may be inferred such was the case from their subsequent dealings with the bonds.

It is quite clear that a pawnee cannot become the purchaser of the property pledged, even when sold at public auction. The law imposes upon him this restraint to insure good faith and fidelity on his part. This rule has been recognized both by American and Roman law. Story, Bailm. § 319; Maryland Fire Ins. Co. v. Dalrymple, 25 Md. 242; Middlesex Bank v. Minot, 4 Metc. [Mass.] 325.

The sale therefore was tortious and invalid as against the complainant, and it depended on his election whether it should become operative. It was voidable by him, but not absolutely void. The complainant was fully advised of the names of the purchasers and of the amount for which the bonds sold as early as July, 1857. The bonds continued to depreciate in the market until the next year, when they would not have produced more than half the amount for which they had been sold. In 1863 the complainant himself sold some of the same class of bonds for thirty per cent. flat, and Mr. Bradbury states that he received some from him at that rate in payment of his account. It was not until January, 1869, that the complainant made any claim to the bonds, or that the respondent was in any way accountable to him for any breach of contract or misconduct in relation to them.

The complainant, after full knowledge of all that had been done by respondent, acquiesced, and by his silence, sanctioned and adopted the proceedings of the respondent for more than eleven years, during which time there had been great changes in the value of these securities, falling fifty per cent. below the amount for which he had been credited on his notes, and subsequently rising in value till they are said to be worth nearly their face.

Will a court of equity sanction such silence and delay, and allow a party thus to reap so large a benefit from his remissness? The court cannot but be of opinion that it was the duty of the party, when fully advised of what had been done, in some way within six years at least, to have communicated to the respondent his disaffirmance of his conduct, and to have notified him that he should insist on his rights; and that after so long a time, and such great changes in the value of the property, it is not consistent with the principles which guide courts of equity, to permit him to repudiate the transaction at so late a day. If he could repudiate it after a sleep of eleven years, under full knowledge of the wrong inflicted upon him, there would seem to be no limit or restraint which could be imposed upon him or his representative in case of his decease. In Doggett v. Emerson [Case No. 3,960], Judge Story says: "Lapse of time in many cases is a most important consideration and weighs much, and sometimes, est maximi et momenti ponderis, especially when there has been a great change of circumstances as to the character and value of the property in the intermediate period; and a fortiori where the party complaining has been fairly put on his diligence, and has had ample means of inquiring as to all the material facts, and has chosen to lie by in gross indifference and indolence." See, also, Hough v. Richardson [Id. 6,722].

"There is a defence peculiar to courts of equity, founded on lapse of time and the staleness of the claim, where no statute of limita-

tions governs the case. In such cases, courts of equity often act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, by refusing to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights." Story, Eq. Jur. § 1520, approved by the supreme court of the United States, in Wagner v. Baird, 7 How. [48 U. S.] 258; Badger v. Badger, 2 Wall [69 U. S.] 94; Id. [Case No. 718.] The statute of limitations is not pleaded in the case at bar, but laches is relied on and distinctly set forth as matter of defence in the answer, and in the opinion of the court the complainant is clearly chargeable with such neglect of his rights as to bar him of all claim to redress, which otherwise he might have been entitled to.

The complainant avers that he "did not, until lately, by reason of the fraudulent concealments of said Whitmore in the premises, come to a knowledge of the several matters and things hereinbefore alleged," but he does not state when or by what means the fraud was discovered. Such general and unsubstantial allegations of excuse cannot be regarded by a court of equity as sufficient. On the contrary, it is well settled that if the complainant would avoid the effect of lapse of time, or the statute of limitations, on the ground of concealed fraud, he must set forth with particularity when and by what means the fraud was discovered, and the averment so made must be supported by proof. Badger v. Badger, supra. In New Albany v. Burke, 11 Wall. [78 U. S.] 107, the same length of time had elapsed since the transaction had taken place, and the court says, "No excuse is therefore shown for the long delay, and it is difficult to see why they are not barred by the rule in equity analogous to the statute of limitations."

At the hearing, objection was taken that Paine should have been joined as a party respondent. This objection, under the circumstances, does not appear to have been made seasonably, as the case was allowed to come to argument before it was presented. It was admitted that Paine was a citizen of Massachusetts at the time the bill was filed, and it was shown that he never actually received the bonds, or in any way took any control over the same. It did not appear that he had made any advances or incurred any liabilities on account of the bonds, or that he had any claim or right of any kind to the same, or had ever asserted such right, and that the bonds were retained and held by the respondent, and by him disposed of, and that the proceeds had been by him applied toward the satisfaction of the liabilities of the complainant. If he had any reason to suppose that Paine had any interest to be affected by the decree, we think he should, in an earlier stage, have made known his claim and brought it to the knowledge of the court. The bill asks for relief only against the proceedings and dealings of the respondent with the bonds, and makes no claim that Paine has in any way wronged or injured the complainant; and although Paine might properly have been made a party, we do not think that it was necessary that he should be a party in order to have done full justice between the complainant and respondent. If the case could have been sustained on its merits, the case of Story v. Livingston, 13 Pet. [38 U. S.] 359, fully sustains this view of the objection. See, also, 1 Daniell, Ch. Prac. 285.

Bill dismissed, with costs.

[The decree dismissing the bill was affirmed upon appeal to the supreme court. Mr. Justice Field delivered the opinion. 21 Wall. (88 U. S.) 178.]

MARSHAL, Ex parte. See Case No. 14,174.

Case No. 9,123.

In re MARSHALL.

[1 Lowell, 462;[1] 4 N. B. R. 106 (Quarto, 27).]

District Court, D. Massachusetts. Aug., 1870.

BANKRUPTCY—DISCHARGE—PROPERTY LOST GAMING—ACQUIRED.

Property acquired in gaming is assets, which, if the bankrupt spends in gaming, he loses his discharge.

In bankruptcy.

S. J. Thomas & G. F. Verry, for objecting creditors.

J. Nickerson, for debtor.

LOWELL, District Judge. The objection to the bankrupt's discharge is that he lost a part of his property in gaming. The evidence tends to show that he was interested in a gambling house in Boston, and that he did lose money at that house and in some others like it. The preponderance of evidence supports the allegation of losses sustained in that way. On the other hand, the evidence for the defence tends to show that the bankrupt had lost all his property some years ago, so that whatever he may from time to time have made or lost, he is no worse off now than if he had never lost at all. From this the argument is deduced that he never had any property to which creditors had a right to trust, and cannot justly be said to have lost any property in gaming. It is said that, if the law should be rigidly applied in such a case, the creditors would receive an undue advantage, because they could always prevent the discharge of a person to whom they had given credit with a full knowledge of the character of the business, and an understanding of its hazardous nature.

So far as this argument applies to gambling debts the bankrupt would have the remedy in his own hands, because the debts, if ob-

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

jected to, could not be proved against his estate; as it regards other debts, much of its force would depend on the circumstances under which each particular debt was contracted. A creditor may know that his debtor has property without knowing how he acquired it, or he may lend him money or sell him goods for some legitimate purpose without reference to his occupation. And such are some, at least, of the debts in this case. I cannot limit the general language of the statute, though its effect may be, and I think is, to consider property acquired in gaming to be assets, which, if the bankrupt spend in gaming, he loses his discharge. It is impossible to look into the mode in which such property as the statute speaks of has been acquired. If property once in the possession of the bankrupt is spent in gaming, which, if not so spent, would be assets in bankruptcy, the case is made out. It is too late after it is spent to say that it was unlawfully acquired, or acquired in any particular way, or that creditors are no worse off on the whole. The case does not by any means show that whatever the defendant won was lost immediately, but rather that he had considerable sums at times, which he afterwards lost. I cannot distinguish such losses from those which any other debtor might sustain in a similar way. The statute is clear and explicit, and cannot be construed away in favor of one whose profession is gambling, though its operation may be somewhat severe in such a case. Neither the knowledge of his creditors of his course of business, nor any intent on his or their part, is material. The fact only can be inquired into. Nor does the law in the matter of discharge invest the court with discretion, as it does so largely in England. It is a mere question of legal right. Discharge refused.

MARSHALL v. The ADRIATIC. See Case No. 89.

Case No. 9,124.

MARSHALL v. BALTIMORE & O. R. CO.

[Taney, 204.] [1]

Circuit Court, D. Maryland. Nov. Term, 1852.[2]

CONTRACTS — LOBBYING — POLICY OF LAW — CONCEALMENT OF PURPOSE IN ADVOCATING.

1. No action will lie on a contract to pay for services rendered in obtaining the passage of a law through the legislature, by what is commonly termed lobby members, the same being against the policy of the law, and void.

2. Such a contract is against the policy of the law, and void, if, at the time it was made, the parties agreed to conceal from the members of the legislature the fact, that the plaintiff was employed by the defendant, as its agent, to advocate the passage of the law it desired to obtain, and was to receive a compensation in money for his services, in case the law was passed by the legislature, at the session referred to in the agreement.

3. If there was no actual agreement to practise such concealment, yet, the plaintiff will not be entitled to recover, if he did conceal from the members of the legislature, when advocating the passage of the law, that he was acting as an agent for the defendant, and was to receive a compensation in money, in case the law passed.

This action was instituted the 22d of August 1850, on an alleged agreement by the defendant, to pay the plaintiff [Alexander J. Marshall] the sum of fifty thousand dollars, in six per cent. bonds of the defendant, at their par value. This sum was claimed under the said agreement, as a compensation for services rendered by the plaintiff, in procuring from the legislature of Virginia, the right of way for the defendant's railroad through that state.

By agreement all errors in pleading were waived, but the plaintiff was to furnish the court, before the day of trial, a statement of his grounds of claim, and the defendant was, in like manner, to furnish a statement of its grounds of defence.

The grounds of claim furnished by the plaintiff were as follows: The plaintiff, in pursuance of the agreement of counsel heretofore made, specifies as the grounds of his claim:

I. 1st. The contract between the plaintiff and defendant for the payment and delivery to the plaintiff of the sum of fifty thousand dollars, in the six per cent. bonds of the defendant, at their par value, upon the terms and considerations specified, and to be found in the resolutions passed at a meeting of the committee of correspondence appointed to take charge of the general subject in regard to measures for obtaining the right of way through the states of Virginia and Pennsylvania, on the 12th of December 1846. And the further resolution of the said committee, passed on the 18th of January 1847; and in the letter of Louis McLane to the plaintiff, dated the 18th of January 1847, and in the letters of the plaintiff to the said Louis McLane, of the 9th of February 1847, and the reply of said Louis McLane thereto, of the 11th of February 1847. 2d. The performance of that contract, by plaintiff's attendance at Richmond, during the session of the legislature of Virginia of 1846–1847, in order to superintend and further any application, or other proceeding, to obtain the right of way through the state of Virginia, on behalf of the defendant, and to take all prompt measures for that purpose. 3d. The happening of the contingencies whereon said compensation was payable, by the passage of the law by the legislature of Virginia of the 6th March 1847, and the acceptance of said law, by the acting under it by the defendant; by which law, upon the election of the city of Wheeling, not to pay to the company the difference of cost between the Grave creek and Fish creek routes, as specified in first section of said act, or upon the failure of said city to

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

[2] [Affirmed in 16 How. (57 U. S.) 314.]

agree to pay such difference of cost, according to said first section, the defendant was authorized to extend its road through Virginia, to a point on the Ohio river, as low down as Fish creek.

II. The contract to be collected from all the correspondence between the plaintiff and Louis McLane, president of the Baltimore and Ohio Railroad Company, between the 12th of December 1846 and the 6th of March 1847, touching the employment and agency of the plaintiff by the defendant, in superintending and furthering the applications and proceedings, by or on behalf of the defendant, to obtain the right of way for the defendant through the state of Virginia, to the Ohio river; all which correspondence is now in the possession and knowledge of the defendant.

III. An implied contract for reasonable compensation for work and labor, care and diligence applied, and money paid, laid out and expended, by the plaintiff for the defendant, at its request, in furthering and superintending, as its agent or counsel, the proceedings before the legislature of Virginia, during the session of 1846 and 1847, by or on behalf of defendant, to obtain the right of way through Virginia, to the Ohio river. On which three distinct grounds, the plaintiff rests his claim, and insists on a verdict in his favor.

The grounds of defence stated by the defendant were as follows:—The defendant in the above cause, having received notice of the plaintiff's grounds of claim, gives the following notice of defence: 1. That the agreement sought to be enforced by the plaintiff, admitting his ability to make it out by legal proof, to the extent of his pretensions, was an agreement contrary to the policy of the law, and which cannot be sustained. 2. Admitting the said agreement to be a valid one, which the courts would enforce, yet the plaintiff is not entitled to recover, because he failed to accomplish the object for which it was entered into. 3. That the law of Virginia, which was accepted by the defendant, after it had been modified by the waiver of the city of Wheeling, as mentioned in the plaintiff's notice, was not obtained through the efforts of the plaintiff, but against his strenuous opposition, and furnishes him no ground for his present claim. 4. That there was a final settlement between the plaintiff and defendant, after the passage of the Virginia law aforesaid, which concludes him in this behalf.

The resolution of the 12th December 1846, offered in evidence by the plaintiff, was as follows:

"Office of the Baltimore and Ohio Railroad Company, December 12, 1846. At a meeting of the committee of correspondence appointed to take charge of the general subject in regard to measures for obtaining the right of way through the states of Virginia and Pennsylvania, there were present Messrs. Harwood, Cooke, Hoffman and O'Donnell; the president also attended. On motion, it was resolved, that the president be and he is hereby authorized, in addition to the agent heretofore employed by the committee for the same purpose, to employ and make arrangements with other responsible persons, to attend at Richmond, during the present session of the legislature, in order to superintend and further any application, or other proceeding, to obtain the right of way through the state of Virginia, on behalf of this company, and to take all proper measures for that purpose. That he also be authorized to agree with such agent or agents, in case a law shall be obtained from the said legislature, during the present session, authorizing the company to extend their road through that state to a point on the Ohio river, as low down the river as Fishing creek, and the stockholders of this company shall afterwards accept such law as may be obtained, and determine to act under it; or in case a law should be passed authorizing the construction of a railroad from any point on the Ohio river, above the mouth of the Little Kanawha, and below the city of Wheeling, with authority to intersect with the present Baltimore and Ohio Railroad, and the stockholders of the Baltimore and Ohio Railroad Company shall determine to accept and adopt said law, or shall become the proprietors thereof, and prosecute their road according to its provisions; then, in either of the said cases, the president shall be and is authorized to pay to the agent or agents whom he may employ, in pursuance of this resolution, the sum of fifty thousand dollars, in the six per cent. bonds of this company, at their par value, and to be made payable in any time within the period of five years. Resolved, that it shall be stipulated in the agreement of said agent or agents, employed pursuant to this resolution, and as a condition thereof, that if no such law as aforesaid shall pass, or if any law that may be passed shall not be accepted or adopted, or used by the stockholders, the said agents shall not be entitled to receive any compensation whatever for the service they may render in the premises, or for any expense they may incur in obtaining such law, or otherwise. James Harwood, William Cooke, Samuel Hoffman, Columbus O'Donnell, Louis McLane, President."

The above resolution was modified, on the 18th January 1847, as follows:

"The committee of correspondence in regard to procuring the right of way through Virginia, met this 18th day of January 1847, at the house of Judge Harwood, the chairman; present, Mr. Harwood, Mr. Cooke and Mr. O'Donnell; the president also attended. A letter from A. J. Marshall, the company's agent at Richmond, dated the 16th instant, was submitted to the committee; on motion, it was unanimously resolved, that the right of Mr. Marshall to the compensation under the existing contract, shall attach, upon the

passage of a law at the present session of the legislature, giving the right of way to Parkersburg or to Fishing creek, either to the Baltimore and Ohio Railroad Company, or to an independent company; provided this company accept the one, and adopt and act under the other, as contemplated by the contract. James Harwood, William Cooke, Columbus O'Donnell.

"January 19, 1847. Mr. Hoffman not having been present at the meeting yesterday, but coming to the railroad office to-day, and having read the aforegoing minute, approved the same. Samuel Hoffman."

A further modification of the resolution is contained in the following letter of the plaintiff, to Louis McLane, of the 9th of February 1847, and the reply of McLane thereto, by order of the company, dated 11th February 1847:

"9th February. Dear Sir: Sheffy reported, this morning, a route to Wheeling different from the prescribed route, but utterly unacceptable; you will not, in fact, be allowed to touch the Ohio at Fish creek; but if a cheaper route can be pointed out (you not to judge of the cheapness), you are to be forced to take it. I heard the bill read only, and need only tell you Mr. Hunter says it is more objectionable than the present law; Mr. Green has promised to get a copy of the bill, and send it to you to-night. We anticipated, from the information given us, that the Wheeling compromise would have given you Fish creek as terminus; we had rallied our strength on Fishing creek and Hunter's compromise; we had taken ground that Fish creek would certainly defeat the road, as you could not accept it; parties were organized on this issue, and many who had voted against us before, had determined to vote with us on this issue; I think we should have carried it; many members wished to end this agitating question; it jostles and endangers every interest in the state. They would pass any reasonable law that would quiet this clamor, and at the same time would embody a fair concession to Wheeling; the extent to which a concession to Wheeling would be compatible with the acceptance of the law, was the point at issue; we insisted that a law making Fish creek the terminus would be rejected, and for this reason we could have carried Fishing creek. In this state of things, we get the proceedings of your stockholders on Monday; their resolutions respond alone to the present laws; they emphatically reject them, and have no doubt that the 'prescribed route' to Wheeling will never do; at the same time, we get the 'American,' in which you are reported to say, you hope to get an acceptable terminus above Fishing creek. I have taken the ground, that this paper has mistaken and misrepresented you; I have no doubt, that a firm stand on your part, stating that Hunter's compromise would be accepted, and that no point higher up would be accepted, would have settled this question by a decided vote; I do not believe, under the present state of our information, you could ever get Fish creek as a terminus. The argument of Wheeling, that you will go to that city, if you can do no better, is greatly strengthened; they say that all you require is a change of the 'prescribed' route, and an assurance that you can do no better. I fear Sheffy's bill will be pressed to-morrow; if it is, I fear it will pass; it will be impossible to resist the belief, that if Virginia is firm, and will modify the route, you will go to Wheeling. It is necessary you should speak plain and speak at once; say you cannot extend your road, unless permitted to strike the Ohio, at least as low as Fishing creek. If you will accept Fish creek, and will be positive that you will go no higher, I think you can get it; this, of course, would cut me out; but that cannot be helped. I wish to get an ultimatum from you, for I assure you, you will be confined to Wheeling otherwise. Please write to Mr. Hunter; his letter can be exhibited; take a firm stand, and we may yet retrieve the day; even if the bill gets to the senate, it may be amended. I am, dear sir, with great respect, your obedient servant, &c., A. J. Marshall."

"Baltimore, February 11th, 1847. A. J. Marshall, Esq., Dear Sir: Your letter of the 9th reached me at too late an hour to afford me an opportunity of consulting the committee, and without that opportunity I could not give the reply I wished. It would be difficult for me to be more explicit than I have been in regard to Fish creek, and I am sorry that you, or any one else, should require any more than the resolution unanimously adopted by the stockholders. That resolution is not confined, as your letters seem to suppose, to the law; it, on the contrary, does, and was intended most explicitly, to reject in toto the route prescribed in the present law; and, as Fish creek could only be approached by that route, or some part of it, as certified in Mr. L.'s letter, forwarded to Mr. Hunter, that point is effectually and necessarily excluded. I am still free to assure you that, in the opinion of the committee, the stockholders will not, under any circumstances, construct their road to Wheeling, without the privilege of a terminus at some point on the Ohio river, not higher up than Fishing creek; and it is absolutely certain, that the compromise proposed by Sheffy will, under no circumstances, or for any inducement whatever, be assented to; to this effect I wrote to-day to Mr. Hunter. At the same time, that I am free to give you these assurances, the committee, after full reflection, are unwilling to assume the responsibility of preventing, by their act, the passage of a law, if nothing better can be had, tendering to the stockholders the option of rejecting or accepting it, which would confine their main stem to Fish creek by such route as the company

might select. While the committee are persuaded that such a law would not be accepted by the stockholders, they know that there are a large number of them who believe that, if such a law should now be tendered to them, they would be thereby introduced into the state, and could hold it under consideration, if for nothing more, for the chance of getting it amended at another session, and we could not, therefore, be responsible for depriving them of that option. In this crisis, if, after the utmost exertion, nothing better can be done, if it were possible to pass Mr. Hunter's substitute, with Fish creek instead of Fishing creek, we would not undertake to prevent the passage of such a law; we would then refer the whole question to the stockholders; and I am authorized to say that, everything else failing, if such a law as is indicated pass, and the stockholders adopt it, and act under it, in the manner contemplated by the contract, your compensation shall apply to that, as to any other aspect of the case. The committee do this from the sense they entertain of the labor and exertions you have already made, and believing that the fruit of these, and your further exertions, if in a form to be acceptable to the stockholders, should inure to your benefit. They do not suppose this was needed to insure your continued exertions in the present crisis. It ought to be clearly understood, however, that Sheffy's compromise can, in no event, be brought within this view; and as it regards that, the committee are willing to be responsible for preventing even its tender to the stockholders; that, or anything like it, is wholly impracticable; it is worse even than the present law; it would involve the employment of Knight's route, under even greater disadvantages, and would be promptly and forever rejected. I am, dear sir, very respectfully, your obedient servant, Louis McLane."

"February 11th, 1847. The committee met this day in the president's office; present, Messrs. Harwood, Hoffman, Cooke and O'Donnell. A letter from A. J. Marshall, dated the 9th inst., asking for the company's ultimatum, was submitted by the president; the same being considered, the president prepared an answer, embodying the views of the committee, which being read, was unanimously approved and adopted, and the president was ordered to send the same to Mr. Marshall. The foregoing is the letter referred to. James Harwood, William Cooke, Samuel Hoffman, Columbus O'Donnell."

In addition to the foregoing evidence, offered by the plaintiff, a great deal of testimony was offered by him to establish the performance of the conditions on which he was to be entitled to the compensation claimed.

The defendants, with a view to establish the illegality of the contract, as against public policy, offered in evidence a letter of the plaintiff, dated 17th November 1846, together with an inclosed document (the reading of which latter was objected to by the plaintiff, but permitted by the court); and also two letters from Louis McLane to the plaintiff, of the 25th November and 12th December 1846, as follows:

Letter of A. J. Marshall:

"Warrenton, November 17, 1846. Dear Sir: In an interview with you, a few days since, I promised to submit, in writing, a plan by which I thought your much desired 'right of way,' through this state, might be procured from our legislature; I herewith inclose my views on that subject, and shall respectfully await your reply. In offering myself as the agent of your company, to manage so delicate and important a trust, I am aware I lack that commanding reputation which, of itself, would point me out as best qualified for such a post; of my qualification and fitness, it is not for me to speak, and in consequence of the absolute secrecy demanded, I cannot seek testimonials of my capacity, lest I should incite inquiry. If your judgment approves my scheme, it is probable, you might get satisfactory information respecting me, by a cautious conversation with John M. Gordon, A. B. Gordon, Dr. John H. Thomas or Joseph C. Wilson, all of your city; without impropriety, I may say for myself, I have had considerable experience as a lobby-member before the legislature of Virginia; for several winters past, I have been before that body with difficult and important measures affecting the improvement of this region of country, and I think I understand the character and component material of that honorable body. I shall have to spend six or eight weeks in Richmond, next winter, to procure important amendments to the charter of the Rappahannock Company; this will furnish reason for my presence in Richmond. There is an effort in progress to divide our county, to which we, of Warrenton, are violently hostile; this affords another reason for myself, and also for one or two other agents, to remain in the city of Richmond, during the winter. Colonel Walden and myself are interested in large bodies of land in Western Virginia, near which the track of your railroad will pass; this is an ostensible reason for our active interference. I live in a range of country whose representation ought to be entirely disinterested on this question of 'the right of way;' notwithstanding which, I believe a plurality of our representatives have heretofore been in opposition; I know the influences that effected this, and am happy to say they will not exist next winter. Edward Broaddus, for many years a representative from Culpepper, a shrewd, intelligent man, influenced this result; Broaddus was a sort of protégé of the Richmond and James river Whigs, was distinguished and promoted by them, and habitually acts with them; his place is now filled by Slaughter, a personal friend of mine; I should have little fear to

carry this section of the state. The proposed plan best speaks for itself; if you think it feasible, there is no time to be lost; I hope to hear from you at your earliest leisure. With entire respect, I am your humble servant, &c., A. J. Marshall.

"I tax you with the postage, as I do not wish to be known as in correspondence."

Document accompanying the above:

"In explanation of the plan I wish to submit, it is necessary to indulge some latitude of remark on the causes which have heretofore thwarted the just pretensions of your company. Richmond city, the Petersburg, Richmond and Potomac Railroad, the James river canal and the Wheeling interest, acting in concert, have heretofore successfully combated 'the right of way;' these interests fall far short of a majority in the two branches of the Virginia legislature; there is no sufficient ground, in the numeric force of this antagonist interest, to discourage the hope of an eventual success. On an examination of their arguments, based either upon justice or expediency, I find nothing to challenge a conviction of right, or an assurance of high state policy; on the contrary, standing heretofore as a disinterested spectator of the struggle, I have condemned the emptiness and arrogance of their pretensions, and felt indignant at the success of their narrow, selfish and bigoted policy. I have observed no superiority of talent, no greater zeal or power of advocacy in the opposition, than in favor of 'the right of way.' The success of a cause before our legislature, having neither justice, greater expediency, stronger advocacy or greater numeric strength, is matter of just amazement to the defeated party. The elements of this success should be a subject of curious and deeply anxious investigation; for when the cause is known, a remedy or counteracting influence may be readily applied. I have no idea that any dishonorable means or appliances (further than log-rolling may be one) have been used to defeat the 'right of way.' As to log-rolling, I am sorry to say, it has grown to a system in our legislature; numbers openly avow and act on it, and never conceal their bargains, except when publicity would jeopard success; no delegation are more skilful or less scrupulous at this game than our western right-of-way men, so in that regard, there is a stand off. It seems to me, the great secret of this success, is the propinquity, the presence on the ground, of your opponents. The legislature sits in their midst; they exercise a vigilant, pressing, present out-of-door influence upon the members. If the capitol were located at Weston or Clarksburg, who would question success? The Richmond interest is ever present and ever pressing; her associates of the railroad and canal are at hand, and equally active; you have no counteracting influence, and hence the success and triumph of your opponents. If I am right in these views, your claims, resting alone on justice, sectional necessity, or even high state policy, will be urged in vain, and must become as mere sounding clamor in the hall, unless you meet your opponents with the weapons they use so successfully against yourselves; experience shows that something beyond what you have heretofore done, is necessary to success; and in this necessity, the plan I have to submit, has its origin. The mass of the members in our legislature, are a thoughtless, careless, light-hearted body of men, who come there for the per diem, and to spend the per diem; for a brief space, they feel the importance and responsibility of their position; they soon, however, engage in idle pleasures, and on all questions disconnected with their immediate constituents, they become as wax, to be moulded by the most pressing influences. You need the vote of this careless mass, and if you adopt efficient means, you can obtain it; I never saw a class of men more eminently kind and social in their intercourse; through those qualities they may be approached and influenced to do anything not positively wrong, or which will not affect, prejudicially, their immediate constituency. On this question of the 'right of way,' a decided majority of the members can vote either way, without fear of their constituents; on this question, therefore, I consider the most active influences will ever be the most successful. Before you can succeed, in my judgment, you must reinforce the 'right-of-way' members of the house, with an active, interested, well-organized influence about the house; you must inspire your agents with an earnest, nay, an anxious, wish for success; the rich reward of their labors must depend on success; give them nothing if they fail; endow them richly if they succeed. This is, in brief space, the outline of my plan; reason and justice are with you; an enlarged expediency favors your claim; you have able advocates, and the best of the argument; yet with all these advantages, you have been defeated; I think I have pointed out the cause. Your opponents better understand the nature of the tribunal before which this vast interest is brought; they act on individuals of the body out of doors, and in their chambers; your adversaries are all on the spot, and hover around the careless arbiters of the question, in vigilant and efficient activity; the contest, as now waged, is most unequal. My plan would aim to place the 'right-of-way' members on an equality with their adversaries, by sending down a corps of agents, stimulated to an active partisanship, by the strong lure of a high profit. In considering the details of the plan, I would suggest, that all practicable secrecy is desirable; it strikes me, the company should have, or know, but one agent in the matter, and let that agent select the sub-agents, from such quarters and classes, and in such numbers, as his discreet observation may dictate. I contemplate the use of no improper means or appliances in the attainment of your purpose; my scheme

is to surround the legislature with respectable and influential agents, whose persuasive arguments may influence the members to do you a naked act of justice; this is all. I require secrecy, from motives of policy alone, because an open agency would furnish ground of suspicion and unmerited invective, and might weaken the impression we seek to make. In regard to the cost of all this, it must necessarily be great; the sub-agency must be extensive, and of first influence and character; all your agents must be inspired by an active zeal and determined purpose of success; this can only be accomplished for you, by offers of high contingent compensation. I will illustrate this point by a single example. Were I to become your agent, on my plan, I should like to have the services of Major Charles Hunton, of this county; Hunton, for many years, was a member of our state senate; his last year of service was as president of that body. He is an unpretending man, of good understanding and excellent address; he is a great favorite with his own party (Dem.), and universally esteemed as a gentleman of highest character; he is in moderate circumstances, with a large family. I have no doubt, if I would bear his expenses, and secure him a contingent $1000, he would spend the winter in Richmond, and do good service; but if I could offer him $2000, it would become an object of great solicitude; it would pay all his debts, and smooth the path of an advancing old age; two thousand dollars would stimulate his utmost energies. If I am able to offer such inducements, I should have great confidence of success; under this plan you pay nothing, unless a law be passed which your company will accept. Of what value would such a law be to you? Measure this value, and let your own interests, in view of the high stake you play for, fix the price. There is no use in sending a boy on a man's errand. A low offer, and that contingent, is bad judgment; high service can't be had at a low bid. I have surveyed the difficulties of this undertaking, and think they may be surmounted. The cash outlay for my own expenses, and those of the sub-agents, would be heavy; I know the effective service of such agents as I would employ, cannot be had, except on a heavy contingent; taking all things into view, I should not like to undertake the business, on such terms, unless provided with a contingent fund of at least $50,000, secured to my order, on the passage of a law, and its acceptance by your company. If the foregoing views are deemed worthy of consideration, I hold myself in readiness to meet any call in that behalf that may be made upon me. Respectfully, &c., A. J. Marshall."

Reply of Louis McLane:

"Baltimore, Nov. 25, 1846. Dear Sir: I duly received your letter, and its inclosure, of the 17th instant, and would have acknowledged it sooner, but that I waited in the hope of being more definite in my reply. The subject is one, however, in which it is not easy to act promptly. I would be quite unwilling to act definitely, either to accept, or modify or reject your proposition, upon my individual responsibility, and the necessity of consultation with those whom I must, in some shape or other, consult, requires both caution and time; for the present, therefore, I propose only to acknowledge the receipt of your communication, and to assure you I will not necessarily lose time in obtaining a decision upon the subject to which it relates. It is possible, too, that I may find it necessary to ask you to repeat your visit to Baltimore. Meantime, I remain, dear sir, respectfully, your obedient servant, Louis McLane.

"A. J. Marshall, Esq., Warrenton, Virginia."

Second letter from the same:

"Baltimore, December 12, 1846. Dear Sir: I am happy to inform you that I am now prepared to close an arrangement with you, upon the basis of your communication of the 17th of November; but as it will be necessary to make some personal explanations, and to acquaint you, more fully than I can do by letter, with our views, I must ask you to visit Baltimore, as early as may be practicable. I am, dear sir, very respectfully, your obedient servant, Louis McLane.

"A. J. Marshall, &c."

The plaintiff requested the following instructions to the jury: "Plaintiff's prayers: The plaintiff, by his counsel, prays the court to instruct the jury as follows: (1) That there is nothing in the terms or provisions of the agreement, embraced in the resolutions of the committee of correspondence, dated 12th December 1846, offered in evidence, which renders the same void, on grounds of public policy. (2) That the plaintiff is not precluded from recovering, under the agreement aforesaid, dated 12th December 1846, as modified by the agreement stated in the letter of 11th February 1847, by reason merely of the second proviso contained in the first section of the act of 6th March 1847, which has been offered in evidence, provided the jury shall find that the route, entering the ravine of the Ohio river at the mouth of Fish creek, and running so as to pass from a point in the ravine of Buffalo creek, at or near the mouth of Pile's fork, to a depot to be established by defendant on the northern side of Wheeling creek, in the city of Wheeling, upon minute estimates, made in the manner and on the basis prescribed in said act, and made after full examination and instrumental surveys of the feasible or practicable routes, appeared to be the cheapest upon which to construct, maintain and work said railroad; and provided they shall also find that the city of Wheeling did not agree to pay the difference of cost, as specified in said act, but on the contrary, renounced the right to do so, as early as the 10th of July 1847; and

provided they shall also find that the said act was accepted by the stockholders of the defendant, as a part of its charter, on the 25th August 1847. (3) Upon the evidence aforesaid, the plaintiff prays the court to instruct the jury, that if they find the contract contained in the resolution of the committee of correspondence of the 12th of December 1846, and in the resolution of the committee of correspondence of the 18th of January 1847, and in the letter of Louis McLane of the 11th February 1847, aforesaid, to have been made with the plaintiff by the defendant; and also, that the act of Virginia of the 6th of March 1847 was passed at the session of the legislature of Virginia for 1846–1847, in the contract mentioned; and also, that the Baltimore and Ohio railroad, by the cheapest route to the city of Wheeling, entering the ravine of the Ohio at or north of Grave creek, was ascertained, by such estimates as the law prescribed, to be more costly to construct, maintain and work, than said road would be by the route passing into the ravine of the Ohio at or near the mouth of Fish creek, and then to the city of Wheeling, and that the difference of said probable cost was then, in like manner, ascertained; that the defendant accepted the said law, within six months from the passage thereof; and also, that when the difference of probable cost between said two routes was ascertained according to said act, the city of Wheeling did not agree to pay to the defendant such difference of cost by the time specified in said act; and that the plaintiff did attend at Richmond during the session aforesaid, and did then and there superintend and further the applications and other proceedings to obtain the right of way through the state of Virginia, on behalf of the defendant —then the plaintiff is entitled to recover, on the special contract contained in the instrument aforesaid, the value of the contingent compensation therein stipulated."

The defendants requested the following instructions to the jury: "Defendants' prayers: (1) The defendants, by their counsel, prayed the court to instruct the jury that the plaintiff was not entitled to recover, because the contract stipulated for the payment of a contingent fee of fifty thousand dollars, in the event of obtaining from the legislature of Virginia, such a law as is described therein, was against public policy and void. (2) That if the jury shall believe that it was agreed between the parties to the said contract that the same should be kept secret, either in the terms of it, or otherwise, from the legislature of Virginia, or the public, such contract, if otherwise proper and legal, was invalid, as against public policy, and the plaintiff is not entitled to recover. (3) If the jury find that the special contract offered in evidence by the plaintiff, was proposed to be entered into by the plaintiff, from the reasons and motives, and to be executed by him, in the way suggested in his communication of the 17th November, and its inclosure, offered in evidence by the defendants (if the jury shall find that such communication was so made by plaintiff), and if they shall find that the contract aforesaid was entered into accordingly, and that said contract, or plaintiff's agency under it, was not made known to the legislature of Virginia, but in fact concealed, that then said contract was illegal and void, upon grounds of public policy. (4) The contract between the plaintiff and defendants of 12th December 1846, looked to the obtaining of a law authorizing the defendants to extend their road through the state of Virginia to a point on the Ohio river, as low down the river as Fishing creek, which law should be afterwards accepted by the defendants, with a determination to act under it, or to the incorporation of an independent company, which the defendants should determine to accept and adopt, or of whose charter they should become the proprietors, authorizing the construction of a railroad from any point on the Ohio river, between the mouth of Little Kanawha and Wheeling, and that no such law having been obtained, the plaintiff is not entitled to recover. (5) That the modified contract of the 11th of February, looked to the obtaining of the passage of Hunter's substitute, with the adoption of Fish creek instead of Fishing creek as the point of striking the Ohio; that the law which was passed on the 6th of March 1847, was a law which did not, in its terms or effect, fulfil the stipulations of the modified agreement of February 11, 1847. (6) That the acceptance of the law of March 6, 1847, by the defendants, even supposing it to be substantially the same as Hunter's substitute, did not entitle the plaintiff to recover, unless the jury should believe that such law was obtained through his agency, under the agreement with the defendants. (7) That even if the jury should believe that the law of March 6, 1847, was obtained through the plaintiff's agency, the plaintiff is not entitled to recover, if they shall believe that it was accepted by the defendants, in consequence of the waiver by the city of Wheeling of the privileges accorded to it therein, and the stipulations contained in the agreement between the city of Wheeling and the defendants of March 6, 1847. (8) That the modified agreement of February 11, 1847, which made Hunter's substitute, modified as stated in the foregoing prayer, the standard of the law which was to be obtained, to entitle the plaintiff to the stipulated compensation, made it necessary that such law should give to the defendants the absolute right to approach the city of Wheeling by way of Fish creek; should release them from the necessity of continuing their road to Wheeling, unless the city should within one year, or the citizens of Ohio county should, in the same time, subscribe one million dollars to the stock of the defendants; should enable the defendants to open

and bring into use, as they progressed, the sections of their road as they were successively finished; and should authorize the defendants to charge in proportion to distance, upon passengers and goods taken from Baltimore to Wheeling, should the road be continued to the latter place; while the law that was actually passed made it the right of the defendants to take the Fish creek route, depend upon its being the cheapest, and even then placed the defendants' right to go to Fish creek, at the option of the city of Wheeling; made it imperative that Wheeling should be the terminus of the road, without any subscription on the part of herself or others; prevented the opening of any portion of her road west of Monongahela, until the whole road could be opened to Wheeling; and obliged the defendants to charge no more for passengers and tonnage to Wheeling, than they charge to a point five miles from the river; and that before the defendants accepted the law thus differing from that referred to in the modified agreement of February 11, 1847, the city of Wheeling waived its control of the route, leaving it to depend upon its comparative cost, agreed to subscribe five hundred thousand dollars to the stock of the defendants, and provide a depot for the defendants, at the terminus of the road; and that the adoption and acceptance of the law of March 6, 1847, thus differing from Hunter's substitute, and induced by the waiver and stipulation of Wheeling already mentioned and action under it; was not such an acceptance, adoption and action as entitled the plaintiff to recover. (9) That if the jury shall believe that the plaintiff received from the defendants the six hundred dollars given in evidence, in full discharge of his claims for compensation, under the agreement in question, then the plaintiff is not entitled to recover."

Wm. Schley and H. W. Davies, for plaintiff.

R. Johnson and J. H. B. Latrobe, for defendants.

TANEY, Circuit Justice, held: 1. If, at the time the special contract was made, upon which this suit is brought, it was understood between the parties, that the services of the plaintiff were to be of the character and description set forth in his letter to the president of the railroad company, dated November 17, 1846, and the paper therein inclosed; and that, in consideration of the contingent compensation mentioned in the contract, he was to use the means and influences proposed in his letter and the accompanying paper, for the purpose of obtaining the passage of the law mentioned in the agreement; the contract is against the policy of the law, and no action can be maintained upon it.

2. If there was no agreement between the parties that the services of the plaintiff should be of the character and description mentioned in his letter and communication referred to in the preceding instruction, yet the contract is against the policy of the law, and void, if, at the time it was made, the parties agreed to conceal from the members of the legislature of Virginia, the fact that the plaintiff was employed by the defendants, as their agent, to advocate the passage of the law they desired to obtain, and was to receive a compensation in money for his services, in case the law was passed by the legislature, at the session referred to in the agreement.

3. If there was no actual agreement to practise such concealment, yet he is not entitled to recover, if he did conceal from the members of the legislature, when advocating the passage of the law, that he was acting as agent for the defendants, and was to receive a compensation in money in case the law passed.

4. If the contract was made upon a valid and legal consideration, the contingency has not happened upon which the sum of fifty thousand dollars was to be paid to the plaintiff, and the law passed by the legislature of Virginia being different, in material respects, from the one proposed to be obtained by the defendants, by the agreement of February 11, 1847, and the passage of which, by the terms of that contract, was made a condition precedent to the payment of the money.

Verdict and judgment for defendants.

Affirmed by the supreme court, in 16 How. [57 U. S.] 314.

Case No. 9,125.

MARSHALL et al. v. BAZIN.

[7 N. Y. Leg. Obs. 342.]

District Court, S. D. New York. 1849.

JURISDICTION IN ADMIRALTY — CONTRACTS FOR TRANSPORTATION OF PASSENGERS—STATE IMPRISONMENT ACTS — RULES OF SUPREME COURT — ARREST—SECURITY.

1. Libel in personam to recover balance of passage money for which a bill of exchange had been given but not paid. The libellant offers to surrender the bill. Suit sustained. *Held*, That admiralty has jurisdiction of contracts for the transportation of passengers by sea, and which may be exercised both in rem and in personam.

[Cited in McGuire v. The Golden Gate, Case No. 8,815.]

2. The new imprisonment acts of the state of New York, as adopted by the acts of congress of Feb. 28, 1839, and Jan. 14, 1841 (5 Stat. 321, 410), do not apply to process issued out of courts of admiralty.

3. The processes of these courts are subject to the regulation of the supreme court by virtue of the acts of congress of May 8, 1792, c. 2; and rules the supreme court adopted pursuant to those acts are authoritative and conclusive on the subject.

4. Rules 2 and 3 of the supreme court give parties the right to a warrant of arrest, and to the advantage of bail to satisfy the final decree rendered in a cause.

5. The respondent was properly held in custody if the libellant had a subsisting right of action.

6. The prospective operation of the act of 1841 is negatived in this respect by that of 1842.

7. Taking personal security for such demand by promissory note or bill of exchange will be regarded a waiver of the remedy in admiralty and bar proceedings, while such security remains outstanding.

8. Delivering up the security upon the hearing, is a sufficient compliance with the principles of law applicable to the case to prevent the respondent avoiding the action by a preliminary motion.

9. The jurisdiction of the admiralty in personam in matters of contract, has no connection with the question of "lien." The party is proceeded against upon his personal liability by process of arrest or citation.

The respondent with his family, came passengers from Havre, in France, to this port, on board the packet ship ——, owned by the libellants. He contracted to pay two thousand francs for the passage, one half to be paid in advance, and the other half in New York on the arrival of the ship here. The advance was duly paid, and for the balance the respondent drew a bill of exchange on himself, payable at sight at Delmonico & Co.'s in New York. The bill was duly presented and accepted by the respondent, and not being paid, the libellants sued out of this court a warrant of arrest against him for the balance of his passage money, on which, for want of bail, he was imprisoned. A motion was now made in his behalf, to discharge him from arrest, and to dismiss the libel and proceedings as not within the jurisdiction of the court.

H. D. Sedgwick, for respondent, made the following points: (1) A contract for passage money is a personal contract, not within admiralty jurisdiction. Brackett v. The Hercules [Case No. 1,762]; 2 Camp. N. P. 431. (2) Imprisonment for debt is abolished by act of congress. (3) Liens in rem or in personam in maritime courts, are waived by acceptance of a personal or other security, and by taking the bill of exchange in this case, the libellant relinquished his lien, and the contract no longer continues within admiralty jurisdiction. Pritchard v. The Lady Horatia [Case No. 11,438]; Hurry v. The John & Alice [Id. 6,923]; 1 Dod. 283; Murray v. Lazarus [Case No. 9,962]; [Ramsay v. Allegre] 12 Wheat. [25 U. S.] 616; The Nestor [Case No. 10,126]; 2 Hagg. Adm. 136; Leland v. The Medora [Case No. 8,237]; Abb. Shipp. 288; [Peroux v. Howard] 7 Pet. [32 U. S.] 345; 4 Camp. N. P. 150; 2 Marsh. 399; 15 Johns. 276; Riley v. Anderson [Case No. 11,835]. (4) If the waiver was not complete by taking the bill of exchange, the lien is lost from the lapse of time allowed before suit brought. Leland v. The Medora [supra].

Philip Hamilton, for libellant: (1) The affidavit of the respondents on which the motion is founded, does not state that the bill of exchange was taken in satisfaction or discharge of the antecedent debt. It only alleges it as received as security therefor. He cited against the application, Cro. Jac. R. 193; 1 Evans, Poth. 380a, 386; [Ramsay v. Allegre] 12 Wheat. [25 U. S.] 611; 1 Cow. 290; [Harris v. Johnston] 3 Cranch [7 U. S.] 311, 316; Cro. Car. 85; 2 Blackf. 317; [Clark v. Young] 1 Cranch [5 U. S.] 191.

The counsel produced the bill of exchange in court, and declared his purpose to surrender it on the hearing of the cause.

BY THE COURT. The cases cited on the first point do not support the position that admiralty has no jurisdiction of contracts for the transportation of passengers by sea. The case Pritchard v. The Lady Horatia [Case No. 11,438] was a claim set up by the master of a vessel by way of answer, upon the proceeds of wrecked goods brought into port in his vessel. He had agreed to bring to the United States the crew of a wrecked vessel for $20 each, passage money, and he also laded on board his vessel such of the cargo of the wreck as had been saved. This cargo was libelled and condemned for salvage at the suit of that crew, and the master sought to attach a lien upon such salvage interests to satisfy their indebtedness to him for passage. The court decided that no lien existed in his behalf, and that the property condemned was not brought in the ship as the property of the seamen, and was not answerable for their personal contracts. That the money in court, was not of the nature of surplus and remnants on which an independent debt could be fastened.

Judge Hopkinson remarks, in the course of his opinion, that the demand is "strictly a personal contract, not made at sea, nor for any cause cognizable in admiralty." No authority is cited in support of the doctrine, excluding the case from the cognizance of the court for these causes; and the case referred to in 2 Camp. 632, rests upon the opposite principle, for it recognises a contract for the transportation of a passenger, as our giving a lien upon his luggage, and maritime liens arising from services by or to a vessel, are the familiar subjects of admiralty jurisdiction. It is not yet decided, that the method of remedy, in rem or in personam, determines the jurisdiction of the court. But the rule is definitely settled, so far as the courts of this district are concerned, by the decisions of the circuit and district courts, upon the precise point.

It was held in this court, that a passenger had a remedy against the vessel for breach of contract by the master, to bring him and his family from a foreign port to the United States, and could recover back the money advanced on the agreement, and damages for the violation of it. The Zenobia [Case No. 18,208]; The Aberfoyle [Id. 16]. The last case was appealed to the circuit court, and was after a full hearing, affirmed. [Id. 17.] This point was made the essential one on the appeal.

It has also been decided by this court, on full consideration, that the non-imprisonment

acts of the state of New York, as adopted by the acts of congress of February 28, 1839, and January 14, 1841 (5 Stat. 321, 410), do not apply to process issued out of courts of admiralty. The processes of these courts are subject to the regulations of the supreme court, by virtue of the acts of congress of May 8, 1792, § 2, and August 23, 1842 (5 Stat. 518, § 6), and accordingly the rules of the supreme court, adopted pursuant to those acts, are authoritative and conclusive on this subject. Lane v. Buck [Case No. 8,048]; Lockwood v. Pearson [unreported]. Rules 2 and 3 of the supreme court, give parties the right to a warrant of arrest, and to the advantage of bail, to satisfy the final decree rendered in the cause, and the respondent in this case is properly held in custody, if the libellant has a subsisting right of action in this court. The prospective operation of the act of 1841, is in this respect intercepted by that of 1842.

The third and fourth points raised by the respondent, present the only matters of contestation open before this court in the cause. The jurisdiction of the court over the subject matter may be lost to the party, or be waived by him, by any act of his indicating that this special remedy is relinquished. Taking personal security for the demand, by promissory note or bill of exchange, will be regarded a waiver of the remedy in admiralty and bar proceedings in this court, whilst such security remains outstanding. Murray v. Lazarus [Case No. 9,962]; Ramsay v. Allegre, 12 Wheat. [25 U. S.] 616. But that admiralty has cognizance of the demand in personam, is distinctly implied in that case, and is explicitly decided in that of The General Smith, 4 Wheat. [17 U. S.] 438, Peroux v. Howard, 7 Pet. [32 U. S.] 324, and that it was intended so to settle the doctrine, is made certain by the remarks of Judge Story, speaking for the court, in Andrews v. Wall, 3 How. [44 U. S.] 572, 573.

On the argument of the motion, the advocate for the libellant produced the bill of exchange, and declared his purpose to deliver it up on the hearing of the cause. This is a sufficient compliance with the principle embodied in the cases, to prevent the respondent avoiding the action by this preliminary motion. It is further noticeable, that the affidavit of the respondent does not aver that the bill was drawn by the agent of the ship at Havre or that he accepted it as a satisfaction of the demand. The implication therefore is that it was but a liquidation of the demand, and a memorandum of the time it was payable, and not intended by the parties to be made a security for the debt.

The jurisdiction of the court in personam, in matters of contract, has no connection with the question of lien. The party is proceeded against upon his personal liability by process of arrest or citation. This remedy, if suspended by taking a bill or note, is restored to the creditor, when the debtor is released of the hazard of having negotiable paper in circulation against him, by its being surrendered him or produced in court and cancelled.

The motion to dismiss the libel is accordingly denied, and the respondent must be put to his defence to the action. The costs will abide the final result of the suit. Decree accordingly.

Case No. 9,126.

MARSHALL v. CRAWFORD.

[4 Sawy. 37.] [1]

District Court, D. California. Aug. 12, 1876.

SEAMEN'S WAGES—MASTER—RETURN TO PORT—ERROR IN JUDGMENT—BOARD OF WIFE AND CHILD.

1. Where the master was compelled, by want of provisions, to return to his home port, and the insufficient supply was caused by an error of judgment, committed in the supposed interest of his owners, *held*, that under the circumstances, the error was not of so gross a character as to make the master personally responsible for its consequences.

2. Where the master claimed the gratuitous privilege of taking with him on the voyage his wife and child, *held*, that he must show a distinct understanding and definite agreement with the owners on the subject.

[This was a libel by George Marshall against Andrew Crawford.]

Jno. M. Coghlan, for libellant.

E. W. McGraw, for respondent.

HOFFMAN, District Judge. Suit for wages as master of the bark Legal Tender. The answer admits the services of the libellants, and the earning of the wages claimed. The defense set up is:

1. The willful disobedience by the master of the owners' orders. The answer alleges that the libellant, having been ordered to proceed from Guaymas to Humboldt Bay, arrived off the latter port on or about March 30, 1876, and there beat about until April 4, without making any attempt to enter the bay, and without any valid excuse for not doing so; and that, on said April 4, the libellant, willfully disobeying the orders of respondent, instead of entering the bay and there procuring a cargo of lumber, squared away for San Francisco, where he arrived April 6, 1876.

The proof shows that the master used every effort, and exhibited proper seamanship while doing so, to enter the bay, but was prevented by adverse winds. It also is clearly established that his sole reason for abandoning further efforts was the almost entire want of provisions. There can be no doubt that his return to San Francisco was rendered absolutely necessary by this circumstance. To have remained longer would have been a criminal breach of his duty to his crew.

The real point of the defense is that the insufficient supply of provisions was due to the master's neglect and carelessness.

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

It is not denied that he was amply provided with funds to obtain, at Guaymas, all the provisions he required.

There can be no doubt that the libellant made a mistake in not taking in more provisions, but I hardly think the mistake was of so gross a character as to render him personally responsible for its consequences. The subject was confided to his discretion, and his motive in stinting the supply was to effect a saving for his owners, the price of provisions at Guaymas being much higher than at this port.

The average length of voyages from Guaymas to San Francisco, is from thirty to thirty-five days. A voyage from Guaymas to Humboldt Bay is, perhaps, on the average, five or ten days longer. Several experienced shipmasters testify that for such a voyage they would take in two months' supply of provisions. But they state that there is no fixed rate, that they would be so governed by circumstances. The Legal Tender's provisions gave out on the fifty-third day.

The fidelity and general capacity of the master are not disputed. He has been in the respondent's employ for several years. I think that a mistake of this character committed in the supposed interest of the owner would not be held by any jury to be such negligence as to render the master liable for damages. If he would not be so liable the respondent cannot recoup or set off in this action such damages against the master's claim.

2. The respondent also claims a deduction from the master's wages, on account of board furnished to his wife and child, who accompanied the master on his voyage. There seems to have been no agreement or definite understanding between the master and respondent on the subject. The latter knew that the master's wife was to accompany him. He does not appear to have either given or withheld his consent in any very definite manner. Certainly he did not agree that she should be maintained at the ship's expense during the entire voyage. There was probably no intention on the respondent's part at that time to make any charge against the master, but he did not expressly renounce the right to do so. And probably the master expected, so far as he had any definite expectation on the subject, to pay the demand in case, contrary to his anticipations, a demand was made. He expressed his willingness to do so after his arrival, provided the balance of his wages was paid, and though his offer may have been merely intended as a mode of settling and compromising the dispute, yet I am inclined to think that it ought to be viewed as a recognition on the part of the master that he had no absolute right to insist upon receiving from the owner so considerable a gratuity. He may have considered the respondent's demand unhandsome, but he does not appear to have resisted it as absolutely unjust and contrary to agreement.

Under all the circumstances I have concluded to allow the deduction. If gratuitous privileges of this nature, involving considerable expense to owners, are claimed by masters, they should come to a distinct understanding on the subject and put the agreement into some definite form. I shall allow a deduction of $125 on this account; for the balance of his wages a decree must be entered.

MARSHALL (DAVIS v.). See Case No. 3,641.

Case No. 9,127.

MARSHALL v. DELAWARE INS. CO.

[2 Wash. C. C. 54.] [1]

Circuit Court, D. Pennsylvania. April Term, 1807.[2]

MARINE INSURANCE — CAPTURE — RESTITUTION — ABANDONMENT—ACTUAL STATE OF LOSS—RIGHT TO ABANDON.

1. The vessel and cargo insured, were captured as prize, libelled and acquitted on the 7th of July; and on appeal by the captors, the sentence was affirmed on the 9th of July, and restitution was decreed; and on the 19th of July, restitution of the property captured was actually made, except of that which had been pillaged by the captors; but at what hour of the day the same was made, was submitted to the court. On the same day, a survey was made to ascertain the amount of the spoliations of the cargo, and on the 30th of July the vessel proceeded on her voyage. On the 17th of July, (in New-York) the plaintiff received notice of the capture. On the 18th, he directed his agent in Philadelphia to abandon, who did so on the 19th, informing the plaintiff thereof by mail; the mail leaving Philadelphia for New-York, at twelve o'clock on the 19th of July. The actual state of the loss, at the time of the abandonment, ought to decide the right of the assured to make the loss a total one; and it is on the reality of the loss at the time of the abandonment, its legality depends.

2. The right to abandon did not depend, in this case, on the question, whether the restitution was actually made, and the property in possession of the master of the vessel. The property was in the actual possession of the master, after the decree and warrant of restitution delivered to the master.

3. In case of capture and recapture, the property remains with the recaptors until salvage is paid.

On a case stated, the plaintiff, a citizen of the state of New-York, and residing in the city of New-York, by his agent, on the 7th of May, 1806, caused insurance to made on the cargo, freight, and brig Rolla, all owned by him; S. Clapp, master, at and from St. Jago de Cuba. The policy on the freight, and part of the cargo, valued; on the vessel, and residue of cargo, open. On the 28th of May, 1806, the vessel, while proceeding on her voyage,

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

[2] [Affirmed in 4 Cranch (8 U. S.) 202.]

was captured and taken possession of as prize, by the French privateer schooner Napoleon, and carried into Lemon, an out-port of Samana. The captors there committed great pillage of the cargo. The Rolla remained at Lemon four or five days, and was then carried to Samana, under the charge of a prize-master, where further pillage was committed. The captors libelled the vessel and cargo, in the inferior tribunal at the city of St. Domingo; and both were acquitted on the 7th of July. This decision was appealed from, by the captors, to the superior tribunal, at the same place; when the said vessel and cargo were again acquitted, and restitution awarded. On the 9th of July, restitution of the brig was ordered to be made to the captain, with what remained of her cargo. On the 19th of July, 1806, restitution was actually made; but, if the court should think there is a collision in the evidence, as to the hour or time of actually delivering possession, and the time shall appear to them material, the court are requested to fix the hour or the time, according to their opinion of the credit and weight of the evidence. The captain had a survey made on the same day, to ascertain the loss and damage from pillage, &c.; and on the 30th of July, he proceeded on his originally intended voyage to St. Jago de Cuba; where he arrived on the 6th of August, and where the remainder of the cargo was sold, and a part of the proceeds invested in a return cargo, which was sent by the Rolla, under the command of the mate, to New-York; and the rest of the proceeds were invested in bark, and brought home in the Jane by the captain. The return cargo arrived at New-York, on the 15th of October, 1806; and on the following day, the plaintiff wrote to his agent in Philadelphia, informing him thereof, and directing him to give the information to the insurers, which was accordingly done; but the insurers refused to have anything to do with the property, or to give any directions as to the disposal of it. The plaintiff then sold the said property, for the account of the underwriters, but without their assent; except some bark, which yet remains unsold. Intelligence of the capture was received at New-York by the plaintiff, on the 17th of July, 1806. He wrote on the 18th to his agent, directing him to abandon the freight, vessel, and cargo to the insurers; which letter was received at Philadelphia, by the agent, on the morning of the 19th; and an abandonment was made to the insurers on the morning of the 19th; of which abandonment the said agent informed the plaintiff by a letter, which was forwarded to New-York by the mail of the said 19th of July, which was closed at Philadelphia at twelve o'clock of the same day. The question for the opinion of the court is, whether the plaintiff is entitled to recover for a total or a partial loss?

Ingersoll & Hopkinson, for plaintiff, contended: First; that if a loss happen by capture, of which the plaintiff is informed, and he offers to abandon, not knowing that the property has been acquitted and restored, though the fact be so, before the offer made; the abandonment is good to authorize the insured to go for a total loss. The loss happened here by capture and detention. Second; that, upon the evidence, the restitution was not complete till one o'clock in the afternoon, whereas the abandonment must have been before twelve o'clock. As to the doctrine that there are no fractions of a day, it does not apply where priority of time, as to two facts, becomes important. 1 Ld. Raym. 281; 2 Ld. Raym. 1568; 3 Burrows, 1433.

Rawle & Dallas, for defendants, denied both propositions. They cited 1 Esp. 237, to show that even after a capture, condemnation, and sale, and the vessel purchased by the captain for his owners, that the insured could not abandon; the captain being the agent of the owners in the purchase. They relied upon the expressions of the supreme court, in Rhinelander v. Pennsylvania Ins. Co. [4 Cranch (8 U. S.) 29], and of the supreme court of Pennsylvania, in Dutilh v. Gatliff [4 Dall. (4 U. S.) 446], and of Lord Mansfield, in Hamilton v. Mendez [unreported], to prove that the fact of the loss continuing to the time of the abandonment, and not the information, fixes the right of the insured to abandon. Also the case of Hallet v. Payton, 1 Caines, 38, in which the case has been directly decided. They also cited Parker, 75, 161.

WASHINGTON, Circuit Justice. The question is, whether if a right to abandon once exist, the subsequent release or safety of the property before the abandonment, but the fact unknown to the insured, will defeat that right, has never been directly decided, that we know of, but in the case of Hallet v. Payton. The reasoning of the case would seem to show, that the state of the loss at the time of the abandonment, ought to decide the right of the insured to make the loss a total one, and thus to throw the property upon the underwriters; and to demand from them the sum insured. The foundation of the right is the loss of the property, really or technically; and the transfer of what may be saved to the underwriter, is predicated upon the reality of the loss. But if the property be in safety, how can the underwriter, under the terms of his contract, be called upon for an indemnity; which was only promised in case of loss, and when no injury, or such as is merely partial, has been sustained? The information received by the insured may have been correct when it was given, but it cannot make the fact otherwise than it really is, at the time when the claim is made for a total loss. Although there is no case, but the one before mentioned, precisely in point, yet there are some which seem to throw considerable light upon the subject; and we think, enough may be gathered from what was said by Lord Mansfield, in Hamil-

ton v. Mendez, to show his opinion respecting it. In that case, the vessel, which had been captured and recaptured, was brought into Portsmouth before the offer to abandon. It is not stated, that at the time of the offer the arrival of the vessel was known to the insured, though the fact is strongly to be inferred. But it is clear, that if such was the fact it does not enter into the reasoning of the judge, who, when he lays down the principles of the law, uses expressions and illustrations, which seem strongly to exclude that circumstance from the consideration which he took of the subject. His lordship observes, that this action, which is brought for an indemnity, must be founded on the nature of the damnification, as it really is at the time of the action brought, or, at most, at the time of the offer to abandon. He considers it absurd to recover as for a total loss, when the final event proves that there was no loss at all, or only a partial one. He seems to fix the time of bringing the action, as that at which the rights of the parties are to be decided; and then lays it down, that if the cause of action does not subsist at the time, its having existed at any previous time will not avail. In no part of this opinion does he appear to consider the right of the insured to go for a total loss, to depend upon the circumstance of information he had received of the situation of the property at the time of the offer to abandon, or at that of the action brought; and the cases which he cites as analogous to, and illustrative of the doctrine he is endeavouring to establish, afford strong ground for believing that he altogether relied upon the loss continuing to the time of abandonment and bringing the action; (and so he also expresses himself in another part of the same case;) and not upon the information to the insured of the safety of the property. For certainly it cannot be contended, that in answer to a plea of the tenant, in an action of waste, that he had repaired before the action brought; or to that of the principal to an action of the surety for an indemnity, that he had paid the debt; the plaintiff could reply, that at the time of bringing the action, he had not notice of the fact set out in the plea. And I think it is impossible to produce a case upon any other subject, where the rights of the parties could be made to depend upon any thing, but the real facts at the time when these rights accrued. Why should there exist an exception in cases of insurance? That Parker has deduced the same conclusion which this court does from the expressions of Lord Mansfield, in this and other cases, is very obvious. He says, that "the loss must continue total at the time when the offer to abandon is made, or the action brought." Parker, 145. The case of Hallet v. Payton, in the highest court of judicature in the state of New-York, which appears to have been very fully argued and considered by the court, is in point. The expressions used by the supreme court of the United States, and the supreme court of this state, in the cases cited, are very strong, though like those of Lord Mansfield, in Hamilton v. Mendez, they are obiter dicta. Upon the whole, then, relying upon these authorities, and the reasons which support them; and considering that they stand unopposed by any case whatever; we feel ourselves warranted in deciding this point in favour of the defendants.

The next question is, whether at the time when the offer to abandon was made, the vessel was, in point of fact, in possession of the insured? I say, in his possession, because these are the terms which the counsel, in argument, appeared to consider as proper. But we wish it to be considered, that this court does not mean to decide that actual possession was not necessary after the decree and warrant of restitution delivered to the officer. It may, perhaps, become a question, whether if the property be in safety, by the acquittal and warrant to execute it, this circumstance may not be sufficient to defeat the right of abandonment. In the cases of capture and recapture, the possession of the property remains with the recaptors till salvage is paid; and in the case of Hamilton v. Mendez, the possession of the recaptors continued after the offer to abandon.

As to the fact, we think it very immaterial, whether the possession was delivered before or after the examination made of the state of the cargo, for it is obvious to any person who looks at the proces verbal, that it must have taken more than double the time to write this warrant, than was consumed in obtaining a knowledge of the facts which it records; consequently, if it began at nine in the morning, and the proces verbal was concluded at one in the afternoon, the facts of which it is a history, must have taken place and been completed long before meridian.

But we do not mean to decide so important a point, upon evidence which may be founded in conjecture. For we hesitate not to declare, that if for want of clear proof, the act of abandonment and restitution must be considered as contemporaneous, the decision ought to be in favour of the defendants, for two reasons—first; that the inclination of judges is not to extend the right of abandonment, for the purpose of converting a partial into a total loss, beyond the point to which former decisions have gone, because such a right is not warranted by the contract of the parties: and secondly, because the insured ought not only to prove the loss, but the continuance of it to the time of abandonment; and if the evidence is not sufficient for these purposes, he must fail. Upon the whole, we are of opinion that the plaintiff is only entitled to recover for a partial loss.

[The case was taken on a writ of error to the supreme court, where the judgment of the circuit court was affirmed, with costs. 4 Cranch (8 U. S.) 202.]

Case No. 9,128.

MARSHALL v. DORSETT.

[4 Cranch, C. C. 696.] [1]

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

ADMINISTRATORS—MARYLAND STATUTE—DECEASED WIFE—CHOSES IN ACTION—TRUSTEE.

Under the act of Maryland, 1798, c. 101, cl. 5, § 8. the husband is the administrator of his deceased wife, and may sue for her choses in action not reduced to possession in her lifetime; although her property had been conveyed, in her lifetime, to a trustee, for the sole and separate use and benefit of her, and her executors, administrators, and assigns;. she not having assigned the trust-fund in her lifetime, nor disposed of it by will or deed executed according to the terms of the trust.

Assumpsit for money had and received by the defendant [Amelia T. Dorsett] to the plaintiff's use. By a deed of trust, the property of the plaintiff [Robert Marshall] and his wife was conveyed to Mrs. Susan G. Beall, in trust for the sole and separate use of the plaintiff's wife, Anne Marshall, her executors, administrators, and assigns. The trustee, with Mrs. Marshall's consent, lent $400 to the defendant, and took her note therefor, payable twelve months after date, to the said "Susan G. Beall, trustee for Anne Marshall, with interest in advance, for value received;" dated September 18, 1832. The wife died, and this suit was brought by the husband in his own name, who, by the Maryland act of 1798, c. 101, cl. 5, § 8, is entitled to all the rights of administrator to his deceased wife, and may sue for and recover her choses in action, not reduced into possession during the coverture.

R. S. Coxe, for plaintiff.
Brent & Brent, for defendant.

THE COURT (nem. con.) decided, that the husband, standing in the place of administrator, had a right to recover this debt, the wife not having, in her lifetime, disposed of the trust-fund by last will or deed executed according to the terms of the trust.

Verdict for the plaintiff, $430.

[See Case No. 4,012.]

MARSHALL (DORSETT v.). See Case No. 4,012.

Case No. 9,128a.

MARSHALL v. JEFFRIES.

[Hempst. 299.] [2]

Superior Court, Territory of Arkansas. Feb., 1836.

PLEADING AT LAW—MISNOMER—IDEM SONANS.

"Jeffery" and "Jeffries" are not idem sonans.

Error to Lawrence circuit court.

Before JOHNSON and YELL, JJ.

JOHNSON, J. This is an action of trespass for an assault and battery, brought by Jeffries against [William B.] Marshall. Marshall pleaded a misnomer of the plaintiff named, alleging that he was called and known by the name of Jesse Jeffery, and not by the name of Jesse Jeffries. To this plea Jeffries demurred, and the demurrer was sustained. The only question for the consideration of this court, relates to the decision on the demurrer to the plea in abatement. We think the court erred in sustaining the demurrer to that plea. We do not think that Jeffery and Jeffries are the same name. They are differently spelt, and clearly cannot be said to be idem sonans. The judgment must be reversed, and the cause remanded, with directions to permit the defendant in error to reply to the plea of misnomer, if he shall apply for leave to do so, and on his failure, then to give judgment in accordance with the plea in abatement. Reversed.

MARSHALL (LEWIS v.). See Case No. 8,327.

MARSHALL (LIGGETT v.). See Case No. 8,342.

Case No. 9.128b.

MARSHALL v. MARSHALL.

[18 Betts, D. C. MS. 36.]

District Court, S. D. New York. Feb. 10, 1851.

COLLISION — SECURED TO DOCK — BLOCKING PASSAGE—TUG AND TOW—DAMAGE BY TOW —LIABILITY.

[1. A vessel secured at a dock is entitled to keep that position against the voluntary approach of any other. Though its position blocks the passage of some other vessel, yet the law does not compel it to move; and if the moving vessel, in attempting to pass, should cause a collision, it will be liable to damages.]

[2. A tug, towing a steamer, collides with a vessel secured to a dock. It is claimed in defence that the tug was acting under the direct and immediate orders of the pilot of the steamer, and that the responsibility, if any, should rest with the steamer. *Held*, that these facts constituted no defence in an action against the tug.]

[This was a libel by George Marshall against Charles H. Marshall to recover damages for injuries sustained in a collision.]

BETTS, District Judge. The sloop Genius, owned by the libellant, when lying at the end of the pier, at Tenth street on the East river, was pressed against and injured by the steamer Goliah, owned by the respondent. The Goliah and Duncan C. Pell, steamers, were engaged in towing the hull of the steam boat Arctic from Rutgers street to the Novelty Works, the Duncan C. Pell on her starboard side and the Goliah on the larboard. The tide was on the last of the flood, and high water. Shell Reef lies off

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

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

Ninth street, and reaches nearly up to Tenth street, and is about in the middle of the river. Tenth street pier projects 40 feet further into the river than Ninth, and the space between the reef and Tenth street pier is estimated at 50 or 60 yards. The width of the three boats in tow was 154 feet. As the tow proceeded up the river, the position of the sloop Genius was noticed, and the wheels of the two steamers stopped a distance of two or three hundred yards below her, and she was hailed by the pilot of the Arctic to move from the pier to afford room for the tow to pass. He also sent out a boat with like directions to the Genius. But the evidence is conflicting upon the fact whether the boatman carried the message, the weight of it being against the testimony of the boatman that he had delivered the order. So also it is doubtful whether the hail of the pilot to the Genius was heard on board her. It is also proved by the libellant that those on the Genius had no reason to apprehend a collision until the tow had come too near her to leave her the ability to move from the pier, although, upon the evidence, there would have been ample time to do it after the hail given from the tow.

The points insisted on by the respondent in defense are that it was the duty of the libellant to have moved the sloop from the pier under the circumstances, and by so doing the collision would have been avoided, and that if the collision was occasioned by any fault of the tow, it is ascribable to the pilot of the Arctic, who had exclusive command of the three vessels, and that the owner of the Goliah is not responsible for it. Neither of these positions are maintainable. It was incumbent on the tow so to be conducted in moving through the harbor as to avoid vessels at anchor or lying at the dock. The Scioto [Case No. 12,508]. It had no authority to command or compel the sloop to leave her mooring at the wharf. Had it been easy for her to do so, and she had wilfully persisted in holding her place when it was apparent to her that a collision must be the consequence, the other party making ineffectual efforts to avoid it, the court might well hold she should bear the consequences of such perverseness.

The equitable principles guiding the decisions of courts of admiralty lead it to discountenance all wilful acts of obstinacy, as well as a disobliging spirit, when either promotes a misfortune to the party exercising them or to others; but I am not aware the power of the court has been carried further in reproof of such dispositions than to regulate the allowance of costs with a regard to it. The admiralty court, no more than a court of law, cannot invade a legal right or privilege, and take it arbitrarily away from the one possessing it. A vessel safely secured at a dock is entitled to keep that position against the voluntary approach and encroachment of any other. The pilot of a steamer has no higher authority than the master of any other craft in this respect, and neither can assume the right to order off a vessel so placed, because her position is to his disadvantage or danger. In the present instance, if there was not room for the passage of the tow, it was the duty of the pilot to have stopped its advance, and, if necessary, to have anchored until he could prevail upon the sloop to leave her dock, or obtain the interference of the proper dock or harbor master to compel it. The wrong, if any, was with the tow in attempting to sweep through a narrow passage with a width of vessels which endangered others at the docks, and the law imposes on them the necessity of so arranging themselves as to go through it without crowding upon and injuring others, although their movement may be thus impeded. The same rule would obtain if the sloop had been at anchor in the river. It would have been her duty, then, to relieve the tow to the extent of her ability by sheering on her cable, or giving way with sweeps, when practicable. but the vessel approaching her without compulsion or necessity could not require her to slip her cable for their relief, or put herself in any peril for their accommodation. After the tow had come so near the sloop that its drift indicated a collision, it would have been hazardous for her to move into the river with intent to go up or down, for she would thus place herself more directly in the path of the tow, and then it would be urged against her, in case of injury, that she had brought it upon herself by such movement. She had a right to suppose the steamers would take care to stop or back or veer off so as to prevent all contact with her in a conspicuous and fixed position.

There is no evidence that there would have been danger—even difficulty—for the tow to have anchored, nor is the court furnished with anything more than mere suppositions that there was not ample width of channel for them all, between the sloop and Shell's Reef. If the Arctic could with safety pass the reef, the Duncan C. Pell might go over it at that state of the tide, which would have extended the channel 49 feet; and if there is 60 yards from the shoal to the dock, or even 50, the tow might thus have kept a safe course through. This, however, was the concern of the tow, and not of the sloop; and, as the danger was foreseen and well understood by the former, she was under obligation to take proper measures to avoid it. The Tecumseh, U. S. Dist. Ct. [unreported]. The injury was inflicted by the Goliah, and, if it must be regarded as caused by the act of the pilot on the Arctic, that in no way renounces the responsibility of the defendant. Ang. Carr. 664, 665. He put his boat under charge of that pilot, and his situation is in no way varied that the pilot took his stand and gave orders on the Arctic, instead of upon the Goliah. The improper management

and direction of the Goliah by those to whom she was entrusted by the owner produced the injury sustained by the libellant, and he is answerable for that wrong to the same extent as if she had remained under the charge of her officers. The Duke of Sussex, 1 W. Rob. 273; Bussey v. Donaldson, 4 Dall. [4 U. S.] 206; Foot v. Wiswall, 14 Johns. 306; Denison v. Seymour, 9 Wend. 9 Indeed, the doctrine with respect to the obligations of tugs employed in towing vessels would seem to be that the steamer is responsible for damages inflicted by the vessel in tow, unless caused by an act of the latter, independent of the tug, and when it was not at the time in her power to prevent it. The Express [Case No. 4,596]. The duty is thrown upon her to so arrange the movements of the vessel in tow, if possible, as to prevent her coming in collision with any other. Id. But, even if the Goliah, in this case, might be regarded as under the motive power of the Atlantic, and propelled by her momentum, and not by her own voluntary action, the responsibility would remain the same. The owner, in placing her in that position, took on himself the risks consequent upon it, and being propelled against another vessel whilst so navigated subjects him to the same responsibility as if she had been governed by her own motive power independent of the Atlantic. The Express [supra]; The Hope, 2 W. Rob. 50; 9 Wend. 9; The Gipsy King [11 Jur. part I, O. S. 357].

In my judgment, the owner of the Goliah is answerable for the injury sustained by the Genius, and it must be referred to a commissioner to ascertain and report the amount. The libellant is entitled to recover the same with costs against the respondent.

Case No. 9,129.

MARSHALL v. MEE (two cases).

[1 MacA. Pat. Cas. 229.]

Circuit Court, District of Columbia. April, 1853.

PATENTS—PRIORITY OF INVENTION—REDUCTION TO PRACTICE—CREDIBILITY AND COMPETENCY OF WITNESS.

[1. One who first conceives an invention and uses reasonable diligence to perfect it, and does in fact perfect it, is entitled to a patent over a subsequent original inventor who first reduces the invention to actual use.]

[2. Mistake by a witness in an immaterial fact should not discredit him. The maxim "falsus in uno falsus in omnibus" only applies where there is willful corrupt falsehood, in one particular, amounting to perjury.]

[3. Two witnesses who had owned an interest in the invention claimed to have sold out about a month before testifying. But one of them admitted that if the machine proved successful part of the proceeds were to be applied to the payment of certain debts of theirs, and the other stated that if it were successful he might or might not get a pecuniary benefit therefrom. *Held*, that both were disqualified, as interested parties.]

[These were two appeals by Moses Marshall from a decision of the commissioner of patents, awarding priority, upon interferences to John Mee in respect to an invention of improvements in knitting looms.]

DUNLOP, Circuit Judge. On the 17th of May, 1851, John Mee filed in the patent office his application for a patent for his invention of an improved knitting loom, and on the 24th of May, 1851, his application for a patent for his invention of an improved warp-knit fabric (afterwards patents Nos. 9718, 9719 [granted May 10, 1853]). The commissioner being of opinion that the patents thus applied for would interfere with patent for similar inventions sought by Moses Marshall, gave notice thereof to the parties; and upon a hearing before him, decided that John Mee was the original and first inventor in both cases, and entitled to patents therefor. From this decision Mr. Marshall has appealed, and the question is now submitted to me by the parties upon written argument. Both cases have been heard together by consent. The commissioner has furnished a certificate in writing of his opinion and decision, and the reasons in support of it, and Mr. Marshall has filed his reasons of appeal, with the written arguments of his counsel. The cases were finally submitted to me on Saturday, the 26th of March, 1853.

There are two reasons of appeal in each case; the first of which in each case has been abandoned by the appellant, leaving only the second reason of appeal in each case, which in substance is that Marshall, and not Mee, was the original and first inventor, in the sense of the patent laws, of the improvement in each case as to the loom. The specifications, drawings, and models of the two parties show that the machines are identical in those parts upon which their interfering claims are founded. The counsel of Mr. Marshall, "for the purposes of his argument, assumes that the two machines and the two fabrics are identical." Those parts embrace only the double-thread guides and two sets of needles and their relative motion in respect to each other. Both machines have two sets of thread-guides and two sets of needle-bars whose movements are the same. As one set of needle-bars is raised for the purpose of being acted on by the two sets of thread-guides, the other set is covered; and as the second set of needle-bars is raised to receive the thread from the thread-guides, the first set is depressed. The movement of these thread-guides in forming the loops around the needles is the same in both machines, and each is capable of like variation in order to change the width of the ribs in the fabric manufactured. The Pepper loom, on which this is an improvement, had one guide and two needle-bars. The two needle-bars were bolted so as to operate together. The principle of improvement admitted to be valuable and patentable, as I understand it, is the

application to this Pepper loom of two separate guide-bars or thread-guides in combination with two separate and independent needle-bars, one working at a time, and the guide-bars reversing each other.

Assuming Mr. Mee and Mr. Marshall to be both original inventors of the improvement on the Pepper loom—Mee the first to conceive and describe it, and Marshall the first to embody it in a working machine; Mee using reasonable diligence to perfect his invention and to reduce it to practice, and succeeding in doing so after Marshall, but before a patent was granted to either—what are their rights, and to which of them should the commissioner award the patent?

It is contended by the learned counsel for Marshall that Marshall, under such circumstances, has the right; that although not the first to conceive, still, if he first reduced the conception to practice and use, he is the first inventor, in the sense of the patent laws, and that Mee must be excluded. The language of his argument is, that "in the race of diligence between rival inventors, he 'who first perfects his invention and reduces it to practice' is entitled to a patent." It will not be contended that if Marshall surreptitiously obtained a knowledge of Mee's invention, and applied for a patent, that he would be entitled, because he would not be the first or even an original inventor. But suppose him to have been an original contriver of the thing claimed, and not to have surreptitiously obtained a knowledge of it from another, then he can only be defeated by Mee's showing that he had previously conceived the idea, and that he had also carried the idea into practical operation; that is to say, in other words, that Mee had not only first conceived the idea, but had also first reduced it to practice. The case of Reed v. Cutter [Case No. 11,645], is cited to sustain this position; but a reference to that case shows that the doctrine laid down by Judge Story is the reverse of the position maintained by the counsel. Judge Story, in delivering his opinion in that case, uses this language: "The passage cited from Mr. Phillips' work on Patents, in the sense in which I understand it, is perfectly accurate. He there expressly states 'that the party claiming a patent must be the original and first inventor, and that his right to a patent will not be defeated by proof that another person had anticipated him in making the invention, "unless such person was using reasonable diligence in adopting and perfecting the same."' These latter words are copied from the fifteenth section of the act of 1836 [5 Stat. 123], and constitute a qualification of the preceding language of that section; so that an inventor who has first actually perfected his invention will not be deemed to have surreptitiously or unjustly obtained a patent for that which was in fact first invented by another, unless the latter was at the time using reasonable diligence in adapting and perfecting the same. And this I take to be clearly law; for he is the first inventor in the sense of the act, and entitled to a patent for his invention, who has first perfected and adapted the same to use; and until the invention is so perfected and adapted to use, it is not patentable. An imperfect and incomplete invention resting in mere theory, or in intellectual notion, or in uncertain experiments, and not actually reduced to practice, and embodied in some distinct machinery, apparatus, manufacture, or composition of matter, is not, and indeed cannot be, patentable under our patent laws, since it is utterly impossible under such circumstances to comply with the fundamental requisites of these acts. In a race of diligence between two independent inventors he who first reduces his invention to a fixed, positive, and practical form would seem to be entitled to a priority of right to a patent therefor. The clause of the section now under consideration seems to qualify that right by providing that in such cases he who invents first shall have the prior right if he is using reasonable diligence in adapting and perfecting the same, although the second inventor has in fact first perfected the same and reduced the same to practice in a positive form. It thus gives full effect to the well-known maxim, that he has the better right who is prior in point of time, namely, in making the discovery or invention. But if, as the argument of the learned counsel insists, the text of Mr. Phillips means to affirm (what I think it does not) that he who is the original and first inventor of an invention so perfected and reduced to practice will be deprived of his right to a patent in favor of a second and subsequent inventor, simply because the first invention was not then known or used by other persons than the inventor, or not known or used to such an extent as to give the public a full knowledge of its existence, I cannot agree to the doctrine, for, in my judgment, our patent laws justify no such construction." The same law is laid down by Judge Cranch in the cases of Heath v. Hildreth [Case No. 6,309], and Perry v. Cornell [Id. 11,001].

The case of Bedford v. Hunt [Id. 1,217], decided by Judge Story in 1817, is explained and modified by the case of Reed v. Cutter [supra], which was decided by the same judge in 1841.

There is no proof that Marshall conceived the idea of the improvement on the Pepper loom before November, 1850, while the witnesses Davis, Wallis, John Pepper, and others testify that Mee had conceived and described it in 1849 and early in 1850, months before Marshall, and had in fact knit the fabric. John Pepper, in his answer to the sixth interrogatory, says Mee so described the extra guide-bar that he (Pepper) could have put it on the loom if he had chosen to do so. Mee never abandoned his conception or failed in the use of reasonable diligence

to perfect and adapt it to use. It was known early in 1851 to the Cranes and J. Pepper that he was engaged in preparing his model, and his applications for patents for the machine and fabric were filed in the patent office on the 17th and 24th of May, 1851. Marshall and Mee's machines are admitted on both sides to be identical in principle, and the fabric, the product of them, the same. It seems to me, therefore, wholly immaterial, upon the authority of Reed v. Cutter, above cited, whether Marshall first reduced the improvement to use in a working machine or not. If Mee first conceived it, and used reasonable diligence to perfect it, and did perfect it, though subsequent to Marshall, he is entitled to the patents claimed by him, even if Marshall was an original subsequent inventor, first perfecting and reducing the invention to use. But upon the proof I do not think Mr. Marshall was an original inventor. If Mee's witnesses are to be credited —confirmed, as I think, to some extent, by Harmon—Marshall is in no sense an original inventor, as he borrowed his ideas of the improvement from Mee. The testimony of Wallis in his answers to the seventh, eighth, and thirteenth interrogatories-in-chief is full to this point. So is the answer of Samuel Adams to the third interrogatory.

Wallis, in his answers to the seventh, eighth, and thirteenth interrogatories-in-chief, says: "* * *" The force of this evidence is felt; and it is attempted to discredit him, first, by the testimony of Crane, who denies that he was present or even heard such conversation. If Crane were a competent witness, the testimony of the two would be balanced. Even if Crane was not present, it would only show that Wallis was mistaken in an immaterial fact. Whether Crane was present or not, does not alter the other facts testified to. A mistake by a witness in an immaterial fact ought not to discredit him. The maxim falsus in uno falsus in omnibus does not apply. That can only apply where there is willful corrupt falsehood in one particular, amounting to perjury; in which case all the other testimony of the witness is to be rejected. It has no application to a case of mistake. The most honest witness may not be found correct in some particulars; and if those particulars are immaterial, they should not discredit him in material matters. But Crane, for the reasons hereinafter given, is himself disqualified as interested; so that Wallis is, in law, uncontradicted.

The learned counsel for Marshall next ingeniously endeavors to destroy the force of this evidence by arguing that the conversation occurred before November, 1850, when the new-improved loom was commenced by Marshall, and that it must have related to some other loom—to a then "late-improved loom." The conclusive answer to this suggestion of counsel is, that Wallis, in the beginning of his answer to the seventh interrogatory, says: "I heard something about an improvement that could be made on the Pepper loom." It did not relate to what had been done or was then doing on an improved loom, but to what could be done. No person can read the evidence without so understanding the witness, according to the natural import of his words, or being satisfied that Mr. Marshall must have so understood him. But Wallis is not alone and unsupported in bringing home to Mr. Marshall the knowledge of Mee's conceptions for improving the Pepper loom in the identical particulars in which it was afterwards improved. Adams corroborates him in his answer to the third interrogatory of his deposition. John Pepper, in his answer to the twelfth interrogatory, corroborates him. John Pepper says: "Jasper Crane wrote that the invention was none of mine, but that it belonged to John Mee. The invention I mean is the new ribbed loom with the double guide-bars." Jasper Crane was then a partner of Marshall, and Marshall is bound by his admissions. These three wit nesses are unassailed in general reputation for veracity, and there is nothing in their testimony in the record to justify me in concluding that they have not spoken the truth.

Next, as to the witnesses examined on the part of Mr. Marshall, the Messrs. Crane (J. G. and Hosea) are not in law competent witnesses, being interested. It is proved by John Pepper, and admitted by them, that they were each interested one-third with Marshall in the machine built by him at Lowell and in the patents he expected to obtain for the improvement on the Pepper loom and the fabric made by it. Though they say they sold out about a month before they testified, J. G. Crane on his cross-examination, in answer to the fifty-second interrogatory, says: "I am informed and believe that in case the machine is successful in a pecuniary view, part of the proceeds are to be applied to the payment of certain debts due from me and my brother to Aldritch & Tyne." The money value of the machine depends upon Marshall's getting a patent for it. J. G. Crane says, in his answer to the forty-seventh cross-interrogatory: "Aldritch & Tyne were substituted in our place, and they have now the interest that we had." For the interest, then, they were to pay the debts referred to. The last cross-interrogatory put to Hosea Crane is in these words: "Do you not expect any benefit to result to you pecuniarily in case Marshall succeeds in getting a patent for this loom?" His answer is, "I may or may not." He does not venture to deny his interest, and he thus disqualifies himself.

As to the testimony of Harmon. The fifteenth interrogatory, put to him on his examination-in-chief by Mr. Marshall's attorney, is in these words: "So far as you know, who claimed to be the inventor of the improved machine?" Answer. "Marshall, as far as I know anything about it. I can't say I am right about that, after all, because after awhile I knew there was another one claim-

ing to have a part in it. It was but little I knew about it any way; what I knew I got from talk about the shop." Harmon does not say who that other one was who claimed part of the improvement, but he no doubt meant Mee, because, in answer to a cross-interrogatory specifically to this point, he admits that Mee did set up a claim to the invention. The thirty-third cross-interrogatory is in these words: "Did you ever hear Mee claim an interest in this improved loom?" His answer is, "I don't recollect anything definite about it through Mee; only by some incidental talk about it. In regard to Mee, as I recollect now in some conversation, he said that he had something to do with this, and that they were not willing to pay him for it, or something of that kind."

Upon the testimony of Mr. Marshall's own witness (Harmon), then, so much relied on by his counsel, what becomes of their argument that Mee could not be the inventor of the improvement because he stood by and saw Marshall spending his time and labor in perfecting the improvement without any assertion of right in himself? What becomes of the charges of bad faith to his employers (the Cranes), in suffering them to expend their money upon the understanding that Marshall was the inventor? It can hardly be thought that Marshall did not know what was talked of in his own shop, or knew less than his own witness (Harmon). Besides, the witnesses on the part of Mee before referred to fully prove Marshall's knowledge of Mee's claim, and also that the Messrs. Crane knew it. The Cranes "were not willing to pay Mee." They may have concluded he was too poor to perfect his improvement, which seems to have been attended with considerable expense; and as Marshall agreed to take them in as joint partners in the machine and patent, it was more to their interest to employ Marshall than Mee to construct the machine. If Mee's witnesses are to be believed, there can be no doubt that the Cranes and Marshall were well aware that Mee claimed the invention as his own. It is certainly of great weight that their statements on this point are to some extent confirmed by Harmon, Mr. Marshall's own witness.

Great reliance is placed by Marshall's counsel on the evidence of Harmon in relation to the cams. These cams, they say, were perfected by Marshall after a failure by Mee, and without them the machine was imperfect and made defective work, and the invention was not reduced to practice so as to be patentable. If the cams were of the essence of the invention, and constituted its principle, it is strange, as testified by Harmon, that Mee should have been intrusted by Marshall (the inventor) with the supervision of their construction. Harmon says that the cams, as made by Mee's order, failed to make a perfect ribbed fabric, and that Mee said "the defect could not be remedied." Harmon admits, however, that Mee on the same day, four or five hours after, said "he could remedy the defect." Marshall suggested the proper alterations in the cams, and then the machine performed its office and made a perfect ribbed fabric.

From the explanations made to me on the hearing by the examiner, I do not understand that the cams form any part of the principle of the improved Pepper loom. That principle consists in the application to the old Pepper loom of a double set of needle-bars, working separately and independently, one set of needle-bars being up while the other set is down, in combination with a double set of guide-bars or thread-guides reversing each other. The cams form no part of the principle of the improvement; are merely auxiliary; a mechanical device requiring no invention, and capable of being made and applied by any skillful machinist. If it was true, therefore, that Marshall had first perfected this mechanical device, and thereby caused the machine first to make the perfect fabric, still, if Mee first conceived the improvement and its principle, and was using reasonable diligence to perfect the mechanical details, he cannot be deprived of his patents. He did perfect his model in a reasonable time. No such delay occurred as to amount to abandonment of his right. His application to the patent office was previous to Marshall's. No patent in fact has yet been granted to anybody; and if he is the first original inventor, and has now reduced his invention to practice, he must prevail over any subsequent original inventor reducing it to use before him, and a fortiori over Mr. Marshall, not an original inventor at all, but borrowing his ideas of the improvement from Mee. The patents for the loom and for the fabric, the fruit of the loom, must therefore be awarded to the assignees of John Mee, unless some person other than Marshall can show a better right. John Pepper asserts that the double needle-bars, working independently, was his original idea; but all the other evidence shows it to be Mee's; and Pepper has entered no caveat, nor set up any adverse claim in the patent office, nor alleged that he made known his invention to Mee, and he is self-concluded.

Upon the whole, therefore, I am of opinion, and do now this 20th of April, 1853, order and adjudge, that the decision of the commissioner of patents of the 12th of January, 1852, in favor of Mee, Rourke, and McKennon, assignees of John Mee, in the cases of improvements in the knitting-loom and knit fabric, be, and the same is hereby, affirmed.

MARSHALL (PATCH v.). See Case No. 10,793.

Case No. 9,130.

MARSHALL v. PIERREZ.

[9 Ben. 39.] [1]

District Court, E. D. New York. Feb., 1877.

SHIPPING—CHARTER—JURISDICTION—DAMAGES ON CONTRACT.

Where a libel in personam was filed to recover damages on a contract for the use of a steamboat for two excursion trips, from the city of New York to Sandy Hook light and return, and a motion was made to dismiss the libel for want of jurisdiction: *Held*, that the contract set forth had all the legal characteristics of a charter-party, and was a maritime contract within the jurisdiction of the admiralty. The cases of The William Fletcher [Case No. 17,692] and The Druid, 1 W. Rob. Adm. 391, considered and distinguished.

[Cited in Wenberg v. Cargo of Mineral Phosphate, 15 Fed. 286.]

[This was a suit by William H. Marshall against Gustavus Pierrez for nonperformance of contract.]

A contract was made in August, 1870, between parties engaged in the business of getting up pleasure excursions for passengers, and the owner of the steamboat Minnie R. Childs, for two excursions from New York to the light-ship beyond Sandy Hook and back, for $125 for each trip, the charterers to have all the receipts from passengers, and the owner to pay the running expenses of the boat. The excursion was duly advertised and prepared for, many passengers gathered at different landings, but the boat did not come at all. The charterers thereupon commenced an action in personam, claiming $1,500 damages for breach of the contract as a charter-party. The contract was verbal, and the answer averred that the negotiations had were only preliminary and that no contract was in fact ever made.

W. H. McDougall and J. J. Allen, for libellant.

H. M. Whitbeck, for respondent.

BENEDICT, District Judge. This is an action in personam brought to recover of the defendant damages for the non-performance of a contract. The libel avers that on the 8th of August, 1876, the defendant, being the owner of the steamboat Minnie R. Childs, agreed with the libellant to charter that boat to the libellant for two voyages from the city of New York to the light-ship outside of Sandy Hook, in the Atlantic Ocean, and back, to carry therein for the libellants a cargo of passengers, for the sum of $125 for each voyage; that the libellants were at all times ready and willing to perform their said agreement on their part, and entered upon the performance thereof by providing for the cargo required; but the defendant wholly refused to perform it on his part, and without cause declined to perform the voyages as agreed, whereby the libellant sustained damage to the amount of $1,500.

A motion has been made to dismiss this libel for the purpose of raising at the outset an objection to the jurisdiction of the admiralty to entertain such an action. In behalf of the defendant it is contended that the facts averred do not constitute a cause of action cognizable in a court of admiralty, and reference is made to the case of O'Brien v. The William Fletcher,—decided by Judge Blatchford, Nov. 14, 1876 [Case No. 7,692],—as a case exactly similar to this, where the libel was dismissed. But the advocate has not observed the distinction existing between an action in rem to enforce a lien upon a vessel and an action in personam to recover damages for the breach of a maritime contract.

The case of The William Fletcher [supra] was an action in rem, and the question determined was a question of lien. In respect to the question of lien, the law as now settled is that in the absence of a special agreement that the vessel shall be hypothecated as security for the performance of the contract, no lien upon the ship arises out of a contract to transport cargo in her, when no cargo is received by the ship and the voyage is never commenced.

This is an action in personam to recover a personal judgment against the defendant for the damages arising out of a breach of contract. The contract set forth is an explicit and complete contract in regard to the performance of two definite voyages by the boat of the defendant, at a definite time, for a definite sum of money. Such a contract has all the legal characteristics of a charter of the vessel and is a maritime contract. As such it furnishes a subject matter within the jurisdiction of the admiralty. The case of Quirk v. Clinton [Case No. 11,518] decided by Judge Betts, and affirmed on appeal by Judge Nelson, was a case similar in principle to the case before the court, and is authority to support this libel. The remark of the court in the case of The Druid, 1 W. Rob. Adm. 391, to the effect that no responsibility can attach upon the owner of a ship if the ship is exempt,—a remark afterwards stated by the judge who made it to be "in the nature of an obiter dictum" (The Bold Buccleugh, 2 Eng. Law & Eq. 540),—if to be understood as of general application, has not been considered to be in harmony with the maritime law of the United States (The Freeman, 18 How. [59 U. S.] 189; 1 Pars. Shipp. p. 174, note), and indeed has not been referred to by the defendant as authority in support of the objection taken to this libel. I am therefore of the opinion that the jurisdiction of the court to entertain this action is complete.

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

Case No. 9,131.

MARSHALL et al. v. REDFIELD.

[4 Blatchf. 221; [1] 40 Hunt, Mer. Mag. 195; 2 Wkly. Law Gaz. 296.]

Circuit Court, S. D. New York. Oct. 2, 1858.

CUSTOMS DUTIES — BOND FOR PAYMENT — GOODS NOT IMPORTED — APPLICATION FOR REMISSION — DELAY—SUIT FOR RECOVERY —VOLUNTARY PAYMENT.

1. Where a bond for the payment of duties was given on a warehouse entry, on the importation of goods, and it turned out that some of the goods covered by the bond were not imported into the country, and a remission of the duties on those goods was refused by the treasury department, because the application was not made within a year after the importation, and the importer then paid, under protest, the duties on the missing goods, to avoid a suit on the bond: *Held*, that he could not recover back the duties thus paid.

[Cited in United States v. Schlesinger, 14 Fed. 683.]

2. The payment was voluntary, and was not made in order to obtain the possession of any goods, within the act of February 26, 1845 (5 Stat. 727).

This was an action [by Edward Marshall and Thomas Tileston,] against [Heman J. Redfield] the collector of the port of New York, to recover back duties charged to have been illegally exacted [under color of the law, by the collector].[2] Nine casks of hardware had been shipped to the plaintiffs, as appeared from the invoice and manifest, and a warehouse entry was made of the same, and a bond given in the usual way, by the consignees, with surety. When the ship was discharged [under the inspector],[2] but seven of the casks could be found on board, the other two having been either lost, sent by some other ship, or not shipped at all. The seven were sent to the warehouse. The plaintiffs, within the three years allowed by the act of congress, paid the duties [to the collector][2] upon the seven casks, and withdrew the goods from the warehouse. They also applied to have the bond cancelled without the payment of duties upon the two missing casks, which, it was claimed, had never been imported into the country, and were, therefore, not chargeable with duties. That application was refused by the collector. The parties then applied to the secretary of the treasury for a remission of the duties, which application was also refused, under a regulation of the department, requiring the application to be made within a year from the importation of the goods. The plaintiffs then paid the duties under protest, in order to obtain a cancellation of the bond, and to avoid a suit on the same. This action was then brought, to recover back the money thus paid, with interest.

NELSON, Circuit Justice. The principal objection to a recovery in this case is, that the money has been paid by the plaintiffs voluntarily, and not under coercion or duress by color of law, so as to lay a foundation for the action. The act of congress of February 26, 1845 (5 Stat. 727), saves the action to parties "who have paid, or shall hereafter pay, money, as and for duties, under protest, to any collector of the customs," &c., "in order to obtain goods, &c., imported by him," &c., and upon which the duties claimed were not chargeable. Now, in the present case, the goods in question were not in the hands of the collector, or under his authority, and, indeed, had never been in the custom-house, and hence the money cannot be said to have been paid to get possession of them. It is supposed, however, that the payment with a view to the surrender or cancellation of the bond, and to avoid a suit thereon, comes within the spirit or intent of the act of congress; and the case of Maxwell v. Griswold, 10 How. [51 U. S.] 242, is referred to as sustaining this position. But, on looking into that case, it will be found not to be an authority for this action. There the goods were in the hands of the collector, and the merchant was obliged to do one of two things, in order to obtain them, namely, allow his invoice price to remain, and be subjected to the penalty of twenty per centum, under the 8th section of the act of 1846 [9 Stat. 43], or add to the invoice price, so as to bring it up to that claimed under the treasury circular. The claim was, in either case, unlawful, as was subsequently held by the court. Among other things, the court say: "The money was thus obtained by a moral duress, not justified by law, and which was not submitted to by the importer, except to regain possession of his property withheld from him on grounds manifestly wrong."

In the present case, the money was paid to avoid a suit on the bond, that being threatened if the duties were not paid. But the defence to that suit was as perfect as if the bond had not been in the case, and to hold such a payment to be one by coercion and not voluntary, would be equivalent to holding that every payment of money demanded by the collector is an involuntary payment, and lays a foundation for an action to recover it back, if the demand turns out, in the end, not to have been founded in law. Upon the case made, a judgment must be entered for the defendant, with costs.

MARSHALL (SLOCUM v.). See Case No. 12,953.

MARSHALL (SMITH v.). See Case No. 13,077.

Case No. 9,132.

MARSHALL v. THURSTON.

[Quoted at length in Third Nat. Bank v. Harrison, 10 Fed. 250. A state case, and partially reported in 3 Lea (Tenn.) 740.]

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

[2] [40 Hunt, Mer. Mag. 195.]

Case No. 9,133.

MARSHALL v. UNION INS. CO.

[2 Wash. C. C. 357.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1809.

MARINE INSURANCE—ILLEGAL TRADE — CONCEALMENT—GROUND OF SUSPICION—CONDEMNATION—AGAINST RIGHT.

1. The vessel insured was captured on her voyage to Carthagena, and condemned on the ground of illicit trade, a part of the cargo having been brought from Spain to New-York by a Spaniard, entered for exportation, and afterwards sold to the plaintiff, the Spaniard going out as passenger on board the vessel, and the transaction being considered by the British court of admiralty as illegal, deeming it a trading between the mother country and her colony. If the jury considered that the assured was guilty of concealment of the shipment of the goods of Spanish origin, then the policies effected by the plaintiff will be void, for the taint of part of the cargo would occasion a seizure, detention, and expense, and give the assured a right to abandon.

2. The assured is not bound to anticipate every possible ground of suspicion which may, against right, weigh with the belligerent cruisers and courts, and to communicate the circumstances; although, if against right, the belligerent courts are in the habit of condemning property under particular circumstances, he should disclose the circumstances, if they exist, that the underwriter may know how to estimate the risk.

This was an action on four policies; one on the vessel, another on the freight, a third on the cargo, and a fourth on an additional cargo, effected in October, 1806. The additional cargo consisted principally of goods brought by a Spaniard from Cadiz to New-York, and entered for exportation for the benefit of drawback. These goods were afterwards sold by the Spaniard to one Cazenove, recently, before they were reshipped, and sold by Cazenove to the plaintiff. The policies contained the usual warranty of neutral property, to be proved here, and against illicit or prohibited trade. The defendant was informed that five Spaniards, with passports, were to go passengers in this vessel to Carthagena, but that any part of the cargo had been brought by one of those passengers from Spain, and had been recently sold by him to the plaintiff, was not disclosed. The vessel and cargo, after having had her papers taken away at sea by a British vessel, was again detained by another British vessel, carried into Jamaica, and condemned. The whole record was read, not as containing evidence, but to show the ground of condemnation. The objections to the recovery were, first; that there were strong circumstances in the case, to show that the sale by the Spaniard was not bona fide, and that the apparent sale was as a cover; and, secondly, that the circumstance of part of the cargo having been brought from Spain, and recently sold by one of the passengers, ought to have been disclosed to the defendants. Three presidents of insurance offices were examined, and they all gave it as their opinion that those circumstances were material. Two of them said, that a disclosure of them would have increased the premium. The third said, that it would have led him to inquire into the fairness of the transaction; but that, if he had found it bona fide, it would have made no difference with him.

WASHINGTON, Circuit Justice, in charging the jury, observed—that it was for them to weigh the evidence, and to decide, not upon suspicions, but upon such circumstances as ought to influence a correct mind, whether the sale was bona fide, or not. If not, it was a fraud upon the neutrality of the United States, as well as upon the defendants, and amounted to a breach of warranty in the policy on those goods. That if the jury should be satisfied upon this point against the insured, it would be sufficient to avoid all the policies upon the ground of concealment, because, although the taint upon part of the cargo would not, or ought not to have caused a condemnation of the other parts, or of the vessel, yet it would necessarily occasion a seizure, detention, and expense, if not danger to the whole, and would, at all events, give a right to the insured, on hearing of the capture, to abandon. The insurer calculates not only the risk of condemnation, but of capture and detention, and a concealment of circumstances which may produce the latter, must be material to the risk, and would, if known, increase the premium.

As to the second point, the jury must inquire for themselves, whether these circumstances were material to the risk, and in making this inquiry, they should carry back their minds to the time when these insurances were effected, without attending to the subsequent capture and condemnation. We are all very wise in finding out the causes which have led to particular events, after the events have taken place; and we are apt to give weight and consequence to circumstances, which would originally have passed unnoticed. Would the circumstances of this case, which were disclosed, have appared material, in October 1806, to any of these parties? The insured knew, provided his purchase was bona fide, that the goods became thereby neutral, and were not liable to condemnation. He also knew, that, in general, it was not necessary for the insured to disclose from whom he had purchased the cargo which he asks to be insured; and he also knew, that according to the law of nations, it was no cause of condemnation, that the vendor was an enemy, and was to be a passenger in the vessel carrying the goods. It might or might not have occurred to him, that these were circumstances, which, with a suspicious court, or rapacious captors, might lead to difficulty; but we do not know that the insured is bound to anticipate every pos-

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

sible ground of suspicion, which might weigh with some minds, and totally escape the observation of others. If, according to any established adjudications of the belligerent courts, generally known, certain circumstances become grounds of condemnation, though in opposition to the law of nations, those circumstances, if known to the insured, should be disclosed. So a case may happen, where the circumstances are of such a nature, as to make the danger of capture very great, in which the court mean not to say, that a disclosure ought not to be made. But it is not every conjecture or opinion, as to the materiality of the circumstances concealed, which ought to weigh with the jury. In this case, the opinions of the witnesses, upon this point, deserve to be respected. Still, however, they are but opinions, which are not obligatory upon a jury. One of those witnesses put the question upon the true ground. The circumstances, if known, would have led him to inquire into the fairness and good faith of the transaction, and if he found it fair, they would have made no difference. This is certainly a very proper inquiry for a jury to make.

Verdict for plaintiff.

[NOTE. Motion for a new trial was made upon the ground of newly-discovered evidence. The motion was allowed. Case No. 9,134. Upon the new trial there was a verdict for defendants. Id. 9,135.]

Case No. 9,134.

MARSHALL v. UNION INS. CO.

[2 Wash. C. C. 411.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1809.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—IMPORTANCE THEREOF.

The court granted a new trial, on the ground that new and material evidence had been discovered, which the court deemed so important, as that the same should be submitted to the jury.

[Cited in Macy v. De Wolf, Case No. 8,933; Aiken v. Bemis, Id. 109.]

This was a motion for a new trial, on the ground that new and material evidence had been discovered since the trial. Vide [Case No. 9,133]. The new evidence consisted of documents from the custom-house at New York, tending to invalidate some of the testimony given on the trial, and to show that the sale by the Spaniard was not bona fide, but a mere cover, and the goods, in fact, not neutral property.

E. Tilghman, against the motion, stated, that when this case was reached upon the trial list, Mr. Dallas, for the defendant, mentioned, that the commission, which had been received a day or two before from New-York, gave him reason to suspect that further testimony might be obtained from the custom-house, and that he had sent on there accordingly. Upon which, the plaintiff's counsel declined pressing on the trial, and left it to Mr. Dallas, whether it should then come on or not. It was, therefore, now too late to urge this testimony as a ground for a new trial. The defendants had chosen to take the chance of a trial upon the evidence they had, and ought not to be allowed a new one on this new evidence, for the production of which, the plaintiff's counsel had offered to wait. He also contended, that the new evidence was not material, and did not affect the merits of the case.

Mr. Dallas, for the motion, replied, that he did not, at the time of the trial, understand the proffered indulgence of the plaintiff's counsel to go so far as Mr. Tilghman did, and as it was merely a suspicion that further testimony might be obtained, he would not have been warranted in requesting from the court, or even from the counsel, a continuance of the cause. As to the materiality of the new evidence, he relied upon it as decisive against the defendant.

BY THE COURT. This is a rule to show cause why a new trial should not be granted, upon the ground of material evidence discovered since the trial. We are satisfied that the newly discovered evidence was not known at the time of the trial, although the defendants' counsel, upon seeing the New-York commission, which only came to hand a few days before the trial, suspected, from some parts of it, that some useful information might be collected. But this would not have been a good reason for continuing the cause; and as the counsel differ, with respect to what passed between them at the bar, we cannot say that Mr. Dallas understood that his opponents would have consented to a postponement, although we are well satisfied, from their declarations, that they would have so consented. But, certainly, he had no ground for insisting upon it.

As to the materiality of the evidence, we cannot positively decide, nor, perhaps, would it be proper now to give a positive opinion about it. It may be explained, but at present it appears to have a considerable bearing upon the point on which the cause turns, and we think it ought to be submitted to a jury.

Rule, for a new trial, absolute.

[Upon the new trial there was a verdict in favor of the defendants. Case No. 9,135.]

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

Case No. 9,135.

MARSHALL v. UNION INS. CO.

[2 Wash. C. C. 452.] [1]

Circuit Court, D. Pennsylvania. April Term, 1810.

MARINE INSURANCE—CONDEMNATION—EVIDENCE—PROCEEDINGS OF ADMIRALTY COURT—CLAIM TO PROPERTY—DUTY OF MASTER.

1. The whole record of the proceedings of the admiralty court in which the property insured was condemned, cannot be read in evidence, the sentence of the court not requiring the whole proceedings to explain them.

2. Cases in which the record may be referred to, in suits brought against the underwriters.

3. Unless under peculiar circumstances, no part of the record, other than the sentence, is evidence; and the party wishing to bring himself within the exceptions, must state the purpose for which he means to read other parts of the record, and confine himself to those parts.

[Cited in Azuria v. Insurance Co. of Pennsylvania, Case No. 691.]

4. It is the duty of the master to put in a claim to property against which proceedings are instituted; and his failing to do so, may possibly affect the claim of the insured, under certain circumstances.

[These were actions on four policies of insurance at the first hearing of which a verdict was rendered in the plaintiff's favor, Case No. 9,133.]

This cause, in which a new trial was granted at the last term [Case No. 9,134], now came on. The evidence was the same, with some additional circumstances, strongly pressed upon the jury by the defendants' counsel, to show that the additional cargo was Spanish property, covered by the plaintiff. No evidence was given to prove the materiality to the risk, of the non-disclosure of the purchase of that cargo, supposing it to have been bona fide. The defendants' counsel offered to read the whole of the record of the vice-admiralty court at Jamaica, condemning the vessel and cargo; but the court refused to let it be read, observing, that the sentence, being free from ambiguity, did not require any aid from other parts of the record, in order to explain the ground upon which it went; and of course, it was all that it was necessary or proper to read. The record might be referred to, for some purposes; such, for instance, as to show that no claim was put in; that the condemnation was probably produced by an untrue and fraudulent claim, or by other misconduct of the captain, to be collected from his answers to the standing interrogatories, and from the same source to impeach his evidence given in the trial here; and also to show what papers were found on board, as acknowledged by the captain. But unless with these exceptions, or such as rest upon similar principles, the record, other than the sentence, is not evidence; and, to save time, the party wishing to bring himself within any of the exceptions, must state the purpose for which he means to read any other part of the record, and confine himself to that point. The court referred to former decisions here upon this question, and to the opinion of the supreme court, at the last term, in the case of Hodgson v. Marine Ins. Co. [5 Cranch (9 U. S.) 100]. The defendants produced in evidence the oath taken at the custom-house by Cazenove, in which he states, that the goods mentioned in the entry, which includes the four boxes imported by Cazenove, he had delivered to Marshall, and Marshall swears that he received them from Cazenove; whereas, the form of the oath prescribed by law, is, that the one sold, and the other purchased. This was urged as strong evidence, to show, that no real transfer of this property from De Lastre had been made. Many inaccuracies were pointed out in the custom-house proceedings, where Cazenove appeared as the importer of these goods, instead of agent to De Lastre; and the invoice of the outward cargo is dated the 4th of October, whereas the sale to the plaintiff is dated the 14th. A witness was examined, to prove that this was a mistake, and that the date of the invoice should have been the 15th. Evidence explanatory of the inaccuracies at the custom-house, was also given. Other circumstances were also relied upon by the defendants, to show that the transfer of these goods, originally belonging to De Lastre, was not real. It was also objected, that the captain put in no claim at Jamaica; which might have produced the condemnation, and for which the insured ought to be responsible. It was also objected that the condemnation was for illicit trade; and also, that the vessel and cargo were not sufficiently documented; and further, that one of the boxes containing books imported by De Lastre, was not pretended to be sold to the plaintiff, although it was acknowledged that it was not covered as the property of the plaintiff, though put on board by him.

WASHINGTON, Circuit Justice (charging jury). It is certainly the duty of the master, to put in a claim for his owners, and their claim upon the underwriters may possibly, under certain circumstances, be affected by a neglect of the master to do so. But in this case, the letters of the captain to his owners calling for duplicates of the papers, of which the first privateer that brought him to had deprived him, proves that it was his intention to file a claim; and his omission to do so may fairly be attributed to his death, which took place before the sentence. As to the charge of illicit trade, there is not the slightest evidence of it; the letter of Mr.

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

Lenox, the consul of the United States at Jamaica, stating this, not being to be regarded by the jury. As to the want of proper papers to prove the neutrality of the property, the charge is unsupported, and the contrary is sufficiently established.

The important point is, whether the goods imported by De Lastre, and mentioned in the bill of parcels from Cazenove to Marshall, were bona fide sold to the plaintiff? Cazenove swears that he purchased them from De Lastre, and sold them to Marshall, and received payment; and this is corroborated by the bill of parcels, with Cazenove's receipt for the money. In opposition to this, the defendants rely upon circumstantial evidence, which, if sufficiently strong to convince your minds that this was a fraudulent transaction, ought not to have the less weight because it is not positive and direct. The circumstances principally relied upon, are, the kind of goods—not such as could be intended for sale, but such as were suited to the condition of a man of fortune and high station; that they are the very goods brought in by him to New-York, and which were exported in the same vessel which was to convey him to Carthagena. Secondly. As a proof that Marshall acted as a mere agent, he charged 2½ per cent. commission at the foot of the invoice. Thirdly. The irregularities at the custom-house. Fourthly. Cazenove has produced no bill of parcels, receipt or other document whatever, showing that he purchased these goods from De Lastre. Lastly, and principally. The oaths taken at the custom-house by Cazenove and Marshall, in which they describe these goods as delivered by one, and received by the other, contrary to the prescribed form, which should have stated them as sold by Cazenove, and purchased by Marshall. It is for you to say, if these circumstances are sufficiently weighty to overpower the positive evidence in the cause. If this was in fact belligerent property, covered by Marshall, the owner of the vessel and cargo, this will avoid all the policies, upon the ground of concealment; because it exposed the whole to the hazard of confiscation, and most certainly to seizure, detention, and expense, affording to the insured an opportunity to throw the whole on the underwriters. If any of the articles put on board by Marshall were the property of De Lastre, and were not covered as belonging to the plaintiff, (which it was contended by the defendants' counsel was the case of the box of books,) this might also be material to the risk, by inducing seizure, a carrying in for examination and adjudication, though finally, a condemnation of more than the belligerent property could not have been justified. As to the materiality of this fact to the risk insured, you are to decide; and the court has only to inform you, that the concealment of a material fact avoids the policy.

Verdict for defendants.

Case No. 9,136.

MARSHALL et al. v. WILLIAMS.

[2 Biss. 255; [1] 3 Am. Law T. Rep. U. S. Cts. 77; 18 Int. Rev. Rec. 165; 2 Chi. Leg. News, 201; 5 Leg. Gaz. 337.]

Circuit Court, N. D. Illinois. March Term, 1870.

PRINCIPAL AND AGENT—COMMISSION MERCHANT—INSTRUCTIONS—CREDIT—WAIVER.

1. Commission merchant is liable to his principal if he sells goods contrary to instructions, or is guilty of negligence in the sale.

2. The receiving without objection accounts of sales made on credit, is a waiver of a previous instruction to sell for cash, and the merchant may afterward presume that he has the right to make further sales on credit.

The defendant, George F. Williams, while acting as the agent of the plaintiffs in selling oil on commission for them sold on fifteen days credit, on the 18th of January, 1867, ninety-two barrels to McCormick and Callender, who soon afterwards failed, whereupon plaintiffs brought this action to recover the value of the oil. On the 16th of August, 1866, the plaintiffs had by letter instructed the defendant in selling oil for them to sell according to the "net cash rule." Nevertheless the oil subsequently sold by the defendant for the plaintiffs was sold not for cash, but on credit, sometimes more than fifteen days, sometimes less—and returns made accordingly.

George Willard, for plaintiffs.
S. A. Goodwin, for defendant.

DRUMMOND, Circuit Judge. The defendant is accountable, in the first place, if he has sold the oil contrary to the instructions of the plaintiffs, and secondly, if he has been guilty of any negligence in the sale by which they have been damnified.

The testimony introduced as to the commercial meaning of these words, "net cash rule" is not of such a character that the court can place any stress upon it; the result seems to be that the language is interpreted according to the notion of each particular merchant. Some construed it in one way, and some in another. There is no general understanding among commercial men applicable to the use of such language, therefore the court must place a legal construction upon it, which is that the oil was to be sold for cash. If the case stood upon that alone, then perhaps there would be no doubt that the plaintiffs could recover. But the subsequent transactions show that if that was the purport of the instructions, it was waived, and the business was done upon a different basis.

The credits given from time to time on sales by the defendant, were known to the plaintiffs, and if it was their intention to hold defendant up to the cash rule they should have at once notified him that such sales

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

were contrary to their instructions and that they must sell for cash. But having accepted without objection the accounts of sale made from time to time by the defendant, and drawn for and received the balances, it must be considered that their letter of the 16th of August was modified by these subsequent recognitions of the credits given by the defendant. Accordingly the presumption is that defendant had the right to sell to McCormick and Callender on fifteen days credit in the same way as he had previously sold to other parties.

This is the construction that must be placed on the conduct of the plaintiffs unless it was the understanding and contract that the defendant was selling on a guaranty of the sales made. If that was so, and the plaintiffs were warranted in believing that it was so understood by the defendant, as a matter of course the change from cash to credit would not be objected to; but I doubt whether the plaintiffs could have so understood it. These sales and reports were made from time to time at the usual commissions charged. Now can it be possible that the defendant believed he was selling on a del credere commission and guaranteeing every sale that he made?

I cannot so interpret the conduct of the parties. I do not know what the facts may be in the commercial world. It may be that commission merchants are so anxious to get business that they may guaranty sales if they receive the property, and have the right to sell it, taking the ordinary commissions, but I do not suppose, and certainly it cannot be inferred from the testimony in this case that such practice prevails in Chicago; and therefore I cannot infer that that construction is to be given to the plaintiffs' conduct.

The only remaining question is, did the defendant act with reasonable diligence and good faith in the sales. Some things had occurred, undoubtedly, calculated to throw suspicion upon the commercial standing of McCormick and Callender, but it cannot be claimed in this case that those circumstances were known to the defendant, or to his agent. The agent who transacted the business expressly states that so far as he knew, he believed that McCormick and Callender were in good standing, and a suspicion as to their position seems not to have been known to a large number of the merchants engaged in the same kind of business, and of course may not have been known to the defendant.

It would be hard merely because a whisper is circulated among men affecting the standing of a merchant, that another should be held accountable for the fact, if it has been indicated to others, and not to himself. So that taking all the testimony together, I cannot say the defendant was guilty of any negligence in the sale of this property to McCormick and Callender. The weight of evidence is that their standing in the community was good at the time of this sale.

This is a hard case undoubtedly on plaintiffs, but somebody has to lose his money. It is a question whether it shall be lost by the defendant or plaintiffs. If the sale was at the owner's risk, then the owner should lose: if at the risk of the defendant, he should lose.

Plaintiffs by permission of the court took a non-suit.

NOTE. A sale by a factor contrary to the order of his principal, may be afterward affirmed by the receipt of the proceeds. Morse v. Smith, Dud. (S. C.) 248. Where a commission merchant from time to time sends an account of sales to his principal, who makes no objection and draws for the balance of account rendered, it is a ratification of the sales, and the principal cannot recover for any alleged violation of instructions as to the terms of sale. Woodward v. Suydam, 11 Ohio, 360.

MARSHALL COUNTY (SCHENCK v.). See Case No. 12,449.

MARSHAL OF DISTRICT OF COLUMBIA (RIDDLE v.). See Case No. 11,808.

MARSHAL OF DISTRICT OF COLUMBIA (WILSON v.). See Case No. 17,822.

MARSHAL OF DISTRICT OF NORTH CAROLINA (UNITED STATES v.). See Case No. 15,727.

MARSHAL OF UNITED STATES (ARNOLD v.). See Case No. 560.

MARSHAL'S AUTHORITY TO ADJOURN UNITED STATES COURTS. See Fed. Cas. Append.

MARSHALS' FEES IN BANKRUPTCY CASES. See Fed. Cas. Append.

MARSTELLER (ARELL v.). See Case No. 514.

MARSTELLER (DEAN v.). See Case No. 3, 710.

Case No. 9,137.

MARSTELLER v. FAW.

[1 Cranch, C. C. 117.] [1]

Circuit Court, District of Columbia. March Term, 1803.[2]

MONEY—LEGAL TENDER—PAPER MONEY—DEPRECIATION—RENT—REDUCTION.

Upon a deed made in 1779, reserving an annual rent of £26 current money in Virginia, forever, the rents accruing during the existence of paper money are to be reduced according to the scale of depreciation.

In equity.

CRANCH, Circuit Judge. In May, 1779, at a public sale of lots contiguous to the then bounds of Alexandria, by the executors of John Alexander, for the benefit of his son, W. T. Alexander, (then under age,) by virtue of the will of John Alexander,—Peter Wise, for Jacob Sly, became the purchaser of a half acre lot, in fee simple rendering an annual rent of £26, current money of Virginia. Before any deed of conveyance was made, Faw, the defendant, purchased the lot

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

[2] [Reversed in 2 Cranch (6 U. S.) 10.]

from Sly, and on the 5th of August, 1779, obtained a deed in his own name from the executors of John Alexander in fee-simple, rendering an annual rent of £26 current money of Virginia, to William Thornton Alexander, who was also a party to the deed. No notice is taken, in the deed, of the existence of paper money, which was then a legal tender, but had much depreciated. Gold and silver were also current money, but were very scarce and difficult to be obtained. Marsteller, who, on the 29th of December, 1794, got an assignment of the rents and the reversion from W. T. Alexander, brought this bill to recover them from Faw.

It appears in evidence that Wise, when he bid off the lot, did not particularly understand in what kind of money the rents were to be paid, but supposed they would be payable in gold and silver, and therefore did not buy a lot for himself. That the rent was low at that time if payable in paper money, but high if payable in gold and silver, on account of its great scarcity. That the general opinion of those who attended the sale was that the rents would be payable in paper money as long as it should be current, and afterwards in gold and silver. It is admitted by the parties that the contract was to pay the rent in such money as should be current at the time the rents would become payable. And that such was their understanding and intention at the time of executing the contract. The rents therefore were payable in paper money while that was current, but were afterwards hitherto payable in gold and silver. This being the nature of the contract, the question is whether the rents forever are to be reduced annually by the scale of depreciation established by the act of the Virginia assembly, passed at the November session, 1781, c. 22; Chancery Revision of the laws, p. 147—(see 1 Wash. [Va.] 341, 342); or secondly, whether those rents only which became payable during the existence of paper money, are to be scaled; or, thirdly, whether the whole rent is now to be paid in gold and silver; or lastly, whether the court will establish any other equitable rule for the payment of the rents. The sum of £26 reduced by the scale for August, 1779, will be only £1. 3s. 7½d. or $3.94. This sum appears farther below the real value of the rent at that time than £26—or $86.67 was above its value. Lots in 1774 rented for 20 to 40 dollars—a lot opposite at 30 dollars in 1774—some as high as 45 dollars of equal value;—in 1784, lots less valuable rented at 133 dollars. Hence it appears that the scale of depreciation does not form a fair and equitable rule of interpretation of the contract. Besides, it seems to me that the admission of the parties that it was their intention that the rents should be payable in money current when the rents should become due, fairly excludes the case from the operation of the scale. Each party knew that at the time of the contract, the rent, if payable in paper, was far below its real value. They knew that the paper was still depreciating, and that it would at a future time cease to be a circulating medium, either by its depreciating so as finally to become of no value, or by depreciating until it gained the par of gold and silver. Either event would produce the same effect. The uncertainty of that event was a risk which each party was willing to take upon himself; and both received a premium for that risk. The benefit to Faw was the present low rent and the length of time during which it might be paid in a depreciated currency. The contemplated advantage to Alexander was the future high rent, when paper money should cease. Faw might be further induced to take the risk of a future high rent from the probability that lots would increase rapidly in value in consequence of the progressive increase of the trade and population of the town. It seems to have been a speculation on both sides attended with no circumstance of fraud or oppression. Each party had the same means of making his calculations upon future events, and neither seems to have been disappointed in his expectations. Faw has had the opportunity of paying part of his rents in paper money, and the benefit of the increased value of the property, and it seems but right that Alexander should receive the benefit of the increased value of the currency. Parol testimony has been adduced, not to contradict or vary the deed, but to explain the ambiguous term current money of Virginia—two kinds of money being current at that time. They have very naturally explained the general understanding of those who were at the sale, and there seems to be no reason to doubt that it was the intention and expectation of both parties, that the rent should be paid in paper while current, but afterwards in gold and silver or other money current at that time, when the rents should become payable.

The contract then seems to be divided into two parts—the one to pay paper money for a certain period, and after that to pay gold and silver. The period for paying in paper has by subsequent events been ascertained to be the 1st of January, 1782. At which time the other part of the contract took effect, which was to pay the rents in the then current money, namely, gold and silver. The act of assembly seems to contemplate only those contracts in which the parties themselves have not ascertained the relative value of paper money and gold and silver, and not those where they may have provided against the depreciation of the money, and its final abolition. The present seems to me to have been a contract of the latter kind. Both parties seem to have had a full view of the existing state of things, and to have made an equally accurate calculation of future events.

The intention of the parties makes the contract. If the intention here was, as is admitted, to pay in paper money during its exist-

ence, and then in gold and silver, then it was a contract to pay in gold and silver after a certain period. The consequence is that as to the payments to be made after the period, the contract is not within the act of assembly, but as to those which were to be made before, it is. But if this contract cannot be considered as a contract to pay part of the rents in paper money, and part in gold and silver, still the question will arise whether this court has not power, under the fifth section of the act of assembly, to examine into the circumstances of the transaction, and make a rule of adjusting the rents, different from the scale of depreciation. Upon this point, I consider the case of Watson v. Alexander, 1 Wash. [Va.] 340, as decisive. The court of appeals in that case decided, that the fifth section was made as well for creditors as debtors. That the second section was intended to apply to contracts where no particular circumstances intervene; but where other circumstances do intervene, which would render the application of the rule unjust, whether to the creditor or the debtor, the court under the fifth section have a right to award such judgment as to them shall appear just and equitable.

The next question, then, will be whether the circumstances of this case, render the application of the scale unjust. The annual rent, when reduced by the scale is only £1. 3s. 7½d. This cannot be a just rule, when lots of equal value rented, before the existence of paper money, for ten times, and after its abolition, at thirty times that sum in gold and silver. If, then, the application of that rule is unjust, what rule can this court adopt more just and equitable? It is, in general, just and equitable that contracts fairly made, should be specifically executed, where a specific execution is possible, and will not be attended with circumstances of peculiar hardship. The contract in this case is to pay the rents annually in current money. This is admitted to be money current at the time when the rents become due. In the years 1780 and 1781, the rents might have been paid in the then current money, that is, paper, or gold and silver, at the option of the tenant. Payment in paper money has now become impossible; but the legislature has declared what shall be an equivalent for those years. Let the rents of those years, therefore, be scaled. But after those years, the option of the tenant ceased. Gold and silver became the only current money. It appears to have been the intention of the parties to pay in the current money of the time when the rents should become payable. It has now become possible to execute the contract specifically, and it appears to me that justice and equity require that it should be done, by paying the rents in the money which has been current ever since the year 1782.

Reversed by the supreme court of the United States. 2 Cranch [6 U. S.] 10.

MARSTELLER (GORMAN v.). See Case No. 5,629.

Case No. 9,138.

MARSTELLER v. M'CLEAN.

[1 Cranch, C. C. 550.] [1]

Circuit Court, District of Columbia. July Term, 1809.

PRACTICE AT LAW—RULE-DAY — PLEA OF LIMITATIONS—UNDER WHAT CONDITIONS.

The court will not permit the statute of limitations to be pleaded to an action of trespass for mesne profits after the rule-day, but upon payment of all antecedent costs and a continuance of the cause.

Trespass for mesne profits.

Mr. Taylor, counsel and attorney for defendant, made affidavit that the plea of not guilty only had been entered in the office, without his knowledge or consent; that he did not attend at the rules when the plea was put in; and that he had been instructed by his client and always intended to plead the statute of limitations. It was admitted that the defendant had only appeared to the ejectment as guardian of Kirk, but by mistake he was not named as guardian.

Mr. Taylor, now offered to file the plea of limitations.

THE COURT permitted him to file it, on payment of all antecedent costs and a continuance or postponement at the option of the plaintiff.

Case No. 9,139.

MARSTELLER et al. v. McCLEAN.

[1 Cranch, C. C. 579.] [1]

Circuit Court, District of Columbia. Nov. Term, 1809.[2]

LIMITATION OF ACTIONS—DISABILITY OF PLAINTIFF—JOINT ACTION.

The disability of one joint plaintiff does not take the case out of the statute of limitations.

Trespass quare clausum fregit for mesne profits. The defendant pleaded the statute of limitations. Replication, infancy of some, and coverture of others of the plaintiffs; but Marsteller and some of the plaintiffs were under no disability.

As to them, Mr. Taylor, for defendant, contended that the replication is no answer to the plea. All the plaintiffs sue in their own rights, and as joint tenants, or tenants in common. There is no difference between the case of joint tenants of goods and joint tenants of land. If the plaintiffs were joint merchants, and some of them out of the country and others in, the action must have been brought within five years. Perry v. Jackson, 4 Term R. 516. The promise of one joint defendant takes the case out of the statute as to all. It is not necessary that

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

[2] [Affirmed in 7 Cranch (11 U. S.) 156.]

the infants and femes covert should join in the action. They might be summoned and severed.

C. Simms, on the same side. This is trespass for mesne profits. Those plaintiffs who were competent to sue cannot avail themselves of the disabilities of the others. Nor can those who by themselves would be under the disability, claim an exemption from the statute, if they join with those who were able to sue. It is not necessary that the wives should be made parties, the husbands were competent to sue alone for a trespass.

E. J. Lee, contrâ. It appears by the whole declaration that the husbands sue in right of their wives. The tracing of the title up to Richard Arrell shows it. It is not averred that they sue in their own right. The husbands are parties only pro formâ. The replication goes to all the parties really interested. The wives would be entitled to the action if their husbands should die. Whereever the husband sues in right of his wife she must be joined.

Mr. Simms, in reply. The right of action is in the husband alone, it is for a trespass upon his possession. In the case of a bond given to a feme while sole, the right of action is in the wife.

THE COURT were of opinion that the replication of coverture as to some of the plaintiffs, and of infancy as to others, is not a good replication to a plea of the statute of limitations.

Where adults and infants have a joint right of action for trespass, the incapacity of the infants shall not avail the adults so as to avoid the statute of limitations.

Judgment affirmed in the supreme court of the United States, 7 Cranch [11 U. S.] 156.

Case No. 9,140.

MARSTELLER v. McCLEAN.

[2 Cranch, C. C. 8.] [1]

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

APPEAL — AMENDMENT PENDING — CLERICAL OR JUDICIAL ERRORS.

1. While the cause is depending in the supreme court of the United States, the circuit court will not permit the declaration, which was substantially defective, to be amended.

2. After a writ of error returned, the court below can only permit clerical or judicial errors in the process or pleadings, to be amended.

Motion by E. J. Lee, for plaintiff, to amend the declaration, by inserting the time of the death of Hunter, the cause being now pending in the supreme court. Mr. Lee cited 3 Mod. 113; 1 Tidd, Prac. 662; 8 Coke, 162; 3 Term R. 349; Id. 749; Doug. 114; Cowp. 841; 1 Strange, 136; [Burrows v. Heysham] 1 Dall. [1 U. S.] 134; [Fury v. Stone] 2 Dall. [2 U. S.] 184; 1 H. Bl. 643; 2 Johns. 184; 1 Stat. 73.

C. Sims, contrà. The amendment prayed is the insertion of a fact, (after judgment on the demurrer and a writ of error thereon,) which would defeat the demurrer. All the cases cited are of amendments of errors in the process or proceedings, by the clerk or of the courts; such as omissions in rendering the judgment upon a verdict, &c. There must be something to amend by. There is no instance of an amendment of a defective declaration, or plea, after error. The parties must be bound by their own pleadings. This is not an act of the court or of the clerk.

E. J. Lee, in reply. This is not assigned as a special cause of demurrer. It is a general demurrer. The case in Strange is the act of the party; so in the case where the letter of attorney was amended.

THE COURT (THRUSTON, Circuit Judge, absent) refused the amendment: it being a case where matter of substance is omitted in the declaration; not an error in process, or a clerical or judicial error.

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

MARSTELLER (PORTER v.). See Case No. 11,287.

MARSTELLER (TUCKER v.). See Case No. 14,222.

Case No. 9,141.

MARSTIN v. McREA.

[Hempst. 688.] [1]

Circuit Court, Arkansas.[2] April, 1854.

DEPOSITION—REDUCING TO WRITING.

A deposition taken under the 30th section of the judiciary act of 1789 [1 Stat. 88] must be reduced to writing by the magistrate or witness, and no other person is competent to perform that duty.

[This was a suit by Charles A. Marstin against Bracy McRea, as administrator of John D. Bracy, deceased.]

J. M. Curran, for plaintiff.

A. Fowler, for defendant.

Before RINGO, District Judge.

The court suppressed depositions taken on the part of the plaintiff under the 30th section of the judiciary act of 1789 (1 Stat. 88), because the judge taking the same certified that the testimony of the witnesses taken by him, "was reduced to writing under my direction." It was held, that the act of congress must be strictly complied with, and, as according to the express requisitions of that act, the deposition of a witness shall be reduced to writing "only by the magistrate taking the deposition or by the deponent in his presence;" no other person was legally competent to perform that duty, and that the magistrate could

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

[2] [District not given.]

not depute any one to perform it; that the act itself excluded the idea that any others than those named could perform it, and so it was a fatal defect. Deposition suppressed.

Case No. 9,142.

In re MARSTON.

[5 Ben. 313.] [1]

District Court, S. D. New York. Sept., 1871.

BANKRUPTCY—MERCHANT OR TRADESMAN—SPECULATING IN STOCKS—SPECIFICATION.

1. A man who speculates in stocks, buying and selling them through brokers, is not a merchant or tradesman, within the meaning of the bankruptcy act [of 1867 (14 Stat. 517)], and may receive a discharge, though he has kept no books of account.

[Cited in Re Woodward, Case No. 18,001; Re Moss, Id. 9,877.]

[Cited in Ex parte Conant, 77 Me. 277.]

2. A specification of opposition to the discharge of a bankrupt, alleging that the bankrupt has destroyed, mutilated and falsified his documents and papers showing his business and financial transactions, but not averring that the acts were done with intent to defraud his creditors, is defective.

[Cited in Re Condict, Case No. 3,094.]

[In the matter of William H. Marston, a bankrupt.]

Chambers, Pomeroy & Boughton and Brown & Estes, for creditors.

Torrance & Pitkin, for bankrupt.

BLATCHFORD, District Judge. The first specification alleges, that the bankrupt, since the 2d day of March, 1867, has destroyed, mutilated and falsified his documents, papers and writings showing and explaining his business and financial transactions. This specification is defective in not averring the act to have been done with intent to defraud his creditors.

All the other specifications, except the third, are too vague and general in their allegations to be triable. The third specification alleges, that the bankrupt, "being a merchant or tradesman," has not, since the passage of the bankruptcy act, kept proper books of account, or any books of account whatever. Assuming that it is sufficient, in the specification, to speak of the bankrupt as a "merchant or tradesman," in the alternative, the question presented for determination is, whether he was a merchant or a tradesman, within the meaning of the provision in section 29 of the act, which directs that no discharge shall be granted to the bankrupt, "if, being a merchant or tradesman, he has not, subsequently to the passage of this act, kept proper books of account." It is admitted that, after the passage of the act, he kept no books of account. Was he, after the passage of the act, a merchant or a tradesman? The only business he was engaged in was what is called speculating in stocks, that is, buying and selling them, with a view to his own profit, to be made by the excess of the selling price over the buying price. He kept no office, did not act as a commission broker for others in buying and selling stocks, and his buying and selling was done through brokers, who purchased in their own names but for his account, and paid for the stocks with their own funds, he being their debtor for the amounts paid. Of the transactions made through these brokers he himself kept no accounts. Although, according to the lexicons, one who is engaged in the business of buying and selling for gain may be called a merchant, and also a tradesman, yet I do not think it would ever occur to any one to speak of a person carrying on the business which the bankrupt carried on in the way in which he carried it on, as a merchant or as a tradesman, nor do I think that those words, as used in the 29th section, embrace such a person. The fact that the bankrupt was engaged in no other business, cannot have the effect to make him a merchant or a tradesman, because he carried on the business he did carry on in the way in which he carried it on. A clergyman, or a physician or a lawyer might carry on the same business in the same way, in addition to his regular professional business, and no one would call him, in consequence, a merchant or a tradesman. If not, the bankrupt cannot be so called. A discharge is granted.

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

MARTENS (PETERS v.). See Case No. 11,031.

Case No. 9,143.

In re MARTER.

[12 N. B. R. (1875) 185.] [1]

District Court, E. D. Michigan.

BANKRUPTCY—GENERAL ASSIGNMENT—FRAUD ON CREDITORS—INJUNCTION—ATTACHMENT FOR CONTEMPT.

1. Where a general assignee for the benefit of creditors had been enjoined from disposing of the property of the bankrupt, and after service of the injunction had made a sale of the assigned property, a motion for an attachment for contempt was denied: (1) Because, under the case of Langley v. Perry [Case No. 8,067], general assignment for the benefit of creditors is held in this circuit, not to be necessarily in fraud of the bankrupt act [of 1867; 14 Stat. 517]. (2) Because the district court had no power to determine the validity of the assignee's title by summary proceedings.

[Cited, but not followed, in Re Sims, Case No. 12,888. Cited in Re Litchfield, 13 Fed. 866; Bowen v. Christian, 16 Fed. 731.]

[Cited in Ex parte Hollis, 59 Cal. 415.]

2. The fact that a bankrupt is adjudicated upon a petition charging him with making a fraudulent conveyance, does not estop his grantee from claiming that as to him the conveyance is valid.

3. An assignment for the benefit of creditors is not fraudulent, because it states the assignor's

[1] [Reprinted by permission.]

desire to distribute his estate "without the sacrifice of property incidental to judicial and official sales, and without the expenses attendant upon winding up an estate in bankruptcy."

Motion for attachment for contempt. [Charles J.] Marter was duly adjudicated a bankrupt on the 3d day of May, and a writ of injunction was issued, prohibiting him and one Moses Beckel from encumbering, disposing of, or in any manner interfering with the property of said bankrupt or any part thereof. Petitioning creditors now come in and move for an attachment for contempt against Beckel, upon affidavit that Marter had made a general assignment to Beckel prior to the adjudication, and that Beckel, since the service of the injunction upon him, had sold the goods assigned to one Lichtenberg; that Lichtenberg had sold them to the wife of the bankrupt, and that the bankrupt, who was then acting as clerk for his wife, was the real owner of the goods. A further affidavit is filed, showing that the wife of the bankrupt executed to Lichtenberg a chattel mortgage on the goods for four hundred and twenty dollars. The counter-affidavit of Beckel does not set forth a different state of facts, but states that the sale to Lichtenberg was made for cash, after public notice of the sale; that it was made in strict accordance with the trusts of the assignment; that before the sale he was advised and believed that the sale was no violation of the injunction, and that it was made with the advice and consent of a majority of the creditors of the said bankrupt. He also shows, for additional cause, that, after the commencement of the proceedings in this case, he held such property adversely to such proceedings, and claimed, and now claims, title thereto, as against any assignee which may be appointed in this case; but that, since the commencement of these proceedings, in obedience to the injunction, he has carefully desisted and refrained from any interference with any of the property of the said bankrupt, not covered by the assignment.

Alfred Russell, for the motion.

Don M. Dickinson, for respondent Beckel.

BROWN, District Judge. It is claimed by the counsel for the petitioning creditors that, admitting the assignment to be valid at common law, yet as it was a general assignment in trust for creditors, it is, within the meaning of the bankrupt act, a conveyance with intent to injure, delay, and defraud creditors, or at least to defeat the operation of the act, and is therefore void as against proceedings in bankruptcy. A large number of authorities are cited in support of this proposition. In re Smith [Case No. 12,974]; Ex parte Burt [Id. 2,210]; Spicer v. Ward [Id. 13,241]; Grow v. Ballard [Id. 5,848]; In re Randall [Id. 11,551]; In re Goldschmidt [Id. 5,520].

A different view, however, was taken by Judge Hall in Re Wells [Case No. 17,387], and by Judge Treat, of the Eastern district of Missouri, in Re Kintzing [Id. 7,833]. Whatever may be my own views with regard to this question, I feel compelled to follow the decision of Mr. Justice Swayne in the case of Langley v. Perry [Id. 8,067], in which he held, reversing the decision of the district court for the Southern district of Ohio, that where a debtor makes an assignment of his property for the benefit of all his creditors, with intent to secure an equal distribution of all the debtor's property among his creditors, it is not necessarily a conveyance of the property with intent to defeat or delay the operation of the bankrupt act. This opinion was afterwards reviewed and affirmed by him in the case of Farrin v. Crawford [Id. 4,686]; and I must hold it to be the law of this court until reversed by the supreme court, or by the learned justice himself.

The fact that Marter was duly adjudicated a bankrupt upon a petition charging him with making this assignment with intent to defraud, does not preclude Beckel from disputing that fact. The adjudication works an estoppel as to Marter, or other persons not parties, only so far as it fixes the status of the bankrupt. Indeed the conveyance may be an act of bankruptcy, under section 5021, and yet valid as to the grantee, under sections 5128 and 5129. In re Williams [Case No. 17,703]; In re Drummond [Id. 4,093]; In re Schick [Id. 12,455]; In re Dibblee [Id. 3,884]; In re Goodfellow [Id. 5,536]; In re Dunkle [Id. 4,160]; In re Hunt [Id. 6,881]; In re Beck [Id. 1,205].

Although there are certain suspicious circumstances set forth in the affidavit in support of this motion, I see no intent upon the face of the assignment to hinder, delay, or defraud creditors. It is true the assignor states his desire to distribute his estate "without the sacrifice of property incidental to judicial and official sales, and without the expenses attendant upon winding up an estate in bankruptcy;" but he precedes this by saying: "It is expressly intended by this instrument to secure an equal distribution of the assets of the said party of the first part among all his creditors, and in no manner or way impede or delay the operation of the bankrupt act now in force, but give to the creditors the same benefits which might be derived under said act, in the true spirit of said act."

It being established, by the opinion above cited, that a general assignment is not necessarily in fraud of the bankrupt act, I see nothing in these words to indicate that this assignment was fraudulent; on the whole his desire to save a sacrifice of his property is rather praiseworthy than otherwise.

But, again, a still more serious question arises as to the power of this court to enforce a claim of this character by summary proceeding. If the assignment was valid it transferred the title of the property to Beckel, and his sale of it was no violation of an

injunction restraining him from disposing of the bankrupt's property. It is only upon the theory that the assignment is void as against creditors, and that the property still belongs to the bankrupt, that Beckel has been guilty of contempt. We are asked then to determine, summarily, upon petition and affidavits, that this assignment was void and passed no title to the property. The right of the assignee in bankruptcy to the property or its proceeds, turns entirely upon the validity of this assignment, which, as we have already said, is valid upon its face. So far as this question is concerned, the case stands precisely as if an assignee had been appointed, and he had petitioned that Beckel should pay the proceeds of the property to him, or should turn over the property itself, in case he had not sold it. Clearly Beckel holds adversely to the proceedings in bankruptcy, and to any title which the assignee hereinafter to be appointed may take.

Whatever doubt may have existed in the minds of the profession in the early days of the bankrupt law, with respect to the power of the district court to proceed summarily against persons claiming titles to property adverse to that of the assignee, I regard it as settled by the supreme court, in the case of Smith v. Mason, 14 Wall. [81 U. S.] 419, that such proceedings cannot be taken except by a suit at law or in equity, as provided by section 4979 of the Revised Statutes. In this case the bankrupt had placed in the hands of an attorney, for collection, certain claims against the government, upon which he had collected a large amount of money. Prior to his bankruptcy, the firm of which the bankrupt was a member had made an assignment of the claim to Biddle & Co., as collateral security. Biddle & Co. also assigned their interest in the claim to one Smith as collateral security for their indebtedness to him. The assignee filed his petition summarily, setting forth that these several debts to Biddle and Smith had been paid, and prayed that the attorney might be restrained from paying out the money, and that he might be required to give bond for its safe keeping and its production in court when ordered. Subsequently he filed another petition against Smith, who, he alleged, claimed an interest in the fund, and prayed that he might be required to show cause why the fund should not be paid to him. "Beyond all doubt, therefore, the case is one where the appellant claimed absolute title to and dominion over the matter in controversy between him and the assignee of the bankrupt's estate." The court was of the opinion that such cases could not be commenced by a petition for a rule to show cause as in this case, nor be determined in a summary way by the district court sitting in bankruptcy, without due process of law. If the assignee in bankruptcy would divest him of the possession and control of the fund he must do it by a suit at law or in equity, as provided in the third clause of the 2d section. "Strangers to the proceedings in bankruptcy, not served with process, who have not voluntarily appeared and become parties to such a litigation, cannot be compelled to come into court under a petition for a rule to show cause."

The question again came before the court, in the case of Marshall v. Knox, 16 Wall. [83 U. S.] 551. In this case certain property of the bankrupt had been distrained for rent under the laws of Louisiana, and was in the hands of the sheriff at the time of the adjudication. The assignee obtained from the court a rule upon the lessor and the sheriff, to show cause why they should not deliver up the property to the assignees, alleging that various creditors of the bankrupt claimed a privilege on the property and that it was necessary for the proper adjustment of all liens that the possession should be surrendered to the assignee. The landlord claimed the right thus to hold possession of the property until his claim for rent was satisfied. This claim was adverse to that of the assignee. The court held that this case did not substantially differ from that of Smith v. Mason [supra], and that the district court proceeded without jurisdiction in compelling the lessor and the sheriff to deliver up possession of the goods in question to the assignee.

Prior to these decisions there had been a great conflict of authority upon this point. The rule here laid down had been substantially adopted in Irving v. Hughes [Case No. 7,076]; In re Kerosene Oil Co. [Id. 7,726]; In re Bonesteel [Id. 1,627]; Barstow v. Peckham [Id. 1,064]; Knight v. Cheney [Id. 7,883]; Rogers v. Windsor [Id. 12,023]; In re Ballou [Id. 818].

I am aware that a contrary view was taken by Mr. Justice Swayne in Bill v. Beckwith [Case No. 1,406], followed by the late judge of this district in Norris' Case [Id. 10,304]; but I think these cases must be regarded as overruled by the supreme court in the two cases above mentioned.

In Creditors v. Cozzens [Case No. 3,378], an attachment for contempt in disobeying an injunction was refused in a case very similar to the one at bar, on the ground that a separate petition must be filed so that the proceedings upon the injunction need not be complicated with those praying the adjudication of bankruptcy.

The rule adopted in this and the other cases above cited is but the enunciation of a general principle applicable to equity proceedings, that an injunction will not be granted against persons not parties to the suit (Fellows v. Fellows, 4 Johns. Ch. 25; Iveson v. Harris, 7 Ves. 251; Stevens v. Barringer, 13 Wend. 639), unless they are mere agents of the defendant.

I think the facts set forth in the affidavits in this case throw a strong suspicion upon the good faith of the assignment, but the

only remedy is by a plenary action at law or in equity against Beckel for the value or the proceeds of the property. It results, therefore, that the motion must be denied.

Case No. 9,144.

The MARTHA.

[1 Blatchf. & H. 151.] [1]

District Court, S. D. New York. Sept., 1830.

SEAMEN—WAGES—DESERTION—FORFEITURE—VOYAGE ENDED—DISCHARGE OF CARGO—RIGHT OF ACTION NOT PERFECTED—COSTS—REHEARING.

1. The act of congress of July 20th, 1790, (1 Stat. 131,) makes desertion, carrying with it a forfeiture of wages, a statutory offence, and defines the evidence by which it is to be established.

[Cited in The Elizabeth Frith, Case No. 4,361; Granon v. Hartshorne, Id. 5,689; The Union, Id. 14,347. Cited in note to Gifford v. Kollock, Id. 5,409. Cited in The John Martin, Id. 7,357; Murray v. The F. B. Nimick, 2 Fed. 88; Welcome v. The Yosemite, 18 Fed. 383.]

2. There can be no desertion after the voyage is ended. The voyage is ended when the vessel is safely moored at her last port of discharge.

[Cited in The Elizabeth Frith, Case No. 4,361; Granon v. Hartshorne, Id. 5,689.]

3. Fifteen days will be taken to be a reasonable time for a vessel to unload in ordinary cases, and where, for wages due on the delivery of the cargo, a vessel was arrested on the fourteenth day after she was moored in her port of discharge, the suit was dismissed as prematurely brought.

[Cited in Granon v. Hartshorne, Case No. 5,689; The David Faust, Id. 3,595.]

4. There is no distinction between what is necessary to constitute the delivery of a cargo where it is owned by a freighter, and where both ship and cargo belong to the same person.

5. The mere offer of a master to pay a seaman's wages is not necessarily an admission that the wages are due and payable.

6. A libel brought before the right of action is perfected, must be dismissed, if duly excepted to on that ground, though such right becomes perfected during the progress of the suit. The case of Thompson v. The Philadelphia [Case No. 13,973] examined.

[Cited in Eight Hundred and Forty-One Tons of Iron Ore, 15 Fed. 618; Henderson v. Three Hundred Tons of Iron Ore, 38 Fed. 40.]

7. Courts of admiralty will dispose of the question of costs according to the general equities of the case.

[Cited in Lubker v. The A. H. Quimby, Case No. 8,586; Shaw v. Thompson, Id. 12,726.]

8. Where a dilatory plea was joined with a defence upon the merits, and the libel was dismissed upon the former, though it would have been sustained upon the latter, it was dismissed without costs.

9. The court will not allow its recollections or impressions of verbal consents and understandings between counsel, not entered in its minutes, to interfere with or control the rights of parties.

10. A court of admiralty will not, except with the free consent of all the parties to be affected, grant a rehearing, or modify its definitive decree, after the term in which the decree is rendered. If the court has the power to do so, such a practice has not been adopted.

[Quoted in The Illinois, Case No. 7,003. Cited in The Lizzie Weston, Id. 8,425; The Major Barbour, Id. 8,984; Snow v. Edwards, Id. 13,145.]

[See In re Dupee, Case No. 4,183.]

11. A decree made on a rehearing without such consent, modifying a final decree made at a previous term, was held to be a nullity.

[Cited in The Illinois, Case No. 7,003.]

12. Semble, that a consent to a rehearing by the parties to a suit, will not affect the rights of a surety in a stipulation for costs, who has been discharged by a previous final decree.

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

The libellant shipped as seaman on board the ship Martha, at New Orleans, for a voyage to Laguyra, thence to one or more ports in Europe, and back to a port of discharge in the United States. One of the printed stipulations in the articles signed by him was as follows: "And it is further agreed that no officer or seaman belonging to the said vessel shall demand or be entitled to his wages, or any part thereof, until the arrival of the said vessel at her last above-mentioned port of discharge, and her cargo delivered." The vessel arrived at New-York on the 21st of February, and was moored on the 22d. On that day the libellant left the ship without permission, and did not return to his duty, and on the same day his absence was entered by the mate in the log. The cargo was not entirely discharged until the 12th of March. On the 5th of March the libel in this action was filed in rem for the recovery of wages, and on the 8th the monition was issued and the vessel was arrested. The defence was, that the wages were forfeited by the desertion of the seaman, or, if not forfeited, that the right of action for them had not accrued at the time the suit was instituted.

Erastus C. Benedict, for libellant.
John Anthon, for claimant.

BETTS, District Judge. The payment of wages to the libellant is resisted, upon the ground that he deserted the vessel, and thereby forfeited his wages; and this conduct on his part is said to have worked a forfeiture, both under the penalties of the law maritime and under the provisions of the act of congress of July 20th, 1790. 1 Stat. 131.

I have several times ruled that the desertion of seamen from the merchant's service, so as necessarily to work a forfeiture of wages, has now become a statutory offense, and must be established in the mode designated by the act of congress. The inquiry, therefore, will not be, whether the particular act of malfeasance charged upon the libellant constituted an offence under the maritime law, which carries with it, as its appropriate punishment, a deprivation or abstraction of wages, but whether it comes within the provision of the statute, so that the judgment of forfeiture is the only one the court can pronounce.

[1] [Reported by Samuel Blatchford, Esq., and Francis Howland, Esq.]

It is a well-understood rule in the construction of statutory law, that when new conditions or requirements are imposed in respect to existing offences, so that those acts constitute the offience which would not have constituted it before, the statute necessarily becomes the exclusive rule, and abrogates or supplants the preceding one. The thing prohibited is no longer an offence, except as it is brought within the terms of the act. Castle's Case, Cro. Jac. 644; Reg. v. Wigg, 2 Salk. 460; Rex v. Robinson, 2 Burrows, 799. If this be so with regard to offences at common law, where the familiarity and notoriety of the common law rule would more safely admit statutory regulations to be considered as subsidiary, it should apply with inflexible strictness to maritime cases, where the customary law is to be sought for in obscure and remote usages, practised not by our own people, but by foreigners, and in periods of comparative ignorance and barbarism.

When congress assumed to legislate in respect to the offence of desertion by mariners, and its consequences to them, it can hardly be supposed that they designed merely to introduce another particular within the limits and penalties of that offence. What the exigencies of the case demanded of the legislature was a clear and precise designation of the duties and responsibilities of seamen in the merchant's service, and especially those most prominent ones, their obligation to the vessel, and their liability to the loss of wages for the breach of it. The uncertainty of the maritime law, as to what constituted a desertion, was alike vexatious and injurious to owners and seamen. Was a mere leaving of the ship without permission a desertion? or, if not, how was the animus revertendi to be ascertained? What was the rule which would protect the seamen from the resentment of an exacting master, and the ship from a heedless or wrongful abandonment by the crew? The question was never settled merely by lapse of time, and accordingly controversies were incessant whether the master might regard the shortest unjustifiable absence as a desertion, or the men purge the longest by a lagging and reluctant return. The statute meets this difficulty. It looks to the fact of absence without leave. and marks that as the characteristic of desertion. With whatever purpose of mind to return the seaman may have withdrawn himself, still his going from the ship without leave supersedes all inquiry into the quo animo. The law, however, makes the reasonable allowance of forty-eight hours within which the sailor may come back, and be only subject to the loss of three days' wages for his misfeasance. And, furthermore, most effectually to guard the seaman from the resentment of the master, excited by any subsequent occurrences, it takes from the latter the power to revive such act of misconduct, or to change that into a desertion which was not so regarded at the time, by requiring that the absence shall be entered on the log-book on the day it occurs, and that the entry shall state the absence to be without leave. This was a most provident regulation. One-half of the attempts of masters to bar seamen of the recovery of their wages, which have passed under the observation of this court, are founded not directly upon the act of misconduct alleged, but are excited by some after occurrence, as a prosecution for wages or for assault and battery, or by some irritation of personal feelings on the part of the master or his officers, under the influence of which the master seeks to give to all preceding misconduct of his men the most odious colorings, and to demand a forfeiture of wages for alleged desertions not denounced as such at the time they occurred. The courts, therefore, for the protection of seamen, exact from the master the most rigid compliance with the requisitions of the act in this behalf. Malone v. Bell [Case No. 8,994]; Jones v. The Phoenix [Id. 7,489]; Herron v. The Peggy [Id. 6,427]; The Phoebe v. Dignum [Id. 11,110]. In my opinion, the statute has specified and defined the desertion by seamen which necessarily incurs a forfeiture of wages, and no desertion having that effect can be established against seamen, except conformably to the statutory directions. In this country, the point is governed by positive law, and all codes or usages of other nations, which are conflicting or inconsistent with the statute, are to be disregarded. The provisions of the statute are broad enough to meet every case, and I cannot suppose that congress meant to legislate respecting heedless and frequently inadvertent absences, and to convert these into desertions, and, at the same time, leave the greater offence of a wilful abandonment of the ship, to the uncertain rules and dogmas of the maritime law as previously administered, that is, to be punished by a simple mulct or abstraction of wages, at the discretion of the court.

The inquiry, therefore, is, whether the act now in proof is such a desertion, and whether it is established by such proof as the statute directs. It must be borne in mind, that it was after the full arrival of the vessel at her port of discharge in the United States that the seaman left her. She reached this as her last port of discharge, from a circuitous voyage, on the 21st of February, and was safely moored on the day following. This, in nautical acceptation, was ending the voyage. The voyage denotes the transit to be performed by the seaman, and it is in this sense that the term is used in the law maritime. Emerig. Cont. de la Grosse, c. 8, § 1; Frontine v. Frost, 3 Bos. & P. 302; The Baltic Merchant, 1 Edw. Adm. 86. The seaman is usually bound by his articles to continue with the vessel and unlade her, and perhaps his obligation to perform that service might, under the maritime law, be regarded as incident to his hiring. The Baltic Merchant, 1 Edw.

Adm. 91. Yet, in so doing, he is considered as fulfilling a specific engagement of service, direct or implied, and not as continuing the voyage. The vessel being securely moored at her port of destination, the duties of mariners, as such, are fulfilled, and any further acts of theirs become those of stevedores or laborers, and the seamen are bound to perform them only by force of special stipulations in the shipping articles. Cons. del Mare, c. 74, No. 144. A neglect or omission of this duty may be appropriately punished by deductions from former earnings. The Baltic Merchant, 1 Edw. Adm. 92. And the earnings payable for the performance of one duty, may well be made chargeable for neglect to perform the other, because the agreement, though consisting of two parts, is entire in its object and effects. The act of congress is in harmony with this distinction between the termination of the voyage and the unlivery of the cargo, though it requires the two things to concur to entitle the seamen to sue for their wages. Act July 20, 1790, § 6 (1 Stat. 133).

In my judgment, the offence of desertion under the statute, which carries with it the absolute forfeiture of wages, can only be committed during the continuance of the voyage, and must accordingly take place anterior to the safe mooring of the vessel at her last port of delivery. As, then, in the present case, the seamen left the vessel after her voyage ended, their departure did not constitute the desertion contemplated by the act, which must be punished by forfeiture of wages, clothing, &c. I do not, therefore, consider it necessary to pass upon the sufficiency of the entry in the log in this instance, because, if sufficient, it has relation to a period of time after the voyage was ended in nautical acceptation, and when the offence could not be committed. This decision will not, however, exonerate seamen from proper responsibility for such offences. The articles themselves make adequate provision for such a case, and the principles of maritime law, which are not superseded by positive legislation, provide sufficient punishment for malfeasances of this character. It is competent for the court, in either aspect of the case, to decree, by way of abstraction of wages, a suitable compensation to the owner for the unfaithfulness or misconduct of the seamen; and I am persuaded it will in practice be found as efficacious, in holding seamen to fidelity in their engagements, to lessen the amount they receive at the end of the voyage, as to strip them and their families of all pay for services during the entire voyage, together with their savings laid up in clothing.

A further objection taken to the suit by the claimant is, that the right of action had not accrued when the suit was instituted. By a stipulation in the articles, the wages were not to be paid until the cargo was delivered. The delivery was not completed until several days after the action was commenced. But there need not in every case be an actual unlading of the cargo, to constitute the delivery contemplated by the agreement. If the consignee should refuse to accept the cargo, or unreasonably delay its discharge, the seaman cannot by such acts lose his rights, and would be considered as having complied with his stipulation by delaying his suit a reasonable time. What is a reasonable time for the unlivery of cargo is not made certain by any fixed rule of law. By the 52d article of the Laws of Wisbuy, from eight to fifteen days are allowed, according to the circumstances of the voyage. By the 21st article of the Laws of Oleron, the same period is allowed for a vessel to discharge. 1 Pet. Adm. App. End. The laws of the United States require every vessel under three hundred and fifty tons burden, to be discharged of her cargo within fifteen working days after her report in her port of discharge, and every vessel over three hundred and fifty tons, within twenty working days, and the vessel is to be reported within twenty-four hours after her arrival. Act March 2, 1799, §§ 30, 56 (1 Stat. 649, 669); Act March 3, 1821 (3 Stat. 640). Following the spirit of these statutes, the district court in Pennsylvania often allowed fifteen days, and sometimes more, to unlade the cargo, before the seaman's right to claim wages was perfected. Edwards v. The Susan [Case No. 4,299]; Thompson v. The Philadelphia [Id. 13,973]; Swift v. The Happy Return [Id. 13,697]. The voyage ends for the seaman when the vessel is moored. She is then, in judgment of law, in a condition to unlade at once. In our chief ports, it would rarely happen that twenty working days would be expended in unlading the largest ship. The statute has allowed time amply sufficient to cover any delay in obtaining permits from the custom-house, or in placing the vessel in a position to begin her actual discharge after her report is made, or in providing for other contingencies which may occasion loss of time. In Massachusetts, the rule seems to be general to allow the statutory period for discharging the vessel, without regard to the special circumstances of the case. Abb. Shipp. 456, note. There is convenience in this analogy, but I do not think a too implicit obedience should be paid to it, and I am disposed to follow the rule in the Pennsylvania district, allowing special circumstances to abridge or prolong the time of unlading, but adopting fifteen days as a fair average period. In this case, even if the action be considered as having been commenced by the issue of the monition, but fourteen days had elapsed, and two of those were Sundays. No special circumstances are in evidence, calling for an abridgment of the ordinary time. On the contrary, a proper degree of despatch is proved, and, considering the state of the weather, the vessel was unladen in a reasonable time. Since, then, sufficient time for

the unlading of the cargo had not elapsed when the suit was instituted, and since, also, it was commenced before the time fixed by statute for the unlivery of the cargo had expired, it must be held to have been prematurely brought.

This objection of the claimant being well taken, and no motion to amend or rectify the proceedings having been made or granted, I cannot, in the present shape of the pleadings, enter into an adjustment of the amount of wages due the libellant, or fix what compensation, if any, he ought to make the owners for withdrawing his services from the vessel. The action in this form must be considered as dismissed or suspended. But the main defence, which rested on the charge of desertion, having been gone into by the claimant, and decided in favor of the libellant, and the libel being stayed upon a point of form, in respect to other particulars, and not on the merits litigated between the parties, I shall give the libellant leave to file a new libel, or supplementary allegations to the one before the court, and to offer further proofs in the cause to show that he had a full right of action when his suit was commenced; and the final decree in the cause upon the merits, and the disposition of costs, will be deferred until the reformed pleadings and new proofs come in. The practice authorized by this decision is intended to be carried at present no further than the necessity of the particular case; that is to say, the claimant having given the court cognizance of the cause by intervening and contesting the question of forfeiture, and that jurisdiction still continuing after the libellant's right to sue for wages has matured, the latter will be permitted now to frame his libel so as to meet the objection that the recovery of wages cannot be had in the present form of the pleadings.

The libellant, under the above permission, filed several additional articles, alleging: (1) That the claimant of the ship was sole owner of her cargo, and that, as matter of law, the arrival of the vessel was a delivery of her cargo, within the meaning of the contract; (2) That the cargo might, with ordinary diligence, have been unladen, and the vessel discharged, within ten days from her arrival; (3) That no provision was made on board the vessel, or elsewhere, by the master or owner, for the support of the libellant until his wages were payable; (4) That previous to the commencement of any proceedings for the recovery of wages, the master called on the libellant's proctors, and told them that the libellant's wages were ready for him. The libellant proved the facts set up in the first and fourth allegations, but failed to prove those set up in the second and third.

Edwin Burr and Erastus C. Benedict, for libellant.

Gerardus Clark, for claimant.

BETTS, District Judge. It is contended that the terms of the shipping agreement were fulfilled, as the cargo was in fact delivered before the suit was brought. It is supposed there is a distinction in respect to the delivery of a cargo where it is shipped by a freighter, and where both ship and cargo are owned by the same person. It is not denied, that in the former case there must be an actual unlading to constitute a delivery; while it is argued, that in the latter, when the ship returns to the port of the owner, the cargo comes into his possession in such manner as to amount to a delivery of it from the ship. I cannot perceive any legal ground for the distinction. The contract of the seaman has no regard to the legal delivery of the cargo, which constitutes a change of property in it. It is as much the property of the consignee, and delivered in point of law, when it is shipped at the port of departure, as when it is unladen at the port of discharge. Dawes v. Peck, 8 Term R. 330; Dutton v. Solomonson, 3 Bos. & P. 582. To construe this clause of the shipping contract to mean a delivery in law, would be to hold that it was satisfied the moment the cargo was laden on board. The delivery referred to in the contract denotes the unlading of the vessel, frequently called, in the maritime law, the unlivery of the cargo. The other provisions of the contract import this. The mariner is not to leave the vessel until she be discharged of her lading, nor to receive his wages until her arrival at the last port of discharge, and the cargo delivered. The delivery of the cargo is made a distinct thing from the arrival of the vessel, and that delivery is the discharging her of her lading. The shipping articles are intended to correspond in substance with the provisions of the statute in this respect, and the court will always endeavor, in interpreting the articles, to enforce that conformity. By the 6th section of the statute, (Act July 20, 1790, 1 Stat. 133,) the seaman becomes entitled to his wages "as soon as the voyage is ended and the cargo or ballast be fully discharged at the last port of delivery." It is no less important to the shipowner, when he is his own freighter, to have an opportunity to ascertain the condition of the cargo, and detect embezzlements, and charge them, if discovered, upon the crew, than when he is merely a carrier for others. It would also be usually not less desirable for him to have reasonable time to raise funds to meet the charges of the ship, when the cargo is his own, than when those funds are to be collected from freighters. In both points of view, it would be in consonance with the character of the service of seamen, that their wages should not be payable until the actual delivery of the cargo, or until a reasonable time for that purpose had elapsed, and a stipulation on their part to that effect would be appropriate to their character and obligatory upon them.

It is further contended, on behalf of the

libellant, that the offer of the master to pay the wages is evidence that he recognised and admitted the libellant's discharge, and that he was entitled to demand them. But the mere offer of the master to pay the wages, in the way in which it was made in this instance, cannot properly be understood as an admission of any legal liability on his part. It was stated on the argument, (and the fact would be implied under the proof,) that the libellant's proctors had made application to the master, and demanded payment of these wages. He knew that a litigation must ensue, unless the claim was satisfied, and his declaration, under these circumstances, that if the libellant would call at a designated place, his wages were ready for him, ought not to be construed into an admission that wages were due at all, much less that they were due and payable because the libellant had fulfilled his engagement and was discharged from the ship. There was a dispute, and a heated one, respecting the libellant's claim to wages. Under these circumstances, it would be a most strained and harsh interpretation of the language of the master, to consider it as having admitted the absolute right of the libellant. Admitting the declaration of the master to have been an offer to pay, it was a qualified, or conditional one; and I do not think it imported any thing more than that the master would rather pay the sum demanded, at a place convenient to him, than litigate the question with the sailor. Such concessions and admissions are never received as waiving any legal defence of the party. The courts encourage attempts at compromise and settlement, and will not permit any act done or language used on such occasions to work a prejudice to the party making the effort. 2 Starkie, Ev. 38, and note g. The nisi prius case of White v. Mattison, 2 Starkie, 325, before Lord Ellenborough, if it forms an exception to this general rule, is distinguishable from the present case; for there the defendant had called up the whole ship's crew to pay them off, and had tendered the plaintiff a specific sum, and the court held, that the seaman might recover that sum, although the period limited by the shipping articles had not expired. There was a plain, unqualified admission of a debt to a certain amount, accompanied by an offer to pay that particular part, and the recovery was limited to the sum so admitted to be due, and did not cover the whole of the plaintiff's demand. I do not think that the circumstance proved in the present case, establishes the libellant's right to sue, or in any way implies that the master recognised that the libellant had been discharged from the ship, or otherwise exonerated from the restriction as to the time when he would be entitled to wages; nor do I regard it as a waiver of the advantage secured to the master by the contract.

A point of practice respecting the authority of the court over the proceedings, as they now stand, presents itself at this stage of the cause. It was not adverted to on the argument, and, in deciding it now, for the purpose of disposing of this cause, I do not intend to preclude the further consideration of the point, should it be presented in another case. It is, whether the libel ought to be absolutely dismissed, or whether the suit may be continued as properly in prosecution since the expiration of the fifteen days.

The matter of defence now in question is no extinguishment of the libellant's claim. A forfeiture of wages has not been incurred, and no payment is established. The claimant, therefore, upon the proofs, stands justly indebted to the libellant for his services as a mariner on board the vessel. If the latter cannot recover his demand in the present action, it will be only for the reason that the claim was not suable when the action was instituted. Courts of admiralty deal liberally with suitors in matters of practice. They give the most favorable interpretation to pleadings, in order, if possible, to support them, and, when a libel is found defective or inapt, instead of dismissing it for such cause, they will even enjoin the promovent to exhibit another libel, clear and properly articled, in order that the case may be determined according to right and justice. 1 Browne, Civ. & Adm. Law (2d Ed.) 462; The Adeline, 9 Cranch [13 U. S.] 245, 284. This practice should probably be considered as having relation to the form of the libel, and as coming under the principle of amendments, which are freely allowed in those courts. Consett, Ecc. Prax. pt. 3, c. 1, § 1, art. 2, and Id. § 2, art. 2; The Caroline v. U. S., 7 Cranch [11 U. S.] 496; The Anne v. U. S., Id. 570; The Divina Pastora, 4 Wheat. [17 U. S.] 52; The Mary Ann, 8 Wheat. [21 U. S.] 380; The Marianna Flora, 11 Wheat. [24 U. S.] 1, 38. Judge Peters has given a wider application to this power of a court of admiralty over its proceedings, than usually obtains. In Thompson v. The Philadelphia [Case No. 13,973], he says: "In this case, although the ship had ended her voyage more than fifteen days, yet, it having been alleged, and not denied, that due diligence had been used, but the vessel could not be unloaded, I give further time for payment." The report of that case indicates a suit in ordinary progress, and the language of the judge imports that he will stay the cause until the time shall arrive when it ought to have been commenced, and will then proceed in it as if the cause of action had been mature when the suit was instituted. I am not prepared to carry the discretionary authority of the court to that extent. It goes far beyond all the doctrines respecting the mere correcting of defects occurring in the frame of pleadings or in the order of proceedings. It assumes that a party brought into court without right on the part of the promovent, may still be detained there until an adequate right is acquired, or, if one is already inchoate, until it

ripens for enforcement. When the objection is presented distinctly and in proper order, I apprehend that every court must dispose of the controversy before it according to the rights of the respective parties as they stood when the suit was instituted. This is so at law and in chancery, and it is not perceived that any clear principle, recognised in the Civil Code, varies the rule in tribunals which have adopted that law.

In causes of civil and admiralty jurisdiction, every matter of exception which goes only to delay the suit, must be urged previous to contestation of suit, (Consett, Ecc. Prax. pt. 3, c. 1, § 2, and Id. c. 2; Cockb. Ecc. Prax. c. 6, §§ 1–7; Clerke, Ecc. Prax. tits. 31, 32,) and should be singly disposed of before contestatio litis, or before bringing the substantive parts of the suit ad judicium (2 Browne, Civ. & Adm. Law, Ed. 1799, 104, 185; Pothier, Traité de la Proc. Civ. pt. 1, c. 2, § 2, art. 1). The matters of exception, however, which bar recovery, may, by the French practice, be urged after contestation of suit. Id. art. 2. So they may be, also, in ecclesiastical and admiralty causes at this day, though Browne questions whether such a practice was allowable in the ancient Roman law. 2 Browne, Civ. & Adm. Law (Ed. 1799) 27, note. The result of these doctrines seems to be this, that in all the courts, if a party goes to trial upon the merits, he will not be permitted, after judgment, to avoid the recovery, by bringing forward an exception that no cause of action existed when the suit was instituted; but that that defence is open to him down to the time of trial, and that, if it is established, the consequence will be to turn the prosecutor out of court. The decision of Judge Peters will, therefore, stand an isolated one upon this branch of procedure, unless it is to be understood as having been given before answer filed, or on a preparatory examination before the judge, out of court, to ascertain whether admiralty process should be allowed. In the latter case, there may be a propriety in the judge's deferring the award of process, or, as it is put in the case reported, giving further time for payment. I should be inclined to understand that decision as made in an initiatory proceeding, rather than in an adjudication between parties litigating in court upon pleadings properly interposed. It does not appear to me to be consonant to the nature of actions in full prosecution, to permit them to be stayed until the plaintiff possesses himself of a right to what he demands; nor to allow him to go to judgment, against the objections of the opposite party, upon rights which have accrued during the progress of the cause and after a defence has been put in. The amendment or privilege allowed the libellant by the former order of the court in respect to his libel, had relation to the manner of pleading and proving his demand, to bring it into a condition to be enforced. It did not authorize him to go on in this suit upon a right which was not in existence when it was brought. I shall, therefore, not decree for these wages, although they have now become due, and although the claimant is liable to pay them. The libellant should not have arrested the vessel until his right of action was perfected; and the objection that she was not liable to arrest, having been duly taken and maintained by the claimant, must prevail. It is not intended to be decided that the same rule will necessarily apply, when the claimant gives his stipulation and makes his answer after the right of action has been perfected.

A further question remains, namely, whether costs shall be allowed or not. If the claimant had pleaded, in a formal manner, a dilatory plea that the suit was prematurely brought, he would undoubtedly be entitled to a decree for costs. But when, instead of pleading that plea by itself, he connects it with other matters of defence which go to the whole merits of the action, and requires full proof to be produced, it becomes questionable whether he is entitled to costs. In the main defence upon which he relied he has failed, and he prevails only upon an exception in the nature of a plea in abatement. Moreover, though the libellant has failed to prove his supplemental allegation, that the vessel might with ordinary diligence have been discharged in ten days, yet he has offered some evidence upon that point, which shows that there was probable cause for his supposing that his right was perfected, depending, as it did, upon the question of a reasonable time for unlading. Courts of equity dispose of the question of costs according to the justice of the case, in the sound discretion of the court; Nicoll v. Trustees of Town of Huntington, 1 Johns. Ch. 166; and courts of admiralty follow the same rule. I shall, therefore, in view of the general equities of the case, dismiss the libel without costs.

After a decree was entered in accordance with the foregoing decision, and in the following term, the counsel for the claimant applied to the court for leave to re-argue the question of costs, and a manuscript decision of the circuit court was produced, overruling the doctrine of this court upon the question of desertion, and holding in effect, that absence from the vessel without leave, after the voyage was ended, but while the cargo was yet undischarged, was a desertion, carrying, as a consequence, the forfeiture of all wages then earned; whereupon, in obedience to that ruling, and after hearing counsel on both sides, it was decreed by this court that costs should be awarded to the claimant. On a subsequent day, a motion was made by the claimant for a summary decree, and for execution upon the stipulation of the surety for costs on the part of the libellant. This was resisted, upon the ground that the decree awarding costs to the claimant was against the libellant, and did not affect his surety.

The affidavit of the counsel for the claimant stated, that within a few days after the decree dismissing the libel without costs was rendered, he applied to the court for leave to re-argue the question of costs, and that the question was subsequently argued by the counsel on both sides, and a decree was entered dismissing the libel, with costs. The affidavit of the counsel for the libellant stated, that immediately after the first decree was rendered, he apprized the surety that he was no longer liable for costs upon his stipulation; that he, the counsel for the libellant, had no authority to waive the rights of the surety under that decree; that, in the subsequent argument upon the question of costs, he contemplated nothing but the interest of the libellant, and supposed that the object of the claimant was to recover costs against the libellant merely for the purpose of extinguishing the wages. The affidavit of the surety stated, that he had given no consent or authority to waive his advantages under the first decree. Upon the facts proved, it was contended for the libellant that the second decree was nugatory and void, or, if not void, that it only availed as against the libellant himself, and that such was the understanding at the time. The counsel for the claimant contended that the second decree was valid, and carried costs against the surety, and that the question of costs was re-argued with that understanding, and he appealed to the recollection of the court to sustain that view of the case.

BETTS, District Judge. The court constantly sees the mischiefs attending efforts to carry on litigated causes by mutual understandings between the counsel concerned in them. I have uniformly declined acting upon such arrangements, unless their result was put in writing, or stated upon the minutes of the court. Nor will I allow my own recollections or impressions as to particulars which have passed in the presence of the court, to interfere with or control rights that may ultimately be brought up for decision. I should certainly never have allowed the argument in this cause to proceed, unless I had supposed that the whole case was under the control of the court, and that the former decree stood suspended until a decision could be had upon the question of costs. Yet, there appears to have been no act of the court bringing the matter within its control, or assuming cognizance of it, other than hearing the counsel for both parties upon that question. The proposition now before the court is, whether a court of admiralty, after entering a definitive decree, can, of its own authority, re-hear the cause or modify the decree, at any time subsequent to the term in which the decree is rendered. Although the court proceeded, in this case, upon a supposed assent of the libellant, yet nothing appears apud acta establishing such assent, or concluding his rights. The proceeding in this case had all the character and effect of a re-hearing. The cause had been disposed of. No reservation of any question had been made, so as to render the decree in any respect interlocutory. A definitive decree, entered on the 26th of August, was changed by force of another decree applied for on the first Tuesday of September. The objection is now specifically taken, that it was incompetent for the court to vacate the preceding decree in that manner.

The course of procedure in the ecclesiastical and admiralty courts in England, does not furnish us with any satisfactory guide on this inquiry. The judge usually renders judgment there after summons to the party to be present to hear it. If he does not appear, there is a succession of decrees of contumacy, and then the decree passes as if by default. If he appears, he must eo instanti present his claims for an alteration of the decree, otherwise it becomes definitive. Consett, Ecc. Prax. pt. 3, c. 6, § 2; Clerke, Ecc. Prax. tits. 232, 234. In the French practice, which conforms very closely to the civil, the judgment becomes perfect as soon as it is pronounced, and the judge cannot correct it after the rising of the court, and after the register has entered the judgment upon the minutes as it was given. Pothier, Traité de la Proc. Civ., c. 5, art. 2. The only case recognised in the early practice of the ecclesiastical courts, in which the same court can revoke its sentence, is where, when the party is cited to show cause why sentence should not be executed, he alleges the nullity of the former decree; and this, whether the former decree was one made by another and a higher court, or by the same court. Cockb. Prax. c. 15, §§ 8, 9. Such, too, appears to be the modern practice. Sir John Nicholl doubts whether the court is competent to rescind a sentence against the wishes of the party obtaining it. And that doubt was strongly expressed in a case where a question of costs had been reserved, and where the application to open the previous decree was made on the day assigned for hearing that reserved question. Thomas v. Maud, 1 Addams, Ecc. 481. This principle seems to be incorporated into the practice of the admiralty courts. In a prize cause, Sir William Scott reserved his opinion upon the question whether he could revoke a previous decree in the cause, but under a pointed intimation that it was a proceeding wholly unknown to the court. The Vrouw Hermina, 1 C. Rob. Adm. 163.

The ordinary rules of practice in the supreme court deny a rehearing of a cause after the term in which judgment is pronounced. Hudson v. Guestier, 7 Cranch [11 U. S.] 1. And some of the cases imply a doubt whether, after a definitive judgment pronounced, the court can revoke or reconsider that judgment. See The Fortitudo, 2 Dods. 58, 70; Smith v. Jackson [Case No. 13,064]; Norton v. Rich [Id. 10,352]. The court of chancery allows a rehearing, upon sufficient reasons, at any

time before decree enrolled, and it has been permitted at the distance of twenty-four years from the time the decree was rendered. Har. Prac. K. B. 341; Mills v. Banks, 3 P. Wms. 8, and note. But this practice has never been introduced into the courts of common law or of admiralty, though I am not aware of any defect of authority in this court to establish such a rule. The character of the suits usually prosecuted here, would, however, deter the court from adopting that practice, unless the great ends of justice were put in hazard by withholding it. Usually, it is of the last importance to suitors here, to have an immediate despatch of their business. Seafaring men are not in circumstances to conduct protracted and reiterated litigations upon their claims, and it is usually better for their interests to have prompt decisions, even though adverse to their demands. Experience, I believe, fully justifies the remark, that whether in the instance or the prize court, every delay and appeal is of serious detriment to the mariner's interest. The sum in dispute is usually small, and of immediate necessity to the suitor. It is for his interest, therefore, that the most speedy decision possible should be obtained, and that, when it is adverse to him, he should rather go immediately to his employment than linger over the contingencies of a reconsideration of his case. These views have probably led to the exclusion from courts of admiralty of the practice referred to; and I concur in the sentiments of the eminent men sitting in the English admiralty and consistory courts upon this point, that it is a matter of great doubt whether a power of this description should be exercised in this court, without the free consent of all parties to be affected by it. The Vrouw Hermina, 1 C. Rob. Adm. 163; Thomas v. Maud, 1 Addams, Ecc. 481.

The fact of consent being expressly denied by the oath of the libellant's proctor, I cannot imply it from the subsequent proceedings, and must hold the last decree to be a nullity. The claimant may, however, if he wishes to have this point considered in the court above, have the stipulation delivered up to him, to be prosecuted in personam. Order accordingly.

Case No. 9,145.

The MARTHA.

[Olc. 140.] [1]

District Court, S. D. New York. April, 1845.

SHIPPING—CARRIAGE OF GOODS—DAMAGE—BILL OF LADING—FAULT OF SHIPPER—VIS MAJOR—BURDEN OF PROOF—PAROL TESTIMONY.

1. Where goods are shipped in good order, and are damaged on the voyage, it devolves on the owner of the ship to show that the damage was caused by fault of the freighter, or by vis major.

[Cited in The T. A. Goddard, 12 Fed. 177.]

2. Libellant shipped 340 bundles of sheet iron on freight from Liverpool to New-York, receiving a bill of lading that the same was received in good order, and to be delivered in like good order, the perils of the sea excepted; when unladen it was found to be stained and rusted by wet, and injured thereby; and notwithstanding proof that the iron was well stowed, that the ship came in tight and dry, that the iron was taken on board in dry weather, and not exposed to the access of water, the vessel was answerable for the damage. The burden of proof is upon the ship to show that the damage existed when the cargo was laden on board.

3. The acknowledgment in the bill of lading that the cargo is received in good order, though part of the shipping contract, may be explained or disproved by parol testimony.

4. Quere: Whether a general ship is liable for damages to cargo well stowed, caused by exhalations or dampness arising from the cargo on board, (also well stowed,) unless there be a special contract in the affreightment against such loss or injury?

This was an action by the consignee of a quantity of sheet iron (310 bundles) laden on board the ship Martha, at Liverpool, for New York, to recover damages for injury to the iron, by wetting. The libellant offered the bill of lading, which contained the usual conditions and stipulations. He then proved that the iron, when unladen from the vessel, was very wet, and water dripped off it. He further proved the damage caused by the injury amounted to about 30 per cent.

On the part of the claimant, it was shown that the vessel came in tight and dry, and that the iron was well and securely stowed, and was not so placed as to be subject to the access of water or moisture during the voyage.

The mate testified, that when taken on board, it had externally the appearance of being in good order, and that the weather was dry at the time, and the iron was not exposed to wet in lading, or before the ship sailed. Evidence was offered to show that the condition of the iron might be ascribed to its having got wet in the hands of the carriers and lightermen, at Liverpool, before it was delivered to the ship, and an instance of the kind was stated where an attempt was made to impose articles on a ship under similar circumstances, but by watchfulness and caution the deception was detected.

Wm. M. Evarts, for libellant.

Wm. M. Emerson, for claimant.

BETTS, District Judge. The bill of lading undertakes to deliver the iron, then in good condition, in the same order here; but without applying to this contract the character of an absolute assumption or admission of the fact, it must be received as strong prima facie evidence that the property was in good order when received on board the ship. Barrett v. Rogers, 7 Mass. 297. The law does not give a bill of lading the character of a warranty that the property received by the ship is in absolute good order and condition. It binds the ship and owner no further

[1] [Reported by Edward R. Olcott, Esq.]

than to the external appearance of the case or boxes, or of the article itself, when imported without envelope. This is especially so as between the freighter and ship-owner (Valin, lib. 3, tit. 2, art. 2; 2 Boulay-Paty, 309, 313); and on general principle, that part of the bill of lading which operates as a receipt, is open to explanation or correction by parol evidence.

The sheets of iron, in this instance, were held together by hoops around them, but not in a way to confine a quantity of fluid, and prevent its being discovered by the mere act of moving the bundles. The injury or exposure of the bundles, by having water already deposited within them, would not thus be ever concealed from observation when they were brought to the ship by the mode of putting them up for exportation; and the claimant is necessarily required to give strong evidence, under such circumstances, that the injury had already been sustained, or the proximate cause of it existed, when the iron was laden on board, otherwise his acknowledgement and undertaking in the bill of lading must stand in force against him.

In this case the libellant does not rely exclusively upon the admission in the bill of lading, but gives positive proof that the iron was delivered to the ship in good order. The fact that it was damaged when delivered to the consignee, fastens the responsibility for the deterioration upon the ship, unless the owner is able to show the injury arose from perils of the sea, or some inherent defects in the article, not discernible when it was received on board. The presumption of the law, without countervailing proof on his part, is, that the injury has arisen from fault or negligence in the stowage or transportation in the ship. Bernadon v. Nolte, 7 Mart. [N. S.] 283.

The ship had a quantity of salt on freight, and an attempt was made to prove it stowed in the vicinity of the iron, in a situation where it might be inferred that an exhalation of dampness from the salt was the means of creating the rust or stain complained of; but the stowage of salt turned out to be in another part of the ship, nor do I think, this being a general ship, the owner would be answerable for this kind of injury received by one part of a cargo from another, if the stowage was in the usual manner, unless the contract of affreightment had stipulated the contrary. There was no evidence that the damage was caused by perils of the sea, or vis major, and it is not enough for the owner to raise a doubt whether the iron came to the ship in a wet condition or received the injury on board, nor to show that it is difficult to account for its condition; but it is cast upon him to prove, affirmatively, that the injury was received before its delivery to the ship, or at least to show circumstances affording a violent presumption that the rust or stain could not have been communicated on ship-board.

Without touching the question, then, whether as against the assignee of the bill of lading, or even the freighter, the ship-owner might prove a fraud practiced on him by the shipper of the goods abroad, in putting them on board in a damaged condition, I am of opinion, upon the evidence produced, that the owner has not shown that the iron came on board wet, or any other fact, discharging his responsibility under the contract in the bill of lading. The engagement of the bill of lading must accordingly be enforced against him, and the libellant is entitled to recover the difference between 4⅛ cents per pound, for which the iron was sold in its damaged condition, and its value here, 5½ cents; together with charges for cartage, labor and money expended in consequence of the damage, but deducting the abatement of duties allowed at the custom-house, because of the damaged state of the iron. The case will be referred to the clerk to state the account, upon the principles of this decree.

NOTE. A case similar to the foregoing has been since decided in Louisiana. The action was for damages of 780 bundles of iron on board ship, by wetting. It was shown in this case, that though the weather had been rough, that the vessel was staunch and well built, and not injured by stress of weather. It was also proved by defendants, by the testimony of the stevedores who loaded the vessel, as well as by other witnesses, that the stowage was such as is customary, and such as is considered safe. But the fact of damage being positively shown, and the burthen of proof resting on the common carrier to show that it was a damage occasioned by the perils of the sea, which fact was not made to appear, the vessel was held liable for the damage. Price v. The Ariel, 10 La. Ann. 413.

MARTHA & ELIZABETH, The (LARCO v.). See Case No. 8,087.

Case No. 9,146.

The MARTHA ANNE.

[Olc. 18.] [1]

District Court, S. D. New York. Nov., 1843.

ADMIRALTY—JURISDICTION — LONG ISLAND SOUND —TORTS—ILLEGAL SEIZURE—DAMAGES —MITIGATION.

1. This court has jurisdiction on the instance side over maritime torts committed within the ebb and flow of tide.

2. Long Island Sound is not only, in common law acceptation, an arm of the sea; it is a strait and parcel of the high seas; it is not within the territorial limits of any particular state.

3. The inhabitants of Oyster Bay township have the exclusive right to the oyster fishing within that bay. And the town has authority to enact and enforce by-laws in support and protection of that right. But process issued by a justice of the peace, under the authority of those laws, cannot be executed on the Sound.

4. The seizure and detention of the libellant's vessel, for the purpose of executing such process on board her, was a maritime trespass and tort.

[1] [Reported by Edward R. Olcott, Esq.]

5. An action in rem against the vessel attached, and in personam against the respondent, her master, will lie in this court for the tort.

[Cited in The Florence, Case No. 4,880.]

6. The libellant is entitled to recover damages in this action, in satisfaction of the injury he has sustained. But those damages should be mitgated, upon the consideration that the respondent was acting under the command of officers of the law, and without intention to do the libellant any wrong.

In admiralty.

W. J. Haskett, for libellant.

Emerson & Pritchard, for claimant.

BETTS, District Judge. The pleadings and proofs in this cause are exceedingly diffuse and contradictory. The case to be gathered from them is, substantially, this. On the 2d of June, 1843, a number of fishing craft, of which the sloop Bahama, owned by the libellant, was one, went into Oyster Bay, on Long Island Sound, anchored in tide waters, and engaged in dragging and raking oysters, and taking them on board. None of the vessels or persons employed in them belonged to Oyster Bay. The libellant resided in Pelham, Westchester county, where the Bahama also belonged. The township of Oyster Bay, by an ordinance or by-law, authorized by the laws of the state of New-York (1 Rev. St. 336), prohibited any person who was not an inhabitant of the town, dragging or raking oysters within the bay, and subjected the person complained of and convicted of the offence, to a fine, &c.

Complaint was made by the supervisors of the town before a justice of the peace of the town, that the above mentioned vessels, including the Bahama, with their crews, had violated the law, and were then in the act of fishing oysters within the bay. Whereupon the justice issued a warrant to a constable of the town, commanding the arrest of the persons complained of. About the same time, the said oyster craft all made sail, and left the bay, running out into the Sound. The sloop Martha Anne was, at the time, in Oyster Bay, and was taken possession of by the constable, under the orders of the magistrate and supervisors of the town, to go in pursuit of the oyster craft, then under way. A posse of forty or more men were also summoned on board the sloop to aid the constable in making the arrest of the fishermen. Many of them took fire-arms on board, and the constable was accompanied in the expedition by the supervisor and justice of the peace, who issued the warrant of arrest, all of whom gave orders to the company on board the sloop to proceed and arrest the accused, and acted in directing and aiding the execution of the orders.

The sloop, thus prepared, sailed in pursuit of the oyster craft, and as she neared them, they were huddled together, some dozen in number. The men on them forbid the approach of the sloop; and by threatening to use various weapons, which were brandished and presented, including axes and fire-arms, endeavored to keep her and her company off. The sloop was, however, navigated so as to be brought up against and made fast to the Bahama, when twenty or more men from her, several of them with fire-arms, sprang on board and arrested all the persons found there, who were brought back in the Martha Anne to Oyster Bay. The respondent was master of the Martha Anne, and under the orders of the civil officers before mentioned, aided in navigating her out, and in towing back the Bahama to Oyster Bay harbor. It was proved that she was brought back to save her, there being no one on board to take charge of her after her master and crew were arrested. The Bahama was anchored and left by those who brought her back in that harbor, but her master was held in arrest under the warrant, and was taken before a justice of the peace, who condemned him to pay a fine for the offence charged against him. No one interposed to prevent the libellant resuming possession and free use of the sloop subsequently, but he allowed her to remain unreclaimed and falling to decay at her anchorage.

The respondent and claimant except to the jurisdiction of this court in the case, because the subject matter is within the cognizance of the local courts, and the remedy of the libellant, if any he has, lies at law, and not in admiralty. This objection would be unavailing in the English admiralty, provided the locus in quo, where the transaction took place, was upon the high seas. 3 Black, 106; 2 Browne, Civ. & Adm. Law, 107, 201. So under our federal system, district courts proceeding as courts of admiralty and maritime jurisdiction, have cognizance on the instance side, of maritime trespasses and torts, both in rem and in personam. The Almeida, 10 Wheat. [23 U. S.] 473; Dean v. Angus [Case No. 3,702]; L'Invincible, 1 Wheat. [14 U. S.] 238; McGrath v. The Candalero [Id. 8,809]. The subject matter, then, indisputably appertains to the jurisdiction of this court, provided the place in which the wrongful acts were done was so also. In this respect, our national judiciary has a wider admiralty and maritime authority than is exercised by English courts of admiralty. It extends over all navigable waters where the tide ebbs and flows, and is not, as is urged with great learning and force of reasoning, restricted by the condition that the waters be out of the territorial limits of the states. De Lovio v. Boit [Id. 3,776]; Hale v. Washington Ins. Co. [Id. 5,916]. But in this case the proof is clear that the libellant's vessel was come upon by the respondent and the Martha Anne, near the centre of Long Island Sound. The Sound is an arm of the sea, within the common law acceptation of the term, being navigable tide-water (Hargrave, Law Tracts, c. 5; Carter v. Murcot, 4 Burrows, 2162; Hooker v. Cummings, 20 Johns. 98), and

more specifically an arm of the sea than mere rivers, bays or inlets; because, in addition to its tide-water and navigable quality, it is without the territorial limits of any county (1 Kent, Comm. 364, 367.) It more properly is a strait, or inland sea, having communication with the ocean at each end, and lying between a long extent of land on two sides of it. Jacobs, Law Dict. "Straits." But what imparts an unquestionable maritime jurisdiction to the United States courts over its waters, and renders it within our jurisprudence, the high seas, is, that it is not within the territory of any particular state of the Union.

In my opinion, therefore, there is no solid ground of exception to the jurisdiction of the court over the case presented by the libel. The libellant is entitled to satisfaction for the wrong he has sustained, out of the vessel which was the instrument by which it was inflicted, and against the master who was the agent causing it. The great stress of the contestation in the cause between the parties has been upon the right of the inhabitants of Oyster Bay to the exclusive fishing of oysters in that bay, and the power of the corporation of the town to enact and enforce the ordinance or by-law in question. I do not go into that subject. It has been largely discussed in the state law courts; and the statute law of the state, together with the decisions of those tribunals, undoubtedly settle that point conclusively, independent of the coincidence of decisions of the federal courts with the doctrines laid down by the state courts. 6 Cow. 376; Id. 545, notes; 20 Johns. 90; Wend. 237; 5 Wend. 423; 14 Wend. 43; 1 Rev. St. 336; Bennett v. Boggs [Case No. 1,319]; [Martin v. Waddell] 16 Pet. [41 U. S.] 367.

The bearing upon that topic is unimportant to this case, because, conceding the exclusive title to the fishing in Oyster Bay is vested in the inhabitants of that town, and admitting the validity of the by-laws passed to support the title, and the regularity and conclusiveness of the proceedings before the magistrates to enforce those by-laws and arrest the parties accused on the occasion in question, yet no authority could be derived from those facts to seize or molest the libellant's vessel at the place where she was trespassed upon and arrested. That place was entirely out of the jurisdiction of the local magistrates. The law creating the county of Queens does not extend its boundaries into the Sound. 3 Rev. St. 2. And, accordingly, there is no color of right shown in justification of the acts complained of, and the libellant is entitled to a decree against the respondent and the Martha Anne, for remuneration of loss thus sustained by him.

I do not think those damages should be of an aggravated or exemplary character against these parties. The respondent did not inflict the wrong wantonly. There is no evidence that he volunteered his sloop or himself personally in the enterprise. He acted under the direction of officers of the law, who could rightfully exact the assistance demanded within the territory of the county; and there was sufficient probable cause for him to submit himself and his vessel to their commands, to remove all presumption of a wilful purpose on his part to perpetrate a wrong and trespass on the property of the libellant. The testimony does not fix upon him any further participation in the tort than being present with his vessel. He is undoubtedly legally responsible to the libellant for the injury inflicted, but the case made out does not call for vindictive or extraordinary damages against him. The Bahama was taken back to Oyster Bay by order of the public officers controlling the proceedings, and anchored there, within one hour after her arrest, and was there left in a safe position and one easy of access for the libellant; and it does not appear that he was in any way prevented resuming immediate possession of her. This, in my judgment, is the reasonable bearing and result of the statements of the witnesses given on the hearing.

I shall order that the libellant recover $50 and his costs, to be taxed, and that he take a decree in rem against the vessel, and in personam against the respondent therefor.

Case No. 9,147.

The MARTHA C. BURNITE.

[10 Ben. 196.] [1]

District Court, E. D. New York. Dec., 1878.

PRACTICE—STIPULATION FOR VALUE—BOND UNDER SECTION 941 OF THE UNITED STATES REVISED STATUTES.

1. A stipulation for value can be substituted for property in custody, at any time, by order of court.

2. At any time before default, property in custody may be bonded in pursuance of section 941 of the Revised Statutes of the United States, without any other condition than is prescribed in that section:

3. But whether it can be so bonded as a matter of right, after a default, quere.

In admiralty.

T. C. Campbell, for libellant.

Beebe, Wilcox & Hobbs, for claimant.

BENEDICT, District Judge. I greatly doubt whether a party can as a matter of right obtain the release of a vessel from custody by giving a bond under section 941 of the United States Revised Statutes after a default has been entered upon the return of the process. It seems to be the intention that the bond should be approved and either filed or returned by the marshal for the purpose of being filed with the process, and it is plainly

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

intended that the bond should be given before any decree has been rendered in the cause. Of course, as in other cases, a stipulation for value may be substituted for property in custody at any time, by leave of the court, but that is a different thing from giving the bond provided for in section 941. The difficulty here is that there has been no default and no publication of notice upon which a default can now be taken. The right, therefore, to have a bond approved in pursuance of section 941 still exists, and may be exercised without any condition other than is prescribed in the section.

The application, therefore, to have terms imposed as a condition of being allowed to bond under section 941 must be denied.

The bond, being regular in form, and the sureties having justified on due notice to the libellant, must be approved.

MARTHA M. HEATH, The. See Case No. 7,113.

Case No. 9,148.

The MARTHA WASHINGTON.

[3 Ware, 245.] [1]

District Court, D. Maine. Jan. 10, 1860.[2]

SHIPPING—POSSESSION OF VESSEL—MAJORITY IN OWNERSHIP—TRANSFER—ACT OF CONGRESS.

1. The constitutional power of congress to pass the law of 1850, § 1 [9 Stat. 440], relative to recording the transfer of vessels, raised but not decided.

2. A court of admiralty has no jurisdiction to decree possession of a vessel to the owners of a majority, when a title to such vessel is set up in mortgage.

This case came up on an agreed statement of facts, about which there was no dispute, and the principal point argued was the validity of the law of the United States of 1850 (section 1). It was to obtain a decision on this point, on which there were conflicting opinions, that the suit was brought. The court thought itself obliged to decide it on a narrower ground.

Shepley & Dana, for libellants.
Fessenden & Butler, for respondent.

WARE, District Judge. This is a libel against the Martha Washington, a brig of about 270 tons burthen, by Blanchard and Sherman claiming 5-16 in full title. In an agreed statement of facts it is admitted that she was built in 1853, at Surry, in the collections district of Frenchman's Bay, within which all the owners resided, and, on the 5th of December, she was registered in that district. On the 25th of October, 1855, she surrendered her registry and was enrolled. On the 7th of December, 1855, being at Norfolk, and desirous to make a voyage to the West Indies, she surrendered her papers and took out a temporary register in that office, and under that register was employed during the whole of 1856 and the greater part of the year 1857. The libellants claim title to one-half of the brig by virtue of a mortgage of Wm. Coggin, dated Nov. 21, 1856, recorded in the collector's office at Frenchman's Bay, Nov. 27, 1856, and at Norfolk, May 11, 1857, and by the clerk of the town of Surry, Nov. 18, 1857. To this title of the libellants, Phebe Flood has put in a claim to three-sixteenths which is derived from a mortgage of the said Coggin, dated April 1, 1856, and recorded in the collector's office in Frenchman's Bay, Sept. 1, 1856. Amos D. Dolivar has put in another claim to one-sixteenth by a mortgage of the same Coggin, dated Sept. 1, 1856, and recorded the second day of the same month in the collector's office at Ellsworth. Coggin, it is admitted, owned one-half and no more of the brig. Of this he conveyed one-half by two mortgages to Flood & Dolivar, both of them of earlier date and record, in the office of the collector at Frenchman's Bay, than the libellants, but neither recorded in the office of the clerk of Surry. He then conveyed the whole of his half to the libellants, who had their mortgage recorded in the office of the collector of Norfolk, and with the clerk of the town of Surry. Coggin had his residence at Surry till the time of his death.

The libellants claim possession on the ground of title to a majority of the vessel, and to one-half, their title is a foreclosed mortgage under the revised statutes of Maine. The words of the law are: "No mortgage of personal property made to secure the payment of more than thirty dollars shall be valid against any other person than the parties thereto, unless possession of such property, is delivered and retained by the mortgagee, or the mortgage be recorded by the clerk of the town in which the mortgagee resides." Chapter 91, § 1. The third section provides that the property may be redeemed at any time within sixty days after the breach of the condition. That time had elapsed before the filing of the libel, and the parties claim an absolute foreclosure by operation of law. To this libel answers are interposed by Flood and Dolivar, claiming title, one to three-sixteenths and the other one-sixteenth parts of the same vessel, on mortgage prior in point of date of the conveyances and of the record in the collector's office at Frenchman's Bay, to that of the libellant. Their claim is under the United States statute of 1850 (section 1). The words of this statute are "that no bill of sale, mortgage, hypothecation, or conveyance of any vessel or part of any vessel of the United States, shall be valid against any person other than the grantor or mortgagee, his heirs and devisees and persons having actual notice thereof; unless such bill of sale, mortgage, hypothecation, or conveyance be recorded in the office of the collector of the customs where such vessel is registered or

[1] [Reported by George F. Emery, Esq.]
[2] [Affirmed in Case No. 1,513.]

enrolled." In both statutes there is a reservation of bottomry contracts and implied liens, which it is immaterial to consider in this case. It may here be remarked, that though the law of the state was enacted in the revised statutes in 1857, it was but a re-enactment of the law of the state dated back to 1839.

On these mortgages the libellants shew a good title under the state law, and the claimants under that of the United States. If these two laws had proceeded from the same authority, that is, if both had been enacted by the same sovereign power, but little difficulty, I think, would be found in holding that of the United States an implied repeal of the state law, and that a compliance with the terms of both would be unnecessary. There appears to me to be a real difficulty in yielding to the authority of the case of Thompson v. Van Vechten, 5 Abb. Prac. 462, which was quoted at the argument, that to secure a mortgage, the mortgagee must record under both laws. Both provide for the same case, they cover the whole matter and they have the same penal sanction, that is, the nullity of the conveyance if the terms of the law are not complied with. They appear to me to fall under the common rule, that a subsequent law, relating to the same matter, is a repeal of a prior, so far as the provisions of the two are repugnant or inconsistent, and if the second covers the whole matter of the first, it is a repeal of that in toto. And it is so plain a principle of the constitution and has been so often recognized, that in all matters to which the authority of the United States extends, their laws are paramount to those of a state, that it seems superfluous to refer to any authority on this point.

If this be correct the rights of the parties under these mortgages must be decided by the United States law, if it is in force. It is so if congress had the constitutional right to pass it, for it has not been repealed. This brings up the point that was mainly, I may say solely, relied on at the argument, that the act of 1850 is purely void from excess of power; that congress, in enacting this law, passed their constitutional limits, and the act is therefore a pure nullity.

If congress has the power to pass laws regulating the title to vessels generally, it must be derived from the grant of power in the first article (section 8): "To regulate commerce with foreign nations, and among the several states, and with the Indian tribes." The clause at the end of this section, "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers," &c., it has always appeared to me cannot enlarge the powers of the general government, because this refers only to incidental powers, which would necessarily follow the grant of the general power without express words. If it did increase their power, it would be neutralized by the tenth amendment. This provides that "the powers not delegated the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people." This is a complete negation of a constructive power on the clause, which I have mentioned.

The grant of power to regulate commerce, it is admitted, includes that of regulating navigation, but it includes it as an incident merely. Congress has the right to regulate foreign navigation so far as it is engaged in carrying on our commerce. Yet no one would contend that they had a general power over vessels belonging to a foreign nation. So congress has the power to regulate ships or vessels just so far and no farther than as they are employed in carrying on trade. There can be no doubt that, under state laws, any one may own a vehicle made of wood, iron, and copper in any form, whether in that of a ship, a barrel, or a box, and may transfer it under what conditions he pleases without reference to the United States laws. It is only when it becomes a vehicle in carrying on trade that it comes within the reach of the United States authority. And whatever may be the form, there can be no doubt that the United States, so far as it is used in trade and commerce, may regulate the transfer and the title generally; that is, so far as it is used in foreign and inter-state trade and trade with the Indians. To this limit was the power of congress carefully confined by the supreme court in the great case of Gibbons v. Ogden, 9 Wheat. [22 U. S.] 1, 197. Under this power congress may order ships or vessels to be registered and enrolled, to be commanded and manned in a particular way, to be under a peculiar police adapted to the service, and be recorded in the custom-house, or they shall have none of the privileges and immunities attached to United States vessels. But the penalty by which this law is enforced must be confined to these privileges. The power of the United States must be restricted to taking away that which the United States can give. The laws of the Union never contemplate vessels as property simply, but as property employed in a particular way, or for a particular purpose. The tenure of all goods in civilized society is fixed by law. As property, the owner holds it under state laws. It is only as engaged in trade, that they hold it under United States law. What the state gives, the United States cannot take away. But the privilege of engaging in a certain trade is given by the United States, and of that vessels, like any other property, may be deprived.

If the authority contended for were allowed it would, in principle, go somewhat farther than is at first imagined. The only ground on which it can be pretended that the United States can regulate the mode of transfer of vessels, is that they may be, and most usually are, used in carrying on trade. But if for this reason alone they may regulate the title generally, I do not see but that with the

same force it may be applied to barrels and boxes, nay, to wagons, carts, and horses, because they may be used in carrying on interstate and Indian trade. A cooper or a pedlar would be surprised to be informed that they could not convey a title to a barrel or a wagon without first consulting the United States laws.

It will not be pretended that a decision against the validity of the law of the United States, or one that should restrict its operation to the immunities granted by their laws, would not be attended with difficulties of the gravest character. There can be no doubt that they can regulate the transfer of vessels so far that they shall have none of the privileges granted by them, unless by a compliance with their laws. In this way only, can vessels be entitled to engage in the public trade, and without these privileges, they would be of little value, while other vehicles derive little of their value from this privilege, as barrels, boxes, carriages, etc. And there would be a real and substantial difficulty in separating the immunities from the thing itself, and allowing these to be transferred independent of the thing itself.

The question raised in this case is one of the greatest importance, as it affects the powers of the general government and of the separate states, as well as the commercial community at large. And it will require very grave consideration before it is decided either way. As property generally, the owners hold vessels as they do all other property under state laws. It is not perceived how, in this case, the United States can take away, in the form of a penalty, what they cannot give. This power of control is not expressly granted by the constitution. That of regulating navigation, so far as it is engaged in trade, is but an incident, and to allow the United States a general control over the transfer of vessels, when their own interests are not concerned, would be grafting an incident on an incident. For it will not be pretended that congress have this power because the public good would be promoted by having it lodged within them. If the plea of utility, of which, from the necessity of the case, the general government would alone be the judge, were sufficient, ours would be a government of discretion and not of fixed rules. And it is an elementary principle of law, that when one acts under a delegated authority he must show it to exist either by express grant or necessarily incident to some express grant, or it does not exist. The supreme court, in one of the most carefully considered opinions ever delivered in that court, have given this construction to the constitution. Martin v. Hunter, 1 Wheat. [14 U. S.] 326–349. The constitution is to be interpreted like every other grant of power. See 1 Pars. Mar. Law, pp. 47–51.

If it were necessary to decide this question on this case, I should desire a longer time to consider it. Every question involving the constitutional power of the general government is important, and there can be scarcely any one more so than this. Within the grant of the constitution the power of the general government is supreme, and overcomes all state legislation, but beyond that its acts are merely void. The conveyance of vessels is of daily occurrence, and it is of the last importance to ship owners when the laws are in conflict, to know whether they are to obey those of the state, or the United States. Although this question must be decided, I think it cannot be in the present case, and the courts of the United States are not in the habit of volunteering their opinions when they are not called for. Sufficient for the day are the evils and trials which the day brings. My opinion is that the case must be determined on the question of jurisdiction, and, as this is preliminary in its nature, it cuts off all questions which arise on the merits.

The title set up by this libel is founded on a mortgage, and the prayer is for possession. It is not pretended that the plaintiffs owned a majority independent of the mortgage. Without a majority they would have no right to claim possession against other co-tenants, and the transfer of the possession must have its foundation in that title. In the case of Boghart v. The John Jay, 17 How. [58 U. S.] 399, the supreme court held that the court of admiralty had no jurisdiction to decree a sale of a ship to pay an unsatisfied mortgage or to transfer the possession to the mortgagees. This case was confirmed in that of Schuhardt v. The Angelique, 19 How. [60 U. S.] 239. It was acted on in that of The William D. Rice [Case No. 17,691]. It is on the ground that the title set up is essentially one in equity, and though a court of admiralty professes to decide ux aequo et bono, on the general principles of equity, it has none of the peculiar powers of that court in the investigation of the title and the equities under it. How far a court of admiralty may look into a mortgage when it comes up collaterally, is another question; but when this lies at the very foundation of the case, it is too well settled in this country, as, before the statute of Victoria, it was in England, that the court looks only at the legal title, to be brought into doubt. It is equally clear that the consent of parties cannot give jurisdiction. If this defect appears at any time in the course of the trial, although not raised by the pleadings of the parties, it is fatal. So it has often been decided by the supreme court.

The libel dismissed with costs.

The decree of the district court was affirmed by the circuit court at Sept. term, 1860. Blanchard v. The Martha Washington [Case No. 1,513].

MARTHA WASHINGTON, The. See Case No. 1,513.

MARTHA WASHINGTON, The (BLANCHARD v.). See Case No. 1,513.

Case No. 9,149.

Ex parte MARTIN et al.

[5 Law Rep. 158; 1 Pa. Law J. 188.]

Circuit Court, D. Massachusetts. 1842.

INJUNCTION—SUITS AGAINST BANKRUPT—EQUITY—JURISDICTION—BANKRUPT ACT.

1. The equity jurisdiction of the district courts of the United States, under the bankrupt act [5 Stat. 440], is not confined to cases, originally arising and pending in the particular court where the relief is sought.

[Quoted in Goodall v. Tuttle, Case No. 5,533. Criticised in Shearman v. Bingham, Id. 12,733.]

2. Where a creditor, living in Massachusetts, commenced suits in Massachusetts, New Hampshire and Kentucky, against a party proceeded against as a bankrupt in Pennsylvania, which suits would deeply affect the property of the supposed bankrupt, if he should be declared a bankrupt; it was *held*, that an injunction ought to issue against the creditor, enjoining him from proceeding in any of the said suits.

This was a case in bankruptcy, adjourned into the circuit court from the district court of Massachusetts, and arose on a petition from James Martin, Jacob M. Thomas, John Thomas, and Samuel E. Stokes, merchants and partners, under the firm of Thomas and Martin; and William Stevens and William C. Claghorn, merchants and partners, under the firm of Stevens and Claghorn, of Philadelphia. The petition set forth, that James B. Danforth, of Philadelphia, merchant, was indebted to the petitioners in a sum of money exceeding five hundred dollars, and was owing debts to the amount of not less than two thousand dollars; that the petitioners, on the 26th day of May, 1842, filed in the district court of the United States, for the Eastern district of Pennsylvania, their petition, praying that the said Danforth might be declared bankrupt, pursuant to the act of congress, and it was thereupon ordered, that the hearing upon said petition should be had before the said court, on the 24th day of June, current. That Samuel S. Lewis, of Boston, had commenced against said Danforth divers suits before competent tribunals, namely, one in the state of Massachusetts, one in New Hampshire, one in Kentucky, and was prosecuting the same to final judgment; in which said suits certain real and personal estate of the said Danforth had been attached. Wherefore the petitioners prayed, that the said Lewis might be enjoined from proceeding in said suits; and for general relief.

The district judge, upon the hearing, ordered the following question to be adjourned into the circuit court for a final determination, to wit: "Whether, upon the facts set forth in the said petition, an injunction can and ought to be granted as prayed for; or whether any, and what other relief, can, and ought to be granted to the petitioners."

The cause was submitted by A. H. Fiske, for petitioners. No counsel appeared on the other side.

STORY, Circuit Justice. This case is not unattended with doubt and difficulty; but, on the whole, I have come to the conclusion, that it must be governed by the decision of this court in Ex parte Foster [Case No. 4,960]. The ground of the doubt and difficulty is, whether the district courts of the United States have, under the bankrupt act of 1841 (chapter 9), any jurisdiction in equity, except in cases originally arising, and pending in the particular court. The language of the sixth section of the act is: "That the district court in every district shall have jurisdiction in all matters and proceedings in bankruptcy arising under the act," the said jurisdiction to be exercised summarily, in the nature of summary proceedings in equity. The act then goes on to enumerate certain specific cases and controversies, to what the jurisdiction extends, (which I deem merely affirmative, and not restrictive of the preceding clause;) and then it extends the jurisdiction "to all acts, matters and things to be done under, and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy." Now, this language is exceedingly broad and general; and it is not in terms, or by fair implication, necessarily confined to cases of bankruptcy originally instituted, and pending in the particular district court, where the relief is sought. On the contrary, it is not unnatural to presume, that as cases, originally instituted and pending in one district, may apply to reach persons and property situate in other districts, and require auxiliary proceedings therein to perfect and accomplish the objects of the act, the intention of congress was, that the district courts in every district should be mutually auxiliary to each other for such purposes and proceedings. The language of the act is sufficiently comprehensive to cover such cases; and I can perceive no solid ground of objection to such an interpretation of it. Here, is the case of a creditor, living in Massachusetts, and commencing suits in Massachusetts, New Hampshire, and Kentucky, against the party, proceeded against as a bankrupt, who lives in Pennsylvania, which suits deeply affect the property of the supposed bankrupt, and, if he shall be declared a bankrupt, which also deeply affect the rights and interests of all the other creditors. If the bankrupt proceedings go on, and the party is declared a bankrupt, and an assignee is appointed, the same consequences must arise, as in the case of Ex parte Foster [supra], and the same rights would attach in favor of the assignee, and the bankrupt, and the creditors, as were held to attach in that case. If the district court of Massachusetts has no jurisdiction to grant relief in the present case, it is clear, that no other court can grant it, at least no other court, sitting as a court of bankruptcy. No state court could entertain the suit; for the

act confers no power or jurisdiction on any state court; and the district court for the district of Pennsylvania is bounded, as to its direct jurisdiction over persons and property, to such only as are within its territorial limits. It is possible, indeed, that the circuit court of the United States might possess equitable jurisdiction over the case in virtue of its general equity jurisdiction between citizens of different states, if the bankrupt should commence a suit here, or if the assignee should be a citizen of Pennsylvania, and should commence a suit here. But this would be a very circuitous remedy, if it be maintainable; and would hardly meet the practical exigencies of cases, like the present. On the contrary, if, as has been suggested, we give a broad interpretation to the words, then the whole objects of the bankrupt act will be promptly and effectually obtained, through the mere instrumentality of the district courts in each district, acting, as it were, sub mutual vicissitudinis obtentu, in aid of each other.

For these reasons, I am of opinion, that the adjourned question, as to the right of the district court to issue an injunction in the present case ought to be answered in the affirmative; and that a certificate ought to be sent accordingly from this court to the district court, in the terms of the certificate in Ex parte Foster, mutatis mutandis.

It may be proper to add, that the injunction ought to apply, as well to the suits in New Hampshire and Kentucky, as to that in Massachusetts, since the creditor is resident in this district, and the injunction acts in personam. The doctrine is now perfectly well settled in equity, that an injunction will lie against a party within the jurisdiction of the court to stay proceedings in any foreign courts. See 2 Story, Eq. Jur. §§ 899, 900, and cases cited in the notes.

[See Case No. 3,560.]

Case No. 9,150.

In re MARTIN.

[6 Ben. 20.] [1]

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

BANKRUPTCY — ERRONEOUS ADJUDICATION — COPARTNERSHIP.

On the petition and schedules of one member of a copartnership, an adjudication of bankruptcy of the firm was made. It appeared that neither of the other members of the firm had consented to the adjudication of bankruptcy, and that they had no place of business within, and resided out of, the district where the petition was filed: *Held*, that the adjudication as to the other members of the firm was erroneous, as the court was without jurisdiction as against them, and that as to them such adjudication must be vacated, but should be allowed to stand as to the petitioning member.

On the 16th of March, 1872, on the petition and schedules of Henry Martin, a member of the firm of Martin, Vaughan & Co., the adjudication of bankruptcy of said firm was signed by the register to whom the case was referred, under a misapprehension of the facts as to Vaughan and Montgomery, the other members of the firm. On a subsequent examination of the petition and schedules, it appeared that there was no evidence that either Vaughan or Montgomery had consented to the adjudication of bankruptcy of the firm; that they had no place of business in the district, and resided out of the district; and that the debts were all contracted prior to January 1st, 1869. The register thereupon, on the same day, of his own motion, made an order setting aside the said adjudication, without notice to the attorney for the petitioner, and, on March 18th, the following Monday, made an adjudication of bankruptcy of said Henry Martin individually. The petitioner thereupon moved that the order setting aside the adjudication of March 16th, and the adjudication of March 18th, be vacated. The register certified the above facts to the court, with his opinion that the adjudication of the firm of Martin, Vaughan & Co. was erroneous, and that Vaughan and Montgomery were entitled to be heard before being adjudged bankrupts.

BLATCHFORD, District Judge. The adjudication of March 16th, 1872, as to Vaughan and Montgomery, was erroneous, as the court was without jurisdiction as to them. I direct an order to be entered vacating such adjudication as to them, but allowing it to stand as to Martin alone. In order to prevent any possible embarrassment, the order had better provide that the register's order setting aside the adjudication of March 16th be vacated, and that the adjudication of March 18th be vacated.

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

Case No. 9,151.

In re MARTIN.

[5 Blatchf. 303.] [1]

Circuit Court, S. D. New York. Feb., 1866.

CERTIORARI — HABEAS CORPUS — COMMISSIONER — MINUTES OF EVIDENCE—CONSPIRACY—SUFFICIENCY OF EVIDENCE.

1. The courts of the United States have power, under the 14th section of the judiciary act of September 24th, 1789 (1 Stat. 81), to issue the writ of certiorari, as ancillary to the writ of habeas corpus, as a means of rendering their jurisdiction under the latter writ effective.

[Cited in Re Macdonnell, Case No. 8,772.]

2. Where a prisoner is committed by a United States commissioner, to await the action of a grand jury of a circuit court of the United States, that court, in connection with a habeas corpus, to inquire into the cause of his commitment, has power to issue a certiorari to the commissioner, to bring up the proceedings which took place before him.

[Cited in Re Coleman, Case No. 2,980.]

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

3. The functions exercised by a United States commissioner, in committing a prisoner to await the action of a grand jury, considered.

[Cited in U. S. v. Martin, 17 Fed. 155.]

4. The court, on a habeas corpus, is not concluded by the finding of the committing magistrate, but may go behind his order of commitment, and, by a certiorari, look into the evidence taken before him.

[Cited in Re Van Campen, Case No. 16,835; U. S. v. Brawner, 7 Fed. 87.]

5. To this end, the court may require the production before it of the minutes of oral evidence taken by the commissioner, and of any written depositions, and may examine the commissioner as to evidence taken by him and not reduced to writing, and as to lost minutes of evidence.

6. The admissions of an alleged co-conspirator, made after the conspiracy has terminated, and not in the presence of the accused, are not evidence against the latter.

7. Communications which pass between client and counsel are inviolable, and the latter cannot be compelled to disclose them.

8. A prisoner committed by a United States commissioner, for a crime against the United States, to await the action of a grand jury of this court, was discharged by this court, on habeas corpus, on the ground that the evidence before the commissioner, brought up on certiorari, was not sufficient to warrant his commitment.

This was a writ of habeas corpus directed to the marshal of the Southern district of New York, commanding him to bring the body of Robert M. Martin before the court. As the petition for the writ alleged that the prisoner was detained in custody under a warrant of commitment issued by a United States commissioner, a writ of certiorari, also, was issued by the court to the commissioner, directing him to send up the proceedings and evidence upon which such commitment was founded. By his return to the habeas corpus, the marshal justified his detention of the prisoner, by setting forth the order of the commissioner, and also produced the body of the prisoner in court. No formal return was made to the certiorari, though the commissioner was in court, with his proceedings in the premises, ready to comply with such order as the court should make thereon. The district attorney, on behalf of the United States, moved to quash the certiorari, on the ground that the commissioner possessed co-ordinate jurisdiction with this court to commit, for the action of the grand jury, persons charged with crime, and that, therefore, this court had no power to revise his action therein. It was insisted, on behalf of the government, first, that the court had no power to grant the writ; and, second, that, if it had, the writ could lawfully operate only to bring up the formal records and files of the commissioner in the case, and that the evidence taken before the commissioner was no part of such records or files, and, therefore, not within reach of the writ. The principal question discussed, on the argument, was the power of the court, through the medium of a writ of certiorari, to bring before it the evidence upon which the commitment was made.

Daniel S. Dickinson, Dist. Atty., for the United States.

Jeremiah Larocque, for prisoner.

SHIPMAN, District Judge. The power of this court to grant the writ of habeas corpus is not denied, and, therefore, need not now be dwelt upon. Neither shall I discuss at much length its power to grant the writ of certiorari, as ancillary to the former writ. The courts of the United States being courts of limited, though not of inferior jurisdiction, their powers must be sought for in the acts of congress. The 14th section of the judiciary act of September 24th, 1789 (1 Stat. 81), provides, "that all the before-mentioned courts of the United States shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of habeas corpus, for the purpose of an inquiry into the cause of commitment. Provided, that writs of habeas corpus shall in no case extend to prisoners in gaol, unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify." Under the authority conferred by this act, the writ of habeas corpus has been repeatedly granted by the courts of the United States, and by the judges thereof. And, although the power to issue the writ of certiorari is not conferred by name, it is no doubt included under the general terms, "all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." Accordingly, the supreme court of the United States, in Ex parte Burford, 3 Cranch [7 U. S.] 448, and in the case of Ex parte Bollman, 4 Cranch [8 U. S.] 75, issued the writ of certiorari, as well as that of habeas corpus. These precedents would be quite sufficient to warrant this court in the exercise of its power to issue the former writ, for, jurisdiction in cases of habeas corpus is conferred upon the supreme and circuit courts by the same words of the act, as well as the power to issue all other writs which may be necessary for the exercise of jurisdiction. The writ of certiorari has always been considered, in appropriate cases, as ancillary to that of habeas corpus, and has long been issued by the courts of England and this country, as a means of rendering their jurisdiction under the latter writ effective. It is said, in Bacon's Abridgment (title "Habeas Corpus," B 3): "As the certiorari alone removes not the body, so the habeas corpus alone removes not the record itself, but only the prisoner with the cause of his commitment; and, therefore, although,

upon the habeas corpus, and the return thereof, the court can judge of the sufficiency or insufficiency of the return and commitment, and bail or discharge or remand the prisoner, as the case appears upon the return, yet they cannot, upon the bare return of the habeas corpus, give any judgment, or proceed upon the record of the indictment, order, or judgment, without the record itself be removed by certiorari." Numerous cases, in the English, federal, and state courts are found, where a certiorari, in connection with a habeas corpus, has been issued. Hamond v. Howell, 1 Mod. 184; King v. Marks, 3 East, 157; King v. Taylor, 7 Dowl. & R. 622; the cases in Cranch, already cited; Edmonds, J., in People v. Martin, 1 Parker, Cr. R. 187. In the last case cited, the power was given by the statute, but in language which plainly indicated that the act, in that particular, was declaratory of what the law was, rather than remedial. The prisoner having been committed to await the action of the grand jury in this court, I have no doubt that, upon principle, by the power conferred by the act of congress, and upon the decided cases, this court is fully authorized to issue the writ of certiorari in connection with the writ of habeas corpus.

The next question is—what proceedings of the committing magistrate is the certiorari to operate upon and remove into this court? In determining this question, it is proper to notice, in the outset, the functions exercised by the commissioner in committing a prisoner to await the action of the grand jury. In this respect, he exercises the powers common to all ordinary committing magistrates. If he finds probable cause to hold the party for trial, he commits him; if not, he discharges him. In neither case is his action final, or a bar to further proceedings. If the prisoner is discharged, he may be again arrested, and, on sufficient evidence, may be committed. If he is committed, he may apply to the court to reduce his bail, or the prosecuting officer may apply to have it increased, or to discharge him altogether. In none of these proceedings of the commissioner are his orders in the nature of a final judgment of a court of record; and it is a common practice for courts, in England and in this country, to which a party is committed for trial, to revise just such orders as the commissioner has made in the present case. This court has repeatedly increased and diminished bail fixed by commissioners, and its authority has never been questioned. Now, in order that this court may exercise intelligently its undoubted authority over such matters, it must be able to go behind the mere formal order of commitment. In order to fix the amount of bail, it must be possessed of sufficient evidence as to what are the peculiarities of the offence committed—whether it is a merely technical breach of law, or one attended by circumstances of peculiar aggravation or atrocity. This court had occasion, not long since, on the application of a former district attorney, to inquire extensively into evidence for the purpose of fixing the bail of a swindler whose depredations on the treasury had been enormous. Indeed, the 33d section of the judiciary act expressly requires the court, in fixing bail, in certain cases, to regard "the nature and circumstances of the offence and of the evidence, and the usages of law." Now, in order to pass upon the evidence, the court must have the same before it. If it is not brought voluntarily into court, the court must have some power to compel its production. The witnesses are not always within its immediate reach, having given their testimony before the commissioner, and gone to distant homes. In some cases, they are abroad, or on the high seas, and the prisoner stands committed on depositions sent home by consuls residing in foreign ports. It is a common practice, for courts in most places where the common law exists, to bring before them the evidence produced before the committing magistrate, and upon which his commitment is founded; and, where this evidence is reduced to writing, in the form of depositions, whether by the committing magistrate or by other competent authority, this is frequently done by a certiorari, in aid of a habeas corpus. But, in whatever manner the evidence is brought before the court, the court is not concluded by the finding of the committing magistrate. 2 Strange, 911, note; King v. Marks, 3 East, 157; Van Boven's Case, 9 Adol. & E. (N. S.) 676; Ex parte Tayloe, 5 Cow. 39; People v. Martin, 1 Parker, Cr. R. 187. In the case of Ex parte Bollman, 4 Cranch [8 U. S.] 114, Chief Justice Marshall remarked: "I understand the clear opinion of the court to be (if I mistake it, my brethren will correct me) that it is unimportant whether the commitment be regular in point of form or not; for, this court, having gone into an examination of the evidence upon which the commitment was grounded, will proceed to do that which the court below ought to have done."

The only plausible doubt suggested in the present case is, as to the power of the court to compel the production of the minutes of the evidence taken by the commissioner. The law does not, in terms, require the commissioner to reduce the testimony of witnesses to writing, although this is generally done by those magistrates, in important cases. If this objection were to prevail, it would only produce embarrassment; for, it often happens, that the evidence upon which a commitment is founded consists in part of depositions taken abroad by consuls, and in part of oral testimony taken before the commissioner, and by him taken down in his minutes. The witnesses who thus testify sometimes leave for remote places, and, where they are officers of a ship, often depart on another voyage before the final trial; and it would be strange indeed, if, on an application to discharge or modify bail, the court were to be deprived of the power to examine into the evidence thus informally taken, while it

would be compelled, in the exercise of a solemn duty, to look into that contained in formal depositions. Under such an administration of justice, the government as well as the accused would often be deprived of material evidence, and the power of the court to properly dispose of the case would be greatly impeded. In such a case, the court would certainly be justified in requiring the commissioner to produce his minutes, and, if he had failed to take them, or if they had been lost or destroyed, to summon him, and examine him under oath touching the evidence upon which his commitment was founded. Indeed, this very course of proceeding has been reduced to a formal rule of practice by at least one court of the United States, of high intelligence and extensive jurisdiction. Ex parte Bennett [Case No. 1,311]. It would be more satisfactory, if the minutes of the commissioner were always formally taken, and the testimony of the witness read over to him, and subscribed by his own hand; but the absence of this formality cannot be permitted to paralyze the arm of this court, and destroy its power to do justice to both the government and the accused.

The importance of this power of the court, to look into the evidence as far as may be necessary, in order to decide whether it is proper or not to hold a prisoner in confinement, will be clearly seen on examining the condition of things if no such power existed. One of two results would follow. Either the prisoner would be kept in confinement just as long as the prosecution might see fit to hold him, or the court would be compelled to make a mere arbitrary order limiting the time within which he should be indicted or discharged. It often happens that prisoners are brought into a district for trial, long before the necessary evidence can be obtained for submission to the grand jury. This happens more frequently in the case of crimes committed on shipboard, in remote parts of the world; but it may and does occur in other instances. In such cases, the court would not, unless compelled to do so, arbitrarily limit the time within which an indictment should be found or the prisoner be released. It would be all-important that the court should look into the evidence upon which the prisoner was committed, that it might determine whether or not the circumstances surrounding the commission of the alleged crime were such as to warrant his further detention in the absence of an indictment. The extent of a justifiable delay would be different in different cases, depending upon the evidence. To put an order upon the district attorney, that he should have his indictment in court by a given day, or that the prisoner be discharged, without looking into the evidence, would be a blind exercise of power, little meriting the term judicial. This the court would be compelled to do, unless it had control over, and the power to examine into, the evidence, or else leave the prisoner virtually in the hands of the prosecutor and to such term of confinement as he might think proper. Of course, no prisoner would be unreasonably detained under the official sanction of the distinguished and enlightened gentleman who now fills the office of prosecutor in this district. But this court, in the discharge of its duties, can be no respecter of persons, nor can it decline any of the responsibilities imposed upon it by the constitution and the laws. It is its duty to see that every person committed to its custody, whether under or awaiting indictment, has a speedy, as well as a public and an impartial trial; and it should accomplish this great object in such manner that the ends of public justice may be attained and the rights of every prisoner be preserved and protected.

There is another important consideration which it is proper to advert to. As this court has the power to issue writs of habeas corpus, for the purpose of inquiring into the cause of commitment (1 Stat. 81, § 14; Ex parte Watkins, 3 Pet. [28 U. S.] 193, 201) it would be compelled, in the exercise of this power, where the warrant of commitment was irregular and void on its face, to discharge from arrest, unless it could go behind the warrant and examine into the evidence upon which it was founded. This, as I have already shown, would sometimes be impracticable, unless the court could resort to the evidence upon which the commissioner acted, and which might be within reach of the court, on the return to the habeas corpus, only through the commissioner's minutes or his own testimony. For these reasons, the commissioner who committed the prisoner in this case must answer the certiorari, by producing the evidence taken before him. As this evidence was, I suppose, substantially reduced to writing by him on the hearing, it will be sufficient to produce his minutes thereof, and the affidavit upon which the original warrant of arrest was issued. The warrant itself and the order of commitment are already before the court.

To avoid all misconception, it may be well to remark, that the principles here laid down, have no necessary relation to the powers conferred upon commissioners under the laws touching the execution of extradition treaties.

The return to the certiorari having been made in conformity to the above decision, and the question of the further detention or discharge of the prisoner having been heard, the court proceeded to render the following decision:

SHIPMAN, District Judge. The evidence and proceedings upon which the prisoner, Robert M. Martin, was committed to await the action of the grand jury in this court, have been carefully examined and considered by the court. The question now to be determined is, whether he shall be remanded or discharged.

As the authorities are somewhat conflicting, touching the degree of certainty with which the affidavit, warrant of arrest, and

commitment should specify the offence, I pass over their form in this case, with the simple remark, that they are extremely general, not to say vague and uncertain. One charge appears to be founded on the fourth section of the act of February 26th, 1853 (10 Stat. 170), entitled "An act to prevent frauds upon the treasury of the United States." It alleges, that the defendant, on the 1st day of November, 1864, within this district, "did knowingly attempt to destroy certain public records of the United States," without stating what records. The other charge is, that the prisoner "did knowingly and wilfully engage in giving aid and comfort to the then existing rebellion against the authority of the United States, and against the laws thereof." This offence, also, is alleged to have been committed in this district. This charge is grounded on the 2d section of the act of July 17th, 1862 (12 Stat. 590). The warrant of arrest contains the same charges, and the order of commitment is endorsed on the warrant of arrest, and refers to the charges within the same. It also states, that the commissioner has examined into the offences charged, according to law, and commits the accused to the custody of the marshal, to be by him held, in default of bail, to await the action of the grand jury.

By the decision of the commissioner rendered before the final commitment, he appears to have held that the charge of attempting to destroy public records of the United States was not made out, and that, therefore, the prisoner was entitled to his discharge, so far as that ground was concerned. It seems, however, that he was of opinion that the general charge of having given aid and comfort to the then existing rebellion, was so far supported as to warrant the commitment of the prisoner. It is only necessary, therefore, as I concur in the opinion of the commissioner as to the charge of attempting to destroy public records, to consider the evidence touching the charge of giving aid and comfort to the rebellion. I shall not dwell at any length upon this evidence, but, as the commissioner informs me that the copy furnished to me is substantially correct, I shall direct the clerk to append the same to, and file it with, this opinion.

An examination of the whole evidence taken on the hearing shows, that the prisoner was in New York about the time of an alleged attempt to burn that city, under suspicious circumstances; and the principal facts which are legal evidence at all, are, first, that he went under an assumed name; and, second, that he was, more or less, in company with certain characters to whom suspicions had attached, and one of whom was subsequently executed by the military authorities, as one of the incendiaries. I assume, rather than decide, that the second fact was admissible evidence against the prisoner. The intelligent assistant district attorney clearly saw that these facts, as they then stood on the proofs, only raised a general suspicion that the prisoner was here for no good purpose; and, in order to make out a case which would warrant the commitment of the accused, he offered evidence of certain declarations made by other parties, some or all of which were made in Canada, and none of them in the presence of the prisoner. The primary tendency of these declarations was, to establish the charge in the affidavit and warrant, of attempting to destroy public records, by burning the city. These declarations were made after the attempt had been consummated, and, so far as can be judged by the proofs, after the alleged conspiracy for that object had terminated. They were, therefore, inadmissible for that purpose; for, the admissions of an alleged co-conspirator, made after the conspiracy has terminated, and not in the presence of the accused, are not evidence against the latter. The commissioner appears to have taken this view of the law, and to have exonerated the prisoner from the alleged attempt to destroy public records by fire.

The only feature of the evidence, from which it can be in any manner inferred that the prisoner, at any time, within this district, gave aid and comfort to the rebellion, is that which was supposed to connect him with those fires. The destruction of the city by fire, involving the destruction of the public records of the United States, was the only act of aiding the rebellion, committed here, of which the evidence gives the remotest suspicion. The commissioner, as I have already stated, decided, and properly decided, that probable cause in support of this fact was not made out. The fact having failed, the inference fails also. It will, I presume, not be contended that the color of the defendant's carpet-bag, or the fact that he had a small amount of gold, supplies any material evidence in the case.

Some testimony was taken tending to show that the prisoner had been an officer in the rebel army. This was obtained from General Whittaker, one of the counsel for the prisoner on this very hearing, by putting him upon the stand as a witness for the prosecution. After the declaration of this witness that he had no personal knowledge about the prisoner during the rebellion except what he had learned from him in his capacity as counsel, the commissioner should not have permitted the examination to be further pressed. I need not cite authorities, or adduce reasons, in support of the inviolability of communications which pass between counsel and client. The highest considerations known to the law guard this relation with jealous solicitude. But, even if the personal knowledge of General Whittaker were admissible, the reputation of the prisoner as a rebel, upon which he was questioned, was wholly inadmissible. And, if we assume that it was legally proved on the hearing, that he had been in the rebel

army, this would not tend to show that he had committed a crime in this district, unless the fact was in some manner connected with an unlawful act done here. As I have already remarked, the only act done here, to which the evidence relates, is the alleged attempt to burn the city; and of this the commissioner found no proof which would warrant him in deciding that probable cause had been made out.

It follows, from these views, that there was no sufficient evidence to warrant the commitment of the prisoner for trial in this district. He must, therefore, be discharged from custody under this warrant or order of commitment, and a proper order will be entered to that effect.

Case No. 9,152.

In re MARTIN.

[2 Hughes (1877) 418; [1] 13 N. B. R. 397.]

District Court, W. D. North Carolina.

BANKRUPTCY — EXEMPTION — HOUSEHOLD FURNITURE—TAKEN UNDER EXECUTION.

A bankrupt is entitled to an exemption of his household furniture, and other necessary articles, although they were taken under an execution prior to the commencement of the proceedings in bankruptcy.

In bankruptcy.

DICK, District Judge. Upon the question of law certified by the register of this court, I have had the benefit of well-considered arguments, and the counsel for the bankrupt filed an elaborate brief referring to all the authorities to be found on the subject. No express decision upon the question in controversy has been cited, and we are left to determine the matter upon the "reason of the thing,"—to be ascertained by a consideration of the spirit and policy of the bankrupt laws.

Under the constitution congress has a paramount power to establish bankrupt laws, with a single restriction—that all such laws must be uniform in their operation in all states. The present bankrupt laws are highly remedial statutes, and are entitled to a liberal construction in effecting the purposes they were intended to accomplish. The general purpose and policy of these laws are to administer the estates of bankrupts in such a manner as to adjust, determine, and secure the rights of the various creditors who prove their debts; and they also afford reasonable benefits to the bankrupts who comply with their provisions.

These laws protect the rights of creditors: First. By requiring an honest surrender of the property on the part of the bankrupt, and by making suitable provisions to guard against fraud and dishonest practices. Second. By adjusting the rights of unsecured creditors upon the principle that equality is equity. They, however, fully recognize and enforce all liens and priorities acquired by other creditors, which are not in conflict with the spirit and purposes of the general system of bankruptcy.

The benefits conferred upon a bankrupt who makes a fair surrender of all his property, and who in all respects acts honestly, are: First. The means of a reasonable, immediate, and temporary support for himself and family against all liens created by operation of law. Second. A full discharge from all debts provable in bankruptcy.

The means of support thus allowed are expressly specified in the law, and consist of: First. The bounties directly conferred by congress in the first clause of the 14th section of the original bankrupt act (Rev. St. § 5045). Second. Exemptions allowed by the statutes of the state in which the bankrupt has his domicil, and which were in force in the year 1871.

Even a strict construction of those clauses of the law which confer the bounties of congress would allow the bankrupt the specified exemptions of household furniture and other property for the support of himself and family against all liens which he had not created by a direct act incumbering the property claimed by him. Congress has plenary power upon this subject, if its laws are everywhere uniform in their operation. The clauses of the law which we are considering are certainly uniform in their operation, and may be regarded as fundamental and essential principles in the system of bankruptcy so wisely established. Any system of bankruptcy would operate injuriously and cruelly that would deprive an honest and unfortunate debtor of all his property—even the necessaries of life—and leave him and his family to starve, or upon the mercy or charity of the public. Such cannot be the spirit and purposes of a system of bankruptcy established by a congress possessing paramount and plenary power over the subject, and representing an enlightened, patriotic, and Christian people. In our case the exemptions allowed by the state laws were set apart by the sheriff before he levied the executions in his hands. Under the state laws the levy would have been unlawful if the sheriff had not previously set apart such exemptions. This matter is not in controversy, and I refer to it only for the purpose of sustaining my views upon the question presented for determination. If the exemptions provided for by the laws of a state—which can exercise only very limited power over the subject—are set apart and allowed, how is it possible that the rights of a bankrupt secured by the law of a congress of plenary power can be defeated?

The question decided in this court in Re Shipman [Case No. 12,791], carrying out the principles adjudged in Re Dillard [Id. 3,912] and in Re Deckert [Id. 3,728], does not apply to the case before the court, as in that case it was only decided that state exemptions are not allowed against debts contracted before the adoption of our state constitution.

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

I deem it unnecessary to further discuss the question certified by the register. I am of the opinion that the bankrupt was entitled to the exemptions which he claimed, and I will direct an order to be drawn requiring the sheriff to pay over to the clerk of this court, for the benefit of the bankrupt, the money derived from the sale of the property, which he holds under a former order of this court.

Case No. 9,153.

In re MARTIN.

[2 N. B. R. 548 (Quarto, 169).] [1]

District Court, S. D. New York. April 26, 1869.

BANKRUPTCY — DISCHARGE — EXEMPT PROPERTY — DELAY IN APPLICATION.

A bankrupt who had no assets except certain property set apart as exempt, failed to apply for a discharge within a year after adjudication of bankruptcy. *Held*, that the granting of a discharge was not a right, but a favor conditioned upon the performance of certain requirements of the statute, and the failure to make said application would preclude a discharge.

[Cited in Re Brockway, 23 Fed. 585; Re Sloan, Case No. 12,945.]

In bankruptcy

BLATCHFORD, District Judge. In this case the original voluntary petition of the bankrupt was filed on the 12th of July, 1867. He was adjudged a bankrupt by the register on the 18th of July, 1867. His application for a discharge was filed on the 5th of January, 1869. It is drawn according to form No. 51, and does not contain any averment that no debts have been proved against the bankrupt or any averment that no assets have come to the hands of the assignee. On this application an order to show cause against a discharge was made by the register, returnable April 10th, 1869. The only debt proved against the bankrupt is one which was proved on the 10th of April, 1869. The only assets set forth in schedule B to the petition are seventy-six dollars and fifty cents worth of exempt property, all of which the assignee has set apart to the bankrupt under the fourteenth section of the act [of 1867 (14 Stat. 522)]. The assignee makes return that no assets have come to his hands as assignee of the bankrupt.

This case, therefore, is one in which, under section twenty-nine of the act, the bankrupt could have applied for his discharge within less than six months from the adjudication of bankruptcy, namely, at any time after the expiration of sixty days from the adjudication of bankruptcy. But it was said in the case of In re Greenfield [Case No. 5,775], by this court, on the strength of a decision made by Mr. Justice Nelson, that in a case where the bankrupt could, under section twenty-nine, apply for his discharge within less than six months from the adjudication of bankruptcy, he must so apply within one year from such adjudication. It is urged that the provision in section twenty-nine, as to the making of the application within one year from the adjudication, is merely directory; but I cannot so regard it. If it is merely directory, it is meaningless, and might as well not have been inserted in the section. Congress must have intended to apply the restriction of an application within one year to some cases, and if it be not applied to a case like the present one, it can have no application. The privilege of a discharge is given, by section thirty-three, only to a person who has, in all things, conformed to his duty under the act, and who has conformed to all the requirements of the act. One of these requirements is that the application in this case be made within one year from the adjudication. The discharge is a favor granted on a compliance with conditions prescribed, and not a right. I must, therefore, refuse a discharge in this case, until directed otherwise by superior authority.

[1] [Reprinted by permission.]

Case No. 9,154.

In re MARTIN.

[2 Paine, 348.] [1]

Circuit Court, S. D. New York.[2]

SLAVERY — FUGITIVE SLAVE ACT — ARREST—EXAMINATION—TRIAL BY JURY—MATTERS OF FACT.

1. The act of congress empowering persons claiming the services of a fugitive slave, to seize or arrest him and take him before a magistrate, &c., makes no provision for the issuing of any process for the purpose of authorizing such arrest; and it has never been the practice, under that law, to issue any such process.

2. When the alleged fugitive is brought before the magistrate, the latter acquires jurisdiction of the case, and authority to proceed with the inquiry, whether the person so seized and brought before him doth, under the laws of the state from which he fled, owe service or labor to the person claiming him.

3. While such examination is pending, the party is in the custody of the law, and the magistrate has authority to imprison him for safe keeping. And during such examination, process issuing out of this court to an United States officer to take the alleged fugitive from the custody of the state officer, would be illegal.

4. The writ de homine replegiando, though nearly obsolete, is a common law proceeding, applicable to a trial of the question of slavery.

5. The act of congress relative to the reclamation of fugitive slaves, is constitutional and valid.

6. The object of the inquiry before the magistrate is only for the purpose of sanctioning the seizure or arrest, and authorizing the removal of the fugitive to the state from which he fled, and does not contemplate a trial on the merits.

7. The right of trial by jury, secured by the 7th article of the amendments of the constitution, is the trial according to the course of the common law, and is confined to matters of fact

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

[2] [Date not given. 2 Paine includes cases decided from 1827 to 1840.]

only. And the inquiry before the magistrate under this act of congress, so far as the question of slavery is involved, is a question of law, and not a question of fact.

THOMPSON, Circuit Justice. This is a motion to quash the writs de homine replegiando, issued out of, and made returnable in this court, by which the marshal is commanded that he cause to be replevied Peter Martin, otherwise called Lewis Martin, a citizen of the state of New York, (whom John Enders and John Grace, citizens of the state of Virginia, have taken and do keep,) &c. From the affidavits upon which this motion is founded, it appears that Peter was claimed as the slave of John Enders, and owed labor and service to him, at the city of Richmond, in the state of Virginia, from whence he had escaped. Upon satisfactory proof of these facts being given to the recorder of New York, he allowed a habeas corpus, upon which Peter was taken and brought before him. But before the recorder had decided upon the case, the writs of homine replegiando were issued to the marshal of this district, and the custody of Peter was transferred from the sheriff to the marshal. Certain proceedings were afterwards had in the supreme court of the state, which it is not material here to notice. At a subsequent day, to wit, on the 20th of October last, Peter was brought before the recorder, who, after having heard the proofs and allegations of the parties, granted a certificate, according to the provisions of the act of congress of February, 1793, — 2 Bi. & D. 331 [1 Stat. 302].

It is not material to examine whether or not the recorder had authority to allow a habeas corpus to bring before him the party examined as a slave. This course was probably adopted in conformity to the act of the legislature of this state. But the view we have taken of this case does not involve an inquiry into the validity of that law. The supreme court of this state has declared it unconstitutional and void. It is understood, however, that a writ of error has been brought upon that judgment, which is now pending before the court of errors; and it does not become this court unnecessarily to volunteer an opinion upon that question. Admitting the recorder had no authority to allow a habeas corpus, yet when the party was brought before him he acquired jurisdiction of the case, unless the act of congress is unconstitutional and void. That law empowers the persons claiming the services of the fugitive, to seize or arrest him, and take him before a magistrate, &c. No provision is made for the issuing of any process for the purpose of authorizing such arrest; and so far as our knowledge extends, it has never been the practice under that law to issue any such process. But the issuing or allowing the process cannot affect the jurisdiction of the magistrate. It must be deemed the act of the claimant, and if he had a right to arrest the fugitive without any process, that right is not taken away or relinquished by having such process. The recorder, therefore, had jurisdiction of the case, and authority to proceed in the inquiry, whether the person so seized and brought before him doth, under the laws of the state from which he fled, owe service or labor to the person claiming him. This inquiry may take up some time, and require some delay for the purpose of procuring testimony; and whilst such examination is pending, the party must be deemed in the custody of the law, and the magistrate must necessarily have authority to imprison him for safe keeping. When, therefore, the writs of homine replegiando were served, the fugitive was taken out of the custody of the law; and this was an illegal execution of those writs whether the habeas corpus was void or not. If it was valid, the fugitive was in the custody of the sheriff of the city and county of New York, a state officer. And to permit the marshal, a United States officer, under a process issuing out of this court to take a party from the custody of the state officer, would be sanctioning a conflict that might be very serious in its consequences, and cannot be justified or excused. But if the habeas corpus was void, the execution of the writs of homine replegiando was illegal, for the fugitive was either in the custody of the law under the order of the recorder, or was in the custody of the claimant. If in the custody of the law, it was irregular to execute the writs pending the examination before the recorder, and if in custody of the claimant, a penalty of five hundred dollars is incurred by any person who shall knowingly and willingly obstruct the claimant in seizing or arresting such fugitive, or shall rescue such fugitive from such claimant when so arrested.

It will be perceived that this opinion, thus far, has assumed the act of congress to be a valid and constitutional law. But the objections that have been raised against the proceedings under the homine replegiando, have been attempted to be surmounted by endeavoring to show that that law is unconstitutional and void, and that, of course, the arrest of the fugitive by the claimant was illegal; and that all the proceedings before the recorder were coram non judice, and furnished no objection to the service of the writs of homine replegiando, or justification for obtaining the fugitive. If the act of congress is unconstitutional and void, we see no objection to the issuing of a homine replegiando, to try the question of slavery. It is a common law proceeding applicable to such a case; and although nearly obsolete, we cannot deny to the party the right of resorting to it. Whether the writs in the present case, and the proceedings under them, are regular and according to the course of the common law, it is unnecessary to inquire, as we are clearly of opinion that the act of congress is a

valid and constitutional law, and that the writs of homine replegiando must be set aside for irregularity. The great objection which has been urged against this law is, that it deprives the party of the trial by jury, which, it is said, is a common law right, secured under the 7th article of the amendments to the constitution. If the inquiry before the magistrate was a trial upon the merits, and conclusive upon the question of slavery, there would be great force in the objection; but it is not. It is only a preliminary examination to authorize the claimant to take back the fugitive to the state from whence he fled, and the question whether he is a slave or not is open to inquiry there, and we cannot listen for a moment to any suggestion that this question will not be then fairly and impartially tried. Reference to the act of congress will show such to be its provisions. It declares that, "where a person held to labor in any of the states, &c., under the laws thereof, shall escape into any other of the said states or territories, the person to whom such labor or service may be due, his agent or attorney, is empowered to seize or arrest such fugitive from labor, and take him or her before some judge or magistrate, (designated in the act,) and upon proof, to the satisfaction of such judge or magistrate, that the person so seized or arrested doth, under the laws of the state or territory from which he or she fled from service or labor, owe service or labor to the person claiming him or her, it shall be the duty of such judge or magistrate to give a certificate thereof to such claimant, which shall be a sufficient warrant for removing such fugitive from labor, to the state or territory from which he or she fled."

The object of the inquiry before the magistrate is clearly for the purpose only of sanctioning the seizure or arrest, and authorizing the removal of the fugitive to the state from which he fled. This necessarily involves an inquiry as to the identity of the person, as well as the question, whether, by the laws of the state from which he fled, he owes service or labor to the person claiming him. The magistrate must be satisfied that the person so brought before him does owe such service, and the examination is limited to these two questions, and depends upon proof being made satisfactory to the magistrate upon these two points. If this was intended to be a final determination of the question of slavery, the law would, doubtless, have declared the freedom of the slave to be thereby established, and it would be a judicial proceeding which would, under the constitution of the United States, be binding in each state. The magistrates designated in the act, who are authorized to entertain this inquiry, clearly show it would not be intended as a trial upon the merits of the case. It may be made before any judge of the circuit or district courts of the United States, residing or being within the state, or before any magistrate of a county, city or town corporate wherein such seizure or arrest shall be made. The 7th article of the amendments to the constitution does not apply to any such preliminary inquiries. It declares that, "in suits at common law, when the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." It is unnecessary to determine whether this amendment is not limited to suits involving a trial of the right of property merely, which is susceptible of valuation, and not to a question of personal liberty, which admits of no pecuniary valuation. But admitting that the trial upon the merits, under the homine replegiando, or any other mode of proceeding which is final upon the question of slavery, would fall within this amendment, and would require a trial by jury, it by no means follows that, for the purposes contemplated by this act of congress, the right of trial by jury is secured. If it is, it is secured in every case where a fugitive from justice is demanded according to the provisions of the same act of congress; and, indeed, it is secured in every possible case of arrest upon a criminal charge; for the identity of the person and prima facie evidence of guilt are subjects of inquiry, upon every such arrest. But another reason may be assigned why this amendment of the constitution has no bearing upon the law in question; the right of trial by jury, secured by this amendment, is the trial according to the course of the common law, and is confined to matters of fact only. All questions of law arising upon suits at common law, are decided by the court; and the inquiry before the magistrate, under this act of congress, so far as the question of slavery is involved, is a question of law and not a question of fact. The magistrate is to inquire whether, under the laws of the state or territory from which the fugitive fled, he owes service or labor to the person claiming him. But it is said that congress has no power to legislate at all upon this subject, there being no express delegation of such power in the constitution. The provision in the constitution is (article 4, § 2): "No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due." This provision contains a prohibition to the states to pass any law discharging the persons escaping from the labor or service which he owes to another; and all such laws would be null and void, and no positive legislation might be necessary on the subject. But to secure the benefit of the latter part of the provision, some legislation on the subject, either by congress or by the states, is indispensable. It declares that the party escaping shall be delivered up to the party to whom he owes labor and service; but the mode and manner in which this is to be done and enforced must be provided for by law: the constitution makes no provision on that

subject, and it cannot be presumed that it was intended to leave this to state legislation. There is no express injunction upon the states to pass any laws on the subject; and unless they choose to do it, the great benefit intended to be secured to slaveholders would be entirely defeated. We know, historically, that this was a subject that created great difficulty in the formation of the constitution, and that it resulted in a compromise not entirely satisfactory to a portion of the United States. But whatever our private opinions on the subject of slavery may be, we are bound in good faith to carry into execution the constitutional provisions in relation to it; and it would be an extravagant construction of this provision in the constitution, to suppose it to be left discretionary in the states to comply with it or not, as they should think proper.

We are, accordingly, of opinion that the act of congress under which the certificate of the recorder was given, is a valid and constitutional law, and that the writs of homine replegiando were irregularly issued, and must be set aside.

The subject of the reclamation of fugitive slaves was very fully discussed by Chief Justice Shaw in Sim's Case, 7 Cush. 285. And see, also, Dixon v. Allender, 18 Wend. 678.

Case No. 9,155.

MARTIN v. ACKER.

[1 Blatchf. & H. 279.] [1]

District Court, S. D. New York. July 9, 1831.

SEAMEN'S WAGES—HAND ON SLOOP—ACTION IN PERSONAM—ACCOUNT STATED.

1. A hand on board a sloop of over fifty tons burthen plying on the Hudson river, between New-York and Catskill, is a seaman; and an action in personam brought by him against the master and owner of the sloop, to recover his wages, is within the jurisdiction of this court.

2. The respondent in such action is bound by his acquiescence in an account stated.

This was an action in personam, for seaman's wages. The defence was, that the libellant [Levi Martin] was not a seaman but a boatman, that the matter claimed was not within the jurisdiction of the court, and that the demand had been satisfied. The libellant served as a hand, and as captain's clerk, on board a sloop of over fifty tons burthen, belonging to the respondent [Jacob Acker], and assisted in navigating her for two seasons up and down the North river, between New York and Catskill. The respondent was also master of the vessel during the time the libellant's services were rendered.

Edwin Burr and Erastus C. Benedict, for libellant.

Charles W. Sandford, for respondent.

BETTS, District Judge. The laws of the United States assume the regulation of all vessels of the description of the one on which the libellant served. They must be enrolled or licensed, and the men must pay hospital money the same as if on board sea-going vessels,—Act Feb. 18, 1793 (1 Stat. 305); Act July 16, 1798 (1 Stat. 695),—and, since the decision in Gibbons v. Ogden, 9 Wheat. [22 U. S.] 1, there can be no longer a doubt that the navigation from port to port in a particular state, is equally subject to the authority of the general government with that from state to state. Those employed in conducting that navigation are properly denominated seamen. The statute which makes provision for the recovery of seamen's wages, supplies no remedy in their case, it being limited to vessels "bound from a port of the United States to any foreign port," and to vessels "of the burthen of fifty tons or upwards, bound from a port in one state to a port in any other than an adjoining state." Act July 20, 1790 (1 Stat. 131). But that statute is never construed as interfering with the privileges of seamen under the law maritime, further than to determine the manner in which suits shall be commenced. It has, accordingly, been decided in several of the courts of the United States, after full consideration, that the remedies of the maritime law apply to all cases of admiralty and maritime jurisdiction on the rivers of the United States which are navigable to the sea for boats of ten tons burthen and upwards. Serg. Const. Law (2d Ed.) 195, 196. In the case of The Thomas Jefferson, 10 Wheat. [23 U. S.] 428, the doctrines before recognised as having relation to all navigable waters, were restrained to waters within the ebb and flow of the tide. It is difficult to discern any principle upon which that limitation can be applied to one description of navigable waters in the United States more than to another. Contracts with seamen, performed or contemplated to be performed on the high seas, or within the ebb and flow of the tide, come under the admiralty jurisdiction, within the most rigorous construction of its extent; and the jurisdiction is not lost, though the voyage is to commence or end beyond the reach of the tide. The whole of the services claimed for in this case having been rendered upon tide waters, the subject matter of the suit falls within the cognizance of this court.

The libellant's account for his services was submitted to the respondent, each item of charge and credit was distinctly stated to him, and he made no objection to its correctness, but agreed to settle it, as stated, in a few days. One witness swears that he offered to give his note for the balance, payable in a few days. Another says, that he understood the respondent to say that a payment of $15 84 ought to be credited, and that he and the libellant would settle the residue between themselves in a few days. The respondent now claims, in addition to the credits stated upon the account, payment for boarding the libellant during the winter, on the vessel, at the rate of $2 or $3 per week. The

[1] [Reported by Samuel Blatchford, Esq., and Francis Howland, Esq.]

respondent's witness who proves the boarding states, also, that he considered the libellant as being in the respondent's employment during the time. As the board was not claimed when the account was stated and the balance acquiesced in, the inference to be drawn from all the evidence is, that the respondent considered the board as satisfied by other services of the libellant, or by payment, and that it is now set up by the respondent out of resentment at the institution of a suit for the wages. This charge is disallowed.

The libellant collected two bills for wood sold, after he left the respondent's employ. These sums are to be credited on his account. On a report by the clerk of the amount due, a decree may be entered for the balance, with costs.

Case No. 9,156.

MARTIN v. BANK OF THE UNITED STATES.

[4 Wash. C. C. 253.] [1]

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

BANKS—NOTES ISSUED—PART OF NOTE LOST—RIGHT TO BE PAID FULL AMOUNT.

If the owner of a bank note of the bank of the United States cut it into two parts, and send those parts by mail, and one part be lost, and the other arrives safe, he is entitled to recover the whole sum from the bank; and this although the bank had previously given notice that in such cases they would not pay unless both parts were produced.

[Cited in Bank of United States v. Sill, 5 Conn. 110–113; Tower v. Appleton Bank, 85 Mass. 390; Hagerstown Bank v. Adams Express Co., 45 Pa. St. 429.]

Case agreed. On the 11th of December, 1820, the plaintiff owned and possessed sundry promissory notes called bank notes, drawn and signed in due form by and on behalf of the defendants, whereby they promised to pay to different persons, or bearer, on demand, the several sums mentioned in the said notes, which were of the description following: one note, letter A, No. 583, for $100, payable to Benjamin Morgan or bearer; fifteen notes for $20 each, payable in like manner, and of the following letters and numbers, viz. H, 1492, G, 1489, &c., &c.; nine notes for $10 each, payable in like manner, and of the following letters and numbers, viz. I, 1576, &c.; and one note for $10, payable to J. C. Faber or bearer, E, No. 1566: making together the sum of $500. That on the same day, the agent of the plaintiff, then being at Cincinnati in the state of Ohio, divided each of the said notes into two nearly equal parts, and thereupon indorsed the right hand parts of the said notes in a letter which he thereupon sealed, and addressed by indorsement or superscription to the plaintiff in Philadelphia, and on the same day placed the same in the post office at Cincinnati aforesaid. That the said letter, nor any one of the said halves of notes has not since come to the plaintiff's hands, but all the said halves of notes have been stolen, lost, or destroyed. That the left hand halves of the said notes were indorsed in another letter, and placed in the same office on the succeeding day, and are now in the possession of the plaintiff. That the plaintiff presented the said halves to the defendants before the institution of this suit, and demanded payment of the same, and at the same time offered to the defendants a good and sufficient bond of indemnity to indemnify them against all claims, payments, costs, or damages which might arise, or which the defendants might be compelled to make or incur in consequence of the said right hand moieties, or any of them. But the defendants refused to accept the said bond of indemnity, or to pay the said notes, or any part thereof. That the notes of the Bank of the United States of the description of those before mentioned, are numbered only on the right hand halves, and lettered on the left hand halves; that the signature of the president is on the right half, and that of the cashier on the left hand half, and there is no known mark, letter, or number, on either half of such a note by which its connexion with the opposite half of the same note is certainly established after the note has been divided. The same letter has numbers from 1 to any number the necessities of the bank require; and the same number is given to four letters, namely, A, B, C, D, but to no more; so that any number may belong to any one of those four letters, but to no more. On the 24th of August, 1819, or as soon as practicable after that date, the defendants published an advertisement, of which a copy is hereto annexed, in all the newspapers in the city of Philadelphia, and in the National Intelligencer at Washington; a copy was sent to each of the offices of discount and deposit of the bank, and published in one or more newspapers in their respective neighbourhoods.

The notice above referred to is as follows: "Notice is hereby given that the Bank of the United States will not, after the 1st day of November 1819, hold itself responsible upon any of its notes which shall be voluntarily cut into parts, except on the production of all the parts."

Mr. Binney, for plaintiff, insisted that, independent of the notice the question involved in this case has been decided, first by this court in the year 1808, in the case of Bullet v. Bank of Pennsylvania [Case No. 2,125], and afterwards in the case of Patton v. State Bank [2 Nott & McC. 464]; also by the circuit court for the District of Columbia, in the case of Armat v. Union Bank of Georgetown [Case No. 535]. He also read 3 Camp. 323,

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

in which Lord Ellenborough had decided otherwise at nisi prius. Mossop v. Eden, 16 Ves. 430; Chitty, Bills (last English Ed.) 190, 201. He contended that the case was not altered by the notice; that it was not competent to the bank to vary the rules of law and of evidence; and to prescribe the terms upon which she would pay her notes, or under what circumstances she would refuse to do so.

Mr. Sergeant, for the bank, admitted that the practice of cutting bank notes for the purpose of transmitting the parts in letters by different mails, from one place to another, was sanctioned by a usage too inveterate to be now condemned. But he pointed out the expense to which it exposed the bank, and the difficulty which the loss of one of the halves occasioned to this bank in particular in identifying the note, and guarding against fraud and imposition. That, strictly speaking, a man has no legal right voluntarily to mutilate the evidence of a debt, and that it was competent to the bank to rid herself of the effects of a contrary usage, by a public notice that she would not pay any thing unless both parts of the note are produced. He admitted that if a negotiable note, which passes by delivery be destroyed, or if other evidences of debt be lost, the owner may resort to inferior evidence to prove his demand, and that a court of common law will afford him relief. But if a note payable to bearer be lost, and may therefore be yet in existence, and in the hands of a bona fide holder, the owner can be relieved only in equity, where alone an indemnity can be provided. As to the notice, he insisted that the right to cut a bank note, and to demand payment upon the production of one of the halves, are not incidents so inseparably connected with such notes, that the bank might not guard herself against impositions to which the practice exposed her, by the means which the defendants had resorted to.

WASHINGTON, Circuit Justice. I have carefully reviewed the decision of this court in the case of Bullet v. Bank of Pennsylvania [Case No. 2,125], aided by the light shed upon the question involved in that and in the present case by the able arguments of the counsel on each side. My opinion remains unchanged, and is indeed confirmed by the two American cases cited at the bar, and particularly by the luminous argument of Judge Drayton in the case of Patton v. State Bank [supra]. The principles upon which this court decided the case of Bullet v. Bank of Pennsylvania were, that a bank, or any other promissory note, is the evidence of a debt due by the maker to the holder of it, and nothing more. It is also the highest species of evidence of such debt, and in fact the only proper evidence, if it be in the power of the owner of the note to produce it. But if it be lost or destroyed, or by fraud or accident has got into the possession of the maker, the owner does not thereby lose his debt, but the same continues to exist in all its rigour, unaffected by the accident which has deprived the owner of the means of proving it by the note itself. The debt still existing, the law, which always requires of a party that he should produce the best evidence of his right of which the nature of the thing is capable, permits him, where such better evidence is lost or destroyed, or not in his power, to give inferior evidence, by proving the contents of the lost paper; and if this be satisfactorily made out, he is entitled to recover. If the evidence be not lost, but is merely impaired by accident, or even by design, if such design be not to injure the maker or to cancel the debt, the principle of law is the same. Cutting a bank note into two parts does not discharge the bank from the debt, of which the note was but the evidence, nor does it even impair the evidence itself, if, by uniting the parts, the contents of the entire note can be made out. If one of the parts should be lost or destroyed, the debt would be no more affected than if the entire parts had been lost or destroyed. The evidence is impaired indeed, not by the act of cutting the note, but by the same accident which would have affected the entire note, had that been lost. In both cases, the owner must resort to secondary evidence, and is bound to prove that the note did once exist, that it is lost or destroyed, and that he is the true, bona fide owner of the debt. If one part only of the note be lost, the difficulty which the real owner of it has to encounter in proving his right to the debt is diminished. For if the entire note be lost, the owner of it at the time of the accident may not be entitled to the debt of which it was the evidence, at the time he demands payment, because the note, passing from hand to hand by bare delivery, may have been found, and have got into the possession of a bona fide holder. But against the real owner of one half of the note, there cannot possibly be an opposing right. The finder or robber of the other half part cannot assert a right to the debt, because he cannot prove that he came fairly to the possession of the evidence of it. I speak judicially, when I say that he cannot prove that fact, because he cannot do it without the aid of perjury, which the law does not presume, and can in no instance guard against it. If the lost half note gets fairly into the hands of a third person, he takes it with notice that there may be a better title in the possession of the other half, and consequently he looks for indemnity to the person from whom he received the half part, if it should turn out that he was not the real owner of the entire note. It is impossible, therefore, that the bank can be legally called upon to pay the note twice; and if the officers of the

institution suffer themselves to be imposed upon by insufficient or false evidence, by which means the bank is brought into this predicament, she must abide the loss as being occasioned by an error of judgment in the officers of the bank, or their want of due caution. The law cannot adapt its provisions to every possible case that may occur, and it therefore proceeds from necessity upon general principles applicable to all cases.

If upon any other ground than fraud, or perjury, the maker of the lost note may by possibility be twice charged, the law will not expose him to that risk by relieving the asserted owner, of it; not because there may be imposition in the case, or because the debt ought not to be paid; but because the proof that the claimant is the real owner of the debt is defective; for it by no means follows, that, because the lost note did belong to him, that it may not then be the property of some other person. A court of law therefore will, in such a case, dismiss the parties from a forum which has no means of securing the maker of the note against a double charge, and leave him to one where those who ask of it equity will be compelled to do equity. The case then resolves itself very much into a question of jurisdiction. For it is quite clear that the real owner of the debt, the evidence of which is lost, is entitled to supply the want of the better evidence by that which is secondary, and this rule of evidence is the same in equity as at law. But whether the application for relief shall be in the one court, or in the other, must depend upon the particular case, and its fitness for the one jurisdiction or the other.

Many difficulties were stated by the defendants' counsel, to which the practice of cutting the notes and transmitting them by mail, exposes banking institutions in identifying the part of a note when produced for payment. That these difficulties do in a measure exist, must be admitted. But the bank knows that there can be but one owner of the note, and who that one is, must be satisfactorily proved, to entitle him to payment of it. The bank has a just right to call for such proof; and if it be truly and faithfully given, there can be no risk in paying it. The possessor of the other half part of the note, as already observed, by whatever means he acquired it, can never oblige the bank to pay the money over again to him. But after all, the rule of law does not rest upon this circumstance. The maker of the note is bound to pay to the person who proves himself to be the legal owner of it; and the difficulties complained of, are not greater than those which attend most litigated questions.

It may not be improper here to observe, that the decision in the case of Bullet v. Bank of Pennsylvania [supra] did not proceed upon any usage applicable to the case. None such was stated in the case agreed, or alluded to by the court.

The next question is new;—no case like it was cited at the bar, nor is there any within the recollection of the court. It is nevertheless within the range of some general principles of law, by the light of which I think it may be decided. The question is, whether it was competent to the bank to notify the holders of her notes, that in case they should be voluntarily cut into parts, she would not pay them, unless all the parts should be brought together? I mean to treat the question as if the notice were brought home to the plaintiff. It is unnecessary, in this case, to decide how far parties to a contract may, by positive stipulations, change the rules of evidence applicable to that particular contract. If they may do so, it must be upon the basis of an agreement assented to by both parties. But upon what principle is it, that one party to a contract can prescribe terms to absolve himself from its obligations, without the assent of the other? I know of none. If the bank can dictate to the holders of her notes the condition stated in this notice, upon the performance of which, and not otherwise, she would pay them; she might with equal authority prescribe any other condition, and declare in what case she would pay, and in what case she would not. The note is the evidence of an engagement by the bank to pay a certain sum of money to the bearer of it; and the general law of the land declares, that if such note, or a part of it, should be lost, or destroyed, the debt shall nevertheless be paid, upon satisfactory proof being made of the ownership and loss. Thus sanctioned, these notes pass from hand to hand; and if the bank can nevertheless discharge herself from her obligation to pay them, unless both parts of the note be produced, or unless the note be produced entire, (and there is no difference between the two cases,) then the arbitrary declaration of the bank must be stronger than the law. This observation applies with equal force to every other species of contract, where one of the parties to it attempts to prescribe to the other the rules of evidence by which alone he will be governed.

I thought the defendants' counsel seemed unwilling to contend, that the bank could go the length of declaring that they would not pay a lost note, or one which had been torn or defaced by accident. But if the court be correct in their opinion upon the first point, it follows, that the law as much compels the bank to pay the owner of half a note, where the other half is lost, as to pay in the two cases supposed; and if so, the right of the bank to prescribe terms in the one case, if admitted, would be equally valid in the others. There can be no difference, unless it be that in the one the notes were voluntarily cut, and in the other they were torn by accident. But the owner

of the debt, being also the owner of the paper which is the evidence of it, he had a legal right to cut it, and by doing so, he could not impair the obligation, unless he intended to do so. In all these cases, the note is cut with a view to the security, not to the destruction of the debt, by doubling the chances of preserving part of the evidence of it, in case the other part should be lost. The defendants do not forbid, or condemn the practice, even if it could for a moment be admitted that they had a right to do either. That is not the gravamen stated in the notice; it is the production of one of the parts for payment, unaccompanied by the other part. That is the case in which the bank declares she will not pay, and in which the law pronounces she shall pay.

I am of opinion that judgment should be entered for the plaintiff.

Case No. 9,157.

MARTIN v. BARTOW IRON WORKS.

[35 Ga. 320.]

District Court, N. D. Georgia. Sept. Term, 1867.

PLEADING AT LAW—DUPLICITY—PLEAS IN BAR—DEMURRER—CONTRACTS UNDER SEAL—FAILURE OF CONSIDERATION—ILLEGAL CONSIDERATION—HIRE OF NEGROES.

[1. A demurrer to a plea on the ground that it is double "in this, that it contains several distinct matters of defence, and also that said plaintiff cannot take or offer any certain issue upon said second plea," *held* insufficient, for failure to point out the particulars in which the duplicity consists.]

[2. In Georgia both a total and a partial failure of consideration may be set up as a defense to writings commonly known as sealed notes or single bills.]

[3. To an action upon a sealed note made in January, 1864, defendant set up, by one of his pleas, a failure of consideration in this, that the note was given for the hire of twenty negroes, claimed by the plaintiff at the time of said hiring as slaves, but who were in fact free under the laws of the United States and the proclamation of the president. *Held*, that the plea showed no failure of consideration, as it did not appear but that the negroes may have first hired themselves to plaintiff and the latter transferred their labor with their consent to defendant, or that plaintiff may have acted as their agent in the hiring and taken the notes in trust for them.]

[4. *Held*, further, that a similar plea alleging that the consideration was illegal in that the contract was in violation of the letter and spirit of the laws of the United States and the president's proclamation, was bad, because there was no legal distinction between the plaintiff's hiring these men to defendant and the men hiring themselves to defendant, there being no averment that they did not consent to be so hired, or that the contract was not performed by plaintiff.]

[5. A plea that the contract was made for the hire of negroes as slaves, and that it was part of the consideration of the contract that defendant was to remove said negroes away and keep them away from the territory within the lines of the Federal army for the purpose of preventing their liberation from their former state of servitude, *held* good as showing an illegal consideration, as the intent to prevent liberation was contrary to the settled policy of the government, and wicked in itself.]

[6. A plea that a note sued on was given with the express agreement that payment was to be made in Confederate treasury notes, and that said notes were prohibited by law to circulate, is bad, for plaintiff, having agreed to receive such notes in payment, has no right to ask a judgment for the amount of the note in "money."]

[This was an action at law by Ann V. Martin against the Bartow Iron Works, to recover money upon a sealed note. Heard on demurrers to the several pleas filed by the defendant.]

Hammond, Mynatt & Welborn, for plaintiff.
Brown & Pope, for defendant.

ERSKINE, District Judge. This is an action of debt brought by the plaintiff against the defendant on a sealed instrument, of which the following is a copy: "$3,000. On or before the 25th day of December next, I promise to pay Ann V. Martin, or order, three thousand dollars, for value received, as witness my hand and seal. Allatoona, January 6th, 1864. (Signed) T. J. Hightower, (L. S.) Supt. Bartow Iron Works."

To this action defendant pleaded nine pleas. The first was withdrawn. Replications were filed to the fifth and sixth, and issue joined. Special demurrers—several of which contained substantial objections also—were put into the second, third, fourth, seventh, eighth and ninth pleas. Defendant, in his second plea, alleges a total failure of consideration, and sets up affirmatively that the promise was made to the plaintiff in consideration of the hire of twenty negro men to work for defendant at the Iron Works in Bartow county, Georgia, for the year 1864, and that it was agreed, as a part of the contract of hiring, that if the Federal army approached near said county, defendant was to remove these hired men and their families, at the expense of plaintiff, and that no hire should be paid for the time lost by reason of said removal. Defendant then avers that the contingency thus provided for happened, and that he removed them to Macon, Georgia, and that there they were taken possession of by the authorities of the so-called Confederate states, and that he received no hire nor other benefit from their services. The third plea alleges a partial failure of consideration; but it is in all other respects substantially like the preceding one.

The demurrer to the second plea presents the following objections: That the plea is double in this, that it contains several distinct matters of defence, and that plaintiff cannot take or offer any certain issue upon said plea. Also, that defendant attempts to set up and plead a failure of consideration, and that the matters therein contained, in manner and form as therein pleaded, are not sufficient in law to show a failure of consid-

eration, and that plaintiff is not, by law, bound to answer the same. Then follows the usual, but (I apprehend) useless formula, that the plea is inartificially pleaded, and is in other respects uncertain. The objections taken in the demurrer to the third plea are in language similar, and are stated substantially in like manner as those to the second plea.

Before giving the opinion of the court on the legal sufficiency or insufficiency of the pleadings in this case, I trust I may not be deemed obtrusive by the bar if I state, briefly, that the long and verbose manner in which pleadings are frequently drawn is unnecessarily laborious to the draftsman and fatiguing to the reader. Take, for example, the precedent for a general demurrer, as printed in the earlier editions of Chitty, and in other works on pleading, and it will be found attenuated to some dozen or fifteen lines, whereas, it would be as sufficient by the rules of good pleading, as understood by the fathers of the law, and equally as intelligible, if set forth in two or three. A general demurrer in the following form would, I apprehend, be sufficient in the case under consideration: "And the plaintiff, by her attorneys, Hammond, Mynatt and Welborn, says that the second, third, fourth, seventh, eighth and ninth pleas are not sufficient in law." Vide Steph. Pl. (8th Am. Ed.) 44. And I will here take occasion to repeat, concisely, what I said more at large in the case of Scott v. Planters' & Mechanics' Bank [unreported], that, while I have the honor to preside in this court, I will discourage, nay, discountenance, all the delicately cunning and curious devices that have crept into the science of pleading. The law, says Lord Coke, "speaketh by good pleading," and the day has arrived when this wise axiom of that great master of the common law is to be interpreted liberally. This is an age of progress and utilitarianism in law as in other sciences, and it is therefore high time that the subtleties, verbosities and useless disputations of the ancient pleader give way to common sense and common reason.

A general demurrer enables the party to assail every substantial imperfection in the pleadings of the opposite side without particularizing any of them in his demurrer; but if he thinks proper to point out the faults, this does not vitiate it. A special demurrer goes to the structure merely, and not to the substance, and it must distinctly and particularly specify wherein the defect lies; and, indeed, the statutes 27 Eliz. and 4 & 5 Anne, as it is said, oblige the party demurring to lay, as it were, his finger on the very point, otherwise the demurrer may not be noticed. 1 Salk. 219; Wils. 219; Snyder v. Croy, 2 Johns. 428. When a party demurs specially, he may, in argument, attack substantial errors.

The first point made in the demurrer to the second plea is, that it "is double, in this, that it contains several distinct matters of defence; and, also, that said plaintiff cannot take or offer any certain issue upon said second plea." It is an ancient and well settled rule that, if a pleading be double, it is bad on special demurrer; but the imperfection must, as we have seen, be pointed out in the demurrer. It is not sufficient to say that the plea is double, or that it contains two or several distinct matters, but the pleader must specially show wherein the duplicity consists (1 Tidd, Prac. 694); for, by pointing out the fault, the adverse party may amend, if he choose, or demand the judgment of the court on its sufficiency.

The objection for doubleness taken to the second plea has, and in like manner, been also taken to the third. This making the law equally applicable to the one as to the other, both may be passed upon together. Has the plaintiff, in this part or division of the demurrers to these pleas, or to either of them, come within the letter or spirit of the rule laid down? I think not. No duplicity—if there be any in one or both of these pleas—has been pointed out in the demurrer or disclosed in the argument.

Another objection—and it goes to the substance—is taken to the second and third pleas, namely: that defendant has attempted to set up in the second a total failure of consideration, and in the third a partial failure. And Mr. Mynatt, in his argument, contended that neither of these defences could be pleaded to a specialty. Such, doubtless, is the rule of the common law, as generally understood in England; but with us it has, in several of the states, been changed, or modified, by statutes; while in others, learned courts have, in a greater or less degree, relaxed this rigid rule, that substantial justice may be done speedily and with as little technical litigation as possible, and without circuity of action.

Whether the writing sued on in this action has all the attributes of the specialty of the common law, is not a question directly before the court for determination. The writing was executed in Georgia, and the contract was to be performed here; and the instrument being of a peculiar character, and not strictly speaking commercial paper, governed by the law merchant—though the promise is absolute, payable to order, and the sum certain—it ought to be given effect to and adjudged agreeably to the local law, and the construction given to such instruments by the local tribunals. Swift v. Tyson, 16 Pet. [41 U. S.] 1.

The distinction between specialties and simple contracts should be carefully preserved by the courts when the dignity of those contracts has not been interfered with by legislative enactments; for, in the payment of debts of deceased persons, and in other cases, the common law makes a distinction; but by the 25th section of the act of 1799 (Cobb's Dig. 1135), promissory notes and other liquidated demands are made of equal dignity with the bonds and other specialties. The act of December 26, 1836 (Cobb's Dig. 490),

enables defendants to give in evidence a partial failure of consideration upon any contract, provided that it be pleaded only in such cases and under such circumstances, and between such parties as would now allow and admit the plea of total failure of consideration.

Albertson v. Holloway, 16 Ga. 377, was a suit on an instrument, in nearly every respect, like this. The defendant pleaded, among other defences, a partial failure of consideration. Plaintiff objected on the ground that no fraud or illegality was alleged in the contract, the same being under seal. The court below sustained the objection. A writ of error was taken, and the case went to the supreme court of the state, and it reversed the judgment.

The opinion of the court was delivered by Starnes, J., who, after commenting on the anomalous status of the instrument, used the following language: "Yet," said the judge, "we know that the rule we have been considering, has not been applied to ordinary promissory notes, but it has been the immemorial practice in our state to allow pleas of total failure of consideration (and of partial failure since the act of 1836) to suits on such notes."

From this it would seem to be the settled law of this state, that total as well as partial failure of consideration affords a good defence to writings, which are commonly known as sealed notes or single bills. And I can see no sound reason why matters which destroy the demand, as well as those which go to diminish it, may not be pleaded in defence of this action.

Withers v. Green, 9 How. [50 U. S. 213]. Action of debt on a single bill. This cause was brought by writ of error from the circuit court of the United States for the Southern district of Alabama, to the supreme court. The law of that state places bonds, or any writing under seal, on the footing of promissory notes, and allows defendants, by special plea, to impeach, or go into the consideration of such in the same manner as if the writing had not been sealed. The opinion of the supreme court was pronounced by Mr. Justice Daniell, who, after reviewing the English and American cases, showing a relaxation of the old rule, and allowing the defendant to obtain justice in this way instead of driving him to a cross action, said: "But, however, the rule laid down by the courts of England, should be understood, it has repeatedly been decided by learned and able judges in our country, when acting, too, not in virtue of a statutory license or provision, but upon the principles of justice and convenience, and with a view of preventing litigation and expense, that when fraud has occurred in obtaining, or in the performance of contracts, or when there has been a failure of consideration, total or partial, or a breach of warranty, fraudulent or otherwise, all or any of these facts may be relied on in defence by a party when sued upon contracts, and that he shall not be driven to assert them, either for protection or as a ground of compensation, in a cross action." The doctrine here enunciated was approved in Van Buren v. Diggs, 11 How. [52 U. S.] 461; and again in Winder v. Caldwell, 14 How. [55 U. S.] 434.

The demurrers to the second and third pleas are overruled.

The fourth plea states that the consideration for the promise has entirely failed, in this, that the note was given for the hire of twenty negro men, claimed by the plaintiff at the time of the said hiring as slaves, but were in fact free, having been so declared by the laws of the United States, and proclamations of the president thereof, before the time of said hiring.

Plaintiff in the demurrer to this plea says, that the matter and things therein contained, in manner and form as set forth, do not amount in law to a failure of consideration. Also, that the plea consists altogether of matter of law upon which no apt or material issue can be taken; and that the plea is argumentative, uncertain and insufficient. The remainder of the demurrer goes to other matters of form generally.

The facts set forth in this plea do not constitute a failure of consideration. Admit that the plaintiff did claim these men as slaves—notwithstanding they may have been free—this would not affect the contract; for they may have first hired themselves to plaintiff, and by their consent, express or implied, she may have transferred their labor to defendant, or plaintiff may have acted as their agent in hiring them to defendant, and may have taken the notes payable to herself in trust for them. Besides, there is no averment whatever that the contract was not fulfilled on the part of the plaintiff.

The demurrer to the fourth plea must be sustained.

The seventh plea says that the consideration for the promise is illegal, for that it was made for the hire of negroes at Bartow county, Georgia, in January, 1864, and that the contract was in violation of both the letter and the spirit of the laws of the United States, and the proclamations of the president thereof. Plaintiff's demurrer alleges that the matters above contained do not support the plea of illegal consideration. The remainder of the demurrer is addressed to the structure of the plea.

The demurrer is well taken to the substance of this plea. The hiring of these men by the plaintiff to the defendant, in the state of Georgia, in 1864, was not in violation of any law of the United States, or any proclamation of the president. And indeed the president, in the emancipation proclamation, dated January the first, A. D. 1863, recommended to the freedmen, "that in all cases, when allowed, they labor faithfully for reasonable wages." 12 Stat. 1268. I per-

ceive no legal distinction in the plaintiff's hiring these men to defendant, and the men hiring themselves to defendant. No averment is made that they did not consent to be so hired, nor that the contract is unperformed on the part of the plaintiff.

The eighth plea alleges that the consideration for the promise was illegal—being contrary to the public policy of the government of the United States; that it was made for the hire of negroes as slaves, and defendant avers that it was a part of the consideration of the contract, that the defendant was to remove said negroes, and keep them removed from the territory within the lines of the Federal army, with a view and design of preventing their liberation from their former state of servitude, and that, previously to the time of the making of said contract, the government had determined upon, adopted and established the policy of liberating said negroes from their former state of servitude.

Demurrer to this plea—and the causes alleged in it—are, that the plea contains no sufficient allegation of illegal consideration; and that no matter of fact has been alleged or shown in bar of the action, but that it consists altogether of matters of law, and that it is argumentative, evasive, double, etc.

Such is substantially the language of the eighth plea and of the demurrer to it.

Ex-Gov. Joseph E. Brown, who argued for defendant, cited and commented on the following authorities: [Marshall v. Baltimore & O. R. Co.] 16 How. [57 U. S.] 336; [Hannay v. Eve] 3 Cranch [7 U. S.] 242; [Miles v. Caldwell] 2 Wall. [69 U. S.] 45; [Chirac v. Reinicker] 11 Wheat. [24 U. S.] 288; 1 Story, Eq. Jur. 293a, 293b; 3 Kelly, 181; [Bartle v. Nutt] 4 Pet. [29 U. S.] 188; [Lessieur v. Price] 12 How. [53 U. S.] 63; [Ranall v. Howard] 2 Black [67 U. S.] 585; Dana, Wheat. Int. Law, 305, note; Add. Cont. 93-96; Chit. Cont. 586; Smith, Lead. Cas. 423.

Mr. Pope, in his brief, referred to Steph. Pl. 256, 424, 260; [M'Niel v. Holbrook] 12 Pet. [37 U. S.] 84; [Shankland v. Mayor, etc., of Washington] 5 Pet. [30 U. S.] 397; Gould, Pl. 421.

Counsel for plaintiff presented the following authorities in support of the demurrer: Steph. Pl. 348, 384, 387; Chit. Cont. 570, 575; 2 Kent, Comm. (10th Ed.) 636, note.

The court will direct its attention to the first point taken in the demurrer. The plea is, perhaps, too general in its structure, and otherwise deficient in form, if tested by the rules of pleading; but if the formal faults be not specially pointed out, it must be adjudged certain to a common intent, this being all that is required in a plea in bar.

In resolving this plea, the court must look to its language alone for the meaning of defendant, and none of the other pleas pleaded, nor any part of them, can be invoked to aid in the interpretation and construction of this, or in explaining the import of any word or phrase used in it. Each plea must stand on its own merits. If this contract when entered into was in violation of the policy of the government, it is vicious and invalid and can find no favor in the courts. Mr. Chief Justice Marshall, in Armstrong v. Toler, 11 Wheat. [24 U. S.] 258, said: "No principle is better settled than that no action can be maintained on a contract the consideration of which is either wicked in itself or prohibited by law." And in Tool Co. v. Norris, 2 Wall. [69 U. S.] 45, Mr. Justice Field in speaking of contracts void, as against public policy, said: "The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of the courts of the country."

The gist of the agreement of the parties as stated in the plea—and this statement as pleaded is admitted by the demurrer, is "that defendant was to remove said negroes away, and to keep them removed from the territory that was within the lines of the Federal army, with a view and design of preventing the liberation of said negroes from their former state of servitude." It needs no argument to show that this agreement was in contravention of the previously settled policy of the government, and wicked in itself.

Demurrer not sustained.

The ninth and last plea is as follows: That the promise aforesaid was illegal and void in this, that it was the express understanding and agreement at the time said promise was given, that the payment of the amount so promised should be made in what was denominated Confederate treasury notes, which currency defendant says was prohibited by law to circulate. Verification.

The demurrer states that the plea is double, containing several and distinct matters of defense, and that no certain issue can be taken thereon, and that the matters and things contained in the plea as therein set forth, are insufficient in law to show illegality of consideration, etc.

In my opinion it is not necessary to decide whether the promise is illegal or whether Confederate treasury notes were prohibited by law to circulate, for it is alleged, that plaintiff agreed to receive these notes for the amount promised. This being so, plaintiff cannot come into this court and ask a judgment for money. Clearwater v. Meredith, 1 Wall. [68 U. S.] 25.

Demurrer overruled.

Judgment nil capiat on the second, eighth and ninth pleas; and so far as the defense goes set up in the third plea, there must be judgment of nil capiat.

Case No. 9,158.

MARTIN v. BURNS.

[Nowhere reported; opinion not now accessible.]

Case No. 9,158a.

MARTIN v. CLARK.

[Hempst. 259.] [1]

Circuit Court, D. Arkansas. July, 1834.

PLEADING AT LAW—TRESPASS—WARRANT — NEW TRIAL.

1. In trespass, any matter done by virtue of a warrant, must be specially pleaded.

2. A new trial will not be granted, because witnesses did not state facts which the party expected they would state.

Appeal from the Crawford circuit court.

[Action by William Martin against Josiah Clark.]

Before CROSS and LACY, JJ.

CROSS, J. The record in this case presents two questions for consideration: First, whether the court erred in excluding an execution offered in evidence by the defendant; and second, in refusing to grant a new trial.

1. Clark brought an action of trespass against Martin, and the cause was tried on the plea of not guilty. In trespass the rule is, that any matter done by virtue of a warrant or authority, must in general be specially pleaded. Co. Litt. 282b, 283a; 6 Com. Dig. "Pleader," E 17; 1 Salk. 107, 108; Doug. 611; 1 Saund. 298, note 1; 1 Chit. Pl. 538; 13 Johns. 443. The evidence was not admissible under the general issue.

2. The ground stated in the application for a new trial is, that two witnesses summoned by Clark did know, and were fully informed, that the property in controversy had been taken out of the possession of Clark and sold to Martin, and probably delivered to him; and that he, Martin, believed those witnesses would swear the truth in relation thereto; but that on the trial they either forgot the facts, or corruptly and wilfully refused to state them, and therefore that he did not have the benefit of a fair trial. This did not entitle Martin to a new trial, and his motion was rightfully overruled. Sayer, 27; 2 Caines, 129; 3 Johns. 256; 4 Johns. 425; 5 Johns. 259. Judgment affirmed.

MARTIN (COLEMAN v.). See Cases Nos. 2,985 and 2,986.

Case No. 9,159.

MARTIN et al. v. CRISCUOLA.

[10 Blatchf. 211.] [2]

Circuit Court, E. D. New York. Oct. 4, 1872.

PRACTICE AT LAW—IN CONFORMITY WITH STATE—SUMMONS IN NAME OF PLAINTIFF'S ATTORNEYS.

The effect of the 5th section of the act of June 1, 1872 (17 Stat. 197), which provides, that the practice, pleadings, and forms and modes of proceeding, in other than equity and admiralty causes, in the circuit and district courts of the United States, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding, existing at the time, in like causes, in the courts of record of the state within which such circuit or district courts are held, is not to authorize the commencement of an action at law in the circuit court by a summons issued in the name of the plaintiff's attorney, according to the mode of commencing actions in the courts of the state of New York:

[Cited in Johnson v. Healy, Case No. 7,389.]

[Action by Francis D. Martin and others against L. Criscuola.]

Goodrich & Wheeler, for plaintiffs.

Beebe, Donohue & Cooke, for defendant.

BENEDICT, District Judge. This motion raises the question, whether the effect of the 5th section of the act of June 1, 1872 (17 Stat. 197), which provides, that the practice, pleadings, and forms and modes of proceeding, in other than equity and admiralty causes, in the circuit and district courts of the United States, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding, existing at the time, in like causes, in the courts of record of the state within which such circuit or district courts are held, is to authorize the commencement of an action at law in this court by a summons issued in the name of the plaintiff's attorney, according to the mode of commencing actions in the courts of the state of New York.

This question, I learn, upon inquiry, has already received the consideration of the circuit judge of this circuit, and he has advised the clerk of the circuit court for the Southern district of New York, that the act referred to does not authorize the commencement of an action at law by such a summons. This action of the circuit judge makes it proper that the practice in this district be made to conform to that directed by the circuit judge, in the Southern district, and, accordingly, the summons served in this action must be set aside, as unauthorized by any law of the United States.

Case No. 9,160.

MARTIN et al. v. CURTIS.

[Betts' Scr. Bk. 99.]

Circuit Court, S. D. New York. 1842.[1]

CUSTOMS DUTIES—COTTON BAGGING—GUNNY CLOTH—ARTICLES USED FOR PARTICULAR PURPOSE.

[1. Substances not used for cotton bagging before the passage of Act July 14, 1832 (4 Stat. 583), are not dutiable as such under that act.]

[2. Whether gunny cloth was used for cotton bagging before the passage of Act July 14, 1832 (4 Stat. 583), is a question for the jury.]

[3. A tariff act imposing a duty on articles used for a particular purpose should not be construed to include articles not so used at the time of the passage of the act, in the absence of an express provision to that effect.]

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

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

[1] [Affirmed in 3 How. (44 U. S.) 105.]

[At law. Action by Martin and Coe against Edward Curtis to recover back duties illegally exacted.]

This action is brought to recover back the duties paid on several importations from Dundee during the year 1841, of gunny cloth, which were paid under protest, amounting to $4,500, and which were levied by the defendant upon the article imported as cotton bagging, gunny cloth being prior to the tariff of July 14, 1832, free of duty. The case (the first tried in this city and the second in the country) is one of very large importance, inasmuch as there have been an immense amount of duties paid on the article under protest, which will be immediately claimed to be refunded and put in suit. The treasury department at Washington also looks with anxiety to the result of the suit, as a case was recently tried in Boston before Judge Story, in which the plaintiff recovered back the duties paid, and instructions were sent here to have this case tried, notwithstanding the decision of Judge Story and the verdict against the United States, in order to obtain Judge Thompson's views as applicable to the law of the case. On the part of the plaintiffs, evidence was adduced showing that previous to 1832, gunny cloth was unknown as an article of cotton bagging. It came originally from the East Indies as gunny bags, and during a great scarcity of cotton bagging a Mr. Watt invented a substitute by cutting open these gunny bags, and sewing them together in another shape, he formed an article suitable for cotton bagging. It is made of the gunny or jute hemp, which grows in the East Indies, and differs in its construction from the cotton bagging known prior to 1832, and which was made of hemp, tow, flax, and sometimes cotton, by having a double wrap and web. The duty was levied by the defendant under the act of 1832, which says the duty shall be levied on cotton bagging, or any article used for cotton bagging, "without regard to weight or width," and the plaintiffs insist, that inasmuch as this article of gunny cloth was unknown at the time that act was passed, congress could not of course have reference to it, in levying a duty on "any other article used for cotton bagging, without regard to weight or width." The defendant urged a different construction of the act, and evidence was also offered to show that this article was in general use as cotton bagging. This was distinctly proved, but there was no evidence to show that it was known or used for such purpose prior to 1832.

D. Lord, Jr., for plaintiffs.

Ogden Hoffman, for defendant.

THOMPSON, Circuit Justice, charged that in his opinion this case was one which depended entirely on the verdict of the jury, that is, whether in 1832, when the tariff act was passed, levying a duty on cotton bagging, gunny cloth was known as being used for cotton bagging. It had been supposed by the defendant that Judge Story in the case tried before him, had laid down some new principles as to the construction of the act of '32, and this court was now called upon to give a decision not in conformity with his. If this court considered that Judge Story had advanced any new principle, they would give the present case more deliberate examination. He did not understand that any new principle had been stated, but that the principle laid down by Judge Story had been established these ten years by the decision of the supreme court of the United States. He believed that the jury were to preserve the existence of the commercial understanding of terms made use of because the laws were made for those engaged in mercantile pursuits, and if they did not resort to that understanding in deliberating upon actions of this nature, they would mislead the merchant who deals in the article. This, which was the decision of Judge Story, was no new rule, but had been settled on the soundest principles for ten years.

The enquiry was then, whether under the act of 1832, this gunny cloth was known as an article applied to the bagging of cotton. The defendant insists that the words "without reference to weight or width" were susceptible of a different construction. It was proper that the duty laid in 1832 should apply to all articles then known and used for cotton bagging, and it did so apply because some was made of hemp, some of flax, of tow and even of cotton, and the qualification therefore did apply to all articles then known or used as cotton bagging, but not to an article unknown as used for such purpose, and if congress had intended to embrace every article which could be used for cotton bagging, they would have said so. They used the words with reference to the articles then known, and not to any which might afterwards be applied to the same use.

The act of Aug. 30, 1842 [5 Stat. 548] has not, as has been asserted, any material bearing on the case. In that act, congress uses broader language, and meant to adopt such language as would cover all articles which might be used for cotton bagging, and the 20th section embraces all articles which bear a similitude to articles which are liable to duty. In 1832, this was not known as an article used for cotton bagging and whoever applied it to that use, because it was cheaper, did nothing improper, but made an honest application of his ingenuity, but congress finding that the ingenuity of man had discovered something which would answer the purpose of bagging for cotton, and which was not known in 1832, and that gunny cloth would answer that purpose, laid a specific duty on it. The court saw nothing in the act of 1842 to take from this case the settled law, that the duty should be laid according to the commercial understanding and acceptance of the article.

Was then this gunny cloth known and used in 1832 when the act was passed, as cotton bagging? If the jury believe it was, the duty was properly laid; and if not, the plaintiffs were entitled to a verdict.

Verdict for plaintiffs.

Case No. 9,161.

MARTIN v. DELAWARE INS. CO.

[2 Wash. C. C. 254.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1808.

MARINE INSURANCE—DEVIATION—JUSTIFIABLE NECESSITY—COURSE OF TRADE.

1. The smallest deviation from the usual course of the voyage, without a justifiable necessity, discharges the underwriters, although the loss was not the immediate consequence of the deviation.

[Cited in Parsons v. Manufacturers' Ins. Co., 82 Mass. (16 Gray) 465.]

2. The underwriters are bound to take notice of the course of trade; but it should appear that the course was so uniformly pursued, as that it should have been known to the underwriters, as well as to the insured.

[Cited in Bulkley v. Protection Ins. Co., Case No. 2,118.]

[Cited in Natchez Ins. Co. v. Stanton, 2 Smedes & M. 340; Crosby v. Fitch, 12 Conn. 422.]

Insurance made, on the 9th of November 1805, on one-third of the schooner Friendship, at and from Kingston, in Jamaica, to the island of Aruba, and at and from thence, back to Kingston, with liberty to touch at Rio de la Hache. On the 24th of December, a memorandum was endorsed on the policy, that, for the additional premium of a half per cent., the said vessel may take in the whole or a part of her cargo at Coro, without prejudice to the insurance; the additional premium to be returned, if she should not go to Coro. The vessel sailed on the voyage insured; stopped about eight days at Aruba; took in a person as a supra-cargo, to go to Coro, to assist in purchasing mules; then returned from Coro, with a load of mules to Aruba, where she remained a part of two days, when the island, then belonging to and in possession of the English, was attacked and taken by the Dutch. The vessel and her cargo were taken and condemned as prize. A regular abandonment was offered and refused.

The claim was opposed, by Rawle and Condy, upon the ground of deviation, in returning to and stopping at Aruba, on the voyage from Coro. Although the former is nearly in the route, from Coro, on the Spanish Main, to Jamaica, still, it was a deviation to stop there. Park, on the subject of deviation was cited; also Marsh, 393; [Hood v. Nesbit] 2 Dall. [2 U. S.] 137.

Ingersoll & Dallas insisted, that according to the plain intention of the parties, which was to cover the voyage out and home, it was absolutely necessary to return to Aruba, as otherwise the return voyage would not be protected, either by the policy or the memorandum; the words of the former being, "at and from Aruba to Kingston." That the permission being to go to Coro "without prejudice to the insurance," and there to take in "the whole or a part" of her cargo, the insured would be prejudiced, unless he was at liberty to return to Aruba; where, probably, it might be necessary for him to take in the balance of his cargo. Besides, without this construction, he could not call at Rio de la Hache, which, by the policy, he was to do, on his way back from Aruba. It was further insisted, upon the evidence of one of the jurymen, who stated that he had known two vessels on this voyage call at Aruba, to take in a supracargo to Coro for purchasing mules, that this was the course of the trade, and therefore it was permitted to call at Aruba, to land this person.

WASHINGTON, Circuit Justice (charging jury). In this case, the vessel was lost in consequence of the stopping at Aruba; but if it had been otherwise, still, if there was the smallest deviation from the usual course of the voyage, without a justifiable necessity, the underwriters are discharged, although the loss was not the immediate or certain consequence of the deviation.

The question is, what was the voyage, as described in this policy and memorandum. In giving the contract a construction, we must attend to the intention of the parties, as far as we can discover it; and we must supply as little as possible, beyond the meaning thus ascertained. It is contended, for the plaintiff, that the vessel was obliged to return to Aruba from Coro; else, the manifest intention of the parties to cover every part of the voyage out and home, would be defeated; since, neither in the policy or memorandum, is she protected back from any other place but Aruba. But, if this argument be sound, I would ask, what part of the policy protects her from Coro to Aruba? The permission to go to Coro, would cover her voyage thither; but there are no words which extend this protection to her voyage back to Aruba. This construction, then, instead of fulfilling, would manifestly violate, the meaning of the parties; which, I admit, was to cover her throughout. The only way to effect this, is to consider Coro, substituted by the memorandum as the termination of the outward voyage, instead of Aruba, which was in the first instance the ultimate point; and then the insurance will be, at and from Kingston to Aruba, and at and from thence to Coro, and at and from thence back to Kingston. But, if the plaintiff's exposition be admitted, we must go on, and add a new voyage, not expressed in the policy or memorandum, and by no means essential to the meaning of the parties as expressed. Had she gone to Coro

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

without the permission, she would have committed a deviation, and the underwriters would have been discharged; but now, she is permitted to go there, so as not to prejudice the policy, the intention of which was, to cover the whole voyage. But it does not follow from this, that the insured should, though not at all necessary, and perhaps very inconvenient to him, stop at Aruba, for no other purpose than to take his departure from thence. This could not have been the intention. As to stopping at Rio de la Hache, if the construction I have given be correct, then the vessel might as safely touch there from Coro as from Aruba.

The evidence given by the juryman, is very far from proving a usage of trade. Twenty instances may have occurred, of vessels, not being otherwise provided with persons acquainted with the traffic in mules on the Main, calling there to obtain such a person; and as many instances may have occurred of vessels proceeding with a supra-cargo, brought from the port of the vessel's departure, relying upon finding such a character at Coro. But this is no proof of a usage. It should appear that this course is uniformly pursued, and that it should be known as well to the underwriters as to the insured. The former must take notice of the usage of trade, but then it must be uniform and fixed. There appears, upon the whole, to have been a deviation.

Verdict for defendants.

MARTIN (ELWELL v.). See Case No. 4,425.

MARTIN (GIBBONS v.). See Case No. 5,381.

MARTIN (GILLELAND v.). See Case No. 5,433.

MARTIN (HEALEY v.). See Case No. 6,295.

Case No. 9,162.

MARTIN v. KANOUSE.

[1 Blatchf. 149.] [1]

Circuit Court, S. D. New York. April Term, 1846.

REMOVAL OF CAUSES—CERTIFIED COPIES—NEW DECLARATION—RULE TO PLEAD.

1. Where an action is removed from a state court to this court, under the 12th section of the judiciary act of 1789 (1 Stat. 79), certified copies of the process or papers by which the suit was commenced in the state court, and of an order of that court for their transmission, should be sent to and entered in this court.

[Cited in Miller v. Tobin, 18 Fed. 612.]

2. Where a defendant, instead of adopting that course, entered here what purported to be a copy of a declaration in the action in the state court, but the copy was not certified from the state court, or accompanied by a certified copy of any order of the state court for its transmission, and then entered here a rule to declare: *held*, that the rule to declare must be vacated, and the copy declaration be taken from the files.

3. On the transmission of the process or declaration by which the suit was commenced in the state court, and the entry of the same in this court, the plaintiff must file a new declaration according to the practice of this court, as if the suit were an original one here.

[See Brownell v. Gordon, Case No. 2,039.]

4. Until the filing of such declaration the plaintiff cannot enter a rule to plead or a default for not pleading.

[See Brownell v. Gordon, Case No. 2,039.]

[John M.] Martin, a citizen of the state of New-York, commenced, by declaration, an action of assumpsit against [Cornelius] Kanouse, a citizen of the state of New-Jersey, in the court of common pleas for the city and county of New-York. Kanouse appeared in the action, and applied to the court for an order removing the action into this court, under the provisions of the 12th section of the act of congress of September 24th, 1789, known as the "Judiciary Act." 1 Stat. 79. The application was denied. But, on the first day of the session of this court next after the filing of his petition in the court of common pleas for the removal of the action, Kanouse entered in this court what purported to be a copy of the declaration against him in the court of common pleas, and appeared in the action in this court by entering common bail, and gave notice thereof to Martin's attorney in the common pleas. The copy of the declaration entered by Kanouse was not certified from the court of common pleas, and he did not enter a certified copy of any order for the transmission of any copy of the declaration. Subsequently, Kanouse entered in the book of common rules in this court a rule that Martin declare within twenty days after service of notice of the rule, or be non-prossed. Notice of this rule was served on Martin personally.

Martin now moved that the copy declaration on file in the action in this court be withdrawn from its files, and that the rule to declare be vacated.

John M. Martin, plaintiff, in person.

Andrew S. Garr, for defendant.

THE COURT vacated the rule to declare, and ordered the copy declaration on file to be taken off, on the ground that in an action removed from a state court under the act of congress in question, certified copies of the process or papers by which the suit was commenced in the state court, and of an order of that court for their transmission, should be sent to and entered in this court.

THE COURT decided at October term, 1850, in the case of Clarke v. Protection Ins. Co. [Case No. 2,860], that on the transmission of the process or declaration by which the suit was commenced in the state court, and the entry of the same in this court, the plaintiff must file a new declaration according to the practice of this court, the same as if a suit had

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

been commenced by regular process in this court; and that until the filing of such declaration, the plaintiff could not enter a rule to compel the defendant to plead, or enter his default for not pleading.

[NOTE. Judgment was entered in the court of common pleas against Kanouse. This was affirmed by the superior court. From this judgment he sued out a writ of error from the United States supreme court. A motion to dismiss the writ for want of jurisdiction was overruled. Kanouse v. Martin, 14 How. (55 U. S.) 23. At the next term of the court the judgment of the superior court was reversed upon the ground that the power of the court of common pleas to render judgment terminated upon the application of Kanouse for order removing case to the circuit court. 15 How. (56 U. S.) 198.]

Case No. 9,163.

MARTIN v. KERCHEVAL et al.

[4 McLean, 117.] [1]

Circuit Court, D. Michigan. June Term, 1846.

NOTES—ASSIGNMENT—CONSIDERATION—BONA FIDE HOLDER.

1. A note in the hands of an assignee is prima facie evidence of the amount of the consideration paid by the assignee.

2. But the assignor, when sued, may prove what was paid.

3. This evidence can not be set up by the maker of the note, in the hands of a bona fide holder.

4. If the payee of the note paid no consideration, and the assignee paid none, the maker may show a want of consideration.

[Suit by Martin against Kercheval and Forsythe.]

Douglass & Duffield, for plaintiff.

Mr. Bates, for defendants.

OPINION OF THE COURT. This action is brought by the plaintiff, as indorsee against the defendants as indorsers, of a promissory note. A judgment was obtained against the maker of the note by the Bank of Michigan, to whom the note was assigned in 1841. After this the counsel, Mr. Douglass, says he filled up the blank indorsement against the defendants. Notice to the defendants was proved to have been duly given by the bank.

A question is made whether, as between the indorser and indorsee, the consideration can be proved? The face of the note is prima facie evidence of the consideration paid on its negotiation. But this is only prima facie. The defendants may show an entire want of consideration, or that a small sum only was paid. This evidence could not be given by the maker. For he is bound to pay the face of the note, at whatever discount it may have been purchased by the holder. When a note has been reduced to judgment, its negotiability ceases; but questions may arise between the other parties to the note, if the maker becomes insolvent. If, indeed, the note was given without consideration, and was indorsed by the payee without consideration, the maker would not be precluded from showing these facts, by way of defense, to a suit brought by the assignee. But where the note, in the ordinary course of business, has been negotiated for a valuable consideration, the maker is bound for the face of the note.

It is alleged that the plaintiff has no interest in the note, and consequently can not maintain this action. The indorsement shows that his name is on the note, and the filling up makes him the legal holder of it. The indorsement having been made long before the judgment against the maker, it was a promise to pay the holder of the paper, who had a right to fill up the blank at any time, provided that legal steps were taken against the maker. This was the only condition of liability by the defendants, to any subsequent bona fide holder of the note. The presumption is in favor of the holder, and that the filling up related back to the time of the indorsement. But no hardship is imposed on the defendants, as they are permitted to go into the consideration between them and the plaintiff.

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

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

Case No. 9,164.

MARTIN v. SMITH et al.

[1 Dill. 85;[1] 9 Am. Law Reg. (N. S.) 694; 3 Am. Law T. Rep. U. S. Cts. 199; 4 N. B. R. 274 (Quarto, 83).]

Circuit Court, D. Missouri. Dec., 1870.

PRACTICE IN EQUITY—FRAUD—DISCOVERY—LIMITATION OF ACTIONS.

1. Unless congress has otherwise provided, state statutes of limitation are applied to controversies in the courts of the United States.

2. The fraud which in equity will prevent the running of the statute of limitations, is that which is secret or concealed, as distinguished from that which is open, visible or known, and a secret or concealed fraud is in equity a fraudulent concealment of the cause of action.

[Cited in Re Rainsford, Case No. 11,537; Re Dole, Id. 3,965; Wood v. Carpenter, 101 U. S. 141.]

3. Even in cases of fraud, the statute will in equity begin to run as against the plaintiff when he has knowledge or information of facts which reasonably creates the belief that the transfer is fraudulent, and can be proved to be so; and if, under all the circumstances, the plaintiff has been guilty of negligence in discovering or attacking the fraud, the statute will begin to operate against him from the period his laches commenced.

[Cited in Baldwin v. Raplee, Case No. 801; Re Dole, Id. 3,965; Davis v. Anderson, Id. 3,623; Phelan v. O'Brien, 13 Fed. 659.]

[Cited in brief in Rogers v. Brown, 61 Mo. 189. Cited in O'Dell v. Burnham, 61 Wis. 571, 572, 21 N. W. 639, 640.]

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

4. What, in the view of a court of equity, will be regarded as a discovery of the fraud, considered.

[Cited in O'Brien Co. v. Brown, Case No. 10,399; Leavenworth Co. v. Chicago, R. I. & P. Ry. Co., 18 Fed. 212.]

[Cited in O'Dell v. Burnham, 61 Wis. 571, 21 N. W. 639.]

5. The statute of Missouri, which provides that "actions for relief on the ground of fraud, must be brought within five years after the cause of action accrued, but the cause of action shall be deemed not to have accrued until the discovery by the aggrieved party at any time within ten years, of the facts constituting the fraud," construed and considered as in substance enacting the equity rule on the same subject, and fixing the period of limitation.

[Cited in Andrews v. Dole, Case No. 373.]

6. In an action by an assignee in bankruptcy of a fraudulent debtor, where the fraud was continuous, and the debtor remained down to the time suit was brought, the real owner of the property sought to be recovered, and in possession of it: *held*, that the statute did not bar the suit, even though the initial fraudulent transaction took place more than five years before the suit was commenced.

[Cited in Re Rainsford, Case No. 11,537.]

This was a bill in equity filed originally in the district court by Martin, as assignee in bankruptcy of Edward K. Woodward, to recover certain property from the defendants. Prior to February, 1861, Woodward had been a merchant in St. Louis, doing business in his own name and in the usual way. In the fall of 1860, however, he became much embarrassed, and, in fact, insolvent. He endeavored, late in 1860, first through the defendant, Gray, and subsequently through the defendant, Smith, to effect a compromise with his eastern creditors, but could not succeed. The defendant, Smith, is a brother-in-law of Woodward, is by profession an attorney at law, and resides in Hartford, Connecticut. On the 8th of December, 1860, Woodward, at St. Louis, wrote to Smith, at Hartford, informing him that suits were already begun against him, entreating him to go to New York and Philadelphia to see if he could not effect the desired compromise and extension. Woodward's letter then continues: "Make the best arrangement possible, except cash down or security; if you cannot arrange with them, come right on here and buy me out on terms that you will be safe in, and such as they will be forced to accept. One suit is within the justice's jurisdiction, and judgment will be rendered on the 10th, so I want something done previous to that time. The trial of the other two is set for the 17th. I shall call for a witness who, I don't believe, will be got at the time, and the probability is that they will be continued for the present. My real estate is in a precarious condition, and unless you can get those creditors into the arrangement, so as to give me time to protect it, everything will be swallowed up, unless you can come out, etc. * * I shall be anxious to hear from you." Smith failed to make any compromise, but he effected a purchase of certain claims against Woodward, at twenty-five cents on the dollar; went to St. Louis February, 1861, and on the 5th of that month purchased of Woodward his stock of merchandise, for the expressed consideration of $11,360. This sum was paid by turning over to Woodward, at their face value, the claims which Smith had purchased a few days before at one-fourth that sum; by assuming amounts due for the rent of the store building, and by his three notes to Woodward for $919.64 each. These notes were soon afterwards paid to Woodward in claims which Smith purchased of Woodward's creditors at twenty-five cents on the dollar, and then sent to St. Louis and turned over to Woodward at their par or nominal value, and the notes for rent were paid out of proceeds of goods sold from the store. After the sale of the goods to Smith, the store was operated in the name of Bailey, agent, for over a year; then in the name of Bell, agent, until March, 1864, when a limited partnership was formed under the statute of Missouri, the articles being executed by the defendants, Gray and Smith, the former being the general, and the latter the special, partner. This limited partnership was, by its terms, to continue for three years from March 1, 1864, and the business was to be conducted in the name of Gray. When the three years expired the same arrangement was continued, and the store was being thus conducted in December, 1867, when Woodward was, on his own petition, adjudicated a bankrupt, and in July, 1868, when the present suit was commenced. On the 22d April, 1861, Woodward, without beforehand consulting Smith, made to him, subject to certain incumbrances, a deed of all his real estate, and this deed was placed on record in February, 1862. Among other parcels was the house in which Woodward then lived, and where he has ever since resided, without paying rent therefor, and the taxes on which have been paid by Woodward out of money from the store. Certain parcels were redeemed by Woodward's direction, from judicial sales, by money likewise taken from the store, and titles made in the name of Smith, of which he was subsequently advised. From the store also, and under Woodward's management, encumbrances have been paid off and the claims have been assigned to Smith, who holds them against the property. See Bobb v. Woodward [42 Mo. 482], supreme court Missouri, March term, 1870. Soon after the purchase of the goods, Smith returned to Connecticut, leaving the store in the nominal possession of one Bailey, as his agent, and taking with him of moneys in the store, the sum of $37, to pay his expenses. In the professed capacity of clerk for Smith, Woodward remained in the store from the time of his sale to Smith, in February, 1861, down to the time of the filing of the present bill, and the evidence showed that, in fact, he managed there as before, and that Bailey and Bell, and even Gray, acted under his direction.

The bill made Smith, Woodward, and Gray, defendants, and set out at great length all of the abovementioned facts, with many others, and charged a fraudulent combination throughout all these transactions between Smith and Woodward, to defraud the creditors of the latter; that the sale of the goods was colorable and fraudulent; that in reality Woodward was the real owner during all the time the business was conducted in the name of "Bailey, agent," and in the name of "Bell, agent," and in the name of Gray; that the real partner of Gray is Woodward, and not Smith; that Smith has been refunded out of the sales from the store, all moneys which he has expended in the purchase of claims against Woodward, or for advances to purchase goods. The bill also alleged that Woodward, in pursuance of the original fraudulent design, procured to be effected the limited partnership with Gray, who was to contribute $6,000 in cash against the stock, which was put at $12,000, and Gray was to be interested in one-third of the profits, and Woodward in two-thirds, but to carry out the fraud Smith's name was used in the articles, and not Woodward's. The bill stated that large profits had been made; that the stock increased in value; that Woodward, at the date of his bankruptcy, was entitled to a large sum from the firm; that Gray had withdrawn large sums and amounts, and was indebted to his copartner, Woodward, therefor; that defendants Smith and Gray had a large amount of property belonging to the firm, which they had sold since the bankruptcy of Woodward was declared. The bill also stated that the assignee, after his appointment in January, 1868, first discovered the frauds aforesaid; that claims to the amount of about $13,000 had been established against the estate of Woodward, by various creditors named, none of whom, it was averred, knew of the frauds complained of, until January 3, 1867. It was also averred that Smith & Gray denied that Woodward had any interest in the firm, and it was stated that the latter had falsely returned to the bankrupt court that he had no interest therein. The prayer of the bill was that an account be taken of all the said partnership dealings between the defendants; that what should be found due from Smith & Gray to the firm, be decreed to be paid to the complainant as assignee; that the respective rights of the defendants in the firm property, at the date of Woodward's bankruptcy, be determined; that a receiver be appointed to collect the debts and take charge of the property of the partnership; that the property be sold and converted into money, and for general relief.

The defendants severally answered, denying the frauds charged against them, and also denying that Woodward ever had any interest in the limited partnership mentioned. Smith, in his answer, specially pleaded the statute of limitations of the state of Missouri, alleging that the purchase of the goods, charged in the bill to be fraudulent, was made February 5, 1861, and that no suit to set aside said sale as fraudulent as to the creditors was brought by or for them within five years after the sale was made and possession taken, wherefore the creditors and the assignee are barred of such suit by the statute of November 22, 1855, referred to in the opinion of the court. Replications were filed; a large amount of testimony was taken, and on final hearing the bill was dismissed by the district court, whereupon the assignee appealed to this court.

Lee & Webster and Cline, Jameson, & Day, for assignee.

Whittlesey & Hamilton, for defendant.

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

DILLON, Circuit Judge. In the argument at the bar counsel differed, not indeed respecting the general nature of the bill, but upon the point whether in the relief sought it embraced the real estate conveyed by the bankrupt to the respondent, Smith, as well as the personal property or the interest in the co-partnership therein mentioned.

The point is important, for the limitation as to real actions is ten years, and as to personal actions five years. The present bill was exhibited more than five years, but within ten years, after the sale of the goods and the conveyance of the real property.

If the averments of the bill and the prayer for relief be carefully examined, it is plain, beyond controversy, that all that is alleged respecting the real estate is in the nature of inducement to show the character of the dealings between Woodward and Smith, and to make probable the gravamen of complaint.

It is extremely important that we shall obtain a correct notion of the real nature, scope, and purpose of the bill; for upon the view we take of this will depend, as we shall presently see, the question whether the statute of limitations bars the relief sought.

The bill is not one to set aside as fraudulent the sale of the specific stock of goods made in February, 1861, or to recover their value as property to which the creditors of the bankrupt are entitled. This sale is indeed set out in the bill, and is alleged therein to have been fraudulent, but it is set forth only as inducement, as the initial transaction of a fraudulent conspiracy and scheme which ended, not with the consummation of that particular sale, but which continued in existence and was flagrant down to the period when Woodward was adjudicated a bankrupt, and when this suit was commenced.

The plea of the statute sets out this sale made in February, 1861, and then alleges that the suit is barred by reason of the lapse of more than five years before it was commenced. The plea misconceives the nature and purpose of the bill, and proceeds

upon the mistaken notion that it is brought simply to impeach the sale of the original stock of goods made more than seven years before.

The true view of the bill is, that it charges that the real parties in interest in the business of the limited partnership carried on in the name of the defendant Gray, are Woodward and Gray, and not Smith and Gray, as appears on the face of the written and recorded articles, and is given out by all three of them to the creditors and the world, and consequently that the interest of Woodward in this business and in the assets of the firm belongs to the assignee for the benefit of his creditors, and it is this interest which the assignee by the present suit is seeking to recover.

The suit is a personal, as distinguished from a real action, and hence the ordinary limitation period is five years, and not ten, from the time when the cause of action accrued. Bobb v. Woodward [supra], supreme court Missouri, March term, 1870.

In the case just cited the supreme court of Missouri decided, upon the proof before it, that the conveyance of the real estate by Woodward to Smith was fraudulent, and of the correctness of that judgment on this point there can be no question. That case had no relation to the personal property or partnership interests now in controversy, and there was no question as to when the fraud was discovered, and hence what is said in the opinion on these subjects by way of argument by the learned judge who delivered it, is not to be taken as points decided by the court.

Upon the proofs in the record now before us we consider the fraudulent conspiracy between Woodward and Smith, charged in the bill, to be so clear as not to admit of fair debate, and that so far from ending with the purchase of the goods in 1861, it continued down to the time this bill was brought. The evidence is voluminous, and it would require too much time without any resulting benefits, to enter upon a detailed or analytical statement and discussion of it.

Suffice it to say, that it firmly establishes that Woodward designed to place the property beyond the reach of his creditors; that Smith made a colorable purchase of the goods to enable the debtor to effect his purpose; that apparently he has received from the sale of the goods in the store all sums which he expended in buying claims against Smith or otherwise; that Woodward was all the time the real, while Smith was only the nominal, party in interest. That the purchase of the stock of goods by Smith was fraudulent is very faintly, if at all, denied by counsel. At all events, they have placed the stress of their defence upon the statute of limitations, and it was upon this ground, undoubtedly, that the bill was dismissed by the learned judge whose decree we are called upon to review.

The question involved is alike interesting and important. To determine it, we must first look at the statute to ascertain its meaning and purpose, and then at the special character of the case in hand, and see whether it is one where the statute will operate to bar the relief sought. In a suit of this kind the assignee is clothed with all the rights of creditors (whom, indeed, he represents) to impeach transfers of property made by their debtor or colorably held by others in fraud of their rights. Allen v. Massey [Case No. 231].

The Code of Missouri declares that "there shall be but one action in the state for the enforcement or protection of private rights, and the redress or prevention of private wrongs, which shall be denominated a civil action." 2 Wag. St. p. 991, § 1.

The statute of limitations (section 8) enacts that "civil actions other than those for the recovery of real property can only be commenced within the periods prescribed in the following sections, after the causes of action shall have accrued."

"Section 10, within five years; fifth, an action for relief on the ground of fraud—the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party at any time within ten years of the facts constituting the fraud." 2 Wag. St. p. 918.

Unless congress has otherwise provided, state statutes of limitation are applied to controversies in the courts of the United States with the same effect as they would be if the controversy were pending in the courts of the state.

It is necessary, therefore, to construe the 10th section of the statute of limitation above quoted, in order to determine its effect upon the rights of the parties to present suit.

We have had called to our attention no decision of the highest court of the state construing this statute in respect to the precise questions which we are now to decide. The legitimate office of construction is to ascertain the legislative will or purpose; and to this end it is not only proper, but often necessary to look not simply at the language of the particular enactment under consideration, but also at the subject matter of it, in the light which the former law, or general principles shed upon it.

Formerly, in the state of Missouri, the forms of action and modes of procedure were as at common law, with a distinct equity jurisdiction. At that time the statutes of limitations were, in substance, the same as 21 Jac. I. c. 16, and professed to apply only to certain specified actions at law. Rev. St. 1845, pp. 373, 374.

Equity at this time applied, of course, these statutes according to the settled doctrines of that court.

The Code subsequently enacted provided, as we have seen, that there should be but "one

form of action"—"a civil action;" and the legislature made the statute of limitations apply to all civil actions; which statute would probably be held, in this state, as it has been in others under legislation of a similar character, to embrace equitable as well as legal causes of action so far as they fall within the terms of the act. That is, the limitations as to all actions therein mentioned and provided for apply equally to causes of action formerly cognizable either in equity or at law. Newman v. De Lorimer, 19 Iowa, 244; Johnson v. Hopkins, Id. 49; McNair v. Lott, 25 Mo. 182.

In this view it is easy to perceive why the legislature adopted the 10th section of the act concerning the limitation in cases of fraud. If the provision had been merely that "actions for relief on the ground of fraud should be commenced within five years after the cause of action accrued," it is extremely probable that the courts would have been obliged to have held that the statute would begin to run from the period when the fraud was consummated, and not as under the well-known equity rule, from the period when the fraud was or should have been discovered. To remove all doubt on the point, and to preserve the equity doctrine on the subject, the legislature added the words: "The cause of action in such case shall not be deemed to have accrued until the discovery by the aggrieved party * * * of the facts constituting fraud."

In my judgment, the legislature by this provision, in substance re-enacted the doctrine which had been established by courts of equity, as to the effect of fraud in preventing the running or operation of statutes of limitation.

If this be so, it becomes important to examine the nature and grounds of the equity doctrine, the better to understand the meaning of the statute.

Mr. Justice Story states the doctrine of equity thus: "If a party has perpetrated a fraud which has not been discovered until the statutable bar may apply to it at law, courts of equity will interfere to remove the bar out of the way of the injured party." Story, Eq. Jur. § 1521. "The question often arises in cases of fraud or mistake, * * under what circumstances and at what time the bar of the statute begins to run. * * In cases of fraud and mistake, it will begin to run," he says, "from the time of the discovery of such fraud or mistake, and not before." Id. § 1521a.

This distinguished jurist, on the circuit, in the supreme court, and in the preparation of his commentaries, had frequent occasion thoroughly to explore the subject, and his opinions upon it are entitled to great consideration, though it is to be regretted that he does not go more into detail. In his commentaries, he does not discuss the nature of the fraud which in equity will prevent the bar of the statute from running; nor what, in the view of that court, will amount to a discovery of the fraud. An examination of these topics, as well as of the ground and reason of the rule itself, is essential to a thorough understanding of the subject, and is required by the circumstances of the cause now before us for determination.

As to the kind of fraud contemplated: Some judges have said that the fraud which will avoid the effect of the statute of limitations must be positive and actual fraud. But this is a point which we are not now required to notice, for in this case the fraud was actual and positive.

It seems to me quite clear, both from an examination of the authorities and the nature of the case, that the fraud which shall operate to displace the statute or prevent its application is secret or concealed fraud, a fraud unknown to be such to the party injured thereby. In a leading case on the subject Lord Redesdale said: "That as fraud is a secret thing, and may remain undiscovered for a length of time, during such time the statute of limitations shall not operate; because, until discovery, the title to avoid it does not completely arise, &c. Pending the concealment of the fraud, the statute ought not in conscience to run," &c. Hovenden v. Lord Annesley, 2 Schoales & L. 624.

That the fraud must be secret or concealed, not open, known, or visible, to prevent the bar of the statute from running, is distinctly asserted or assumed in many cases. Troup v. Smith, 20 Johns. 33, 47, 48, per Spencer, C. J.; Stearns v. Paige, 7 How. [48 U. S.] 819, 829; Carr v. Hilton [Cases Nos. 2,436, 2,437]; McLain v. Ferrell, 1 Swan. 48; Bucknor v. Calcote, 28 Miss. 432; Wilson v. Ivy, 32 Miss. 233; Cook v. Lindsey, 34 Miss. 451; Young v. Cook, 30 Miss. 320; Campbell v. Vining, 25 Ill. 525; Farnam v. Brooks, 9 Pick. 212; Phalen v. Clark, 19 Conn. 421; Moore v. Greene [Case No. 9,763], affirmed 19 How. [60 U. S.] 69, 72; Ang. Lim. c. 18; Sugd. Vend. 612, pl. 17.

It is declared, indeed, that no case can be found where the statute has been avoided, at law, or in equity, unless on the ground of fraudulent concealment on the defendant's part. Bishop v. Little, 3 Greenl. 405.

This subject was discussed by a truly great judge in the case of Carr v. Hilton, above mentioned, which was a suit in equity, by an assignee in bankruptcy, to recover of the defendant lands fraudulently conveyed to him by the bankrupt. The defendant relied on the statute of limitations contained in the bankrupt act of 1841. In holding that the cause of action did not accrue to the assignee till the fraud was discovered, Curtis J., says: "Statutes of limitation do not run in cases of fraud while it is secret. It is objected that the bill does not contain any averment that the cause of action was fraudulently concealed. But it does state a case of secret fraud, and it would be difficult to distinguish this from fraudulent concealment. A

secret, or what is the same thing, concealed fraud, is a fraudulent concealment of the cause of action." This I assent to as a perspicuous and accurate statement of the law on this point.

As to what amounts to a discovery within the meaning of the equity rule: This is regarded as so important that it must, with all necessary circumstances, be distinctly stated in the bill.

Grier, J., speaking of this point when delivering the opinion of the supreme court, says: "Especially must there be a distinct allegation as to the time when the fraud was discovered, and what the discovery is, so that the court may see whether, by the exercise of ordinary diligence, it might not have been before made." Carr v. Hilton; Fisher v. Boody [Case No. 4,814]; Moore v. Greene [supra]; s. c. 19 How. [60 U. S.] 69. And the bill, it has even been said, should negative laches in not making the discovery. Mayne v. Griswold, 3 Sandf. 463; Field v. Wilson, 6 B. Mon. 479.

The question recurs, however, what is discovery? I answer, notice of the fraud; or, in the language of the Missouri statute, of "the facts constituting the fraud." What is notice? In answering this, Judge Curtis, in Carr v. Hilton, quotes and approves the following doctrine laid down in Kennedy v. Green, 3 Mylne & K. 719, 721, 722: "It is a well established principle that whatever is notice enough to excite attention and put the party upon his guard, and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it."

The cases quite generally hold that the statute will run and fraud will not avoid it, if the plaintiff, under all the circumstances, has been guilty of negligence in discovering or attacking it. Smith v. Talbot, 18 Tex. 774; McDonald v. McGuire, 8 Tex. 361, 370; Campbell v. Vining, 25 Ill. 525; Ferris v. Henderson, 12 Pa. St. 49; Johnson v. Johnson, 5 Ala. (N. S.) 90; Bucknor v. Calcote, 28 Miss. 432; Edmonds' Ex'rs v. Goodwyn, 28 Ga. 38; Lott v. De Graffenreid, 10 Rich. Eq. 348; Farnam v. Brooks, 9 Pick. 212; Way v. Cutting, 20 N. H. 187; Stearns v. Paige, 7 How. [48 U. S.] 819, 829; Edwards v. Gibbs, 39 Miss. 166; Ang. Lim. § 183, and note, § 190; Nudd v. Hamblin, 8 Allen, 130, and cases cited.

It is easy, it seems to me, to press this principle too far, and I prefer the test or doctrine approved and applied by Judge Curtis, i. e., holding the plaintiff to know all that the information he is possessed of makes it his duty, as a reasonable man, ordinarily vigilant in protecting his own interests, to know or to learn.

The language of the statute is "discovery by the aggrieved party at any time within ten years, of the facts constituting the fraud." This is the same, in my opinion, as if it read discovery of the fraud. If a party knows the facts constituting the fraud, he knows the transaction to be fraudulent. It is not enough simply that he is aware of the fact of the transfer, but he must know "the facts" which make that transfer fraudulent.

In Godbold v. Lambert, 8 Rich. Eq. 155, 164, where an alleged fraudulent deed was placed on record, and it was contended that creditors were bound to know its character, the chancellor very sensibly observed, "registry of a deed is only implied notice of its contents, and not of any fraud that may be perpetrated in its execution." I cannot assent to the correctness of the remark in the case of Lott v. De Graffenreid, 10 Rich. Eq. 346, that the registry of a deed is sufficient notice to creditors, and the statute of limitations begins to run from that period, even though the deed be fraudulent.

There is one peculiarity of the Missouri statute which ought not to be passed without notice, and that is the clause which renders it necessary to make the discovery of the fraud within ten years. The language of the section was evidently copied from the New York Code, which is literally the same as the Missouri statute, except that in New York the words, "at any time within ten years" are omitted. How. N. Y. Code, § 91. The same words are omitted likewise from the Ohio Code, the Nebraska Code (St. 1857, p. 395), the Kansas Code (St. 1868, p. 633), the Minnesota Code (St. 1866, p. 451), and the Iowa Code (Revision 1860, § 2741). All these statutes enact that in actions for relief on the ground of fraud, "the cause of action shall not be deemed to accrue until the discovery of the fraud," or of the "facts constituting the fraud." Words limiting the time when the discovery shall be made are, so far as I have observed, peculiar to the legislation of Missouri.

Lord Erskine, in one case, declared that "No length of time can prevent the unkennelling of a fraud." Forrester, 66. Lord Northington said, with emphasis, in Alden v. Gregory, 2 Eden, 285, "Never, while I sit here, will delay purge a fraud." These expressions of decisive indignation against fraud are natural enough indeed, but if taken literally they lay down a doctrine which, if fully carried out, would be at war with the peace and repose of society, on which rests the wise policy of all limitation statutes. Hence the provision very generally adopted in the legislation of the states that the statute will begin to run from the period when the fraud is discovered, and hence, also, the additional provision of the Missouri statute, which seems to require the discovery to be made within ten years from the consummation of the fraud. The effect of this provision is, not to declare that the plaintiff cannot for a period of ten years be guilty of laches, or that he may for full ten years shut his eyes to facts which it would otherwise be his duty to notice and act upon, but its effect, rather, is to require him, at his peril, to make the discovery within the

prescribed period. I do not doubt that the provision is wise in conception, and will prove salutary in operation.

The reason or ground in this rule in equity is quite plain. Applying, as this rule does, only to cases of secret or concealed, as distinguished from known fraud, as before explained, I have no doubt that Lord Redesdale gives the true reason for its adoption by equity, viz: that it is against conscience for a party to avail himself of the statute when by his own fraud he has prevented the other party from knowing or asserting his rights within the period prescribed by the statutes of limitation. 2 Schoales & L. 634; Troup v. Smith, 20 Johns. 33, 47, 48.

This is entirely consistent with the exposition of the rationale of the doctrine by Baron Alderson in Brooksbank v. Smith, 2 Young & C. 58: "In cases of fraud, courts of equity hold that the statute runs from the discovery, because the laches of the plaintiff commences from that date, on his acquaintance with all the circumstances. In this courts of equity differ from courts of law, which are absolutely bound by the words of the statute." Imperial Gas, etc., Co. v. London Gas-Light Co., 26 Eng. Law & Eq. 425.

So in cases under the Missouri statute: the limitation begins to run as against the plaintiff when he has knowledge of facts which would have impressed a reasonable man with the belief that the transaction was fraudulent, for from that time his laches begins, if his debt is mature.

Judge Curtis, in the case before cited, speaking of the ground of the rule that fraud voids the statute, says: "In my judgment the most reasonable and sensible ground is that, substantially, the title to avoid it does not arise until the fraud is known." [Carr v. Hilton.] This is adopting the view of Lord Talbot, Cas. t. Talb. 63, and it has also the sanction of eminent judges.

The title to avoid the fraudulent transaction does ordinarily arise as soon as the fraud is perpetrated (26 Eng. Law & Eq. 425; J. J. Marsh. 445; 33 Miss. 233; 20 Johns. 33, supra; but substantially it does not, because the fraud is not known, and hence the fraudulent wrongdoer is estopped, while the aggrieved party is kept ignorant of his rights, from setting up against him the bar of the statute.

But this assumes that the creditor's debt is one which is due, so that he is in law enabled effectively, to assert his rights, and therefore properly chargeable with negligence if he fails, for the prescribed period, to do so.

There may be some question as to the scope of the language of the statute, "an action for relief on the ground of fraud;" but there is no doubt that a bill in equity by a creditor to set aside a fraudulent conveyance or transfer of property by his debtor, is such an action. The cases before cited will show that this point has never been disputed.

Having thus seen that the present suit is one which falls within the aforementioned tenth section of the limitation act; that the fraud contemplated by that act is fraud which is secret or concealed, as distinguished from that which is open and known; and having also seen what, in the view of a court of equity, is regarded as a discovery of the fraud, so that thenceforth the laches of the plaintiff and the running of the statute alike begin; that the ten years' limitation in the section is not to be construed as sanctioning negligence or the shutting of eyes to information of the fraud; and having also seen the reason, or policy and purpose of this legislation, we are now prepared to apply the statute as thus expounded, to the facts of the present cause. This, in view of the length of this opinion already, we must do briefly.

The facts constituting fraud in the transfer of property by a debtor, are, in some cases, concealed or secret, and in some visible or open. The fraud in the sale of the stock of goods to Smith, in February, 1861, in view of the relationship of the parties, of facts known to a great many creditors as to Woodward's condition, and Smith's knowledge of it, and the manner in which Woodward was still allowed to exercise control over the property, was such, in our judgment, that any creditor might, if ordinarily vigilant, have discovered it within five years from its sale.

If the present was a bill simply to have declared fraudulent the sale made in 1861, we should have to hold, taking all the circumstances together, that the fraud was not so concealed or secret but the creditors, using due diligence, might and should have discovered it, and if their debts were due, could and should have assailed it within the five years. Undoubtedly, it was this view of the case which was taken in the court below.

But, as we have before shown, such is not the case made by the bill, and such is not the relief sought. The question before the court is, whether, upon proofs, Woodward has any interest in the limited partnership carried on in the name of the respondent, Gray; whether Smith or Woodward is the party really owning the interest other than that owned by Gray.

Upon this subject we entertain a very decided conviction, and that is, that Smith has no real and substantial interest therein; has apparently no money invested in it beyond what he has received; that his pretence of ownership is purely sham, a device to keep at bay the creditors of Woodward; and that the latter, though held out simply to be a clerk, is the owner of the interest in the firm, other than that held by Gray. Since 1861, Woodward has, in effect, been managing the store the same as before, giving to it his time, attention, and skill; to these, and the profits which are their product, his creditors and not Smith, are best entitled.

Equity looks at substance and not form. It penetrates beyond externals to the substance of things; and it accounts as nothing, and delights to brush away barricades of writ-

ten articles and formal documents when satisfied that they have been devised to conceal or protect fraud.

The fraud in the case before us, as we view it, ended not with the purchase of the goods in 1861, but continued down to the time this bill was filed. The case is different from what it would be if the sale of the goods had been the only transaction, and Smith had taken exclusive possession of them and held or sold them as his own more than five years before his purchase was attacked by creditors of his vendor.

It is our opinion that the fraud, commenced in 1861, has been continued down to the time this suit was brought; that in equity, as respects creditors, the interest in the firm and its business is owned by Woodward and not by Smith; that the latter holds that interest, whatever it may be, in secret trust for the former, and hence the statute of limitations cannot avail to prevent that interest from being ascertained and subjected to claims of creditors of the bankrupt.

It is not necessary in this view to consider the point made that at all events the statute could not bar the relief sought, at least not entirely, because the debts of some of the creditors of Woodward did not fall due until 1867.

We now decide two points only: First, that Woodward has an interest in the property and assets of the firm business carried on in the name of Gray, which may be reached by the assignee in the present suit. Second, that the statute of limitation, pleaded by the respondent, Smith, is no bar to the relief sought.

The decree of the district court is reversed. Reversed.

NOTE. Discovery of fraud within meaning of statute of limitations: Affirmed, Wood v. Carpenter, 101 U. S. 141. Followed, Davis v. Anderson [Case No. 3,623]. Cited, Andrews v. Dole [Id. 373]; Baldwin v. Raplee [Id. 801]; O'Brien Co. v. Brown [Id. 10,399]; Darling v. Berry, 13 Fed. 659.

Property fraudulently conveyed vests in assignee in bankruptcy: Followed, In re Rainsford [Case No. 11,537].

Case No. 9,165.

MARTIN v. SOMERVILLE WATER POWER CO.

[3 Wall. Jr. 206; 5 Am. Law Reg. 400; 27 How. Prac. 161; 37 Hunt, Mer. Mag. 64; 13 Leg. Int. 332.] [1]

Circuit Court, D. New Jersey. Oct. Term, 1856.

CONSTITUTIONAL LAW—CONTRACTS—ACT OF LEGISLATURE—MORTGAGE—REMEDY DESTROYED.

The constitution of New Jersey adopted in 1844 limits the powers of the legislature and separates them from those of the judiciary, and adopts the prohibitions of the constitution of the United States against laws impairing the obligations of contracts, and further, prohibits the depriving a party of any remedy for enforcing a contract which existed when the contract was made. Hence, where the legislature passed an act for the relief of the creditors of a manufacturing corporation, providing that certain persons should be authorized to sell all property mortgaged for the payment of bonds, at public sale, to the highest bidder, free from all encumbrances, and after paying certain expenses and costs, should distribute the proceeds to the corporation's creditors, according to the priorities of their several liens, it was held that such legislation was unconstitutional, by reason of its impairing the obligation of the contract between the mortgagors and the mortgagees, and depriving the mortgagees of a remedy which existed at the time the contract was made.

[Cited in State v. Assessors of City of Rahway, 43 N. J. Law, 340.]

The Somerville Water Power Company, incorporated under the laws of New Jersey, and doing business in that state, issued, in 1848, to different persons, a number of negotiable bonds, payable in 1853, and amounting in all to $50,000; and to secure their payment, executed (as under its charter it had power to do) a mortgage of all its real estate, property and franchises to trustees for the benefit of the bondholders; one of the conditions of the bonds being, "that if default should be made in the payment of the $50,000, or any part of it, it should be lawful for any holder to enter upon the premises, and to sell and dispose of them, and of all benefit and equity of redemption of the corporation, and to make a good and sufficient deed, &c., to the purchaser in fee simple, and out of the money arising from such sale, to retain the principal and interest which shall then be due on the said bond or obligation, together with the costs and charges of advertisement and sale of the premises." The title to the lands and property of the company having been encumbered by judgments, and embarrassed by decrees, sales and conveyances subsequent to this mortgage, the company or its assigns, and some of its creditors, sought the aid of the New Jersey legislature to enable them to put things on a new and better basis, and with that view to clear off all liens and make a perfect title to the property. For these purposes two acts of assembly (Acts of 10th and 18th of March, 1856 [Laws 1856, pp. 193, 393]) were passed. Taken together, they recited that certain persons had been appointed receivers of the property in a suit in the court of chancery of the state of New Jersey, to protect and superintend the real estate, property and franchises of the said company; that the concerns and interests of the company had become so involved in complicated difficulties and embarrassments, that the parties interested therein as creditors and stockholders could not have full and satisfactory relief, without protracted and expensive suits in the courts of law and equity. They recited further that it was represented by the parties interested in the property and affairs of the company, that the company was abundantly able to pay off and satisfy every just claim against it, and that a favorable oppor-

[1] [Reported by John William Wallace, Esq., and here reprinted by permission. 37 Hunt, Mer. Mag. 64, contains only a partial report.]

tunity was now presented to sell and convey its property, and that the interests of creditors and stockholders would be promoted by a sale of its real estate with all its franchises and works clear of all encumbrances, and had prayed for legislative aid in the premises. They then enacted—First. That the receivers might sell the real estate, franchises and works of the company, &c., at public sale, to the highest bidder, free and clear of all encumbrances, and free and clear of all mortgages, judgments and other liens whatever. Second. That these receivers might then deduct from the proceeds of such sale all reasonable allowance for commissions and services heretofore rendered by them as such receivers, and pay out of said proceeds all expenses by them incurred in effecting and consummating such sale. and all such costs and expenses as have heretofore been incurred in a suit pending in the court of chancery of New Jersey, wherein they had been appointed receivers.[2] Third. That after the same were so paid, the receivers should next, out of the proceeds, pay off and satisfy all just and lawful debts, due from said company to any creditor or creditors, in the order of priority in which they might lawfully stand of record, and after the payment of such debt or debts of record should, out of the balance, pay and satisfy all other just and lawful debt or debts which were not of record, if said balance was sufficient for that purpose, and if not sufficient, then in proportion to the respective amounts of such debts or claims, and after the payment of all said last mentioned debts, should ascertain by due and legal evidence, who, as contributors to the property, franchises and work of said company, or as stockholders in the same, were entitled to the balance of said proceeds, and in what proportions, and should pay to such persons their respective proportions of such balance. Fourth. That the receivers should have power to subpoena and examine witnesses, touching the duties and trusts reposed in them by these acts, and should make report to the chancellor of the state, of what they did in the premises; and that any person aggrieved by their proceedings should be at liberty to file exceptions to such report in respect to his own particular interest therein, which exceptions should abide the final decree of the chancellor to be made therein.

Under these acts, the receivers sold the whole of the mortgaged property for $50,000; the bonds never having been paid, and now amounting with interest to $60,000. Before the sale was made, however, the complainant who held some of the bonds which he had bought in common course in the New York market, and on which bonds default had been made in the payment of both interest and principal, filed this, his bill in this court for the foreclosure of the mortgage, and a sale of the property, or so much thereof as might be necessary to pay the amount due on his bonds; and for an injunction to restrain the receivers from proceeding any further under the acts of the legislature already mentioned. The constitution of New Jersey adopted in June, 1844 (article 3, § 1), says: "The powers of the government shall be divided into three distinct departments—the legislative, executive and judicial. And no person or persons belonging to or constituting one of these departments, shall exercise any of the powers properly belonging to either of the others," &c. It says again (article 4, § 3): "The legislature shall not pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or depriving a party of any remedy for enforcing a contract which existed when the contract was made." The constitutionality of the acts of assembly was, therefore, the point in question.

W. L. Dayton and A. O. Zabriskie, for the company, referred to many legislative acts of the state of New Jersey, which showed that from the foundation of the province a species of chancery jurisdiction had been exercised by the legislature; which acts, though often operating to substitute, against the creditors' will, one fund for another, had, nevertheless, never been regarded as impairing the obligation of contracts, or in any way unconstitutional; the main purposes of the contract under a new form being still kept in view. Potts v. Trenton Water Power Co., 1 Stockt. [9 N. J. Eq.] 593, was such a case. There the Trenton Water Power Company owed much money secured by mortgage, which the mortgagees were not pressing; and became insolvent. A receiver was appointed at the instance of some creditor; a subsequent one perhaps. But the receiver could make no sale free of liens; and the legislature passed an act to give him power. He did sell, professing to sell free of liens, and his sale under the act was declared to have discharged the liens. Of course the remedies of the mortgagees had been violently taken away; but the proceeds having been paid into chancery and so substituted in the place of the land, the legislative act was declared by the court of errors and appeals to be constitutional.

After argument by Mr. Ransom and by the complainant in person, the court's opinion was given by

GRIER, Circuit Justice. [The demurrer to the bill in this case has been entered for the purpose of having a final hearing and judgment of the court on the validity of the act of the legislature of New Jersey, authorizing the receiver to sell the premises in question free and discharged from the lien and estate of the mortgagees.

[It is contended that this legislation is forbidden both by the constitution of the state and that of the United States.] [3]

[2] Of this suit the complainant had had no notice, and was not a party to it.

[3] [From 5 Am. Law Reg. 400.]

Previous to the 29th of June, 1844, the state of New Jersey was governed by the old colonial constitution, adopted on the 2d of July, 1776. This contained no bill of rights nor any clear limitation of the powers of the legislature. The history of New Jersey legislation exhibits a long list of private acts and anomalous legislation on the affairs of individuals, assuming control over wills, deeds, partitions, trusts and other subjects usually coming under the jurisdiction of courts of law or equity. Consequently the decisions of the courts of New Jersey on questions arising under the old constitution, cannot be cited as precedents applicable to the present one, which carefully defines and limits the powers entrusted to the legislature, the executive and the judiciary. It is very desirable that the constitution of a state should be construed by its own tribunals, and we regret that the researches of counsel have not furnished us with such precedents. The case of Potts v. Trenton Water Power Co., 1 Stockt. [9 N. J. Eq.] 592, has reference to an act passed before the adoption of the present constitution. That act was declared by the court "not to impair the obligation of any contract, and to be remedial only." The first mortgagees gave their assent to the sales made under it, and others could not object to it as made without their authority. In this important respect it differs from the present case, and cannot be relied on as a precedent.

The validity of this act has been challenged on several grounds. If found invalid on any one, we need not examine the others. The constitution of New Jersey has not only carefully limited the powers of the legislature, and separated them from those of the judiciary, but it adopts the prohibitions of the constitution of the United States against "ex post facto laws, and laws impairing the obligation of contracts," and with this addition, "or depriving a party of any remedy for enforcing a contract which existed when the contract was made." It is not contended that this act comes under the category of an "ex post facto law;" and if it be merely remedial in its character, as defendants contend, there can be no valid objection to it under this head of the constitution.

Does it impair the obligation of the contract between the mortgagees and mortgagors, or deprive the mortgagees of any remedy which existed when the contract was made? The act and supplement must be construed together as forming one act. It is entitled, "An act to relieve the creditors and stockholders of the Somerville Water Power Company," &c. It sets forth, in its preamble, certain representations, made no doubt by those who procured the act, showing plausible reasons for such legislative interference, but the validity of the act must be judged from its actual operation on the rights of parties subjected to it, and not by the pretences put forth by the preamble. This may show that the legislature acted in good faith, and believing that their interference would wrong no one, but not that such was the actual result. Legislatures cannot be too cautious, when asked to interfere with special legislation for particular persons or particular cases, on ex parte representations. They cannot call all parties before them and judge upon a full hearing; this is for the courts. Their action may not always be unjust, but it may be and often is tyrannical and injurious.

Let us inquire what is the contract, and how is it affected by this act? The mortgagees of this property hold the legal title in trust for the several bondholders, who may properly be treated as the real mortgagees. They may be said in common parlance, to have a "lien" or "security" on the property mortgaged, but they have it by force of their legal title to the property. It is an estate in fee simple, defeasible only by the payment of the debt. When the condition of the obligation is broken, the mortgagees may enter on the premises and recover the rents, issues and profits thereof, till their debt is satisfied. If they see fit, they may appoint an agent or attorney, who may enter on the lands under their direction, and make sale of the same in satisfaction of the debt. This disposal of the mortgaged premises is to be made according to the discretion and judgment of the mortgagees, and not of another. No subsequent encumbrancer or assignee of the equity of redemption can divest their estate contrary to their will, unless by a tender of the debt due. They cannot be compelled, to suit the convenience of others, to put up the property to sale at a time or in a manner which might lessen or injure their security. Now by this contract the estate of the mortgagees is defeasible only by payment of the debt. But this act permits the receiver to dispose of their estate, and does not provide that the debt shall be first fully paid. It permits the receiver to sell for any sum, whether it be sufficient for such purpose or not. And the receiver has made a contract of sale for a sum insufficient by many thousands of dollars. This is making a new contract for the parties and impairing the obligation of the mortgage. It may be truly said, "'tis not so written in the bond," The mortgagees may dispose of their security for less than the amount of their debt, but no other person can.

2. The obligation of this contract is moreover impaired by this act, in that it gives a precedence to certain indefinite costs and charges (not costs of the sale merely) to be paid out of the proceeds of the property before the mortgage debt. This is in direct contravention of the contract by which the estate was conveyed to the mortgagees free from all charges and encumbrances.

3. The mortgagees had, by their contract, a remedy to be used at their own option and discretion as to time and mode of sale, and by law they had the remedy of entry on the premises and receiving the rents and profits.

This act deprives them of both, contrary to the letter of the constitution of New Jersey, without invoking the aid of the cases of Bronson v. McHenry, 1 How. [42 U. S.] 311, and McCracken v. Hayward, 2 How. [43 U. S.] 611.

We have not thought it necessary to review the very numerous cases on this subject, or to attempt any metaphysical definition of what constitutes the "obligation of a contract;" as it is clear that any legislation which defeats the estate of the mortgagee, without payment or tender of the whole debt due on the bonds, which gives a preference to posterior liens, and which deprives the mortgagee of his remedy given by the covenants of his contract, as also that given by the law of the land, "impairs its obligation," and is contrary to the letter and spirit of the constitution of New Jersey. This act may be remedial as to the owners of the equity of redemption and those having liens against it, but the mortgagees have a right to say "non in hoec foedera veni"—we have never agreed to have our estate defeated to suit the convenience of others.

[See 9 Barb. 48.]

[The plaintiff is entitled to a decree making the injunction perpetual, but the defendants have leave to answer as to the other charges of the bill.] [4]

Case No. 9,166.

MARTIN v. TAYLOR.

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

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

COURTS — JURISDICTIONAL AMOUNT—COVENANT—PENALTY—DAMAGES—ACTION OF DEBT.

1. Action of covenant upon an agreement under seal, containing a penalty amounting to less than five hundred dollars. The circuit court has jurisdiction, the action being for damages exceeding five hundred dollars, as laid in the declaration.

[Cited in Ladd v. Tudor, Case No. 7,975. Followed in Victor Sewing Mach. Co. v. Mingus, Id. 16,936. Cited in brief in Healy v. Prevost, Id. 6,297.]

2. If an agreement contain a penalty, the plaintiff may bring debt for the same, and for no more; or covenant, and recover more or less damages than the panalty.

[Cited in Lawrence v. U. S., Case No. 8,145.]

[Cited in Farrar v. Christy, 24 Mo. 474. Cited in brief in Shreve v. Brereton, 51 Pa. St. 182. Cited in New Holland Turnpike Co. v. Lancaster Co., 71 Pa. St. 446. Applied in Townshend v. Simon, 38 N. J. Law, 239. Quoted in Supervisors of Jackson Co. v. Leonard, 16 W. Va. 481. Cited in People v. Central Pac. R. Co., 76 Cal. 38, 18 Pac. 95.]

3. The defendant, against an express acknowledgment under seal, cannot deny the effect of such obligation, from expressions in the instrument, which amount only to an implication to the contrary.

[4. Cited in U. S. v. Craig, Case No. 14,883, to the point that comparison of handwriting is inadmissible as evidence.]

Covenant upon an agreement under seal, whereby the defendant, in consideration of a Virginia treasury land warrant for twenty thousand acres of land, which he acknowledges to have received of the plaintiff, and of a sum of money agreed by plaintiff to be paid on the performance of the work, stipulated by the defendant; agrees to enter the said warrant on vacant and unappropriated land in the state of Virginia, of a particular description, and to have the same surveyed and regularly returned, all at the expense of the defendant; except the surveyor's fees. The defendant, in another clause of the agreement, covenants, immediately on receipt of said warrant, to proceed to locate and survey, &c. The parties, for the true and faithful performance of all and singular the covenants, &c. bind themselves each to the other in the penalty of £120, Virginia currency.

Breach assigned in the words of the covenant. Plea, covenants performed. Replication, supporting the breach in the declaration.

Mr. Dallas objected to the reading a deposition which Mr. Ingersoll, for the plaintiff, was about to read, because not signed by the deponent.

Ingersoll: The deposition was only intended to prove the execution of the covenant; and as on this plea it is unnecessary to prove it, I shall not insist upon the deposition.

Dallas moved for a nonsuit, on the ground that the £120 was in lieu of liquidated damages, and that as the plaintiff could recover no greater sum than that, the court had no jurisdiction of the case.

WASHINGTON, Circuit Justice. Where there is a penalty in an agreement under seal, the party injured, may, at common law, sue for the whole penalty, and must be satisfied with it; or he may bring covenant, and recover in damages more or less than the penalty. See 4 Burrows, 2225; 6 Brown, Parl. Cas. 470. If, in the latter case, the sum stipulated to be paid is not a penalty, but intended as a compensation for non-performance, it must govern the jury in the assessment of damages. But that is not the present case; and yet more, it is unimportant on the present motion, which is to nonsuit the plaintiff for want of jurisdiction. The action sounds in damages. The declaration claims more than 500 dollars; and by the decisions in the supreme court, the amount of the plaintiff's claim laid in the declaration, furnishes the rule for testing the jurisdiction of the federal courts. Motion overruled.

Ingersoll endeavoured to prove a receipt of defendant, by comparison of hands.

PER CURIAM. This kind of proof is inadmissible.

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[4] [From 27 How. Prac. 161.]

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

Ingersoll, having proved the Virginia treasury price of a land warrant, closed the opening.

Dallas insisted, that the plaintiff had not proved delivery of the land warrant, and therefore was not entitled to recover. That the acknowledgment of having received it, in the first part of the instrument, was contradicted by the latter part, which says, that "on receipt of the warrant, the defendant shall proceed to locate," &c.

PER CURIAM. The defendant cannot, against an express acknowledgment of the receipt, do it away by these expressions, which at most amount only to an implication of the contrary.

THE COURT, after stating to the jury that the only proof exhibited was the articles and the price of a Virginia land warrant at the treasury, left the question of damages upon this proof to the jury.

MARTIN (THURSTON v.). See Case No. 14,018.

Case No. 9,167.

MARTIN v. TOOF et al.

[1 Dill. 203;[1] 4 N. B. R. 488 (Quarto, 158).]

District Court, E. D. Arkansas. 1870.[2]

BANKRUPTCY—FRAUDULENT PREFERENCE—BURDEN OF PROOF.

1. The inability to pay debts in the ordinary course of business as merchants in trade usually pay them, constitutes insolvency within the meaning of the bankrupt act [of 1867; 14 Stat. 517].

2. Where a party cannot pay his debts in the ordinary course of business and knows that he cannot, he will be held to have had knowledge of his insolvency.

3. The necessary effect of a conveyance to creditors in satisfaction either in whole or in part of a pre-existing debt, by one who knows that he is insolvent, is a preference in fraud of the bankrupt act, and he must be held to have intended this as a necessary result of his action.

[Cited in Alderdire v. State Bank of Virginia, Case No. 154; Re Jacobs, Id. 7,159.]

4. Ignorance of the law cannot avail creditors who are possessed of facts that show the insolvency of the debtor, and a preference received under such circumstances is fraudulent and void.

5. Where a transaction that contemplates the securing of a debt is out of the ordinary course of business, the bankrupt act declares it to be prima facie fraudulent, and the onus of showing that it is not so is cast upon the defendant.

[See Babbitt v. Walbrun, Case No. 694.]

[Cited in Washburn v. Huntington, 78 Cal. 576, 21 Pac. 306.]

[Suit in bankruptcy by Martin, assignee, &c. against Toof, Phillips, and others.]

Watkins & Rose, for plaintiff.

Garland & Nash, for defendant.

CALDWELL, District Judge. W. P. Haines & Co., a firm composed of W. P. Haines and C. E. Chetlain, were retail merchants doing business at Augusta, in this state. On the 29th day of February, 1868, they filed their petition praying to be adjudged bankrupts, and on the 22d May, 1868, they were so adjudged, and the plaintiff appointed assignee. On the 18th day of January, 1868, the bankrupts conveyed to the defendants for the consideration of $1,876.84, to be credited on a debt due from the bankrupts to the defendants, an undivided half of a parcel of real estate owned by the bankrupts as partnership property. At the same time the bankrupts assigned to F. M. Mahan, one of the members of the firm of Toof, Phillips, & Co., a title bond they held for certain other real estate in the town of Augusta, on which the bankrupts had made valuable improvements. This title bond was assigned to said Mahan for the consideration of $7,000, also to be credited on the indebtedness of the bankrupts to Toof, Phillips, & Co. There were some $740 of the purchase money still due on said property, and this said Mahan paid and procured a conveyance to himself from one Hough, the owner of the fee of the property.

The plaintiff charges that these conveyances were made in fraud of the bankrupt act; that the bankrupts were insolvent at the time they made them; that they were made with intent to give a preference to the defendants, and that the defendants at the time said conveyances were made, knew or had reasonable cause to believe the bankrupts were insolvent, and that said conveyances were made in fraud of the bankrupt act. Plaintiff also charges that the assignment of the title bond to F. M. Mahan, one of the defendants, was in fact for the use and benefit of the defendants, and for the purpose of securing the said property or its value to the defendants, in fraud of the rights of the other creditors of the bankrupts, and that this purpose was well known to, and participated in, by said Mahan.

In determining this case, the following inquiries arise: (1) Was the firm of W. P. Haines & Co. insolvent at the date of these conveyances? (2) Were these conveyances made with a view to give a preference to defendants over the other creditors of the bankrupts? (3) Did the defendants have reasonable cause to believe the bankrupts were insolvent?

1. That the bankrupts were in fact hopelessly insolvent at the date of this transaction cannot be questioned, as will be seen from the following statement of their liabilities and assets:

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

[2] [Affirmed by circuit court; case unreported. Decree of circuit court affirmed by supreme court in 13 Wall. (80 U. S.) 40.]

Indebtedness of firm at date of conveyance as per schedules on file and referred to in deposition of Haines		$55,353 01
Individual indebtedness of members of the firm:		
Chetlain		3,850 00
Haines		105 00
Total indebtedness at date of conveyances		$59,308 01
Assets of firm as per schedules	$21,851 41	
Stone house and lot, say	1,800 00	
Dwelling house of each partner, say $2,000 each	4,000 00	
		27,651 41
Excess of liabilities over assets.		$31,656 60

About $18,000 of the assets consisted of notes and accounts, most of which are shown to be worthless. Nearly all of the remaining assets as shown by bankrupts' schedules, consisted of personal property on which defendants held a mortgage, and the real estate embraced in the bankrupts' conveyances to defendants. The stock of goods on hand invoiced as shown by the schedules, $2,600. And this was the condition of the bankrupts' property at the date of the conveyances to the defendants. Chetlain and Frisbie both testify that the bankrupts sold no goods and did no business after that time. The indebtedness of the bankrupts is stated by some of the witnesses to have been from $31,000 to $35,000. How this discrepancy occurs between the statement of indebtedness by the witnesses and the statement of the indebtedness by the bankrupts in their schedules does not appear, and is not material, as taking either as correct the bankrupts were hopelessly insolvent. All the bankrupts' indebtedness, with slight exceptions, was in the shape of commercial paper, and with the exception of a debt owing to Walker Bro. & Co., amounting only to some $1,000, was over-due and unpaid at the date of this transaction. Creditors had pressed the bankrupts for payment of their debts without result; their stock of goods had been levied on, and their store closed by the sheriff by virtue of an execution issued on a judgment against one of the bankrupts; they had contemplated going into bankruptcy, and during the fall and winter of 1867–68, they only paid (excluding payments to defendants) $500, on an indebtedness of over $50,000 then over-due. The inability to pay debts in the ordinary course of business, as merchants in trade usually do, constitutes insolvency within the meaning of the bankrupt act. The bankrupts could not pay their debts in the ordinary course of business, and they knew it, and they must, therefore, be held to have had knowledge of their insolvency.

2. Knowing they were insolvent and unable to pay their debts, they conveyed to the defendants a large portion of their property, in part satisfaction of a pre-existing debt. The necessary effect of this conveyance was to give the defendants a preference, and they must be held to have intended the necessary result of their action. The witness, Frisbie, says that in the latter part of December, 1867, "I assisted Mr. Haines in making up his balance sheets; the result was that their available assets were not sufficient to pay their indebtedness."

3. The defendants not only had reasonable cause to believe the bankrupts insolvent, but they had actual notice of the fact. Chetlain, in his deposition, says: "I told Mr. Mahan we could not pay out," and the same witness says that Mahan was in Augusta during the time their goods were levied on, and that they "had an interview with Mr. Mahan on the subject." And the witness, McCurdy, swears that sometime in December, 1867, defendants sent him for collection, a note against the bankrupts, that he was unable to collect it, and he then says: "I wrote to Toof, Phillips, & Co., that I thought they had better look to their interests, as my conviction was that it was doubtful about their being able to collect their debt from William P. Haines & Co. I think shortly after writing this letter that a representative of the house came round to look after the matter. I think it was Mr. F. M. Mahan."

The defendants, in their answer, say: "It is true, as alleged in said bill, that at the time of the said several transactions, said Haines & Co. owed a large amount of debts, but that they were then insolvent is untrue, but, on the contrary, it is true that at the time aforesaid, said Haines & Co. had available assets in excess of their indebtedness, to the amount of sixteen thousand dollars; that while it is true said Haines & Co. did owe Toof, Phillips & Co., they were desirous to secure their debt, yet they deny they did so, or that they made any effort to secure the same, regardless of the rights of other creditors, but at the time aforesaid said Haines & Co. were not only able to secure said debt of defendants, but also to make good and secure all their other liabilities. Here is a direct admission of knowledge of the bankrupts' indebtedness, and the averment that the bankrupts were able to "make good and secure their other indebtedness" is fairly tantamount to a confession that they could not pay in the ordinary course of business, as merchants usually do. They had positive knowledge the bankrupts had not done so in their case, but all doubts on this point are put at rest by the defendants' answer to the first interrogatory of the bill, in which they say: "At the time of making of the transfers, defendants do not believe said Haines & Co. were able to pay their debts in money, but they were able to do so on fair market valuation of the property they owned, and of their assets generally, and they were then able to do so." Here is a direct confession of a fact

that in law constitutes insolvency, and it is idle for defendants to profess ignorance of the insolvency of the bankrupts in the face of such a confession. If the bankrupts could not pay their debts in the ordinary course of business, that is, in money, as they fell due, they were insolvent, and if defendants did not know this constituted insolvency within the meaning of the bankrupt act, it was because they were ignorant of the law, and that ignorance can avail them nothing in this suit; and their denial of knowledge of the insolvency of the bankrupts, must, in view of their own confessions, and the overwhelming proof in the case, be held to be a denial of the law rather than the fact.

The transactions themselves being out of the ordinary course of business, the bankrupt act declares them prima facie fraudulent, and casts on the defendants the onus of showing they were not so. They not only fail to rebut this prima facie case, but their own admissions, and the proofs in the case, show that the transactions were, in fact, frauds upon the bankrupt act. The effort to make it appear that the transfer by the bankrupts, of their homesteads to Mahan, was a bona fide transaction, and that it was entered into without any view or expectation that the consideration Mahan was to pay for the property was to apply as a creditor on the indebtedness of the bankrupts to the defendants, is negatived by every fact and circumstance appearing in the whole case. Chetlain swears positively that it was "expressly understood between me and Mr. Mahan that the drafts (Mahan's drafts for the price of the property) should go to our credit." Haines swears to the same effect. The pretence that Haines & Chetlain were at liberty to make what disposition they pleased of Mahan's drafts on Toof, Phillips, & Co., for the $7,000 agreed to be paid for the property, and that their transmission to Toof, Phillips, & Co., by Haines & Chetlain, with instructions to place to the credit of Haines & Co., was an agreeable surprise, is too incredible for belief. It is obvious that these drafts never would have been paid if Haines & Chetlain had transferred them to any other of their creditors, or if they had demanded the money on them. The claim that Mahan made this purchase in good faith in his own name, and for himself, as "an investment," cannot be supported.

The property which he would have it appear he purchased as an investment on private account, for seven thousand dollars, to be paid in cash, is shown by the testimony of Chetlain to have been worth only $4,000, and by the testimony of Hamblet to have been worth only $3,500, and it is valued by the bankrupts in their schedules at $4,000, and we may reasonably suppose its value was not under estimated by them. The property at the same time was subject to a lien of $740 for the original purchase money. That some inducement other than a desire to make "an investment" must have operated on Mahan to have induced him to give $7,000 for property worth at most but $4,000, with an incumbrance on it for $740, is a conclusion which the mind cannot resist. What was that inducement? But one answer can be given to this question: it was to secure this property for his firm, on account of the bankrupts' indebtedness to them; and the testimony of the witness, Mahan, must be based rather on the form of the transaction as evidenced by the papers, than on the actual intention and purpose of the parties. That he expected to pay to his firm $7,000 in cash for taking up the drafts he drew for the agreed price of this property, I do not believe, nor do I believe he could or would so swear. It is true he says "the amount was charged up to him on the books of the firm." So was the title bond assigned to him and the deed made to him, but equity pays no regard to the forms resorted to by parties, in fraud of the law. Chetlain and Haines both swear, and every fact in the case shows that the inducement to this purchase on the part of Mahan, was to secure the value of this property to his firm; and on the part of the bankrupts, it was to give a preference to the defendants, and to obtain further advances. These advances Mahan promised to make in order to secure these conveyances, but as soon as he obtained the conveyances the defendants refused to make any further sales or advances to the bankrupts. Mahan admits he "agreed at the same time to continue selling them goods on the usual time, same as we had been doing before, and we continued to do business with them as usual until some time in the following month." If he means to be understood as saying defendants sold the bankrupts goods on credit, or made any advances to them in any manner, after the date of these conveyances, he is contradicted by the positive testimony of Haines and Chetlain, and by Exhibit A, to his own deposition, which contains a full statement of defendants' dealings with the bankrupts, and shows that defendants did not sell the bankrupts any goods, or give credit to them in any way whatever, after the date of these conveyances.

It must be recollected that in this case the interests, both of the bankrupts and defendants, are adverse to the assignee, for if the plaintiff succeeds it can only be on the ground that the bankrupts made a preference in fraud of the bankrupt act, which would preclude them from obtaining a discharge, and the defendants, of course, are interested to the value of the property. It is not, therefore, very remarkable that they should strive to avoid a conclusion leading to such results. As the evidence shows a state of facts from which the law will infer and declare insolvency and an intent to prefer, it is but fair to presume their denials were intended to repel a charge of actual moral fraud, and that

they were made in ignorance of the legal effect of their action.

No one who will read carefully the pleadings and proofs in this case can resist the conclusion that this transaction was a bold effort of an enterprising and cunning creditor to possess himself of the bulk of the property of the bankrupts, in fraud of the bankrupt act and the other creditors of the bankrupts.

The conclusions reached on the law and the facts of this case are fully supported by the ruling of this court in the case of Rison v. Knapp [Case No. 11,861] and in the following cases: In re Black [Id. 1,457]; Merchants' Nat. Bank v. Truax [Id. 9,451]; In re Arnold [Id. 551]; In re Gay [Id. 5,279]; Haughey v. Albin [Id. 6,222]; Wilson v. Brinkman [Id. 7,794]; Farrin v. Crawford [Id. 4,686]; In re Randall [Id. 11,551]; Ahl v. Thorner [Id. 103]; In re McDonough [Id. 8,775]; In re Kingsbury [Id. 7,816]; Graham v. Stark [Id. 5,676]; Scammon v. Cole [Id. 12,433]; Campbell v. Traders' Nat. Bank [Id. 2,370].

The mortgage on the personal property and the prospective crop of the bankrupts, executed to secure the defendants for advances made and to be made to aid in the production of a cotton crop, was executed many months before they were adjudged bankrupts, and so far as the proof shows, before they were insolvent, or the defendants had reason to believe them to be so, and so far as relates to the property mentioned in this mortgage, the bill is dismissed. As to the real estate conveyed by the bankrupts to Mahan and to the defendants a decree will be entered for the complainant vesting the title of the property in him.

The defendants should be repaid the $740 paid out by them to perfect the title of this property, and the decree will require the complainant to pay that sum to them after deducting therefrom the reasonable rents and profits of the property during the time they have had the possession. A master will be appointed to take and state the account.

Ordered accordingly.

[NOTE. From the decree entered in this case an appeal was taken by respondents to the circuit court. The decree was affirmed. Case unreported. The respondents then appealed to the supreme court, where the decree was again affirmed. 13 Wall. (80 U. S.) 40.]

Case No. 9,168.

MARTIN v. UNITED STATES.

[Hoff. Land Cas. 146.][1]

District Court, N. D. California. June, 1856.

MEXICAN LAND GRANT—VALIDITY—UNITED STATES—THIRD PARTIES.

This claim entitled to confirmation as against the United States, but without prejudice to third parties.

[Cited in Meader v. Norton, 11 Wall. (78 U. S.) 457.]

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

Claim for one square mile of land in Napa county, rejected by the board, and appealed by the claimant.

Stanly & King, for appellant.

William Blanding, U. S. Atty., for appellees.

HOFFMAN, District Judge. The claim of the appellant in this case is founded on a grant made in 1836 by Governor Manuel Chico to Nicolas Higuera. The authenticity of this grant is fully proved, nor does its validity appear to have been questioned either by the board or the law agent of the United States. The original grant and the expediente from the archives are produced, and the record of the act of judicial delivery of possession is also exhibited, showing that Higuera was personally put into possession of his land, and the boundaries were definitely established by proper authority. It is also shown that the conditions of the grant were fully complied with by Higuera, who appears to have enjoyed the uninterrupted possession of the grant, except those portions which he may have sold, until his death. There appears then to be no doubt of the validity of the original grant as against the United States, nor do I understand it to be disputed on their behalf. This fact having been ascertained, it would seem that the chief duty of this court is performed, and that the claim should be confirmed. It is however opposed nominally on behalf of the United States, but really in behalf of parties claiming under Higuera and affirming the validity of the original grant, but denying the rights of the present claimant [Julius] Martin, to the portion of the land alleged to have been conveyed to him. The real controversy is, therefore, between the claimant and third persons, and this court is asked in effect to decide between parties whose interests, by the very terms of the act, its decree cannot affect.

If under cover of proceedings instituted to ascertain the rights of the United States to the lands claimed under grants of the former government, all persons claiming adverse interests could come into the controversy and obtain an adjudication upon their conflicting titles, it needs no argument to show that this class of cases would soon assume so complicated and embarrassing a form as to indefinitely protract their final determination. In the mass of adverse claims which might be presented for the same land, and in the innumerable questions which might arise of fraud, accident or priority, or of heirship, devise, partition, succession, purchase, etc., under the Spanish or American laws, the great object for which the proceedings were instituted and the jurisdiction conferred upon the board and on this court would in many cases be wholly lost sight of, and the time and labor of the court would be devoted to trying a complicated series of cross ejectments in a suit not

dissimilar to a proceeding in rem. But if this court were to undertake to adjudicate upon the rights of adverse claimants as between themselves, the very nature of the proceeding would require it to permit all such claimants to intervene in every suit. The impracticability of allowing this right was demonstrated in the opinion delivered by Mr. Commissioner Thornton in case No. 2 before the board, and for the reasons there assigned this court has heretofore decided that after ascertaining the validity of the original grant as against the United States, it would not attempt to adjudicate upon the rights of various claimants under the original grantee, but would decree in favor of the party presenting the application, provided he showed a prima facie right to the confirmation of his claim. In this way alone could the inquiries before this court be limited to the questions the act intended it should decide, while all questions of mere private right would be settled before the ordinary judicial tribunals of the country to which all parties have access.

The only question then to be determined in this case is: Do the mesne conveyances to the claimant show such a prima facie right in him as entitles him to a decree in his favor, or are they so clearly void as to make it incumbent to reject his claim, although we are satisfied that the land in no event can be the property of the United States? The claim was rejected by the board on the ground that the description of the land in the mesne conveyances by Higuera to Fallon and wife, and by the latter to the claimant, was vague and uncertain, and that therefore nothing passed by the deeds. The description is as follows: "A certain quantity of land lying, being and situated in the district and territory already named in the valley of Napa, containing more or less one mile square of land in the place known as the Rincon de las Carneras, commencing on the wagon road and ending at the point of the hill on the east."

Much additional testimony has been taken in this court. Had that testimony been before the board, it is not certain that their decision might not have been different.

It is, I think, sufficiently established by the proofs, that the Rincon de las Carneras is a triangular piece of land embraced between Napa river on one side and the arroyo de las Carneras on the other. These two streams come together at an acute angle at the south, forming the apex and two sides of a triangle. The limits of the Rincon on the north seem not very definite, but the boundaries of the land in that direction are indicated in the conveyance with tolerable distinctness. A line drawn from the wagon road to the point of the hills on the east would nearly form the base of the triangle above described, and I think sufficiently shows the intended limits of the grant in that direction. If then the grant had been of the Rincon, commencing at the line above stated, I do not perceive that any doubt could exist as to the precise tract intended to be conveyed. But the words of the grant are "a quantity of land containing more or less one mile square in the place kown as the Rincon de las Carneras, commencing," etc. Was this then a grant of one mile spuare out of the larger quantity contained in the Rincon, or did the grantor intend to convey the Rincon from the line mentioned, adding a rough estimate of its supposed extent? I incline to the latter view. If the parol testimony taken be deemed admissible, there cannot, I think, remain any doubt on the point, and the equitable right of the claimant as against his grantor and his heirs to have the land according to the limits originally intended, would seem indisputable. The looseness and inaccuracy of the estimates of the area of land formed by the Mexican population of the country is notorious, and there is nothing improbable in the supposition that a piece of land containing in fact eighteen hundred acres should be described as containing a "square mile more or less." If the intention had been to restrict the grantee to the precise quantity of one mile on the line mentioned, the words "more or less" would hardly have been introduced. The fact that they are in the deed shows that the grant was not intended to be of any specific quantity of land, but of some tract present to the mind and before the eyes of the parties. That tract or piece of land must have been the Rincon, limited on the north by the line mentioned in the grant.

It is unnecessary, however, to discuss the question further, for no decision of the court on this point can ultimately bind the parties who alone are the contestants. I think it clearly our duty to confirm the claim as against the United States to the whole Rincon, south of the line mentioned, without prejudice however to the rights of any third parties having or pretending to have any adverse title to the same land or to any part of it.

MARTIN (UNITED STATES v.). See Cases Nos. 15,728–15,732.

Case No. 9,169.

MARTIN v. WADDELL.

[Nowhere reported; opinion not now accessible. Decree of circuit court reversed by supreme court in 16 Pet. (41 U. S.) 367.]

Case No. 9,170.

MARTIN v. WALKER.

[Abb. Adm. 579.] [2]

District Court, S. D. New York. Sept., 1850.

PRACTICE IN ADMIRALTY—LIBEL—AFFIDAVIT—BY ATTORNEY—BALANCE—JOINT ACCOUNTS—BAIL—STALE DEMAND.

1. The general course of admiralty procedure in this country requires a sworn libel as the foun-

[1] [Reported by Abbott Brothers.]

dation of any process of arrest of person or property.

[Cited in The E. W. Gorgas, Case No. 4,585.]

2. When a libel is verified by an attorney in fact of the libellant,—as in case of the libellant's absence, &c.,—it is not necessary that the authority of the attorney to act should be made to appear when he attests the libel or files it; it is enough if he establishes such authority when it is called in question.

3. A mere general employment as proctor or attorney at law to prosecute a demand in a court of admiralty, is not sufficient to authorize the party employed to verify a libel as attorney in fact of the libellant.

4. No action can be maintained in a court of admiralty by one ship-owner against another to collect a balance to be determined in favor of the libellant on the settlement of the joint accounts of the parties.

5. In holding a respondent to bail, a court of admiralty will be governed much by the equitable considerations of the case.

6. Accordingly, where a libellant procured the arrest of respondent in a suit brought in a district different from that in which they both resided, upon a stale demand, of small amount, and which was already in litigation between the parties in the courts of the state in which they dwelt,—*held*, that the respondent ought to be discharged from the arrest.

7. A motion to set aside an arrest, founded on irregularity in the libellant's proceedings, is not within rule 25 of the circuit court, and will not be denied of course, merely because it was not made at the earliest day practicable after the arrest.

8. Compare the case of Duryee v. Elkins [Case No. 4,197], where it is held that admiralty has not jurisdiction to take an account of the profits of the voyage and determine the share due to a seaman employed on a "lay" or share of the proceeds.

This was a libel in personam filed by Mulford M. Martin against Lewis M. Walker, to recover for supplies and materials furnished to vessels of the respondent. The cause now came before the court on a motion to set aside the arrest of the respondent, and discharge the recognizance of bail given by him.

Scoles & Cooper and E. W. Stoughton, for the motion.

Beebe & Donohue, opposed.

BETTS, District Judge. The defendant moves to set aside his arrest in this cause, and that the recognizance of bail given by him therein for the limits, be discharged.

Both parties are residents of the district of New Jersey, and were such when this suit was instituted. On the 2d of August last, a libel in personam was filed, demanding of the defendant the payment of about $2,700, for supplies and materials furnished by the libellant to two vessels alleged to be owned by the respondent. The account is of long standing, the advances to the schooner Copper having been made more than ten years since, and to the schooner Roanoke between the years 1836 and 1841.

The libel alleges that supplies to the amount of $13,000 were furnished to the Roanoke, of which sum there yet remains due and unpaid about $2,150, besides interest, and in like manner to the schooner Copper to the amount of $139.

The respondent in his affidavit swears that the libellant was part owner with him of the schooner Roanoke, and that whatever supplies were obtained for her were furnished on account of the joint owners, and not for him individually. He further asserts that the charges in respect to the Copper, passed into the subsequent account in relation to the Roanoke, and have been adjusted between the parties in that account, and upon the merits of the case avers that he is not indebted to the libellant, but that a balance is due him on their transactions. It is moreover stated that the whole subject-matter is now in litigation between the parties on cross-bills filed by them respectively, in the court of chancery in the state of New Jersey.

Five objections to the plaintiff's right to maintain this action are taken: That the libel was not authenticated according to the requirement of the rules of this court, and that the process of attachment issued thereon was irregular. That no such affidavit of debt was made by the libellant as would entitle him to hold the respondent to bail in the suit. That one part owner cannot sue another in admiralty to recover advances made for their joint benefit. That the demands are stale, and if not actually barred by the statute of limitations, yet the court of admiralty will not give a party in such case the advantage of an arrest and imprisonment of the debtor on mesne proofs. That the voluntary selection of a home tribunal by the parties, for the litigation of these claims, precludes both from arresting each other out of that jurisdiction on the demands.

1. The attestation to the libel is made in the name of the libellant "by C. Donohue, his attorney," and in the jurat it is stated, that "the libellant is sick, and absent from the district, and could not swear to the libel," and the commissioner certifies that Donohue appeared before him, "who signed the libel as attorney in fact for the libellant."

For the respondent it is insisted that no fact is made to appear on this jurat authorizing the authentication of the libel otherwise than by the oath of the party himself, and that no arrest can be made of a party unless a libel regularly attested on oath is previously filed.

The general course of admiralty practice here unquestionably requires a sworn libel as the foundation of any process of attachment, (Ben. Adm. § 413; Dunl. Adm. Prac., 2d Ed., 126–128; Betts, Adm. 22, 23; Conkling, Prac. 423,) although the affidavit which justifies the arrest need not, it would seem, be made on the libel, but may be a separate deposition. Sup. Ct. Rules, 7. Such was the practice in the English admiralty, as the warrant of arrest issued previous to filing the libel. Clarke, Adm. tits. 1, 19; 2 Browne, Civ. & Adm. Law, 410, 411, 432, 434.

The rule of this court requires the verification to be in the libel itself. Rule 3. This oath must be made by the party himself, (rule 4,) unless the libellant is absent from the United States, or resides out of this district, and more than one hundred miles from the city of New York, (rule 93,) in which cases it may be made by an attorney in fact or proctor. Id.

In the present instance the libellant's residence was out of the district, but less than the distance of one hundred miles from the city. The case did not accordingly exist as one in which the oath of the party himself could be dispensed with, and the libel must be regarded as insufficiently authenticated without it.

It is not necessary that the authority of the attorney in fact to act for the principal should be made to appear when he attests to or files the libel. It is sufficient for him to establish that authority when it is called in question.

The affidavit of the libellant himself is read on this motion for that purpose. It is exceedingly loose and ambiguous on this point, and goes no further than to swear that the proctors were authorized and empowered to take all steps, in his absence, for the collection of the debt, and to assert that the suit is brought for his own benefit and with his consent and approbation.

On a question of rightful authority in the agent, something more than general and loose statements of that kind should be produced to support his acts. If no positive and formal appointment need be shown, at least there should be an explicit recognition of such agent in the character of an attorney in fact, to uphold his assuming that representation.

Mr. Donohue testifies, in his affidavit, that he verified the libel as agent of the plaintiff, and that he had full power and authority to verify the libel, and was fully authorized to file the same.

It is to be remarked that the libel was filed in the name of Mr. Beebe as proctor, and Mr. Donohue as advocate, and that these gentlemen are connected in business in practice at this bar. All that Mr. Donohue states in his affidavit may be satisfied by the general retaining or authorization of these gentlemen as attorneys to prosecute this demand, without there having been any direct and express appointment of Mr. Donohue as attorney in fact or special agent in the matter. Attorneys in law are agents of the principal (Story, Ag. § 23), but attorneys in fact are so called in contradistinction to attorneys in law, and may include all other agents employed in any business, or authorized to do any act or acts en pais for another. Id. § 25.

Judge Story, however, observes, the appellation sometimes designates persons who act under a special agency or a special letter of attorney; so that they are appointed in factum; for the deed or act to be done. Id. § 25. This position is supported by reference to Bacon's Abridgment, but Bacon clearly regards it as necessary, in order to constitute an attorney in fact, that his authority should be delegated by deed. 1 Bac. Abr. 306, tit. "Attorney."

So Comyn distinguishes between attorneys in court (Com. Dig. tit. "Attorney," B) and attorneys for other purposes, (Id. tit. "Attorney," C 1); and lays down the principle that, in the latter case, the appointment must be by deed or letter. Id. 5.

Admitting, however, that a parol appointment is sufficient, it would seem that the nature of the authority delegated, in the fair import of the rule of this court, would require an express authorization to do the particular act, when done by one as agent and not as proctor. One cannot, by virtue of his retainer as attorney in law, assume to act in the cause in the character of attorney in fact. It does not appear, upon the proofs offered in this case, that any other authorization was given by the libellant than the usual one given to attorneys in court to prosecute and collect demands. Upon a case standing in that attitude, it is plain that the libellant could not rightfully take an order to hold the defendant to bail.

2. The oath of indebtedness attached to the libel is not sufficiently positive to satisfy the rule on that subject. The evidence of indebtedness must be direct and explicit, and the agent states nothing beyond his information and belief deduced from the examination of documents. Graham, Prac. (1st Ed.) 130; 1 Archb. Prac. 52, 53, 58, 65. The preliminary affidavit being requisite in admiralty courts in order to hold to bail, the English rule with regard to the requirements of such affidavit would naturally be adopted as the practice of that court, especially as it is the guide to the practice of the circuit court, and that court supplies the authority to the district court in matters of procedure not regulated by specific rules. Dist. Ct. Rules, 260. Supplemental affidavits, to make up a case sufficient to justify holding to bail, were not allowed in this state, (Norton v. Barnum, 20 Johns. 337,) upon the English distinction, that affidavits to cure defects in the original one upon which the defendant was held to bail, were not admissible. They could not be allowed to retroact so as to authorize continuing the defendant under bail when he had been arrested by means of a defective affidavit.

3. The libellant, in his affidavit, does not deny the allegation of the respondent's deposition that he was part-owner with the libellant in the Roanoke. He asserts that he made the advances claimed in the character of ship's husband, and that the respondent is responsible to him for them. That may be so upon a due adjustment of the legal and equitable rights of the parties, but this is not a competent tribunal through which to enforce such adjustment. The acknowledged fact that

both parties are prosecuting suits against each other in New Jersey, in chancery, upon these claims, indicates plainly enough that the subject-matter is not one of simple indebtedness on the part of the one to the other. A libel cannot be maintained in this court by one owner against another, to collect a balance to be determined in his favor on the settlement of their joint accounts. The Fairplay (Case No. 4,615). The instance side of the court exercises in such cases no higher or other functions than a court of law, and before either tribunal it would be a bar to such action, to show that it was founded upon a counter and unadjusted responsibility of joint owners, it being insisted upon by each party that his advances to the common concern had been greater than those of his associate.

4. This objection does not apply to the small sum of $139 accruing from supplies furnished to the schooner Copper, and if the arrest of the defendant had been made for that demand alone, it might, perhaps, stand on the footing of an ordinary action by a materialman against the owner of a vessel.

In matters of bail, however, the court will be governed much by the equitable circumstances of each case. In this instance, the demand is exceedingly stale, and there is no allegation that the respondent could not have been arrested upon it within a reasonable period after the indebtedness had been incurred. Its justness is now denied by the affidavit of the respondent, and it is one of the subjects of litigation between the parties in their chancery suits. Under such circumstances it would not be reasonable or equitable to compel the respondent to give bail to this action in a state foreign to his domicil, and litigate the matter away from his own residence and that of the libellant, especially when it was already in prosecution between them before a home tribunal. All unwarranted arrests may be vacated, (rule 36,) and the court may, at its discretion, mitigate or enhance bail according to the rights of parties. Betts, Adm. 40. It appears to me that there is no proper ground in this case for the plaintiff to hold the defendant under arrest for a demand disputed by the latter, and which accrued more than ten years since.

5. I am not disposed to lay out of view the fact that the parties have selected a domestic forum for litigating these matters, which are now on investigation before it. Although I do not say that such fact is a legal bar to an action in this court on the same matters, it ought nevertheless to have a bearing in determining this question upon the equities between the parties. If the respondent has made his motion in due time, he is entitled, upon the principles already indicated, to his discharge, because of the defectiveness or irregularity of the proceeding on his arrest. Should his delay in making the application interfere with such relief as an absolute right, the equitable circumstances may properly be regarded by the court in determining whether he ought to be longer held in imprisonment in a controversy so circumstanced.

It is supposed by the libellant, that rule 25 of the circuit court governs the case, and that the respondent is precluded from making any application for relief after four days from his arrest. That rule, it must be remarked, does not in terms cover this case. The prohibition is in respect to orders to show cause of action, to mitigate bail, or for a bill of particulars, all of which presuppose regularity in the proceedings, and only provide for relief to the party proceeded against in connection with the continuation of the suit.

This application is founded upon irregularity and defectiveness in the proceedings of the libellant, and the respondent may rightfully appeal to the court for protection against it at any time after it is reasonably presumable he had means of ascertaining such irregularity, and especially when he has done nothing on his part to waive or cure it.

The arrest was made early in August last, and the respondent was confined in close prison thereon about ten days thereafter. No stated term of the court has been held since the arrest until the present sitting, nor has the Judge been residing in the city so that application could have been made to him personally for relief previous to the term now in session. Although the movement has not been at the very opening of the court, yet it does not appear that there has been any intentional delay or laches on the part of the respondent, and I am of opinion that he should not lose his claim to relief by the omission to bring forward his motion at the earliest day practicable.

The order will accordingly be, that he be discharged from arrest on his stipulating not to bring an action for false imprisonment against the libellant, or his attorney in fact.

If it was important to the interests of the libellant that his remedy should be sought in an admiralty court, he would have had easy access to the one in New Jersey, where both parties reside, and his arrest of the defendant in New York was needless and vexatious. The defendant is accordingly to be paid his taxed costs on this motion. Order accordingly.

Case No. 9,171.

MARTIN et al. v. The WILLIAM.

[Oliver's Forms (Ed. 1842) 474.]

District Court, D. Massachusetts. April, 1819.

SEAMEN—WAGES — FORFEITURE — INCONSIDERATE TREATMENT—INTENTION.

[Rebellious and disobedient conduct on the part of a ship's crew will not be held to justify a total forfeiture of wages where such conduct was caused, more or less, by inconsiderate treatment on the part of the ship's officers, and was the display of a sudden irritation thereat, and not of a deliberate purpose to disobey.]

The libel was for $100 apiece as wages and compensation for having been kept on

short allowance. The respondents [George Bachelor, master, and B. F. Pickman and others, owners, of the William], in their answer admitted there would have been due to the libellants, if they had discharged their duty as follows, namely: to John G. Martin, $63.26: William Jackson, $79.26; James Oliver, $87.71; Thomas Hay, $88.83; Andrews Armstrong, $85.65; but allege, that the libellants have forfeited their wages by neglect of duty and disobedience of orders, resistance to the lawful authority of the officers, and mutinous conduct.

James T. Austin, for libellants.

George Blake and George Sullivan, for respondents.

DAVIS, District Judge. The libellants demand balances of wages alleged to be due them respectively, for their services as mariners, on board the ship William, in a voyage from Boston to Calcutta, and back to Boston. The voyage was performed between the 22nd of February, 1818, and the 11th of February last, when the ship arrived at Boston. The engagement and services on board are not disputed, but the respondents contend that the wages, which would otherwise be due to the libellants, are forfeited by their violent and mutinous conduct on the 24th of October, and on the 30th of January last. An instance of disobedience is also offered in evidence, and, in a degree, urged at the hearing, which is asserted to have occurred at Calcutta, in July. It is not stated in the answer to the libel as one of the grounds of forfeiture, and seems to have been principally relied on in argument, as indicating an unruly disposition in those of the crew who are implicated in the charge. All the libellants, excepting Martin, are named in the log-book as culpable on that occasion.

In disputes which happen on board ships at sea, and especially in those wherein acrimonious feelings of hostility are engendered, the officers and crew taking different sides, it is generally extremely difficult to obtain a precise view of controverted facts. In this case, the mutual resentments excited on the voyage have been inflamed by proceedings since the return of the ship; and from the colorings which such occurrences naturally induce it is not easy to determine satisfactorily the true features of the transaction.

The affair of the 24th of October, commenced with a dispute, resulting in a violent affray of considerable continuance, between Isaac Bradford, the mate, and James Brown, one of the seamen. Brown was at the helm about 8 o'clock in the morning of that day, and, on being told by the mate that the ship was not in her exact course, but that the sails were shaking in the wind, he questioned the truth of the remark. An altercation on this subject, in which the mate's opinion was pertinaciously opposed by Brown, ended in blows. The first blow was given by the mate. The parties were soon locked together on the quarter-deck, giving and receiving blows, and exercising other modes of mutual annoyance. Armstrong was on the quarter-deck at the time, and either took part with Brown, or was endeavoring to relieve him, when Captain Bachelor, Mr. Smith, the supercargo, and Hay, the second mate, came up on deck. Armstrong was taken off from Bradford by the captain, and went forward. So also did Martin and Oliver, who, as Mr. Smith testifies, were on the quarter-deck when he came up from the cabin, and whom he ordered to go forward. The conflict continuing, Brown cried, "Murder!" Some of the witnesses say that this cry was repeated, and one of them, Taylor, exclaimed to the crew below, that "the mate was killing Brown." The eager attention of the whole crew was called to what was passing. With few exceptions, they advanced to the quarter-deck, avowedly with an intention of relieving Brown. The captain and officers ordered them to keep back, and for the purpose of maintaining the command of the quarter-deck, and to repel the approach of the men, some of whom were furnished with offensive weapons, the captain had his pistols brought up from the cabin, and the mate seized a capstan bar, which, when he went below for the pistols, he gave to the supercargo. The men made a pause at the gangway, and did not advance further. The two combatants, after a struggle of several minutes, in which the mate had the advantage, were separated by the captain. Brown went forward and washed the blood from his face. After a consultation between the captain and mate, he was soon ordered aft, to be put in irons. He made show of resistance to this order, and some intemperate language was uttered by one of the libellants. Martin, however, advised him to submit. Brown was accordingly put in irons, without resistance or opposition from any of the crew, and so remained three days, with a scanty allowance of bread and water.

In this affair though much sympathy was manifested by the libellants, and by the rest of the crew, with their comrade, Brown, the authority of the captain or officers was completely maintained, and though the interference of the men, for the relief of Brown, was in an unusual and imposing manner, yet the impetuous movement seems to have been seasonably checked, without actual force or violence having been committed by the libellants or any of the crew.

No further difficulty occurred until the 30th of January. The men, being below at dinner on that day, were called upon by Hay, the second mate, to haul out the bowlines. Martin first came up with his knife, which he had used at his dinner, in his left hand. The dinner, it appears, had not been satisfactory. It was a day on which pork had usually made part of the meal. Of this article, for some reason, which is not explained, they were on that day deprived; and the unpalatable rice, without its

usual seasoning, had been the subject of complaint among them while at dinner. Martin was uttering some indistinct murmurs on this account, when he came upon deck, and looking at the captain, who was walking on the quarter-deck, used some abusive language in regard to him, intimating a determination to have satisfaction at some future time. The second mate said to him, "Who are you damning, and what are you grumbling about?" "What is that to you?" replied Martin, with a coarse argument too common among men of this class. The captain, hearing this reply, came forward, and ordered Martin to go aft. He refused to obey the order. It was the determination of the captain that he should be put in irons. In attempting to compel Martin to go aft, as required, the captain seized him by the collar. The two mates say that Martin first seized the captain in that manner. It is difficult to reconcile the testimony as to this fact. It was evident that it was the captain's intention to compel obedience to his order, and that Martin should be put in irons for his offensive language and deportment, and it appears probable that the mutual seizing by the collar was cotemporaneous. Bradford the mate, accompanied the captain, and assisted him in the struggle which ensued. On the other hand, the other four libellants engaged in Martin's assistance. In this operation, Bradford was pressed violently against the rails; and he is persuaded that nothing but very great efforts, by himself and the aid of the captain, prevented his being thrown overboard. Captain Bachelor was struck in the contest by Jackson, to whom he had given a blow with his flat hand. The parties, being at length disengaged, the purpose of compelling Martin to go aft, to be put in irons, was abandoned. Jackson, after the struggle, was ordered aft, but refused to obey, declaring that "he would see any man's heart's blood who should attempt to put him in irons." The officers deliberated on the state of the ship, and appear to have been in a state of alarm, and apprehension. Captain Bachelor said that he had no confidence in his crew, and a consultation ensued on the expediency of proceeding to Bermuda, or to Charleston, the nearest port in the United States. It was determined, however, to hold on their course to Boston, being careful to keep loaded arms constantly at hand, to be employed in case of an emergency, which they thought they had reason to expect. The officers were directed by the captain not to order Jackson or Martin, who were considered as the greatest offenders, to do any duty on board the ship. They were, however, occasionally employed, and took their turns in steering, though not in consequence of any orders given to them by the officers. No disorder or uneasiness afterward took place on board the ship during the twelve subsequent days that she was at sea.

It remains to consider how this culpable conduct is to be estimated in reference to the seamen's contract, and whether it shall operate, as the respondents contend it should, to the forfeiture of the wages of the libellants who were concerned, with more or less aggravation, in both affairs. The rules and principles applicable to this peculiar subject, the offences of seamen, require a full view and consideration of all the circumstances attending the transactions. These men undoubtedly committed an offence, but if there exist any circumstances in extenuation, or mitigation, they have a legitimate operation in their behalf, which the court is bound to regard.

The first remark which I would make, in respect to these two instances of disorder, is that they do not appear to have been the result of any preconcert, or premeditation, but were of sudden emergence, from unexpected circumstances. In the origination of the first affair these men had no concern. I cannot say that the mate was without fault in that instance. The conduct of Brown was, no doubt, impertinent and irritating; but some other and more deliberate mode of punishment should have been adopted than a blow with the fist, especially while the man was at the helm. The violence of the contest which ensued, was such as might have been expected from the intemperate passion with which it commenced. The mate was of superior strength. Cries of murder were uttered by Brown. It was proclaimed that the mate was killing him. The crew, who hastened to his relief, were undoubtedly wrong in part of their conduct on that occasion, especially in assuming offensive weapons; but they evidently were under the operation of sudden excitement, and were impelled by sympathies which have claims to a liberal consideration, unless there should be found combined with them a malignant and mutinous temper. I do not see evidence of that exceptionable disposition in this transaction. The sudden check to the advance of the crew should not be attributed altogether to the arms, or to the physical force opposed to them. A respect to authority should be admitted as having an influence in their minds, and in the midst of their impetuous burst of feeling, they had regard to their station and to their duties. Brown, after returning to his companions, and having washed off the blood with which he was disfigured, was soon called into the presence of the officers to be put in irons. There was no opposition to this severe act of discipline. He was advised by Martin to submit to it when manifesting some natural reluctance to that mode of confinement. This circumstance should be viewed as evidencing a prevalence of principles of subordination among the crew at that period and may lead us to impute the preceding angry appearances to sudden excitement and sympathy. There was an immediate return to duty, and if there was no subsequent misconduct, this transaction.

might be fairly considered, I think, as overlooked and forgiven, as in my opinion it ought to have been, from principles of common prudence, a discreet regard for the successful prosecution of the voyage, as well as from the general considerations applicable to cases of this description.

The second disturbance appears to me to have been much more reprehensible. But, even in regard to this, there are some mitigating circumstances, which ought not to be disregarded. It originated in discontents respecting provisions. "Though mariners and soldiers," says Molloy, "have just cause of complaint, as that their victuals or provisions are not good, yet they must not mutiny and rebel, whereby to distract and confound the whole crew, but must make a civil and humble address to their commander, that the same may be amended; and, if the case be such, that the commander cannot redress the same, they must like men bear with the extremity." The first discontent on board the William in regard to provisions appears to have been manifested in the manner which the authority enjoins, and which propriety dictates to the most uninstructed minds. The beef with which the ship was supplied, from defect in quality, or some other cause, was much disliked by the crew. They reckoned, therefore, very much on the two pork days, as they were called, Tuesday and Friday. On the Tuesday preceding the 30th of January, the quantity of pork at their dinner was so small, that an appeal to the captain was made on the subject. Instead of experiencing any beneficial change from the application, on the next pork day, which was the day of the disturbance, they had no pork at their dinner. This produced discontent at their meal, and they were especially dissatisfied with the insipidity of the rice, being without its usual relish, and without sugar, which, they thought, should have been substituted, if pork, which they preferred, should not be furnished.

From all that appears in the case, I cannot but think that a greater degree of attention to the wishes of the men, in this particular, would have been more prudent and reasonable. There would have been no loss of dignity, in an accommodation to expectations, which do not apear to have been immoderate, and were distinctly, though respectfully, expressed. The indulgences of mariners at sea are necessarily brief and few; but such as they are they cannot be abridged unnecessarily or negligently, without risk of disturbance; and a discreet regard to reasonable expectations on this head is a cheap and easy mode of acquiring cheerful obedience and submission to the severest duties of the employment. Inevitable privations are met with fortitude; but unnecessary or capricious curtailments are the sure incitements of resentment and ill will.

It would have been better, perhaps, not to have taken offense at the murmurings of Martin, or of any of the crew, when in a state of mind, which, it would seem, might have been anticipated; especially as the order which was given, was executed without delay; and in regard to Martin's intemperate language, part of which was in a degree equivocal, some more deliberate mode of punishment, I think, might have been selected to better effect, than that which was adopted. Still, the maintenance of authority on board of vessels at sea, though it may be harshly urged, is indispensable. The captain's order should have been obeyed, and whatever reluctance might have been manifested at submission to the threatened punishment, no man should have interposed to prevent its execution, unless by respectful request or representations. Mariners should understand this to be their duty most distinctly, and if the measures adopted by their commander be unnecessarily severe, due recompense is to be sought from the proper authorities, upon the arrival of the vessel.

Making every allowance, therefore, for the differences in testimony, as to some particulars of this disturbance, I must consider the conduct of the libellants as very exceptionable; but I cannot consider it when all circumstances are taken into view, as operating a forfeiture of their whole wages." The position laid down in Abb. Shipp. has been urged, that "what will justify a master in discharging a seaman, during the voyage, will also deprive the seaman of his wages." We do not gain any precise direction by this doctrine. Before it can serve as a guide, we have to apply the facts of the case to the question whether they would authorize a discharge of the men, if the ship were in a situation in which a discharge were practicable. Now, on the facts in this case, if the ship were in port, the voyage unfinished, I should doubt whether the master could have compelled the men to take a discharge, or a discharge which should deprive them of past wages, provided they should have signified proper repentant dispositions, and there should have been sufficient grounds to infer that there might be a reliance on their future good conduct. In estimating the confidence that could have been placed in them, I cannot but observe that, excepting in the two particulars relied on in the defence, and the transient and comparatively trivial instance of misbehavior at Calcutta, the history of the voyage evidences the good deportment of the men. They have performed the services required by their engagement, faithfully and uniformly, during a long voyage, and under circumstances of more than ordinary hardship and exertion.

The letter to the captain which was produced at the hearing, and all the circumstances occurring when the ship was about sailing from Calcutta, appear to me, when fairly considered, not unfavorable to these men. They pleaded the captain's declara-

tion of a willingness to discharge them on request, and proceeded to solicit a discharge, provided the lading should be augmented to a degree which they thought unsafe. This was after the ship had put back, in consequence of a leak, and when it had been manifested that she had been overladen, and a portion of the sugars had been discharged. After a communication with the captain, the men adhered to the ship, though not without concern, and after the additional lading, which they objected to, had been put on board. The state of the ship, on the return voyage, seems to prove that the apprehensions of the crew were not altogether groundless. At any rate, I cannot but think that the concern which they expressed was genuine, and that the indications manifested in that particular, ought not to be imputed to a turbulent and unreasonable temper.

In the case of Johnson v. The Columbus [unreported] I had occasion to remark on the spirit, which it is allowable, and even requisite to introduce in causes of this description. The general considerations, expressed in that case, are applicable to this, and I shall not now repeat them. Dating from the earliest precedents, the law, in regard to the offences of seamen, admits of the reasonable operation of clemency. This is an ingredient intimately interwoven with the whole doctrine on this subject. "At the same time," as Sir William Scott observes, "this must not be understood, as if the court would show such a blind indulgence as should overrule the real justice of the case; it is only such an indulgence as the equitable considerations of public utility require, which can seldom, in such cases, any more than in others, be separated from particular justice."

From a full view of the conduct of the libellants, I cannot but consider them as very culpable, but not in an equal degree; and the mulcts, which I think I am bound to impose, will correspond to that diversity. Martin and Jackson, I shall view as not earning wages, after the 30th of January, and shall deduct three months' pay from the amount previously earned by them. Two months' pay will be deducted from the wages of Oliver, Hay, and Armstrong, each party to sustain their own costs. It will be understood, that in these deductions, applied as mulcts for the offences of these men, I do not impute to them the very atrocious design, which the mate supposes they meditated against him, in the affair of the 30th of January. I have no doubt of the reality of his apprehensions; but I do not see sufficient evidence, to authorize a conviction, that the enormity suggested was intended.

Some of the considerations, which have been expressed in giving an opinion on this case, would probably have had an operation to mitigate the demand, which has been made, of an entire forfeiture of wages, if some circumstances, peculiarly irritating, had not been adopted against the officers, soon after the arrival of the ship. The death of Brown, which happened soon after the arrival, was imputed to the officers, and a charge of murder was instituted against them. From the imprisonment consequent on the first examination on that charge, they have been liberated. From all that has appeared on this hearing, I see no ground for such an imputation. It is said that the charge was made by a relation of the deceased, and not by any of the crew. It would appear, upon the facts now disclosed, that the said prosecution could not have originated without exaggerated representations on their part. Whatever might have been their views on this subject, it is evident from the testimony of Dr. Warren, that Brown's death could not have been occasioned by any injury sustained in the affray with the mate. It was from a cause which brings many victims to a premature grave. Dr. Warren who examined the body of the deceased, testifies that he never witnessed more decided marks of disease from the intemperate use of ardent spirits. This question, however, has no intimate connection with this suit; but it having been introduced, what I have said has appeared to me to be required by the occasion.

NOTE. The decree of the judge was that, as the balance of wages, Martin recover $34.42; Jackson, $48.42; Hay, $71.84; Armstrong, $67.71; Oliver, $64.78; and each party pay his own costs.

Mutinous and rebellious conduct on the part of a seaman will justify the master in ejecting him from the duty of the ship. This will be a legal cause to refuse payment of his wages after his discharge, but, an acceptance of his services afterwards, will operate as a forgiveness of his offence, and a reinstatement in his former position. Relf v. The Maria [Case No. 11,692]; The Mentor [Case No. 9,427]. In some very aggravated cases, it would seem that all the wages due would be forfeited, if there had been no compromise or re-acceptance of service. Habitual intoxication so as to incapacitate a seaman for the discharge of his duty, habitual disobedience of reasonable commands, general neglect of duty, it would seem, will operate a forfeiture of wages; but not a single act. See The Mentor [supra] and the authorities there cited. But after a sufficient cause for forfeiture of wages has occurred, if the master, from the necessity of the case, has been obliged to retain the refractory seaman, it will not, of itself, operate as a forgiveness of his offence; and, therefore, the forfeiture will remain with its fullest effect.

Case No. 9,172.

MARTIN v. WINSLOW.

[2 Mason, 241.] [1]

Circuit Court, D. Rhode Island. June Term, 1821.

NOTES—INDORSER—DEMAND—DELAY—NEW PROMISE.

1. In a suit by an indorsee against an indorser of a note payable on demand, the plaintiff must

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

shew that the demand was made within a reasonable time on the maker for payment, otherwise the indorser is discharged. A delay for seven months to demand payment, unaccompanied by any circumstances accounting for such delay, is an unreasonable delay.

[Cited in Emerson v. Crocker, 5 N. H. 164; Sylvester v. Crapo, 32 Mass. (15 Pick.) 93; Poorman v. Mills, 39 Cal. 352.]

2. A promise by an indorser to pay a note, after being discharged by neglect of due notice, is not binding, unless made with a knowledge of all the material facts.

[Cited in Farrington v. Brown, 7 N. H. 274; Edwards v. Tandy, 36 N. H. 544; Spann v. Baltzell, 1 Fla. 301; Turnbull v. Maddux, 68 Md. 588, 13 Atl. 335.]

Assumpsit by indorsee against indorser on a promissory note given by Lewis Rousmaniere to the defendant [Andrew Winslow], on 4th September, 1819, for $1,129.76, payable on demand, at the New-England Commercial Bank in Newport. On the trial upon the general issue, it was admitted by the plaintiff [William Martin] that the note never was lodged at the Commercial Bank, and that no demand was ever made for payment upon Mr. Rousmaniere personally in his life time. It further appeared, that Mr. Rousmaniere died suddenly on the 6th of May, 1820. After his death, a demand was made upon his administrators as soon as could be, and notice of non-payment, Rousmaniere having died insolvent, was immediately given to the defendant, and payment demanded of him. The defendant said he had indorsed the note, and had received the notice, and being then insolvent, he said he had no objection to its coming in with his other debts. It did not appear, whether at the time of this conversation the defendant had any knowledge, that payment had never been demanded of the maker in his life time, or that the note had never been lodged at the bank. The present note was a renewal of a note originally given for the same sum, payable in nine months, which was indorsed by the defendant for the accommodation of Rousmaniere, and was delivered by the latter to the plaintiff for the purchase money of a vessel bought by Rousmaniere of the plaintiff.

Hazard & Hunter, for defendant, contended: (1) That demand of payment was not made of the maker within a reasonable time. It ought to have been made in his life time, and within a reasonable time after the note was indorsed. (2) That as it did not appear, that the defendant knew of the omission to lodge the note in the bank, or to demand payment in the maker's life time, the promise, such as it was, was not binding, being made in ignorance of the facts.

Pierce & Pitman, for plaintiff, argued e contra on both points.

STORY, Circuit Justice (charging jury). I have no hesitation in saying, that a note payable on demand must be demanded within a reasonable time, otherwise the indorser is discharged. What shall constitute a reasonable time is not a matter of absolute certainty, as to which a definite rule can be laid down. It must depend on circumstances. But unless there be circumstances in the case, which account for the delay, a neglect to demand payment of such a note for more than seven months is an unreasonable delay, and discharges the indorser. If the fact of such delay for such a length of time appear naked of all circumstances, it is a discharge of the indorser. And the onus to establish any justification or excuse for such delay lies on the plaintiff. It makes no difference in the case, that the indorsement was in lieu of a former security between the same parties, or was for the accommodation of the maker, unless the indorser assented to the delay. It will be for the jury to decide, whether there are any circumstances in this case, from which an assent to this delay can be inferred.

Then, as to the second point, a promise to pay with a full knowledge of all the facts, is binding upon the indorser, although he might otherwise be discharged. But if he promise in ignorance of material facts affecting his rights, it is not a waiver of those rights. The question then is, whether the indorser in this case had such knowledge. It may be inferred from the connexion between the parties, their near relationship, and the deep interest, which the defendant had in this particular case to ascertain, after the death of the maker, his own responsibility as indorser. It may also be inferred from the language used by him on this occasion. He did not object to the delay, though he knew the length of time, which had elapsed since the note was given. As no objection of this sort was made, it leads to the presumption, either that the indorser understood originally, that the note was to lie unpaid for a period at least as long, or that under all the circumstances he did not deem it an unreasonable delay. He had no ground to presume, that any demand of payment was made of the maker in his life time, and the fact, that the first known demand was on the administrators, and the first notice given to him after that demand, would strongly lead him to the conclusion, that there had been no prior demand. And in fact no prior demand was made. But as these are mere presumptions of fact arising from circumstances, the jury will give them what weight they think them entitled to.

The jury gave no verdict, having disagreed; and a new trial was had at June term, 1822, upon additional evidence, and a verdict returned for the defendant.

[NOTE. For another action against Winslow as indorser upon another of Rousmaniere's notes, see Thatcher v. Winslow, Case No. 13,863.]

MARTIN, The D. R. See Case No. 1,030.

Case No. 9,173.

MARTINETTI et al. v. MAGUIRE et al.

MAGUIRE et al. v. MARTINETTI et al.

[Deady, 216; 1 Abb. U. S. 356.] [1]

Circuit Court, California. April 20, 1867.[2]

THEATRES AND SHOWS—INJUNCTION—COLORABLE IMITATION—DRAMATIC COMPOSITION—INDECENT CHARACTER.

1. Where a party seeks to enjoin another from the exhibition or performance of a spectacle or dramatic composition, he must show an exclusive right in himself to the use of such spectacle or composition, before his application will be allowed.

2. Where two spectacles, called respectively the "Black Crook" and the "Black Rook" produced the impression upon those who witnessed them that they were substantially the same: *held*, that one was a colorable imitation of the other.

3. The act of August 18, 1856 (11 Stat. 138), which gives "the proprietor of a dramatic composition, designed or suited for public representation, the sole right to represent the same, does not include a mere exhibition, spectacle or arrangement of scenic effects having no literary character—the same not being a "dramatic composition" within the meaning of the act.

4. The act aforesaid purports only to apply to dramatic compositions "suited to public representation," and therefore it ought not to be construed to protect the proprietor of a composition of an immoral or indecent character, in the exclusive right to represent the same.

5. In the exercise of its power to secure "to authors and inventors the exclusive right to their respective writings and discoveries" (Const. art. I, § 8, subd. 8), congress may discriminate in favor of good morals, and against vice.

[Cited in Hockett v. State, 105 Ind. 256, 5 N. E. 178.]

6. The power aforesaid is conferred on congress, not generally, but only as a means to this particular end—"To promote the progress of science and useful arts"—therefore, it seems that it does not extend to writings of a grossly immoral or indecent character, or to inventions expressly designed to facilitate the commission of crime.

The complainants in [Julian] Martinetti and others against [Thomas] Maguire and others brought suit to enjoin the defendants therein from performing or exhibiting a play or spectacle, called by them the "Black Crook," alleging that the same was a mere colorable imitation of a play known as the "Black Rook," which is the property of the complainants. Thereupon, Maguire and others brought suit against Martinetti and others, to enjoin the latter from performing a play called by defendants the "Black Rook," alleging that the same was a mere colorable imitation of a play known as the "Black Crook," which is the property of said complainants.

Upon the filing of the bills, the complainants in each suit gave notice of an application to the court for a provisional injunction, as prayed for in the bill, until the final hearing. By consent of parties, the motions were heard together, upon the bills and evidence taken at the hearing.

Hall McAllister, for Martinetti and others.

Alexander Campbell, for Maguire and others.

DEADY, District Judge. The bill of the complainants, Martinetti et al., charges, that on October 17, 1866, at New York City, one James Schonberg composed and copyrighted a dramatic composition called the "Black Rook," and then and there assigned the same exclusively to complainants; that complainants are the proprietors of the Metropolitan Theatre, in San Francisco, and are about to produce on the stage thereof said play of the Black Rook; that the defendants, Maguire et al., by improper means procured a manuscript copy of the Black Rook from an employee of complainants, and is exhibiting the same at the theatre of said defendants, Maguire's Opera House, in San Francisco, to the injury of complainants; and that defendants before making such exhibition, changed the name of said play to the Black Crook, and also changed the names of the characters, and made some slight alterations in the dialogues and incidents thereof.

The bill of the complainants, Maguire et al., charges, that about July 1, 1866, one Charles M. Barras, of New York City, composed a dramatic composition called the Black Crook, and copyrighted the same; that said play was exhibited at Niblo's Theatre in New York, early in September, 1866, and continuously since that date, for the benefit of and with great gain to the author; that about March 25, 1867, the complainants became the exclusive assignee of the right to exhibit the Black Crook in the state of California, and in pursuance of such assignment, and by virtue of such right, are now exhibiting the same at Maguire's Opera House aforesaid; that during the exhibition of the Black Crook at Niblo's, as aforesaid, the defendants procured a copy of the same by employing one Schonberg, or other person, to attend such exhibition and take down the parts in shorthand, as they were spoken and acted by the players; and that the defendants are now about to exhibit such play from the copy so obtained, at the Metropolitan Theatre aforesaid, under the name of the Black Rook, to the damage of the complainants.

A number of witnesses have been examined on either side as to the identity of the plays. So far as I can judge from the evidence, the plays are identical. One of them must be a mere colorable imitation of the other. The triking similarity in the names—Black Crook and Black Rook—is enough of itself to suggest that the one is an imitation of the other. All the disinterested witnesses who have been present at the exhibition of the Black Crook at Niblo's and Maguire's agree in stating that they thought the plays the same. It is admitted and charged by Martinetti, that the

[1] [Reported by Hon. Matthew P. Deady, District Judge, and by Benjamin Vaughan Abbott, Esq., and here compiled and reprinted by permission.]

[2] [District not given.]

play now on exhibition at the opera house is substantially the play which he calls the Black Rook, and claims to be the proprietor of. For the purpose of the comparison, let it be assumed that the Black Rook is being played at Maguire's Opera House, and the Black Crook at Niblo's. Whatever may be the technical differences in the exhibitions at these two places, if the result is so nearly the same as to produce the impression that they are identical upon ordinary spectators, it seems to me that as a question of fact, one ought to be held a mere colorable imitation of the other. A play like this has no value except as it is appreciated by the theatre-going public. It cannot be read—it is a mere spectacle, and must be seen to be appreciated. If the similarity in general character and effect between the alleged imitation and original, is sufficient to deceive the public who ordinarily witness such exhibitions, it is fair to conclude that the one is a piracy of the other.

Which, then, is the original, and which is the imitation? The respective dates of their composition seem to furnish a satisfactory answer to this question. It is admitted that the Black Crook was composed and copyrighted in the early part of July, 1866, while it is not claimed that the Black Rook was composed earlier than the middle of the October following—and after the former had been exhibited at Niblo's for at least six weeks. Unless both are original compositions or contrivances—unless this striking similarity between them is a mere coincidence, I must conclude that the Black Crook is the original, and the Black Rook the imitation or copy. As neither of these spectacles have any substantial claim to originality, I suppose the coincidence is possible. But such coincidence is not probable, while all the other circumstances of the case point to but one conclusion—that the manuscript of the so-called Black Rook, procured in New York by Martinetti from Schonberg, was a mere colorable imitation or copy of the Black Crook, obtained by improper means or without authority of the proprietors.

Whether Martinetti knew this fact at the time or since, is immaterial. In any view of the matter, he has only the same right in the premises that Schonberg would have, if he were now the party before the court. Under the circumstances disclosed by the evidence, the reasonable inference is, that Martinetti did not purchase the Black Rook, believing it to be an original composition of that name, but rather that he employed Schonberg, or some other, to procure a copy of the Black Crook, to which, after making some unessential changes upon it, he gave the name of Black Rook. No evidence is produced of the alleged purchase of the Black Rook, except the allegation to that effect in the bill. If Martinetti had purchased an original composition, or what he believed to be such a composition, called the Black Rook, which had been copyrighted by the author, it is reasonable to infer that he would have taken an assignment of the latter's right to himself, and have produced it here in evidence or accounted for its absence. The omission to do this tends strongly to disprove the allegation of a purchase from Schonberg by Martinetti.

On the other hand, it is admitted that Maguire has the legal right to exhibit the Black Crook in California, and also that the present exhibition at the Opera House, is being made, not from the copy obtained from the author at the time of the assignment by him to Maguire, but from a copy of the manuscript which Martinetti alleges that he obtained from Schonberg; and that Maguire's copy is now on the way here from New York.

Martinetti's copy being prior in point of time to the assignment to Maguire, if it had been obtained by legitimate means, he would have the legal right to make an exhibition or representation of the play from such copy as against the author or his subsequent assigns. In that case, such copy would be the literary property of Martinetti, and the obtaining of a copy of this manuscript by improper means —without the consent of Martinetti—would be a fraud upon him. The purchase of this copy by Maguire's manager from Martinetti's employee—McCabe—was made under such circumstances, that he did not acquire any right thereby as against the lawful proprietor of the original. At the time of the sale McCabe declined to tell when, where, or how he got the copy. Maguire's manager then knew that the Martinettis were rehearsing the spectacle set down therein. The manager from these and other circumstances had good reason to believe that he was purchasing stolen property; and whether he believed so or not, as such was the fact, the effect is the same.

But Martinetti had no literary property in the copy which he obtained from New York. By literary property, of course, I mean property in the composition, and not in the mere paper. The Black Rook, or manuscript in the possession of Martinetti, was itself a plagiarism of, or a slightly disguised copy of, the Black Crook. This being so, it was stolen property in the same sense that the copy was which McCabe sold to Maguire, and therefore Martinetti has no literary property in it. He is neither the author, assignee or donee of the play or the manuscript of it. For this reason, I am clear that he cannot enjoin Maguire from the use of his copy, however obtained. In this respect, both parties are wrong-doers and in pari delicto.

More than this, I suppose that the owner of a play who finds that a colorable imitation of it, or a true copy surreptiously obtained, is in the hands of a third person, may purchase the same, even if he should know at the time that the person from whom he is purchasing has obtained it from another improperly. This may be the easiest and cheapest way of protecting his rights as owner. In effect he is only buying his own prop-

erty—or buying his peace instead of going to law.

This, I believe, disposes of all the grounds on which the complainants—Martinetti et al.—rely for an injunction, and their motion must, therefore, be denied, with costs.

On the other hand, if this play is a "dramatic composition," within the purpose and meaning of the act of congress (4 Stat. 436; 11 Stat. 138), the motion of the complainants—Maguire et al.—for an injunction against Martinetti et al. should be allowed. But as at present advised, I do not think it such a composition. All the witnesses agree—particularly the experts—that the so-called play of the Black Crook has no originality, and that it consists almost wholly of scenic effects, or representations taken substantially from well known dramas and operas. The evidence of W. B. Hamilton, the stage-manager of the Metropolitan, is explicit and satisfactory on that point. He has been an actor since 1828, in both Europe and America. He appears to be well informed in what pertains to his profession, and impressed me with his fairness and candor.

The Black Crook is a mere spectacle—in the language of the craft a spectacular piece. The dialogue is very scant and meaningless, and appears to be a mere accessory to the action of the piece—a sort of verbal machinery tacked on to a succession of ballet and tableaux. The principal part and attraction of the spectacle seems to be the exhibition of women in novel dress or no dress, and in attractive attitudes or action. The closing scene is called Paradise, and as witness Hamilton expresses it, consists mainly "of women lying about loose"—a sort of Mohammedan paradise, I suppose, with imitation grottos and unmaidenly houris. To call such a spectacle a "dramatic composition" is an abuse of language, and an insult to the genius of the English drama. A menagerie of wild beasts, or an exhibition of model artistes might as justly be called a dramatic composition. Like those, this is a spectacle, and although it may be an attractive or gorgeous one, it is nothing more. In my judgment, an exhibition of women "lying about loose" or otherwise, is not a dramatic composition, and, therefore, not entitled to the protection of the copyright act. On this ground, the application of Maguire et al. for an injunction is denied, with costs.

But, further, the act of congress provides that a "dramatic composition" to be entitled to be copyrighted, must be "suited for public representation." What is intended by the word "suited?" Simply that the composition is technically adapted to the stage, and capable of being produced upon it? While it means this, I am inclined to think it means something more; that to be suited to public representation, it must be fit to be represented. I do not for a moment suppose or pretend that congress has the power to interfere directly and prescribe a standard of good morals on this subject. But the benefit of copyright is a privilege conferred by congress in pursuance of the constitution of the United States. In conferring this privilege or monopoly upon authors and inventors, I suppose that it is both proper and constitutional for congress so to legislate, as to encourage virtue and discourage immorality.

Congress has power "to establish an uniform rule of naturalization." Const. art. 1, § 8, subd. 4. In exercising this power, it has always discriminated in favor of morality, by providing that on the hearing of the application for citizenship, the applicant must prove that for five years prior to such application, "he has behaved as a man of good moral character." 2 Stat. 154.

Besides, the power to pass what are called copyright and patent laws, or as the constitution expresses it, to secure "for limited times to authors and inventors the exclusive right to their respective writings and discoveries," is given not generally, but only as a means to this particular end—"to promote the progress of science and useful arts." Const. art. 1, § 8, subd. 8. Hence, it expressly appears that congress is not empowered by the constitution to pass laws for the protection or benefit of authors and inventors, except as a means of promoting the progress of "science and useful arts." For this reason, an invention expressly designed to facilitate the commission of crime, as murder, burglary, forgery or counterfeiting, however novel or ingenious, could not be patented. So with a dramatic composition which is grossly indecent, and calculated to corrupt the morals of the people. The exhibition of such a drama neither "promotes the progress of science or useful arts," but the contrary. The constitution does not authorize the protection of such productions, and it is not to be presumed that congress intended to go beyond its power in this respect to secure their "authors and inventors the exclusive right" to the use of them. Upon this ground, I very much doubt whether the spectacle of the Black Crook is entitled to the benefit of copyright, even if it were admitted that it was a "dramatic composition."

In considering these questions, this court does not pretend to be the conservator of the public morals in this respect. That is a matter for the local legislature. But in giving construction to the constitution and laws, when legitimately called upon to do so, it is the duty of all courts to uphold public virtue, and discourage and repel whatever tends to impair it. Now, it cannot be denied that this spectacle of the Black Crook only attracts attention as it panders to a prurient curiosity or an obscene imagination by very questionable exhibitions and attitudes of the female person. True, the lawfulness of such an exhibition depends upon the law of the place where it takes place. But when the author, inventor or proprietor thereof asks the power of this court to protect him in the exclusive

right to make such an exhibition under the copyright act, the matter assumes a very different aspect. I am strongly impressed with the conviction that an injunction should not be allowed in this case on the ground that the Black Crook is not "suited for public representation"—not fit to be exhibited—within the meaning of the act of congress; and on the further ground that it is not within the scope of the power granted to congress to protect the authors or inventors of such exhibitions in "the exclusive right" to the use of them, as they neither promote the progress of science or useful arts.

Case No. 9,174.

MARTINEZ v. The ANGLO NORMAN et al.

[Newb. 492.] [1]

District Court, E. D. Louisiana. Nov., 1854.[2]

COLLISION—TOW—SHORT HAWSER—PROPER MEASURE OF PREVENTION.

1. Where it appeared, that while the libelant's schooner and a bark were in tow of a tow-boat, both vessels being astern of the tow-boat, the schooner by some mismanagement, ran in before the bow of the bark, broke her own hawser, capsized and immediately sunk; and it further appeared that the cause of the disaster was the shortness of the hawser of the schooner, and the refusal of those in charge of her "to pay it out," in obedience to the orders of the master of the tow-boat; it was *held* that neither the tow-boat nor the bark was to blame, and that the libel should be dismissed.

2. In a collision between two vessels, where it appears that one of them has neglected an ordinary and proper measure of prevention, the burden is on her to show that the collision was not owing to her neglect, but would have equally happened, if she had performed her duty.

[Suit in admiralty by Ramon Martinez and others, owners of the schooner Anita, against the steamboat Anglo Norman and the bark Jane E. Williams for the recovery of damages caused by collision.]

C. Roselius, for libelants.

Benjamin, Bradford & Finney, for the Anglo Norman.

Durant & Hornor, for the Jane E. Williams.

McCALEB, District Judge. In this case it appears that, while the schooner Anita belonging to the libelants, and the bark Jane E. Williams were in tow of the Anglo Norman, both vessels being astern of the tow-boat, the schooner by some mismanagement, ran in before the bow of the bark, broke her own hawser, capsized and immediately sunk. This suit is brought to recover the damages sustained by the libelants in consequence of the loss of their vessel; and they have filed their libel against both the tow-boat and the bark.

An attentive examination of all the evidence has led me to the conclusion that the cause of the disaster was the shortness of the hawser by which the schooner was towed. It is impossible, it seems to me, that the loss of the schooner could have occurred in the manner spoken of by the witnesses, if the two vessels astern had been placed at an equal distance from the stern of the tow-boat. The evidence on behalf of the libelants is very strong in support of the position assumed by their proctor, that the collision occurred in consequence of the wild and irregular steering of the bark; but on behalf of the latter vessel, it is equally strong that the schooner was to blame. I can see no fair ground for giving judgment against either the tow-boat or the bark. The captain of the former repeatedly gave orders to the schooner, to "pay out" the hawser; and he was certainly not to blame if his orders were not obeyed. Nor could the bark be responsible for the deficiency in the length of the hawser, or the irregular steering which was the consequence of that deficiency. I am therefore of opinion that the libelants have failed to make out a case which would entitle them to the judgment of the court.

In a collision between two vessels, where it appears that one of them had neglected an ordinary and proper measure of prevention, the burden is on her to show that the collision was not owing to her neglect, but would have equally happened if she had performed her duty. [Clapp v. Young, Case No. 2,786]; Abb. Shipp. 300, note.

The libel must therefore be dismissed, with costs.

The above case was taken by appeal to the circuit court, and the decree of the district court was affirmed by Justice Campbell.

MARTIN, The JOHN. See Cases Nos. 7,357 and 7,358.

MARTIN, The MARIA. See Case No. 9,079.

Case No. 9,175.

MARTINS v. BALLARD et al.

[Bee, 51.] [1]

District Court, D. South Carolina. Oct. 1, 1794.

PRACTICE IN ADMIRALTY — LIBEL IN PERSONAM—TORT—DAMAGES.

Damages will be assessed in this court, upon a libel in personam, for commission of trespass or tort upon the high seas.

[Cited in Plummer v. Webb, Case No. 11,233; Camden & A. R. Transp. Co. v. The Lotty, Id. 2,337a; New Jersey Steam Nav. Co. v. Merchants' Bank of Boston, 6 How. (47 U. S.) 432.]

In admiralty.

BEE, District Judge. This is a libel for damages. The evidence is, in all material points, the same that was produced in the cause of Jansen v. The Magdalena [Case No. 7,216], and these defendants; except only as to the matter of damages. I shall not, there-

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

[2] [Decree affirmed in the circuit court. Case unreported.]

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

fore, recapitulate that evidence; the former case having been so recently decided.

The proceedings are, now, in personam; but the principles of both cases, as relates to the law of nations and to treaties, are the same. The plea to the jurisdiction of the court is made as by [William] Talbot, with this difference, that, upon the former occasion, [Edward] Ballard made default, and every charge was of course taken, as against him, pro confesso. Here he has pleaded, and his advocate relies upon the ground not taken in the first case. I shall consider the arguments by which it is contended that a difference exists as to the merits. The former decree was founded on the 19th article of the treaty with the United Netherlands. It is said that Ballard's commission does not come within that article.

It is also contended that the schooner L'Ami de la Liberté is a vessel belonging to the French republic, and therefore not within the letter or spirit of the 19th article of the treaty with Holland. That any American citizen may lawfully command a public vessel, under French authority, and may of right examine, on the high seas, vessels belonging to neutrals or to the enemies of France. Molloy, 1, 3, 12. That Captain [Peter] Martins, having made resistance to such examination, must abide by the consequences of his own imprudence.

I have already declared my opinion of the authority under which Ballard acted. It runs thus:

"In the Name of the French People. On board the Tigre, 13th of Germinal, 2d year of the republic, &c. Peter John Vanstable, rear admiral commanding a division of the naval forces of the republic, stationed on the coast of the United States of America. In consequence of the offer of citizen Sinclair to enter, voluntarily and from pure love of liberty, into the service of the French republic, and the engagement on his part to conduct himself altogether as a good French republican, I give him an order to take command of the schooner 'L'Ami de la Liberté,' and to fulfil the commission confided to him by me. (Signed) Rear Admiral Vanstable.

"We Anthony Louis Fonsportuis, consul of the French republic, charged with the consul's office at Charleston, certify to all whom it may concern that the citizen John Sinclair, having declared to us his inability to go to sea, requires us to transfer the present commission to the citizen Edward Ballard. We have therefore transferred the said commission to the said Ballard, to be executed by him in the place of said Sinclair."

Given at the consul's office.

This commission, however legal for the purpose mentioned in it, was illegal when applied to others, so different from its tenor; and Ballard was highly criminal in so converting and abusing it. What proof is offered that this vessel belonged to the French republic? The admiral's commission does not describe her as such; nor is she so called in the consul's letter to the collector of Charleston. He says, only, that she is under a special commission of Admiral Vanstable, charged by him with a secret expedition. That it is indispensable that she should be allowed to go to sea; and that she does not come within the embargo. But he does not say she belongs to the republic. If we examine the evidence of Mr. Airs, we shall find that at the time when she was employed by Admiral Vanstable in the business committed by him to Sinclair (which both Airs and Sasportas explained to be unrigging and prevention from sailing of certain vessels at Norfolk) he (Airs) sailed in her from the fleet to that place. She was then, he says, commanded by Ballard, and Sinclair appeared as a passenger on board. He says further: that she was raised from a pilotboat, and was fitted with railing and stanchions, and a streak above wale, for guns. When she arrived here, she came in under American colours: Wallace the boarding officer, minuted her as a Virginia pilotboat, armed in Norfolk. The collector says she was entered as such, by Sinclair; that he alone managed all that related to her at the custom-house, even after she had been transferred by the consul to Ballard. Add to this Craig's evidence, and no doubt can remain as to her being private, not public property. Here is, indeed, proof positive from the acknowledgment of Sinclair himself, and of Talbot, that she was owned in part by Sinclair, whose partnership with the French republic is too ridiculous to be credited. All reliance upon the ground of her being a public vessel of that government must fail. As therefore Talbot, under the treaty with Holland, was not at liberty to capture Dutch property; as Ballard's was a private vessel, and himself incapable of making lawful capture, for want of a lawful commission; I can do no otherwise in this case than I did in that of Jansen v. The Magdalena [supra], I must sustain the jurisdiction of this court, and declare the proceedings of both these defendants to be wholly illegal.

It remains to inquire whether the court has any, and what, further jurisdiction in cases of this nature. The 9th section of the judiciary law of congress vests this court with exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction. This necessarily includes all matters arising on the high seas, of a civil nature; all contracts, torts and trespasses; and, by the law of nations, is extended to all civil contests between our own citizens, and between foreigners, as to the right of property which has been illegally and piratically taken on the high seas. Such property, may if retained, and brought within the jurisdiction of the court, be restored: and equivalent damages may be given, if it has been disposed of. The court may proceed civiliter, even where it is, expressly, without criminal jurisdiction. In Le Caux v. Eden Doug. 594, it is shewn, by two cases, that the court of admiralty in England, sitting as an instance court, restored

property taken by pirates, who had not been apprehended.

The supreme court of the United States having, in Glass v. The Betsey [3 Wall. (3 U. S.) 6], decided that this court is possessed of all the powers of a court of admiralty, whether as an instance or prize court, it must be authorized to inquire into, and to determine the quantum of damages and costs in all cases of trespass or tort. The case from Douglas above reported is supported by that of Livingston v. M'Kenzie, in 3 Durn. & E. [3 Term R.] 333. And similar proceedings have been had formerly in this court, as appears by reference to its records. I will, at present, content myself with mentioning the case of Walton v. Jeamans, in August, 1748 [unreported]. There the defendant was condemned to pay £500 for unlawfully capturing and entering the libellant's vessel and taking therefrom the goods, wares, and merchandise enumerated in the libel. Hopk. 137, is full to the same point, viz. the power this court has to assess damages in personam. I shall proceed to do so in the case before me.

It is pretended by the defendants that they boarded the actor's vessel (Fortune der Zee) merely for the purpose of examining her. Why then did they, in the first instance, order her to strike? and why, after boarding her, and finding that she was Dutch property, did they not relinquish the prize? Their conduct, on the preceding day, in the case of the Magdalena makes their real intentions too plain. But the bringing off the captain and crew of the Fortune, when they found themselves obliged to give up the ship, serves to shew that the folly of their conduct was equal to the guilt of it: for had they been left, the vessel would have proceeded on her voyage, and the trouble and expense of this suit would have been spared. It has been proved that the sails and rigging were much injured; and though this has been attributed to the circumstance of the vessel's going into the Havanna, it is neither probable that it was so, nor was any evidence adduced to support the assertion.

I find by reference to merchants of respectability, well acquainted with such business, that the amount of damages done to the sails and rigging could not be less than... Dollars 500
The pay and wages of a captain and seamen to navigate her to Holland is, at least..... 300
(I make no allowance for demurrage at the Havanna, as it appears that the vessel waited there for the fleet, not choosing to sail alone.)
From statements in the libel, which are not contradicted, and from information of the witnesses, I calculate captain Martin's damage, by loss of clothes, plate, &c. at.. Dollars 750
His pay as captain, from 18th May to 18th December, (seven months) when he may probably get back to Holland, amounts, at thirty dollars per month, to..... 210
His expenses here for four months, at thirty dollars per month..... 120
Counsel's fees 150

Total amount ..... Dollars 2,030

Of this sum I decree to the owners of the ship..... Dollars 800
To the captain, as above..... Dollars 1,230

As both defendants were included, by consent of their counsel, in this decision, I adjudge and order that each of them pay one moiety, say ten hundred and fifteen dollars, of the above total amount; and that they pay the costs of suit. I direct further that twelve hundred and thirty dollars be paid to the captain of the Fortune der Zee; and the remaining eight hundred deposited in the branch bank here, till applied for by the owner or owners of the ship, or their authorized agent.

[NOTE. Ballard, who had been surrendered into custody by his surety, made application to be allowed to take the oath for the relief of persons imprisoned for debt. The application was refused. Case No. 9,175. There was an appeal in the case of Jansen v. Vrow Christina Magdalena (Case No. 7,216) to the circuit court. It was there affirmed. Case unreported. It was then appealed to the supreme court, when the decree was again affirmed. 3 Dall. (3 U. S.) 133.]

Case No. 9,176.

MARTINS v. BALLARD.

[Bee, 258.] [1]

District Court, D. South Carolina. 1808.

IMPRISONMENT FOR DEBT—RELEASE—TORTS.

Persons confined in jail for torts and trespasses do not come within the provisions of the act of congress, or that of this state [South Carolina] for relief of insolvent debtors.

The application now before the court is made on the part of Captain Ballard, who desires that he may be admitted to take the oath, mentioned in the act of congress, for the relief of persons imprisoned for debt. It has been objected that this act relates solely to persons confined for debt on execution; and that Ballard does not come within that description. The law of this state for the relief of insolvent debtors excepts such persons as are in confinement for torts and trespasses; and it has been contended that the exception ought to prevail in this instance. That such is the proper construction of the state law is admitted by the opposite counsel; but they assert that it cannot apply here. That the act of congress alone must guide the present decision, and that, in it, all civil actions are comprehended. That it must be construed favourably, being in favorem libertatis. That confinement of debtors is contrary to every principle of humanity. That the claim [by Peter Martins] against [Edward] Ballard, for which he stands imprisoned, is by operation of law become, and must be considered as, a debt, within the meaning and intention of the law of congress.

BEE, District Judge. As this is a case of first impression, I have considered it with

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

much attention. In order to determine it, we must look to the origin of the suit, and see in what predicament Ballard now stands. The suit was instituted, originally, for damages, under the treaty with the United Netherlands. Ballard was taken into custody on a warrant out of this court, and gave bond with sufficient security to abide the court's decision. Previously to a final decision, his surety, or bail, applied here for leave to surrender back the defendant to the custody of the marshal; and this was done accordingly. Ballard now applies for relief under this act of congress.

It cannot be doubted that the act was intended solely for the relief of persons imprisoned for debt. It speaks of such as may be in confinement "on executions issuing from any court of the United States for satisfaction of judgments in any civil actions." If this suit had been for debt, or on contract, I should have had no doubt upon the point; but, by reference to the treaty with the United Netherlands, we find that this suit originated in a violation of that treaty expressly guarded against thereby. (See 13th article of that treaty.) We must, therefore, consider how far cases like the present could have been contemplated by congress, when they passed this act. Could they mean to discharge such offenders as Ballard; against whom the treaty expressly declares that their persons, as well as their goods, shall be answerable for any violation of its provisions? I am of opinion that the clause of the act relates not to him. To discharge him under the present application would, I think, shew a misconstruction of the law, and amount, on my part, to an infringement of the treaty. Let the application be dismissed.

[See Cases Nos. 7,216 and 9,175.]

MARTIN, The THOMAS. See Case No. 13,926.

MARTIN WHITE, The (MENDELL v.). See Case No. 9,419.

MARTIN, The WILLIAM. See Case No. 17,698.

Case No. 9,177.

The MARTIN WYNCOOP.

[10 Blatchf. 167.] [1]

Circuit Court, S. D. New York. Sept. 23, 1872.

COLLISION — SPECIFIC NEGLIGENCE CHARGED — HELM SHIFTED—NEGLIGENTLY NAVIGATED.

Where a libel, in rem, for a collision, alleged, that the collision occurred because the vessel sued shifted her helm from starboard to port, and it was not clear, on the evidence, that that was the fact, but the libel also alleged that the vessel sued could easily have avoided the collision, but was so negligently and carelessly navigated, that she ran into the other vessel, which was lying disabled, and the evidence sustained such allegation: *held*, that the failure to prove the alleged mode in which the collision occurred was no ground for refusing a decree to the libellants.

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

Charles Donohue, for libellants.

Robert D. Benedict, for claimants.

WOODRUFF, Circuit Judge. I concur in the conclusion of the learned district judge, by whom, more than nineteen years ago, this case was decided. The libellants' schooner was suddenly disabled, and, while, with all diligence, her captain and crew were making the necessary repair, by which alone the schooner could be steered, the vessel meantime lying with her head to the wind, and with little or any motion, except with the current, the sloop, the Martin Wyncoop, having a range of the whole breadth of the North river, nearly three miles at the point in question, ran into her, and caused the damage for which recovery herein was sought. I cannot find that the schooner or her crew omitted any practicable and reasonable precaution to prevent the collision, or that they did anything which contributed thereto; and, that the sloop had abundance of time and opportunity to see and avoid the schooner, is most palpable.

It is, however, most urgently insisted, that the decree should be reversed, because the precise mode in which the vessels were brought together, as stated in the libel, is not confirmed by the proofs; that is to say, that it is stated in the libel, that the sloop had her tiller to starboard, and would have cleared, and was, in fact, clearing the schooner, when her tiller was shifted to port, and she was thereby directed and navigated into the schooner. It is claimed, that not only the positive testimony, but the manner in which the blow was given and received, disproves this allegation.

There is, no doubt, some difficulty, upon the proofs, to explain precisely how the two vessels got into the position in which they were at the moment of the blow, that is, starboard bow to starboard bow, for that is the preponderance of the evidence. But, the allegation in the libel relates to the time when the danger was imminent, when those on board the schooner had actually hailed the on-coming sloop, when, as I think, for want of a proper lookout on the sloop, she had got herself in too near proximity to the schooner, and when, whether it is true that she ported her helm, or, in the excitement of the peril, neglected to keep off sufficiently, ought not to be made the test of the right of recovery. The substantial fact stated in the libel, that, at a time when, at such distance from the schooner that she could easily have passed on either side of her, she was so negligently and carelessly navigated that she ran

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

into her, is, I think, fully proved. On that ground the libellants should have a decree, for the amount decreed below, with interest and costs.

MARTZ (CLEARY v.). See Case No. 2,873.

Case No. 9,178.

In re MARVIN.

[1 Dill. 178;[1] 3 Chi. Leg. News, 394.]

Circuit Court, E. D. Missouri. 1871.

BANKRUPTCY—INSANE DEBTORS—OBJECTION OF GUARDIAN.

A person who is so unsound in mind as to be wholly incapable of managing his affairs, cannot commit an act for which he can be forced into bankruptcy by his creditors against the objection of his guardian.

[Cited in Re Pratt, Case No. 11,371; Re Weitzel, Id. 17,365.]

[In review of the action of the district court for the Eastern district of Missouri.]

A petition was filed, in February, 1871, in the district court for the Eastern district of Missouri, by creditors, under the 39th section of the bankrupt act [of 1867 (14 Stat. 536)] for an adjudication of bankruptcy against William L. Marvin. Two acts of bankruptcy were charged: (1) That Marvin, being a merchant, on the 4th day of January, 1871, suspended and did not resume payment of his commercial paper within fourteen days, nor at any time thereafter. (2) That in January, 1871, Marvin being insolvent, did suffer his property to be taken on legal process under writs of execution and attachment, with intent to defeat and delay the operation of the bankrupt act. Marvin, by his guardian, appeared and filed an answer to the petition, stating that on the 30th day of January, 1871 (prior to the filing of the petition in bankruptcy), by due proceedings in the probate court of St. Louis county, Marvin was adjudged to be a person of unsound mind, and incapable of managing his affairs, and that by an order of said court B. D. Lee was duly appointed, and has qualified as guardian of the person and estate of the said Marvin. And the answer states that at the time mentioned in the petition, when the acts of bankruptcy were committed, Marvin was a person of unsound mind, wholly incapable of managing his business, and of committing any of the acts of bankruptcy charged against him, and had been in that condition of mind for more than six months before the commencement of the proceedings in bankruptcy. The district court (Treat, J.) held this to be a good answer to the petition, and accordingly overruled a demurrer thereto, and the petitioning creditors electing to abide by the demurrer, their petition was dismissed, and they bring the question into this court for review.

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

Tatum & Horner, for petitioning creditors.

B. D. Lee, opposed.

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

DILLON, Circuit Judge, referring to the somewhat unsatisfactory state of the authorities cited in the note, observed, that upon consideration, the court is of the opinion that a person who is so unsound in mind as to be wholly incapable of managing his affairs cannot in that condition commit an act for which he can be forced into bankruptcy by his creditors, against the objection of his guardian. Whether such a person, on the petition of himself or guardian, may, if insolvent, go into voluntary bankruptcy, the court gives no opinion. Affirmed.

NOTE. Shelford says: "An inquisition of lunacy will not protect a lunatic against an action, and a commission of bankruptcy is a species of action against which lunacy cannot be used as a defense (Anon., 13 Ves. 590), if the act of bankruptcy was committed when the party was sane; for a lunatic under the influence of that visitation cannot commit an act of bankruptcy;" citing Ex parte Priddy, 8th June, 1793; Shelf. Lunatics, 429. See 2 Pars. Cont. (4th Ed.) 617, 3 Pars. Cont. (5th Ed.) 461, where the author seems to intimate a contrary doctrine, but no authorities to the point are cited. But see Ex parte Stamp, 1 De Gex, 345.

Case No. 9,179.

MARVIN v. CHAMBERS.

[12 Blatchf. 495;[1] 13 N. B. R. 77; 1 N. Y. Wkly. Dig. 365.]

Circuit Court, E. D. New York. April 17, 1875.

BANKRUPTCY—ILLEGAL PREFERENCE — MORTGAGE TO SECURE FUTURE CREDITS.

F., a dealer in boots and shoes, was accustomed to buy goods of C. At a time when he was not indebted to C., he applied to C. to buy more goods on credit, and it was agreed that C. should furnish him goods from time to time, on the security of a mortgage on certain lands of F. The mortgage was made by F. to C., being, in terms, to secure any liability, not exceeding $3,000, that might be incurred by F. to C., and being so drawn as to cover any present as well as any future liability. C. afterwards sold goods to F. to the value of $800, who continued his business, but was, shortly afterwards, adjudged a bankrupt. The assignee in bankruptcy of F. brought this suit to set aside the mortgage: *Held*, that the mortgage was valid to the extent of the goods sold by C. to F. on the faith of the mortgage.

In equity.

Richard Marvin, in pro. per.

Charles M. Dickinson, for defendant.

BENEDICT, District Judge. This is an action brought by Richard Marvin, assignee in bankruptcy of Joseph Farrel, to set aside a mortgage made by Farrel to the defendant James Chambers. It appears, from the evidence, that Farrel was a dealer in boots and

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

shoes, accustomed to buy goods of the defendant. On the 5th of June, 1874, Farrel, not being at the time indebted to Chambers, applied to Chambers to buy more goods upon credit, whereupon it was agreed that goods should be furnished him from time to time, upon the security of a mortgage upon certain lands. In pursuance of this arrangement, the mortgage in question was made, which, in terms, stated that it was given to secure any liability, not exceeding the sum of $3,000, that might be incurred by the mortgagor to the mortgagee. The clause in the mortgage is drawn to cover any present as well as any future liability; but, as before stated, it is admitted that no present liability existed at the time of its execution. Goods were thereafter sold by Chambers to Farrel, to the amount of some $800, and, no long time afterwards, Farrel became bankrupt. Now, Chambers claims to hold this mortgage as security for the value of the goods actually sold by him to Farrel upon the faith of the mortgage. The evidence contains some contradictory testimony as to whether Chambers knew that Farrel was insolvent at the time of the execution of the mortgage; but, there is no dispute as to the fact, that, after giving the mortgage, Farrel continued his business, and actually received from Chambers some $800 worth of goods, which were purchased upon the faith of the mortgage in question. The case is thus shown to be one of a mortgage executed in good faith, for a present good consideration. Such a mortgage is protected by the bankrupt law, and, to the extent of the advances actually made, is good as against an assignee in bankruptcy.

There must, therefore, be a decree dismissing the bill, with costs.

Case No. 9,180.

MARVIN v. DENNISON et al.

[1 Blatchf. 159;[1] 20 Vt. 662.]

Circuit Court, D. Vermont. May Term, 1846.

EJECTMENT—TITLE—POSSESSION—PROPER PARTIES—BOND FOR DEED.

1. The object of the action of ejectment, as used in Vermont, is to settle the title and establish the right of property, as well as to recover the possession; and the judgment is made conclusive as to all the parties.

2. Where it appeared, in ejectment, that one of the defendants claimed title to the lands in question, under a mortgage from the others, and that the others were in the actual occupancy of the lands, there being no evidence, however, that the defendant claiming as mortgagee was in actual possession: *held*, nevertheless, that he was properly joined as a party defendant in the action.

3. It would seem, that any person under whom the tenant in possession may, legally speaking, be said to hold, whatever may be the nature or character of the tenancy, should be liable to be made a party to the action.

4. It would seem, also, that a vendor may be joined with his vendee, where the latter holds under a bond or contract for a deed; or a trustee with his cestui que trust, where the latter is in possession under the trust title.

This was an action of ejectment [by Ebenezer Marvin against Isaac Dennison and others]. It appeared that one of the defendants claimed title to the lands in question, under a mortgage from the others, and that the others were in the actual occupancy of the lands; but there being no evidence that the defendant, so claiming as mortgagee, was in actual possession, it was objected that the action could not be maintained against him. The court overruled the objection, on the grounds and for the reasons stated in the following opinion.

B. H. Smalley, for plaintiff.

Lucius B. Peck and Oliver P. Chandler, for defendants.

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

PRENTISS, District Judge. The object of the action of ejectment, as adopted and in use in this state, is not merely to recover the possession, but to settle the title and establish the right of property as well as to recover the possession. To this end, and to prevent repetition of actions, the judgment, instead of leaving the title and right of property unsettled, and the same question liable to be retried by successive suits, as at common law, is made conclusive as to all the parties. Looking to the purpose and effect of the action, as thus defined and regulated, it would seem that, as a general rule of practice naturally resulting therefrom, independent of any special legislative enactment on the subject, any person under whom the tenant in possession may, legally speaking, be said to hold, whatever may be the nature or character of the tenancy, should be liable to be made a party to the action.

How far the statute regulation, that "the action shall be brought as well against the landlord as the tenant in possession of the premises," which makes the joinder imperative, instead of leaving it optional with the plaintiff, as it otherwise would be, does or ought to be held to extend, is a question of construction. If it embraces all tenancies, tenancies of every nature and kind, then, of course, the parties to all not only may but must be joined. If it extends only to a particular class of tenancies, such as are created by lease, reserving rent, service, or other equivalent duty, where the relation of landlord and tenant strictly and properly exists, as would seem to be the more reasonable and just construction, then all other tenancies, not within the particular regulation, remain subject to the common rule, and the parties to them, like parties in other analogous cases, may, but need not be joined.

To the joinder of mortgagee with mortgagor, we are not able to perceive any well

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

founded objection; nor any, we may add, to the joinder of vendor with vendee, where the latter holds under a bond or contract for a deed, or of trustee with cestui que trust, where the latter is in possession under the trust title. In these and other cases of a like nature, but especially in that of mortgagee and mortgagor, there is such a relation or connection existing between the respective parties as constitutes a tenancy, though it may not amount to that of landlord and tenant within the meaning of the statute. A mortgagee, if he claims title under the mortgage, cannot be allowed, in contradiction to the tenancy, to set himself up, or claim to be treated, as a stranger to the possession. If he claims nothing under the mortgage, and would, on that ground, not only discharge himself from, but recover costs, there can be no injustice or hardship in compelling him to disclaim, so that he may be forever estopped by matter of record from setting up any title under the mortgage.

If the mortgagee cannot be made a party, the suit would be, in a good measure, ineffectual; since a judgment against the mortgagor, though conclusive upon his rights, would have no effect upon the rights of the mortgagee, who would be at liberty to bring an action in his own behalf and have the title tried over again, or to leave it unsettled and open to litigation during his pleasure or until the statute of limitations should run. Instead of such being the rule of practice, it would seem to be more consistent with the general reason and policy of the law, that all the parties to the title, under and subsidiary to which the possession is held, should be liable to be joined in the first instance, and the title finally settled as to all, in one suit. The fitness and propriety of this will appear none the less obvious, when it is considered that otherwise, especially where different courts, acting under different and independent jurisdictions, exist and may be resorted to, there might, possibly, be conflicting decisions upon the same title.

As the mortgagee, even after default in payment, has no right, or but an imperfect right, under any view of the law, to the rents and profits, until demand made or action brought, he can be answerable for them only when he has received them. It has been argued, however, that if there is a recovery against him for seizin and possession, there must also, of necessity, according to technical rules, be judgment against him for the rents and profits. But we see no such technical difficulty, nor indeed any practical difficulty whatever, if the parties plead severally, as they may do, in giving judgment in such case for the damages against the mortgagor alone.

No adjudication of the state court has been brought to our notice or referred to by the counsel, nor are we favored with information in any other way how the subject is or has been considered there. We learn, however, that the precise question here presented was determined in this court several years ago by the late Judge Thompson, and we all know how to appreciate the soundness, as well as the learning and ability of his judicial opinions. On the authority of that decision, thus in point, as well as upon our own judgment on the merits of the matter, given in the views already expressed, the objection taken by the defendants' counsel must be overruled.

Case No. 9,181.

In re MARWICK.

[2 Ware (Dav. 229) 233;[1] 8 Law Rep. 169; 3 N. Y. Leg. Obs. 286.]

District Court, D. Maine. May 31, 1845.

BANKRUPTCY — PARTNERSHIP — CREDITORS — NO JOINT ESTATE—INDIVIDUAL CREDITORS.

1. Whether under the bankrupt act the creditors of a partnership can be allowed to prove claims against the separate estate of one of the partners to receive dividends, in concurrence with the separate creditors of the partner, when there is no joint estate and no living solvent partner—quaere.

[Cited in Re Johnson, Case No. 7,369.]

2. If there be any joint fund, however small, such proof cannot be allowed, although such fund may have been created by the separate creditors purchasing some of the partnership assets, actually worthless, for the purpose only of creating it; for if there be a joint fund, the court cannot, under the statute, look behind the fact, to inquire how it has been produced.

[Cited in Re Byrne, Case No. 2,270; Mead v. National Bank of Fayetteville, Id. 9,366; Re Dunham, Id. 4,144; Re McEwen, Id. 8,783; U. S. v. Lewis, Id. 15,595.]

[Cited in Harris v. Peabody, 73 Me. 269.]

This was a case of objection to a proof of a debt. [Albert] Marwick, the bankrupt, in May, 1837, entered into a co-partnership with one Frederick Davis, and as partners they purchased a quantity of provisions for the Georgia Lumber Company, to the amount of $800, for which they drew their bill on the company in favor of one Bradbury. Before the bill was paid, the company failed, and the failure of the company produced that of the copartnership of Marwick & Davis, by which the firm was dissolved. They afterwards gave their joint note for the sum remaining due, viz., $740.88. This note, Bradbury, for a valuable consideration, transferred to Dole, with notice with that it was a partnership debt. The assignee of Marwick & Davis, rendered in his account of the joint estate, Oct. 25, 1844, showing outstanding demands, in favor of the firm, to the amount of $13,000, which comprised the whole assets of the firm and which were all represented as utterly worthless. Dole, the creditor, proved his debt, June 17, 1842. The assignee, after rendering his first account, applied for liberty to compromise, or sell, the claim against the Georgia Lumber Company, which was disposed of for $40, of which a supplementary account was rendered, and the

[1] [Reported by Edward H. Daveis, Esq.]

amount paid into court, April 25, 1845, to the credit of the joint estate. The final account of the assignee of the separate estate showed assets to the amount of $545.93. Two debts have been proved and allowed against the estate, one by Charles E. Marwick, for $684.04, and the debt of Dole. Marwick objected to the admission of Dole's debt against the separate estate.

WARE, District Judge. Two questions have been raised and argued in the present case. The first is, whether the creditors of a copartnership can, in any case, be admitted to prove their claims against the separate estate of one of the copartners, for the purpose of receiving dividends in concurrence with the separate creditors of the copartner. The second is, whether, admitting that they may in some cases, the partnership creditors can be admitted so to prove under the facts in this case.

The 14th section of the bankrupt act [5 Stat. 448] provides, when two or more persons become bankrupt who are partners in trade, that separate and distinct accounts shall be kept, in the settlement of their estates, of the joint effects of the firm and of the separate effects of the several partners, and when the whole expenses are paid, that the net proceeds of the joint property shall be applied to the payment of the joint creditors, and the separate property of each partner shall be applied to the payment of his separate creditors, and that the creditors of the respective estates shall be allowed to receive dividends from the other estate only after the creditors of that estate shall have been fully paid. This is in substance the rule established by the law, and it is quite clear where there is both a joint and separate estate, that the creditors of neither can prove against the other estate for the purpose of receiving dividends, except from the surplus remaining after its own proper creditors have been fully satisfied. This general rule for marshaling the assets and claims is taken from the English bankrupt law. But under that system there are exceptions, as well established as the rule itself. One of these exceptions is where there is no joint estate and no living solvent partner, as is the fact in the present case. In such a case, the joint creditors are allowed to prove and receive dividends against the separate estate, in concurrence with the separate creditors. Story, Partn. § 372; Eden, Bankr. Law, 172. But to bring the case within the exception, there must be absolutely no joint estate. If there be any, however small, the exception is not allowed, and it has been rejected where the joint estate amounted only to £1. 11s. 6d. And again, there must be no living solvent partner—and solvent is here used not in its ordinary sense, that is, an ability to pay the whole of one's debts—but in the sense of non bankrupt partner. For though he may be in fact insolvent and unable to pay the whole of his debts, if he be not actually in legal bankruptcy, the exception is excluded and the general rule prevails. Ex parte Janson, 3 Madd. 229. The principle is, that while there is any fund, however small, to which the joint creditors may resort, they cannot come against the separate estate in competition with the separate creditors; and though a person may be insolvent, if he be not in actual bankruptcy, and thus divested of all his property, he may still have the ability to pay part of his debts, and this possibility is held to be enough to exclude the joint creditors from sharing in the separate estate of the bankrupt partner, except in the surplus after the separate creditors are paid. Such is the general rule under the English bankrupt laws, and such the character of the exception to the rule, which it is supposed may be admitted under our law. Our statute has adopted the general rule, without taking notice of any of the exceptions. It does not appear to contemplate the case of there being no joint property, and as it passes it by in silence, it may be a grave question, whether it does not leave such a case open to the application of the general principles of equity. But as there is a joint fund in the present case, it is immaterial whether it does or not, unless the court may look behind the fact of there being a joint fund, to the manner in which it has been created.

It appears from the proofs in the case, or the facts which are admitted, that the assignee rendered in his first account of the partnership estate in October, 1844, in which the whole of the assets, consisting of outstanding demands, are represented as worthless; that afterwards he applied for liberty to compromise or collect a debt, on which he obtained $40, and rendered into court a supplementary account; and it further appears, that the money to take up this note was actually advanced by Charles E. Marwick, as creditor of the separate estate. Now, the argument is, that if the exception to the general rule of marshaling the assets and debts, established under the English bankrupt system, may be admitted under our statute, then, as it is founded on the general principles of equity and distributive justice, a creditor of the separate estate ought not to be permitted to defeat the equity of the joint creditor, by purchasing for a small sum a partnership demand, for which nothing could have been obtained but for this purpose. Allowing the premises on which the argument is founded to be correct, it does seem to present itself with some force to the equitable consideration of the court. The effect in the present case will be, that the separate creditor will receive nearly the whole of his claim and the joint creditors but a small percentage, if each is restricted to his own appropriate fund.

But after considerable reflection I have come to the conclusion, that, admitting the assumption on which the argument is found-

ed, it cannot prevail. In the first place, if this matter is viewed as a struggle between the two classes of creditors, it is a strife on the part of the separate creditors, not de lucro captando, but de damno vitando. A creditor may, without any grave imputation in the forum of conscience, be allowed all fair and legal means to avoid a loss, though it may incidentally be at the expense of another creditor. And though it is a maxim in equity jurisprudence that equality is equity, yet the court holds the maxim subordinate to legal priorities, which one party may by his diligence acquire over another. And further, the whole subject of marshaling the assets and claims between the joint and separate creditors in bankruptcy, involves some of the most difficult problems that occur in the whole range of jurisprudence. It has hitherto been found impracticable to establish any general rule that will meet the equities of all the various cases that come up in practice; and the courts have been finally compelled, instead of subjecting the whole to a rigorous analysis and extracting a system of rules which will carry out the principles of natural justice, to cut down the difficulties by establishing a general rule, which at first seems conformable to general equity, and then to limit and qualify it by a number of arbitrary exceptions, in order to meet the particular equities of particular cases. Eden, Bankr. Law, 169, 174; Story, Partn. §§ 374, 382.

This system is admitted to be not entirely satisfactory; it has sometimes been departed from and again restored, and is now adhered to, not because it is in all respects conformable to the principles either of positive law or of natural equity, but partly as a rule of convenience, as it has been sometimes called, and partly because no system has been hitherto presented as a substitute, which is not found to be encountered by equal difficulties. Dutton v. Morrison, 17 Ves. 207; Ex parte Elton, 3 Ves. 238.

If, then, we admit that the equitable doctrines of the English courts, in the administration of their bankrupt law, are applicable under our statute, how will the case stand? In the first place, if this fund had been brought into court in consequence of the purchase of this note by any other person than a separate creditor, it is clear there would have been an end of the case. What difference does it make that he has advanced the money, and thus created the fund? It was the duty of the assignee to make the most of the assets. If, with the knowledge that $40 could be obtained by the transfer of this note, he had rendered it into court as worthless, he might have been compelled to pay the money out of his own pocket. The fund would then have been produced in this way, and the joint creditor would have been in the same condition he is now. It was not for the assignee to inquire who the purchaser was, or what were his motives in making the purchase. And even suppose that he might have done this and refused to sell to a separate creditor for such a purpose, the creditor might have gone to the debtor and furnished him the money to take up the note, and thus indirectly obtain the same result. And indeed this seems to have been the course adopted in the present case; for the note was nominally taken up by one of the company, who was liable upon it, though the money was advanced by the creditor. So that if we were to adopt the principle of going behind the fact of there being a fund, to inquire whether that had not been inequitably created by the management of the separate creditors, the court would at once be involved in inextricable difficulties.

The object of this inquiry is to reach the supposed equity of the case, by making a more just and equal distribution of the assets between the different classes of creditors, and to prevent the separate creditors from creating out of worthless assets a small fund for the sole purpose of preventing the joint creditors from sharing with them the separate assets. But after all, is not this supposed equity more apparent than real? Each class of creditors originally trusted to different funds and different responsibilities, one to the social and one to the separate responsibility. The general equity would, therefore, seem in all cases to confine each class of creditors to that fund which they primarily trusted, unless in a case where there had been a fraudulent or improper abstraction from one estate for the purpose of increasing the other. And this is the general rule, not only in bankruptcy, but in general equity. Each class of creditors has a right of prior payment out of the estate to which he is supposed to have given credit, and the other class can only go against the surplus. If a creditor of one partner attaches partnership property, his attachment only holds the right or interest which the parties shall be found to have in the property after an account is taken and the joint creditors are paid. Kent, Comm. (5th Ed.) 64, 65, note c; Story, Partn. § 363. The equity of each class of creditors against their proper fund, certainly seems to be stronger than that of the other class who never could have looked to it for their security, except so far as there might be a surplus after discharging its own proper liabilities.

The general rule, therefore, has its foundation in natural equity, and it is established by the law. The law itself makes no exception. Now, admitting the case of there being no joint estate to be a casus omissus, not contemplated and therefore not within the purview of the law, it certainly covers all cases where there is a joint fund, without inquiring into its origin. And it is a rule in the construction of statutes, that when the statute covers the whole case in all its circumstances, and makes no exceptions, none can be made by the court.

My opinion, on the whole, is, that the proof

cannot be admitted against the separate estate, in competition with the separate creditors.

MARX (CLARK v.). See Case No. 2,830.

Case No. 9,182.

The MARY.

[Blatchf. Pr. Cas. 618.] [1]

District Court, S. D. New York. Jan. 17, 1865.

PRIZE—BLOCKADE—COMING OUT OF BLOCKADED PORT—NO PAPERS—ADMISSIONS OF MASTER.

Vessel and cargo condemned for an attempt to violate the blockade.

In admiralty.

BETTS, District Judge. The above-named vessel, laden with a cargo consisting of cotton, tobacco, and spirits of turpentine, was captured, as prize of war, by the ship-of-war Mackinaw, Commander Beaumont, of the United States navy, on the 3d day of December, 1864, on the Atlantic Ocean, in latitude 32° 11′ north, longitude 78° 14′ west, and was sent into this port for adjudication. On the 22d day of December thereafter, the said prize vessel and cargo were seized and attached by the marshal, upon due process of law, and on the 10th of January, 1865, such attachment was by him returned in open court, and filed therein, upon which arrest and attachment due proclamation was made in court, and defaults were ordered and declared by the court, upon the motion of the United States attorney. The pleadings and proofs in the case, after such default was taken, and judgment thereupon was rendered by the court, were submitted to the consideration of the court by the United States attorney, and judgment final was moved thereon, for condemnation and forfeiture of the said vessel and cargo.

No paper documents proving the ownership of the vessel were discovered on board the prize. Her master testifies on his examination in preparatorio, that he believes she belonged to a man residing in Nassau, N. P., named Ferguson; that she sailed under English colors, and had no other on board; that she was captured for attempting to run the blockade imposed and maintained by the United States government against ports of the enemy; that he was appointed to her command in Charleston by an agent of the owner, and took possession of her at Dewey's outlet, fifteen miles from Charleston; that he shipped all the crew but the mate and one man, at Charleston, November 22, 1864; that he believes the vessel was built in Nassau; that the voyage on which she was captured began at Charleston, and was to have ended in Nassau; that her last clearing port previous to her capture was Charleston; that he has no bills of lading or other papers in his possession in relation to the vessel or cargo, and saw none signed, and does not know how many were signed; that the vessel was captured December 3, 1864, off the coast of Charleston, in the Gulf Stream; that he knew of the war, and of the blockade of Charleston, when he sailed; that he was directed to throw overboard papers, if his vessel became exposed to capture; that he threw overboard papers in envelopes, the contents of which he did not know, on the appearance of a vessel previously to the appearance of the one making the capture; that he supposed his vessel ran the blockade of Charleston in going into that port; and that she sailed from Dewey's Inlet for Charleston, December 1st, and, on being sighted and approached by the Mackinaw, surrendered herself immediately to that vessel.

Francis Hertz, the only witness on board of the prize vessel at the time of her capture, who was examined in preparatorio, gives substantially the same testimony as to the facts and circumstances of the voyage and the seizure of the prize.

The result of the proofs is clear and satisfactory that the vessel and cargo were designedly employed, when arrested, in violation of the lawful blockade of the port of Charleston, South Carolina.

A decree of condemnation and forfeiture is accordingly pronounced against the vessel and cargo.

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

Case No. 9,183.

The MARY.

[1 Gall. 206.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1812.

EMBARGO—INTENT—VOLUNTARY ARRIVAL—PRIMA FACIE CASE.

To constitute an importation of a cargo into the United States, there must be a voluntary arrival within some port with intent to unlade the cargo. An involuntary arrival, by stress of weather, does not constitute an importation. A coming into port with a cargo is prima facie evidence of importation.

[Cited in The Boston, Case No. 1,670; U. S. v. Lyman, Id. 15,647; The Gertrude, Id. 5,370; Waring v. Mayor of Mobile, 8 Wall. (75 U. S.) 116, 120; Kidd v. Flagler, 54 Fed 369; The Coquitlam, 57 Fed. 717.]

See U. S. v. Arnold [Case No. 14,469]; s. c., affirmed, 9 Cranch [13 U. S.] 104; U. S. v. Lindsey [Case No. 5,603]; The Mary, 1 Dod. 68.

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

There were two informations in this case; one against the schooner for taking on board, at Liverpool in Great Britain, certain goods

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

of British manufacture, with intention to import the same into the United States, with the knowledge of the master, against the act 1 March 1809, c. 91, § 6 [2 Story's Laws, 1116; 2 Stat. 529, c. 24]; another against the cargo of the schooner, being goods of British manufacture, for being imported into the United States, contrary to the same act (section 5). By consent, both informations were heard together upon the facts stated by the district judge in his decree, and the papers transmitted on the appeal. In that decree, the facts are stated as follows: "These goods were shipped on board the Mary at Liverpool, in November last, by Carter and Storr, citizens of the United States, established and doing business as merchants at that place. The destination of the vessel was for Amelia Island, or any port to which she might be ordered to proceed by said Stephen Higginson, Jr. The bills of lading, in possession of said Higginson, bear date Nov. 13, A. D. 1811. The vessel touched at Lisbon, where the master was for some misconduct, or unsatisfactory behavior, displaced, and John Baxter received the command by appointment of the American consul. On the 28th Feb. said Baxter received his instructions from the consul, and was directed to proceed with said vessel to Boston Bay, and there to await the coming of a pilot boat, which would convey the instructions of said Higginson, and which were to be pursued. He was not to proceed into port with said vessel, unless so ordered by said Higginson, or unless he should learn, that goods purchased prior to the non-importation law would be admitted to entry. Soon after receiving these instructions, said vessel sailed from Lisbon, and on the 10th of April, having arrived in Boston Bay, was boarded about four miles from the Boston Light House, by a pilot boat, bearing a letter from said Higginson to Baxter, the master, directing him to proceed to Halifax. It appears to have been the determination of the master to comply with these instructions. But a strong head wind prevented an immediate departure from the bay, and in an hour after the receipt of the letter, the weather was such, that the master found it necessary, for the safety of the vessel and cargo, and of the crew, to seek a place of safety, and came to anchor in Nantasket Roads. About 4 o'clock p. m. on the same day, possession was taken of the vessel by a revenue cutter, and the next day she was brought under detention into the inner harbor. A manifest of the cargo was forthwith presented to the custom-house, with a destination expressed and claimed for Halifax, but intelligence of the recent embargo act having that day reached Boston, the collector considered himself restrained from permitting the departure of said vessel. A seizure was afterwards made, and this libel was filed, alleging said cargo to be liable to forfeiture under the 5th sect. of the act of March 1, 1809."

G. Blake, for United States.
C. Jackson, for claimants.

STORY, Circuit Justice. From an examination of the facts, (the result of which does not seem contested) I am satisfied that an actual landing of the goods was not intended to be made in any port of the United States, contrary to the statute; and that the goods of course were not put on board with that intent. It would seem, therefore, that no forfeiture could attach to the vessel, or cargo.

But it is contended on the part of the United States, that as the vessel arrived voluntarily within four miles of the coast, the importation became complete into the United States, as to its effects both on vessel and cargo. That as to the former, such arrival rebuts all presumption of a contrary intention, because the whole papers and evidence show, that the goods were laden with an intention to come as near the coast, as within four miles; and that as to the latter, the subsequent necessity imposed on the party, of coming into port, will not suspend the forfeiture fixed by the prior importation.

In support of this argument, the attorney for the United States has cited the 4th section of the act, 1 March 1809, c. 91 [c. 24], which declares, that it shall not "be lawful to import into the United States, or the territories thereof," &c. any goods of British growth, produce or manufacture, &c.; and also the 27th sect. of the collection act of 2 March, 1799 [1 Stat. 648], which prohibits any goods from being unladen from any vessel, "bound to the United States," within four leagues of the coasts thereof. The attorney further argues, that as to revenue cases, the term "import" means merely "bringing into," and that the limits of the United States extend to a greater distance than a marine league from the shore; and as to enclosed bays, like Boston Bay, at least in a direct line across from the head lands.

I will not undertake to decide how far, in a national view, the limits of the United States extend on the sea coast. Perhaps the argument of the attorney on this head may be perfectly consistent with the law of nations, but as to revenue laws, I am well satisfied that an importation into the United States, means not merely a bringing within our jurisdictional limits, but also a bringing into some port, harbor, or haven, with an intent to land the goods there. It is undoubtedly true, that the mere act of coming into a port, though without breaking bulk, is prima facie evidence of importation. Yet even this presumption may be rebutted. If a vessel come in by distress, or to avoid capture, it has never been considered as an importation, as to foreign ships; nor could a different rule be applied as to citizens. The Eleanor, 1 Edw. Adm. 135; The Paisley, Id. Append. 17; Reeves, Shipp. (2d Ed.) 197; Bunb. 236. Indeed it has been doubted, whether an arrival within the limits of the port of

London, though it should seem nearly twenty miles below the usual places of unloading, constituted an importation. Leaper v. Smith, Bunb. 79. Upon a careful examination of the case of U. S. v. Vowel, 5 Cranch [9 U. S.] 368, the court evidently consider, that an importation into the United States did not mean an arrival within the limits of the United States, or even of a collection district, but within some port, harbor, &c. with an intention there to unload the goods. The case there was, that a cargo of salt had arrived within the collection district, but not within the port of Alexandria until after the repeal of the act, levying a duty on salt. The words of the first act were, that a duty should be levied upon all salt, &c. "brought into the United States," from any foreign port or place, &c. (Act Aug. 10, 1799, c. 39, § 1), and of the supplementary act, upon all salt "imported into the United States" (Act July 8, 1797, c. 15, § 1). The court held that the duty was not payable, because it did not accrue until the vessel arrived at the port of Alexandria. They consequently held, that until such arrival the importation was not completed.

The statutes of the United States on the subject of the revenue, evidently adopt the same construction. The 32d sect. of the collection act of 2 March, 1799, c. 128 [1 Story's Laws, 601 (1 Stat. 651, c. 22)], contemplates the case of a vessel arriving at a port of the United States, with a destination of her cargo to a foreign port, and provides that, in such case, the cargo shall not be liable to the payment of duties. The 2d section of the act, 22d Feb. 1805, c. 78 [2 Story's Laws, 962 (2 Stat. 316, c. 18)], has a similar provision. I consider, therefore, the mere arrival within the jurisdictional limits of the United States, even supposing that they extend beyond a marine league, and to the four miles stated in the evidence, as not constituting an importation within the purview of the law. If this be true, there can be no doubt that the subsequent arrival within the port of Boston, in consequence of stress of weather, cannot be considered as an importation. The cases of distress and wreck are exempted from the operation of these, and I believe most other revenue laws. See Sheppard v. Gosnold, Vaughan, 159, 166; Courtney v. Bower, 1 Ld. Raym. 501; Hale, "Customs;" Harg. Law Tracts, 123; Peisch v. Ware, 4 Cranch [8 U. S.] 347, 355, note; Reeves, Shipp. (2d Ed.) 196, etc.; Reniger v. Fogossa, 1 Plowd. 1; Hardr. 358, 361; 2 Ruth. Inst. 353.

On the whole, I am satisfied that neither vessel nor cargo is forfeited. There was no loading with an illegal intent to import into the United States, which would affect the former with forfeiture, and no voluntary illegal importation, which would contaminate the latter.

I affirm the decree of the district court as to vessel and cargo, but I shall certify reasonable cause of seizure. Restored.

Case No. 9,184.

The MARY.

[1 Gall. 620.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1813.[2]

PRIZE—ENEMY PROPERTY—KNOWLEDGE OF WAR.

A shipment made from the enemy's country after a knowledge of the war, by an American citizen, subjects the property to confiscation as prize of war.

Appeal from the district court of the United States for the district of Rhode Island.

In admiralty.

Boss & Woodward, for captors.

Searle & Crapo, for claimant.

STORY, Circuit Justice. The brig Mary and cargo were captured on the 22d of April, 1813, by the privateer Paul Jones, Captain Taylor, being then on a voyage from Waterford, in Ireland, to Newport, with a cargo of British merchandize on board. It appears in evidence and is admitted, that the brig, with her cargo on board, sailed from Bristol on the 16th of August, 1812, and having received damage at sea, put back into Waterford about five days afterwards, and remained there until the 7th of April, 1813, when she sailed, by permission of the British government, for the United States. The declaration of war was published in the London Gazette on the 26th of July, 1812, and was well known at Bristol within one or two days after. The invoices of the cargo are dated the 13th of August, 1812, and it seems the whole is insured in England; but the exact day, when the shipment was actually made, does not precisely appear. No claim is interposed for the brig; but the cargo is claimed by a Mr. Nanning I. Vischer, as administrator of a General Fisher, an English gentleman, who is said to have died in England, and whose heirs are said to reside in this country. The cargo is alleged to have been shipped, as an investment of part of the proceeds of General Fisher's estate, for the benefit of his heirs. Who these heirs are, and how they claim, is not stated.

From the evidence in the cause, which I forbear to detail, I am by no means satisfied of the verity of the facts alleged in the claim; and I think it would be very difficult to establish the title to be bonâ fide American. There are instructions in the letters found on board, which carry a pretty strong odor of concealed British interests, although written after knowledge of the war. At all events here is a clear trading with the public enemy after knowledge of the war; and I cannot open the case to show, that the goods were purchased and shipped before that time.

I condemn the brig and cargo, as enemies'

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

[2] [Affirmed in part and reversed in part in 8 Cranch (12 U. S.) 388.]

property, and reverse the decree of the district court.

Affirmed as to the ship; and reversed as to the cargo, upon another point appearing upon further proof ordered. 8 Cranch [12 U. S.] 388. See The St. Lawrence [Case No. 12,232].

Case No. 9,185.

The MARY.

[1 Mason, 365.] [1]

Circuit Court, D. Massachusetts. May Term, 1818.

SHIPPING—PRIVATEER—DAMAGES—OWNER—ESTOPPEL.

If a person has in the acts of court asserted himself as part owner of a privateer, he will be responsible as such owner for damages assessed against such privateer, although his name be not in the ship's papers.

This cause having been decided in favor of the privateer Cadet against the claim of the privateer Paul Jones the damages were assessed against the owners of the latter, under the decree of the supreme court, which is reported at large in 2 Wheat. [15 U. S.] 123. At May term, 1817, of the circuit court, process issued against the owners, who were named in the commission and ship's papers, for the damages so assessed; but the process was returned unsatisfied. And at October term, 1817, the plaintiffs filed a petition praying for a monition against Messrs. Bryant and Sturgis as joint owners, to compel them to pay the damages. It appeared of record in the proceedings, that at May term, 1816, Messrs. Bryant and Sturgis filed a petition in the circuit court, alleging that the Mary [Thomas, master] had been condemned in the district court of Maine, "to them the petitioners and others, owners of the private armed vessel Paul Jones as captors;" that the same decree had been affirmed in the circuit court "adjudging the said vessel and cargo to the petitioners and others, said owners, as captors;" and praying a delivery of the proceeds to them on bail pending the appeal to the supreme court. This petition was resisted on the part of the owners and officers of the private armed vessel Cadet, and finally an agreement was entered into by the parties, at the same term, as follows: "In the case of the application of Messrs. Bryant and Sturgis, in behalf of themselves and others, owners of the private armed vessel Paul Jones, &c. praying that the proceeds of the prize vessel might be paid out to them, on giving bonds, &c. It is agreed by the parties in interest, that one half of the said proceeds be paid out as prayed for and one half thereof be in like manner paid out to the adverse claimants, (the owners of the Cadet,) each giving therefor such security as the other shall approve, to be approved by the judges at chambers, or in court." The proceeds were paid out accordingly, and the proper approved security given, and Messrs. Bryant and Sturgis received one moiety thereof.

A monition was granted by the court against Messrs. Bryant and Sturgis, to appear and show cause, why the damages should not be paid by them. At the return of the monition they accordingly appeared, and filed a special answer, and defensive allegation on oath. It stated that at the time of the equipment and commissioning of the Paul Jones, she was armed by one Samuel Hubbard, who gave bonds at the custom house on the outfit for the cruise; that after the equipment of the Paul Jones, one Joshua Hilton representing himself a part owner, and being indebted to the respondents, proposed to give them one sixteenth part of the Paul Jones for five hundred dollars, in satisfaction of their demand, to which the respondents assented; that no written conveyance has been since made, and no money or settlement with Hilton upon that contract, although it was, and is, the expectation of the respondents to allow the said sum in account with Hilton on settlement; that the said Hubbard was constituted agent for the privateer, and that the proceeds have been paid into his hands, and are received by him for payment of the sums due in this case; and they, therefore, prayed that a monition might issue to the said Hubbard, and his sureties, on the custom-house bond, and to the other owners, to pay the amount before the respondents should be made liable; and they submitted to the court the question of their liability.

The court directed a monition against the sureties in the said bond. And the question as to the liability of Bryant and Sturgis as owners, was several times spoken to by Mr. Sprague, for owners of the Cadet, and by L. Shaw, for respondents.

STORY, Circuit Justice. Whatever might have been my opinion upon the special facts stated in the answer, as to which I affirm and deny nothing, I am very clear, that the proceedings of Messrs. Bryant and Sturgis, in the acts of court, in which they assert themselves to be owners, and claim a delivery of the prize proceeds on bail in that character, are conclusive upon them, and they cannot now be permitted to deny, that they are owners at least to the extent of being responsible for the damages in this case. This case is much stronger than that of The Nostra Signora de los Dolores, 1 Dod. 290, where Sir William Scott held a person liable, as owner, for damages, although his name was not in the ship's papers. There the party had only asserted himself owner by acts in pais; here the respondents assert it by acts of record, and must be estopped by such acts. The prize proceeds were delivered to them on bail, in virtue of their character as owners. How can the court now consistently permit them to shake off the

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

character they have voluntarily assumed? There must then be a decree against them for payment of the damages; but we will do all we can to relieve them, by calling, with the consent of the plaintiffs, in the first instance, upon the original owner and his sureties, and suspend process to compel payment, until we see if that proceeding be effectual.

The money was afterwards paid by the sureties of the original owner.

Case No. 9,186.

The MARY.

[1 Paine, 180.] [1]

Circuit Court, S. D. New York. April Term, 1822.

SEAMEN'S WAGES—LIEN—WHEN ENFORCED—WAIVER—BONA FIDE PURCHASER.

1. No rule has ever been adopted by the maritime law, either of England or this country, prescribing the time within which mariners should proceed to enforce their lien for wages. Necessity of some rule.

[Cited in Cole v. The Atlantic, Case No. 2,976; Packard v. The Louisa, Id. 10,652; Pierce v. The Alberto, Id. 11,142; The Galloway C. Morris, Id. 5,204.]

2. The lien of mariners has no analogy to common law liens, as regards the possession of the subject.

[Cited in Edwards v. The Robert F. Stockton, Case No. 4,297.]

3. A forbearance by seamen to libel a vessel at a port where they are discharged, before the end of the voyage, does not amount to a waiver of their lien, as against a subsequent bona fide purchaser. Difference between a bottomry lien and a lien for wages as respects delay in enforcing it.

[Cited in Knox v. The Ninetta, Case No. 7,912; The Bolivar, Id. 1,610; The Avon, Id. 680; Crosby v. The Lillie, 40 Fed. 368.]

[Distinguished in The Rover v. Stiles, 5 Blackf. 485.]

4. A vessel sailed with a cargo on a voyage from New-York to New-Orleans and back. She remained at New-Orleans more than a year after her arrival, waiting for freight. Not obtaining any, the master discharged the seamen, whom he persuaded to return with him in another vessel to New-York, to get their wages. Afterwards, while the vessel was at New-Orleans, she was sold, and went a voyage to Liverpool, and thence to New-York. *Held*, that the seamen could libel her on her arrival at New-York, and that they were entitled to their full wages to the time of their return to that city.

[Cited in The Utility, Case No. 16,806; Thompson v. The Oakland, Id. 13,971; Knox v. The Ninetta, Id. 7,912; Edwards v. The Robert F. Stockton, Id. 4,297; Packard v. The Louisa, Id. 10,652; The D. M. French, Id. 3,938; The Galloway C. Morris, Id. 5,204; Southard v. Brady, 36 Fed. 561.]

[Distinguished in The Rover v. Stiles, 5 Blackf. 485.]

This was an appeal from a decree of the district court for the Southern district of New-York, sustaining a libel for seamen's wages.

The respondents shipped on board the Mary, as mariners, in June, 1818, on a voyage from New-York to New-Orleans and back to New-York, or such other port as the ship might take freight for. Freight was earned to New-Orleans, but the ship remained at that port, after her arrival, until August, 1819, without obtaining freight for any other port, when the master, in pursuance of what he deemed his duty, discharged the seamen and left the ship himself. In October following, the present claimant purchased the ship, and sent her the next March on a voyage to Liverpool, and thence to New-York, at which latter place she arrived in July, 1820, and was soon after libelled by the respondents. The respondents were dissuaded from libelling the ship at New-Orleans, by the master, who informed them, that if they would come on with him to New-York, he would see them paid. The district court allowed full wages until the return of the seamen to New-York. [Case unreported.]

W. Slosson and J. Bulkley, for appellant, contended that, as the vessel did not earn freight after her arrival in New-Orleans, the seamen were not entitled to full wages; freight being the mother of wages. 3 Johns. 154, 518; 9 Johns. 350; 11 Johns. 279; Abb. Shipp. 430, 434, 483. And that, not having libelled the vessel in New-Orleans, where they might have done it, but having elected to return to New-York and look to the owners or master, they had either waived their remedy against the ship, or been guilty of such laches, that they could not proceed against her, in the hands of a bona fide purchaser. Code de Comm. arts. 191, 196; Abb. Shipp. 465, 470, note; 1 East, 4; 7 East, 5; Doug. 101; 2 Emer. Ins. 230; 1 Valin, Comm. 362; [Blaine v. The Charles Carter] 4 Cranch [8 U. S.] 328; 4 C. Rob. Adm. 245.

H. Wheaton and E. Paine, for respondents, replied that, where men are discharged by the master, without their own fault or consent, the maxim that "freight is the mother of wages," cannot apply. Johnson v. Sims, Case No. 7,413; 3 Johns. 517; 1 Holt, Shipp. 449; 2 Ld. Raym. 1044; 3 Bos. & P. 405; Roccus, De Nav. No. 43; Pothier, Des Matelots, 179, 198; 2 Rob. Adm. 251; 3 Rob. Adm. 92; 5 Rob. Adm. 224; Abb. Shipp. 491, note; The Saratoga, Case No. 12,355. That mariners are not barred of their remedy against the ship, though in the hands of a bona fide purchaser, by any lapse of time; the statute of limitations of the state not applying, and the United States having no statute on the subject: and that, at any rate, there was no evidence, in the present case, of that gross neglect which might occasion a forfeiture of their remedy. Madonna D'Idra, 1 Dod. 40; Brown v. Jones. Case No. 2,017; The Jerusalem, Id. 7,294; Relf v. The Maria, Id. 11,692; Code de Comm. art. 196; 1 Holt, Shipp. 443.

LIVINGSTON, Circuit Justice. This is an appeal from a sentence of the district court,

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

sustaining a libel for wages on behalf of the respondents, Wilson and Joseph.

That freight was earned on the voyage from New-York to New-Orleans, and that wages of course became due, admits of no doubt. It is equally clear, that the voyage, as it regarded the crew which shipped in New-York, was ended at New-Orleans by the act of the master, and the present libellants were discharged by him, with a promise that he would see their wages paid in New-York. They accordingly left the Mary on the 5th of August, 1819, and claim wages from the 4th of June, 1818, when they shipped on board of her, at the port of New-York, on a voyage thence to New-Orleans and back to New-York, or such other port as the said ship might take freight for.

The right of the libellants to wages thus far being either admitted or not much contested by the claimant, it is insisted that, by not libelling the ship at New-Orleans, they have lost all remedy against her, and can resort only to the former owner or master, inasmuch as she has since passed into the hands of a bona fide purchaser, without notice of any lien on her for the wages now demanded. If a claim of this kind be not seasonably prosecuted, and the vessel become the property of another for a fair consideration and without notice, it seems reasonable that those who have been negligent should suffer, and not an innocent purchaser. Some rule of this kind appears the more necessary in a case where it is so difficult, if not impossible, to ascertain either the existence or the extent of demands of this nature. But however reasonable such a rule may appear, none has yet been adopted, either in England or this country, which requires a seaman to assert his lien in any given time, or which will justify this court in saying that if he does not proceed by libel the very first opportunity which is afforded him, (which is the case here,) he shall forfeit all right of obtaining satisfaction in that way, unless the vessel shall still belong to the same person.

Few claims are more highly favoured and protected by law, than those for seamen's wages. They are hardly earned, and liable to many contingencies, by which they may be entirely lost, without any fault on their part. When they become due, the vessel, owners, and master are generally all responsible until satisfaction be obtained. The liability of a vessel for wages may be considered as the law of every commercial nation. They take precedence of bottomry bonds, and in the language of Sir William Scott, they are "sacred liens, and as long as a plank remains, the sailor is entitled as against all other persons to the proceeds as a security for his wages." These unqualified and strong terms would hardly have been employed, unless it had been intended to postpone, not only a claim under a bottomry bond, which was then before the court, but also that of a bona fide purchaser, to a demand for seamen's wages. It is true that by the laws of France this privilege of prosecuting against the vessel is extinguished, if after a voluntary sale, she shall have made a voyage in the name and at the risk of the new purchaser, and without objection on the part of the privileged creditor of the vendor. The 16th article of the celebrated Marine Ordinance of Louis the 14th, confines this preference to the wages of the sailors employed on the last voyage; which provision, with the qualification just mentioned, is also found in the present commercial code of France. Whatever wisdom or justice there may be in thus limiting the continuance of this lien, it amounts only to a municipal regulation, and would rather seem to imply that antecedently, the law even of France was otherwise, and had been changed on account of the inconveniences to which purchasers of this species of property had been exposed. The same rule has not yet been adopted in this country.

A lien for wages was likened, on the argument, to that of a factor on merchandise in his hands, and it was supposed, that as the latter lost his lien by parting with the property, so a sailor, by giving up possession of the vessel, lost his right of proceeding against her for wages. There is no resemblance between those cases. A seaman as such has no possession of a vessel, and his claim for wages is perhaps incorrectly termed a lien. It is rather a right to proceed against the vessel, and to be paid out of her proceeds in preference to all other creditors. His very application to a court of admiralty is on the ground that the possession of the ship is not in him, and has for its object its arrest and detention by proper process, until his right can be adjudged.

It was also insisted by the appellant, that there had been a voluntary and express abandonment on the part of the libellants of their right to have recourse against the vessel. Even if abandonment by parol could have availed, there is no evidence of such abandonment. The only testimony on this point is, that the master brought the libellants with himself to New-York with a view to prevent them from libelling the ship at New-Orleans, which they threatened to do; and that upon their asking the master when they should get their wages, he told them to come with him to New-York and he would pay them. This amounts to nothing more than a forbearance on the part of the libellants not to libel at that time, in expectation of being paid in New-York, but not to a waiver of any remedy they might have if they were not paid on their arrival here.

There is one circumstance which has not been adverted to, but appears to me of some importance. The libellants were discharged, and the voyage for which they shipped was ended as to them at New-Orleans, on the 5th of August, 1819. The claimant made his purchase three months after, the Mary still be-

ing in that port, from which she did not depart for Liverpool until the month of March following. Now it cannot well be denied even on the claimant's own principles, that at the time of the purchase, and for five months after, that is, as long as the vessel was at New-Orleans, she was liable to be proceeded against in the district court of Louisiana for the very wages claimed in this suit. If then the purchasers took her when this lien, (as it has been called,) was in full operation, and might have been enforced, not only on the day of the sale, but long after, it is not perceived why it should be extinguished, as it regards the present owner, merely from the circumstance of the vessel's having since made a voyage to Liverpool and from thence to New-York. If she had been disposed of at Liverpool, the purchaser then might have had some reason to complain; but the present claimant is in no worse condition than if the Mary had been libelled at New-Orleans after his purchase, and previous to her departure for Liverpool.

Because, in the case of Blaine v. The Charles Carter, 4 Cranch [8 U. S.] 328, the supreme court of the United States postponed the obligee in two bottomry bonds to other creditors of the obligor, who had seized the vessel in execution on a judgment obtained more than a year after the date of the bonds, it is thought that within the reason of that decree the present claim for wages ought not to prevail in prejudice of the intervening right of a fair purchaser. But in that case, it should be remembered, that between the date of the first bottomry bond and the filing of the libel, the Charles Carter had made two voyages from Europe to America, and one from America to England, the freight of which had been received by the libellant, who held the bottomry bond. In the case before us, the delay is not only much less, but there is not that danger of fraud, which was relied on in the argument of that cause. It was said, and very properly, that the bonds might have been held up or concealed, for the purpose of giving a false credit to the owner of the vessel, while the obligee was receiving the whole benefit of her earnings. Such a fraud cannot be practised in the case of seamen, nor can their forbearance to libel ever be imputed to any sinister motive whatever, or be attributed to aught but negligence, inability or ignorance; and, therefore, there seems no reason for considering their case as at all affected by the decision which has been just mentioned, or as coming at all within the reason of it.

It may be further remarked, that the Mary was libelled very soon after her first return to New-York, at which port the libellants had shipped, and which may be regarded as the termination of the voyage for which they had engaged themselves; and if they had not been discharged, but had remained on board until her return to this city, a doubt cannot be entertained that the ship would have been bound, as well for their wages, which were earned on the voyage to New-Orleans, as for those which would have accrued afterwards, notwithstanding her intermediate alienation. If this be so, it would not be easy to assign any good reason why, as they were regularly discharged at New-Orleans, they should lose their remedy against the ship merely because they did not arrest her in transitu, but waited patiently for her arrival at New-York. If it be admitted that mariners may be guilty of such gross negligence in following up a claim of this nature, as to forfeit their remedy against a vessel in the hands of an innocent purchaser, it would be imposing on them a very unreasonable diligence to compel them in all cases, under the penalty of such a forfeiture to institute a proceeding in rem the moment their wages became due, or at any rate before the vessel left the port at which the voyage, as it respected them, was ended. It might be very inconvenient for them to remain in a foreign port until the termination of a suit in the admiralty; or, which would often be the case, they might find it very difficult in a strange place to procure that security or bail which is required on the institution of proceedings against a vessel—or they might be generous or liberal enough rather to forego for the moment their right of suit in this way, than to arrest for a small sum a valuable vessel at a distance from home, at the hazard of breaking up the remainder of her voyage, or of exposing her to be sold at a great sacrifice.

My opinion, upon the whole therefore, is, that the forbearance, or delay complained of in this case, furnishes no pretence for dismissing the present libel, or for deciding that the change of title which took place at New-Orleans, is a bar to the libellants of the vessel for the wages claimed in this suit. The sentence of the district court is, therefore, affirmed, with costs.

Case No. 9,187.

The MARY.

[1 Paine, 671.] [1]

Circuit Court, D. Connecticut. April Term, 1824.

BOTTOMRY — ESSENTIALS — NECESSITY OF LOAN—WHO MAY PLEDGE—OWNER—MONEY TO BUY CARGO—MORTGAGE.

1. The risk of the lender and his right to repayment only on the safe arrival of the vessel, constitute the essential difference between a bottomry and simple loan.

[Cited in The William & Emmeline, Case No. 17,687; Leland v. The Medora, Id. 8,237; Greely v. Smith, Id. 5,750; The Rapid Transit, 11 Fed. 325.]

2. Marine interest is also requisite to a bottomry loan, but if not expressed in the bond, it will be presumed to have been included with the principal.

[Cited in Greely v. Smith, Case No. 5,750.]

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

3. The jurisdiction of courts of admiralty over contracts depends principally upon their subject matter; and in cases of bottomry, it is not the absolute necessity of the loan that gives the jurisdiction.

[Cited in Waterbury v. Myrick, Case No. 17,253; The William & Emmeline, Id. 17,687; The Perseverance, Id. 11,017. Approved in The Draco, Id. 4,057. Cited in Furniss v. The Magoun, Id. 5,163; Leland v. The Medora, Id. 8,237; Waring v. Clarke, 5 How. (46 U. S.) 486; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (47 U. S.) 421; Haller v. Fox, 51 Fed. 299.]

4. And the owner as well as the master of a vessel may pledge her by bottomry in a foreign port.

[Approved in The Draco, Case No. 4,057.]

5. The master of a vessel in a foreign port, acting in the character of agent, is limited in his power, and can only pledge the vessel in case of necessity; but the owner, having an absolute control over his property, may pledge her for money to purchase a cargo, and thereby create an admiralty lien.

[Cited in The Hilarity, Case No. 6,480; The Panama, Id. 10,703; Greely v. Smith, Id. 5,750; The Ole Oleson, 20 Fed. 387; Freights of the Kate, 63 Fed. 713, 720.]

6. In November, 1822, the owner of a vessel in Connecticut, gave a bill of sale of her in the nature of a mortgage, but was suffered to remain in possession and act as absolute owner, and her register and all her papers remained unaltered. In July following, he gave a bottomry bond for money advanced to purchase a cargo for the vessel in the West Indies, without notice to the lender of the mortgage: *Held*, that upon common law principles, the claim of the lender was to be preferred to that of the mortgagee.

[Applied in The Romp, Case No. 12,030. Cited in Leland v. The Medora, Id. 8,237; The Hendrik Hudson, Id. 6,358; Greely v. Smith, Id. 5,750.]

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

In admiralty.

S. P. Staples and I. J. Hitchcock, for libellants.

N. Smith and J. Backus, for claimants.

THOMPSON, Circuit Justice. This case comes up on appeal from the decree of the district court, dismissing the libel which had been filed in that court against the sloop Mary, upon a bottomry bond given by William H. Young, captain and sole owner of the sloop, which is described as of Fairfield in the state of Connecticut. The bond bears date on the 1st day of July, in the year 1823, and purports to have been executed at the port of Nassau, in the island of New Providence, to Robert Wear Elliot of that place, pledging the said sloop, her tackle, apparel, and furniture, together with her freight and earnings, for the payment of one thousand one hundred dollars, alleged in the bond to have been advanced for the repairs, outfits, and other disbursements, for the use of the said vessel, and for enabling her to perform her voyage, to be paid within sixty days next after the arrival of the vessel in the port of New-York. A claim was interposed by Daniel Young, under a bill of sale in the nature of a mortgage, executed by William H. Young, bearing date the 16th of November, in the year 1822, as collateral security and indemnity to the said Daniel Young, for one thousand two hundred dollars, for which he was bound for William H. Young to Walter Thorp, being the consideration for the purchase of the sloop. The sloop arrived safe in the port of New-York, and was shortly after removed to Bridgeport in Connecticut, and was there, after the expiration of the sixty days from her arrival in New-York, seized and libelled, possession having been taken by Daniel Young, under his bill of sale. It appears by the proofs, and was admitted by the libellant's counsel, that the principal part of the money advanced by Elliot was for the purchase of a cargo, and not for necessaries for the vessel.

Under these circumstances, the questions presented for consideration, are (1) whether the case falls within the admiralty jurisdiction of the district court; and (2) whether the bottomry bond has priority over the claim under the bill of sale, which is of an antecedent date.

It has not been denied, and I presume cannot be, but that the remedy upon a bottomry bond given by the master abroad, falls properly within the admiralty jurisdiction of the district court. But it is said, when the bond is given by the owner, recourse must be had to the courts of common law. No adjudged case either in this country or elsewhere has been referred to, or has fallen under my observation, to justify such a distinction; and I do not perceive any well founded principle growing out of the nature of the contract to warrant such a distinction.

I deem it unnecessary to go into an examination of the struggle that has been carried on between the English common law and admiralty courts, with respect to the extent of the jurisdiction of the latter. Much of that controversy grew out of the different constructions given in the one court and in the other to certain English statutes which we have not in this country. But with respect to contracts, over which the admiralty has jurisdiction, the common law courts in England have yielded in some measure to the doctrine of the admiralty, that the jurisdiction depends in a great measure upon the subject matter of the contract. This principle was recognised by Mr. Justice Buller, in the case of Menetone v. Gibbons, 3 Term R. 267. But we must look to our own constitution and laws to ascertain the extent of this jurisdiction. By the constitution of the United States the judicial power extends to all cases of admiralty and maritime jurisdiction. And by the judiciary act of September 24, 1789 [1 Stat. 73], cognizance was given to the district courts of all civil causes of admiralty and maritime jurisdiction. Without undertaking to define the precise extent of this clause, "all cases of admiralty and maritime jurisdiction," I think I may safely say, the terms are broad enough to embrace all maritime contracts,

and if so, by the judiciary act, cognizance thereof is given to the district courts.

What are the contracts then, that properly fall under the denomination of maritime contracts? And here again I would not be understood as attempting to prescribe the limits of this class of contracts; but so far as my researches have extended, all civilians and jurists agree, that marine hypothecations fall under this denomination; and that a bottomry bond is such hypothecation admits of no doubt. And why should there upon principle be any difference as to the jurisdiction of the court, whether the bottomry bond is given by the owner or the master? If the jurisdiction depends upon the subject matter of the contract, this is the same whether the pledge is given by the one or the other: The object and effect of the bond are the same in both cases, creating a lien upon the vessel. And it would be a little singular if the master in this respect had greater powers than the owner; this would be giving to the agent an authority beyond his principal; reversing the established law in relation to principal and agent. The master acting as an agent is limited and restricted in his power, and can pledge his vessel only in case of necessity for the purpose of repairs and other things indispensable to the prosecution of the voyage. It is for the convenience of commerce, that he should have authority to pledge his vessel for the security of a foreign creditor, who might furnish the means of relieving his necessities. But such power ought to be well guarded, and confined to cases coming within the reason of the rule. It is therefore incumbent on the creditor to show that the advances were made for repairs and supplies necessary for effectuating the objects of the voyage, or the safety and security of the vessel. The master would, therefore, have no right to pledge the vessel for advances to purchase a cargo.

Had the bond in question been given by the master only, it would not have created a valid lien, for the advance was made for the purchase of cargo. But there is no such limitation upon the authority of the owner; he has the absolute control over his property, and has a right to pledge his vessel for money borrowed for any purpose, to be applied to repairs, outfits, or other necessaries, or to the purchase of a cargo.

The essential difference between a bottomry and a simple loan is, that in the latter the money is at the risk of the borrower, and must be paid at all events; in the former, it is at the risk of the lender during the voyage, and the right to demand payment depends on the safe arrival of the vessel. The perils of the sea being at the risk of the lender, gives the right of reserving any rate of interest the parties shall agree upon, without incurring the penalties and consequences of usury. By the bond in question, no interest whatever is stipulated. The reason of this has not been explained. It is perhaps reasonable to conclude, that the marine interest was included with the advance, and inserted in the bond as principal, for it can hardly be supposed that the lender gratuitously took upon himself the perils of the sea; his right to claim the money, at all events, depends, according to the terms of the bond, upon the contingency of the arrival of the vessel in the port of New-York, and no marine interest is now claimed. In the case of The Barbara (4 C. Rob. Adm. 1) the bond, as in this case, was given by a person who was both master and owner, and no objections appear to have been made to the jurisdiction of the court on this account. But proceedings were instituted and carried on in the admiralty, as a case within the admitted and ordinary jurisdiction of the court. This question has not, to my knowledge, ever come under the consideration of the supreme court of the United States. But so far as it has come incidentally before our courts, in this country, the admiralty jurisdiction appears to be sustained. And indeed I have not discovered any intimation to the contrary.

Doubts have been entertained whether a bottomry bond, executed by the owner, in his own country, might be enforced by admiralty process, because the owner might execute an express transfer or mortgage of his vessel, should his necessities require it. [Blaine v. The Charles Carter] 4 Cranch [8 U. S.] 328. And it may be said he can do this in a foreign country. But it would not be consistent with sound policy, and the interest of commerce, to impose upon the owner the necessity of selling his vessel in a foreign country, which must of course be attended with great sacrifice. In the case of Wilmer v. The Smilax [Case No. 17,777], the district court of Maryland sustained the admiralty jurisdiction, upon a bottomry bond, given by the owner of the vessel, even in one of our own ports. And the same principle is recognised in the case of Corish v. The Murphy, 2 Browne, Civ. & Adm. Law, Append. 22. The books furnish us with very few cases on this point, probably, because when the owner himself is with his vessel, he will have it in his power in some way to relieve his necessities, without submitting to the sacrifice of paying bottomry interest. I cannot, however, see any objection upon principle, under the provisions of our constitution and laws, against sustaining the jurisdiction. It is clearly a maritime contract. The vessel is pledged for the payment of the money. The principal was put at hazard, and the risk of the voyage assumed by the lender. The bond was executed abroad, and the contingency upon which the money became due has happened. I think, therefore, the court below erred in dismissing the libel.

The next inquiry is, whether this claim is to be preferred to that which grows out of the mortgage given to Daniel Young upon this vessel; and that it is, would seem to follow as a necessary result from my conclusion

as to the first point. Abbot in his treatise on Shipping (part 2, c. 3, § 28), and for which he rests upon the authority of Bynkershook, says: "It should be observed of these securities (bottomry bonds) in general, that if they are given at different periods of a voyage, and the value of the ship is insufficient to discharge them all, the last in point of date is entitled to priority of payment, because the last loan furnished the means of preserving the ship, and without it the former lenders would entirely have lost their security" and this principle is sanctioned by Mr. Justice Story in the case of The Jerusalem [Case No. 7,294], who lays it down as an established rule, that a second bottomry bond, although posterior in time, has priority of claim. The present case, however, does not require the adoption of so broad a principle. The adversary claim here is not founded upon a bottomry bond, but upon a bill of sale in the nature of a mortgage, and which would not create any valid lien as against a subsequent bona fide purchaser or incumbrancer, without notice. William H. Young was permitted to remain in possession, and to act as the absolute owner of the sloop; the register, and all her papers, standing in his name, and without any endorsement, showing any incumbrance upon the vessel: Daniel Young is therefore chargeable with negligence, in permitting William to appear as absolute owner, and thereby putting it in his power to impose upon a foreign creditor, who should advance money upon the security of the vessel. Upon the principles of the common law, as well as of equity, the claim of Daniel Young must be postponed to that of the libellant.

The decree of the district court must accordingly be reversed, and a decree entered, that the proceeds of the vessel be paid over to the libellant towards satisfaction of his claim.

Case No. 9,188.

The MARY.

[1 Spr. 17;[1] 5 Law Rep. 75.]

District Court, D. Massachusetts. March, 1841.

SHIPPING—GENERAL AVERAGE—WAGES AND PROVISIONS — PORT FOR SAFETY — TIME OF DETENTION — CARGO INJURED — DESTROYED BY FIRE—REASON FOR LANDING CARGO.

1. Wages and provisions are to be allowed in general average from the time when a vessel in distress alters her course to seek a place of safety.

[Cited in The Star of Hope, 9 Wall. (76 U. S.) 236, 237.]

2. If masts are cut away at sea, and the vessel lies for a time disabled, and afterwards alters her course and puts away for a port of safety to refit, wages and provisions are not allowed in general average during the time of such detention, but only from the time of altering her course.

3. Semble, if by cutting away the masts the deck is ripped up, and by that means water gets in and injures the cargo, such damage to the cargo is to be paid for in general average.

4. If a vessel, from perils of the sea, is compelled to seek a port of safety, and there the cargo is necessarily landed and stored in order to repair the vessel and to enable her to proceed on her voyage, and while thus stored is destroyed by fire, it must be paid for in general average. But if the cargo was landed and stored because it was damaged, and is destroyed by fire while thus stored, it is not to be paid for in general average. If both these causes for landing and storing the cargo concur, and it is destroyed by fire, it is not to be paid for in general average.

[Cited in The Charles F. Perry, Case No. 2,616; Dupont v. Vance, 19 How. (60 U. S.) 171.]

[Cited in Gage v. Libby, 14 Allen, 269. Approved in Dabney v. New England Ins. Co., 14 Allen, 310.]

5. Where by a charter-party a gross sum, not divisible, was to be paid as freight for the round voyage out and home, the principal object of the voyage being to obtain a return cargo, and a general average has occurred on the outward passage; *held*, that the whole freight for the round voyage must contribute.

[This was a suit in admiralty by Shelton and others against the brig Mary.]

E. Blake and F. C. Loring, for libellants.

B. R. Curtis, for respondents.

SPRAGUE, District Judge. The questions, which have been presented in this case, relate to the adjustment of general average. First, from what time is the allowance for wages and provisions to commence? It is admitted to be the general rule, that it is from the time when a vessel in distress alters her course to seek a place of safety. There is a controversy here as to the time when the brig so altered her course. Her masts were cut away on the 10th of February. The protest of the master, mate and two seamen, states, that from that time until the 19th, the brig lay disabled, sometimes in the trough of the sea, but most of the time with an anchor out, to keep her head to the wind; and that on the 19th "at 8 a. m., kept her off S. S. W., concluding to run for St. Thomas." The log-book is said to be mislaid and is not produced, but the protest refers to and professes to conform to it.

The captain, in his first deposition, says, that the day after the accident "we set out for Nassau, New Providence, but finding we could not fetch there on account of westerly winds, we laid for St. Thomas; but thinking it not safe to run through the islands, I stood for Antigua. I did this on the 21st of March." By the day of the accident, I presume is meant the 10th of February, and if so, the statement does not correspond with the protest, which describes the condition of the vessel, and the measures taken to have been such as to repel the idea of her then setting out for Nassau, or indeed any other place. Nor does it correspond with the previous statement of the captain in the same deposition, for he says: "The eleventh we got clear of the wreck of the

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

mainmast, got the water out of the vessel and got the cargo trimmed; after that we lay about twelve days a wreck without trying to get along, with one anchor down to keep her head to the wind." [Further on the deposition states, that the "day after the accident we set out for Nassau, but finding we could not fetch there, on account of westerly winds, we laid for St. Thomas." Now, when did they lay for St. Thomas? On the 19th, only nine days after the accident, during all which time the captain himself had just before stated, that they lay a wreck without trying to get along? How then could they, during any part of that time, have been endeavoring to get to Nassau, and found that they could not fetch by reason of the westerly winds?][2] There is something inexplicable in these two statements of the captain; and the protest made under oath, by the master, mate, and two seamen, on their arrival at the first port after the disaster, must prevail over the inconsistent statements of the deposition.

But it is urged, that the inability of the vessel to proceed from the 10th to the 19th, was caused by the previous voluntary sacrifice of the masts, and that the wages and provisions should therefore be paid for in general average. Suppose that the vessel, instead of putting away on the 19th, had proceeded to her original destination and arrived in safety,—would wages and provisions be paid for during the delay? If so, then in every case of the cutting away of a spar or other voluntary sacrifice, which protracts the voyage, this allowance must be made for the time the voyage is extended. But I cannot consider such consequential loss a voluntary sacrifice of wages and provisions for the common benefit. The allowance for them in this case must, I think, begin on the 19th of February.

In the second place, it is testified, that by cutting away the masts the deck was ripped up, and thereby salt water was let in, which injured the cargo, and that such damage should be paid for in general average. The fact is contested. The burden is on the owner of the cargo, and I do not think that he has sustained it by the evidence. No allowance, therefore, is to be made for this alleged damage. The cargo was landed and stored at Antigua, and a part of it destroyed by fire. Shall this be brought into general average? If it was landed and stored in order to repair the ship, then this new risk was incurred for the general benefit, and should be allowed upon the principle of the case in 1 Magens, 160. But if it was landed and stored because the cargo was damaged, then the new risk was incurred only for the benefit of the cargo, and the loss is particular average. But the evidence shows, that both causes concurred. The report of the surveyors ordered the cargo to be landed in order to examine the ship, and it was so much damaged that it could not have remained on board.

No decided case applicable to such a state of facts has been cited, and we must recur to original principles. Property is paid for in general average from justice and policy. It is just, that he whose property has been sacrificed for the general benefit, should bear no more than his proportion of the loss; it is good policy, because the owner who may be supposed to be present personally, or by his agent, is thereby induced to make less resistance to an act, which is deemed conducive to the common good. But this rests entirely upon the supposition, that there has been a voluntary and intentional sacrifice for the general benefit. In the case before us, the cargo was so damaged as to render its removal from the vessel indispensable. The owner had no option. I cannot therefore consider him as having made a voluntary sacrifice for the purpose of prosecuting the voyage. The goods consumed by fire are not, therefore, to be brought into general average.

The next question is, in what manner the freight shall contribute. By the charter-party a gross sum was to be paid for the round voyage out and home. It was not divisible. The principal object of the voyage was to obtain a return cargo, and there were but few articles on board on the outward passage, when the disaster occurred. Three modes of assessing the freight have been proposed: (1) That the whole freight for the round voyage should contribute. (2) That it should be divided, and that only the proportion for the outward voyage should contribute. (3) That only a fair freight on the articles actually on board should contribute. In Williams v. London Assur. Co., 1 Maule & S. 318, cited by the counsel for the libellants, it was decided by the court of king's bench, that the whole freight for the round voyage is to contribute. This is expressly approved by Mr. Hughes in his treatise on Insurance (page 298). In the case of The Progress, Edw. Adm. 210–224, military salvage was assessed on the same principle, and this appears not to have been new in that court; for Sir William Scott, in delivering his judgment says, that, "where a ship goes out under a charter, to proceed to her port of destination, in ballast, and to receive her freight only upon her return, the court is not in the habit of dividing the salvage." The case of The Dorothy Foster, 6 C. Rob. Adm. 88, tends to sustain the same doctrine. On the other hand, Mr. Benecke insists, that in such cases the freight ought to be divided, and such part only contribute as may fairly be presumed to belong to the outward voyage; and Mr. Phillips concurs in this opinion. Phillips' Stevens & B. Ins. 255, 257, note a.

The arguments of Mr. Benecke are entitled to consideration,—and at least show, that the question is not free from difficulty. But they are by no means conclusive. He first urges, that if the whole freight out and home should contribute for a loss upon the outward passage, it may also be called on to contribute

[2] [From 5 Law Rep. 75.]

for a loss on the homeward passage, while the outward cargo only would contribute to the first, and the homeward cargo only to the second general average. But would not the vessel in such case contribute to both? And if the same cargo or a part of it, as sometimes happens, were on board, out and home, that also would contribute to both. But suppose a portion of the freight, one-half, for example, is assessed for the outward loss, is not the whole at risk on the homeward passage, and liable to contribute for any general average there incurred? If so, the alleged inequality still exists, only in a less degree. His next objection is, that as the freight is not to be paid until the vessel shall have arrived in safety at her home port, expenses and risks are still to be encountered in earning it; for example, wages, provisions and disbursements at the port of destination; and that as none of these expenses would have been incurred, if the vessel had been lost by the misfortune which gave rise to the general average, the crew cannot be said to have saved the whole freight, after the arrival of the ship, at the end of the outward voyage. This is indeed a strong argument to show, that a deduction for these expenses ought to be made from the round freight, in determining the amount upon which the contribution should be levied; but has no tendency to prove that the residue, after making these deductions, ought not to contribute. On the contrary, the author seems to admit (page 259) that the owner ought to contribute for what the thing saved is worth; and the freight is worth the round sum, less these deductions. And Mr. Phillips, in a note to Stevens and Benecke (page 255), says: "The freight pending at the time of the jettison or other sacrifice contributes to the average; and if wages and provisions are to be subsequently expended in order to save the freight, the expense of them is to be deducted in ascertaining the amount in which freight is to contribute." See, also, 1 Phil. Ins. 360, 361; and 2 Phil. Ins. c. 15, § 11, note 2. And that such deduction is to be made in ascertaining the contributory value of the freight, is directly decided in Spafford v. Dodge, 14 Mass. 66. Neither in Williams v. London Assur. Co., nor in the case of The Progress, did the court decide as to the amount for which the freight was to contribute; that question was not raised.

It is further objected by Mr. Benecke, that the freight is still at risk, while the vessel and cargo are in safety. This point was fully considered in Williams v. London Assur. Co., and was necessarily before the court in the case of The Progress. And that safety is not essential to render it contributory is decided in Spafford v. Dodge, and conceded by Mr. Phillips in the extract I have just quoted, and also by Mr. Benecke himself, who says, (page 259): "When disbursements of the nature of a general average take place in the course of a voyage, and that voyage be continued, the parties pay their respective shares, not for actually gaining possession of their property, which still remains exposed to future perils of the navigation, but for the probability of the property coming ultimately to their hands."

Another argument urged by Mr. Benecke is, that it would lead to singular consequences, if the ship-owner could be liable to contribute for any other freight than that of the goods actually on board, or of such as the law considers as being actually on board. And by way of example, he says, "a vessel bound from A. to B. may be chartered to another party before her arrival at B. for a voyage from B. to C. If a general average should take place upon the voyage from A. to B., would it not be absurd to make the freight for the intended voyage from B. to C. also liable, because it was also at stake." Without undertaking to point out in detail in what respects the two cases differ, it is sufficient to say, that there is such a vested interest in the freight for the round voyage which has been commenced, that the whole is insurable; but as to the voyage which has not been entered upon, it is not so. Here is a marked distinction between the two cases, recognized by the commercial law. But the argument rests upon the supposition that there is no difference between them. Mr. Benecke, following out his reasoning to its legitimate consequences, says, that when a vessel is sent out in ballast under charter-party to bring a cargo home, the freight for the homeward cargo ought not to contribute toward a general average loss occurring on the outward bound passage. But to this Mr. Phillips does not agree, and places his dissent on the ground, that the homeward freight, that is, the freight for the round voyage, is at stake, and is insurable from the time the vessel breaks ground on the outward passage, and then argues that on an adjustment of an average on the outward or homeward passage, it should be apportioned and contribute on a proportion, in each case. But is such the legitimate conclusion from his premises? If the whole be at risk, then the whole is saved, and ought to contribute just as much as the whole vessel, which contributes in both cases. But upon what principle is it to be argued that the whole freight upon a round voyage, which is in no part earned or payable until the arrival of the vessel at her home port, is not to contribute to a general average loss occurring on the homeward passage? Is not the whole at risk? Is not the whole saved? Is it not the principle upon which the assessment is to be made, that every one shall contribute in proportion to the benefit received? And the owner is benefited to the whole amount of his freight then depending. I have not attempted to exhaust the argument, but merely to present some reasons why I prefer reposing on decided cases, rather than on the reasoning of Mr. Benecke

and Mr. Phillips. I am of opinion that, in this case, the freight for the round voyage must contribute.

Case No. 9,189.

The MARY.

[1 Spr. 51; 6 Law Rep. 73; 9 Hunt, Mer. Mag. 173.] [1]

District Court, D. Massachusetts. March, 1843.

SHIPPING — GENERAL AVERAGE — SALE OF CARGO BY MASTER—NECESSARY REPAIRS—PROFITS—INTEREST.

1. Specie was shipped from Boston for Porto Cabello, for the purpose of purchasing a return cargo, and the vessel put into Antigua on account of a disaster, where the master, being destitute of funds, sold a part of the specie, for the purpose of making repairs, and the vessel proceeded to her port of destination, and thence to Boston. *Held*, that the owners thereof were not entitled to recover the profits which they might have made upon a return cargo, but that they were entitled to interest upon the value of the specie, from the time when they would have had the benefit of it at Porto Cabello, if it had been carried forward with the rest of the cargo.

2. No adjustment of general average was made at Porto Cabello; but this, under the circumstances, did not impair the right of the shipper to interest.

[Cited in Dupont de Nemours v. Vance, 19 How. (60 U. S.) 171.]

The libellants [Shelton and others] shipped a quantity of specie, consisting of five-franc pieces, on board the Mary, from Boston to Porto Cabello, for the purpose of purchasing a return cargo. On the outward passage, the Mary met with a disaster; her masts were cut away, and she put into Antigua for repairs. The master being destitute of funds, and unable to raise them, sold a part of the specie for the purpose of making the necessary repairs, and the vessel afterwards proceeded on her voyage to Porto Cabello; and thence to Boston. It was admitted, that the specie of the libellant, which was thus taken, should be paid for in general average, at its value at Porto Cabello, the port of destination; and it appeared, that five-franc pieces passed at that place, as currency, and of the same value as Spanish dollars. No adjustment of general average was had at Porto Cabello, and none, until since the filing of the libel in this case. The question presented was, whether, in making such adjustment, the libellants should be allowed interest on the specie so taken, from the time when they would have had the benefit of it at Porto Cabello, if it had been carried forward with the rest of the cargo.

Edward Blake and F. C. Loring, for libellants.

B. R. Curtis, for respondents.

SPRAGUE, District Judge. I am of opinion that the libellants are entitled to such interest. The owner of the cargo is under no obligation to keep the ship in repair. But in certain cases, the law allows the master, from necessity, to sell a part of the cargo without the consent of the shipper, in order to enable the vessel to prosecute the voyage. But in such case, the shipper is to be compensated, and the measure of compensation is to be such as to place him in as good a situation as he would have been in, had the property of some other shipper been taken, instead of his. This is the general rule, and it is manifestly founded both in justice and policy. In conformity to this principle, it is well settled, that the shipper is entitled to be paid for his property, at its full value at the port of destination, deducting certain necessary charges. This, it is supposed, will afford him an indemnity, because, with the money thus paid to him, it is presumed that he can replace the articles taken, or purchase others of equivalent value, at his election.

But it is obvious, that, in order to afford him an indemnity, payment should be made to him at the port of destination. He cannot otherwise be placed in as good a situation, as he would have been in, had the goods of some other shipper been taken. His purpose was to place his cargo in that port. There he needed it to carry forward his enterprise. To refuse this to him while the other shippers have their parts of the cargo carried forward and delivered at the port of destination, would by no means place him in as good a condition as they, and would clearly violate the fundamental principle by which compensation is to be made.

As he had a right to have the goods shipped delivered to him at the port of destination, so has he the right to have that, which, without his consent and for the benefit of others, has been substituted for the goods, delivered to him at the same place. And if this be not done, he is entitled to compensation for the injury sustained thereby.

What shall be the measure of such compensation? The libel asks that it may be the profits which would have been made on the homeward cargo. But this was abandoned at the argument, and very properly. The law cannot go into a speculation of contingent profits, and it presumes that the shipper might have substituted other funds for a return cargo, if he saw fit. Interest is the established measure of damages for the non-payment of money.

The shipper might waive his right to payment at the port of destination. But there is nothing in this case from which such waiver can be presumed, unless it be that the adjustment of the general average was not made up, until since the arrival of the vessel here. But I do not think that sufficient to warrant a presumption, that the shippers voluntarily relinquished their right. They were not personally at Porto Cabello; and it does not appear that any offer of payment was made to their correspondents, or consignees. It must

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission. 9 Hunt, Mer. Mag. 173, gives only a partial report.]

be inferred, that the captain had no funds, or means of making payment, at Porto Cabello; and as the parties all resided here, the adjustment was properly left to be made by themselves, after the return of the vessel.

I have discussed this case, as if the goods of the libellants had been sold. But it is proved, that the five-franc pieces passed as currency, and were money at Porto Cabello. If this makes any difference, it strengthens the claim, bringing it more directly within the case of Sims v. Willing, 8 Serg. & R. 103, and the remarks of the author in 2 Phil. Ins. (2d Ed.) p. 131.

All the authorities cited at the bar tend in some degree to sustain the positions above taken. In many of them, and particularly in the case of The Packet [Case No. 10,654], such taking of the property of a shipper is regarded as a forced loan. And surely as much compensation should be made by the law in case of a forced loan, as is ordinarily allowed when the lending has been voluntary. Judgment accordingly.

Case No. 9,190.

The MARY.

[1 Spr. 204.] [1]

District Court, D. Massachusetts. July, 1852.

SEAMEN'S WAGES — COASTING LICENSE — ILLEGAL VOYAGE—RIGHT TO RECOVER—KNOWLEDGE OF SHIP'S PAPERS.

1. Seamen on board of a small vessel, under a coasting license, employed in collecting and taking paving stones from Marshfield and Scituate beaches, and conveying them to Boston, the whole passage being within the ebb and flow of the tide, have a lien upon the vessel for their wages.

[Cited in The Buffalo, Case No. 2,111. Distinguished in Raft of Cypress Logs, Id. 11,527. Cited in The Minna, 11 Fed. 760.]

[See The Charles F. Perry, Case No. 2,616.]

2. If a vessel is engaged in the coasting trade, without a license, and that fact is not known to a seaman, it does not affect his right to wages. It is not incumbent upon a seaman to examine the vessel's papers, to see if the voyage be legal.

[Cited in The Norfolk, Case No. 10,297.]

This was a libel promoted by David Downing and others, of the crew of the schooner Mary, in a cause of subtraction of wages. It appeared that the vessel was employed in bringing paving-stones from Scituate and Marshfield beaches, to Boston, and the libellants were employed in loading the vessel with the stones, at the various places where they were obtained, navigating the vessel to Boston, and unloading her. The schooner had a coasting license, which expired on the 14th April, 1852; after which, and before the renewal of the license, she made one trip to Scituate. The claim of the libellants was for services on that trip. It was insisted in the defence, that the services of the libellants were not properly maritime, the compensation for which creates a lien upon the vessel; that the trip made after the expiration of the license, was illegal, and that no wages could be recovered for services on an illegal voyage.

H. C. Hutchins, for libellants.

R. H. Dana, Jr., for respondents.

SPRAGUE, District Judge. The first ground of defence is, that the services of the libellants were not maritime. In the supreme court of the United States, in the case of The Jefferson, 10 Wheat. [23 U. S.] 428, it was decided that the services must be rendered upon a vessel whose passages were upon the high seas, or within the ebb and flow of the tide. Judge Hopkinson, in the case of Thackarey v. The Farmer of Salem [Case No. 13,852], a vessel under fifty tons burden, the business of which consisted in going across the river, about two miles, for wood, the passage seldom occupying more than an hour, held that the admiralty had no jurisdiction. The same judge sustained the jurisdiction in the case of a vessel plying between Philadelphia and Smyrna, in Delaware, entirely a river navigation, but within the ebb and flow of the tide. Smith v. The Pekin [Id. 13,090]; Wilson v. The Ohio [Id. 17,825]. In Packard v. The Louisa [Id. 10,652] a small vessel carried stones from Quincy to Boston, and the men on board not only loaded and unloaded them, but assisted, also, in laying them into the wharves and other structures; and Judge Woodbury intimated that they had no lien upon the vessel. In my opinion, persons employed in navigating vessels, engaged in transporting goods upon tide-water, although within a harbor, are engaged in the maritime service, and have a lien upon the vessel for their wages, which may be enforced in the admiralty. If such service is merely incidental, and subsidiary to some other, as the quarrying of stone for the building of wharves, then the whole cannot be deemed maritime; but if the taking on board of the stones, and the discharging or laying them into the walls of the wharf, are merely incidental and subsidiary to the maritime employment of the vessel, then the whole contract service is maritime, and the suit thereon may be brought in the admiralty. In the present case, the vessel in her passage for the paving stones, went upon the high seas. After leaving the outer light, she was extra fauces terræ. While taking in her cargo, she was upon the high seas. It appeared, by the evidence, that the libellants were seamen, and that they signed shipping articles for a coasting voyage. Their contract, therefore, was maritime.

As to the objection of the illegality of the last trip or voyage, there is no evidence that the seamen were aware that the vessel had not the requisite papers. It is not incum-

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

bent on the mariner to examine the vessel's papers, or to see whether the master has done his duty. If it should appear that the seamen knew of the illegality of a voyage, it might bar his claim. Such is not the present case.

Decree for libellants.

See The Canton [Case No. 2,388]; McCormick v. Ives [Id. 8,720].

Case No. 9,191.

The MARY.

[1 Ware (454) 465;[1] 1 Law Rep. 157; 20 Am. Jur. 421.]

District Court, D. Maine. Aug. 18, 1838.

SEAMEN'S WAGES — WHEN TO BE PAID — CUSTOM OF PORT — PROVISIONS — SHORT ALLOWANCE — DOUBLE PAY — EQUIVALENTS — NAVY RATION.

1. A mariner is entitled to his wages as soon as he is voluntarily discharged from the vessel; and if not paid within ten days after his discharge he may have process from a court of admiralty against the vessel to enforce the payment.

[Cited in The Annie M. Smull, Case No. 423.]

2. Whether the seamen are bound to remain by the vessel after the voyage is ended and assist in discharging the cargo, depends on the custom of the port.

[Cited in Packard v. The Louisa, Case No. 10,652.]

3. If a vessel has not the quantity and kind of provisions required by the act of congress of July 20, 1790, § 9 [1 Stat. 135], and the crew are put on short allowance, they are entitled to double wages for every day that the short allowance is continued.

[Cited in The Childe Harold, Case No. 2,676; The John L. Dimmick, Id. 7,355; Foster v. Sampson, Id. 4,982; Collins v. Wheeler, Id. 3,018.]

4. But when the master is unable to obtain the kind of provision which the statute names, other kinds may be substituted as equivalents.

5. When the crew are put upon an allowance and there is a controversy whether it be short or not, the navy ration is assumed as the standard of a proper allowance.

This was a suit for subtraction of wages. The libel sets forth a contract for a voyage from Portland to Goree in Africa and the Cape de Verd Islands, and back to her port of discharge in the United States, for wages at the rate of eighteen dollars a month, alleges the faithful performance of the contract, and claims a balance due of $48.08. In another article the libellant claims extra wages in consequence of being put on short allowance of provisions for twenty-two days during the return voyage. The answer of the owner admits the contract, the service, and the balance due, as alleged in the libel, and avers that he is, and always has been ready to pay the sum, and brings the money into court, and alleges that the libellant has never demanded it. The answer denies that the crew was put on short allowance, and avers that they were at all times supplied with a sufficient quantity of good and wholesome provisions of the kind usually furnished in such voyages. The answer also contains an allegation that at the time when the libel was filed in court ten days had not elapsed since the discharge of the crew.

Mr. Haynes, for libellant.
Mr. Fox, for respondent.

WARE, District Judge. The first question raised by the pleadings in this case, in the natural order in which they present themselves, is whether the suit is prematurely instituted. The allegation of the answer, on this point, is incorrect in point of form, but if the facts bring the case within the exception it is susceptible of amendment. The statute does not prevent the filing of a libel before the expiration of ten days, but the issuing of process against the vessel. Whether this objection is available for the respondent upon the facts as they are proved, depends on the construction of the sixth section of the act of July 20, 1790, c. 56 [1 Story's Laws, 106; 1 Stat. 135, c. 29]. The particular clause fixing the time when admiralty process may be issued against the vessel, provided the wages are not paid, has been thought to be not of very easy interpretation. It is in these words: "As soon as the voyage is ended, and the cargo or ballast fully discharged at the last port of delivery, every seaman or mariner shall be entitled to the wages which shall then be due according to his contract; and if such wages shall not be paid within ten days after such discharge, or if any dispute shall arise between the master and seamen, or mariners, touching the said wages, it shall be lawful," &c. And at the close of the section it is further provided, that nothing herein contained shall prevent any seaman or mariner from having or maintaining any action at common law, for the recovery of his wages, or from immediate process of any court having admiralty jurisdiction, wherever any vessel may be found, in case she shall have left the port of delivery where her voyage ended before payment of wages, or in case she shall be about to proceed to sea before the end of the ten days next after the delivery of her cargo or ballast.

One difficulty in the construction of the act, is supposed to arise from coupling the two phrases, "as soon as the voyage is ended," and "the cargo or ballast is fully discharged." The statute seems to have been framed upon the idea, either that these two phrases are identical in their meaning, the latter being added as merely exegetical of the former; or that by the principles of law, the seamen are bound to remain with the vessel until the cargo is fully discharged. But it is quite clear that in the maritime sense of the word, the voyage is ended when the vessel has arrived at her last port of destination, not always her last port of delivery, and is safely

[1] [Reported by Hon. Ashur Ware, District Judge.]

moored at the wharf. Cloutman v. Tunison [Case No. 2,907]; Edwards v. The Susan [Id. 4,299]. The cargo may have been delivered at any other port, and thus the discharge of the cargo happens before the end of the voyage, yet the seamen are unquestionably bound to bring her to her last port of destination, and their wages will not be due by their contract until that time; or what is more common, the last port of delivery may be the last port of destination, and then the voyage will be ended before any part of the cargo is discharged. And further, admitting what is not perhaps quite clear, that the seamen are, by the general principles of the marine law applicable to their contract, bound to remain by the vessel and assist in discharging the cargo, the general principle may be controlled by an established usage to the contrary. In this port, and it is believed in most of the ports of the United States (Dunl. Adm. Prac. 98), the uniform custom on the return of a vessel from a foreign voyage is to discharge the crew before unlading the vessel, and to employ other persons to perform that service. It is a custom so uniform, general, and of so long standing, that it may fairly be considered as entering into, and making part of the implied terms of the contract. The end of the voyage and the delivery of the cargo do not therefore refer to the same time according to the established usage of this port. The end of the voyage is when the vessel has arrived and is safely moored at the wharf, or when the master has provided other men to take the place of the crew and assist in unlading the cargo. The owner in the present case acted upon this custom. The vessel arrived in the afternoon of Saturday the 28th of July; and the crew were discharged the same day. Their wages were made up including and terminating with that day, and some of them paid on Monday. The sum brought into court and admitted to be due to the libellant includes Saturday only, and no complaint is made that he left the vessel before the voyage was ended, or that he had not completely performed his contract. It is manifest, therefore, that both the owners and the seamen considered the voyage for which they contracted as ended when the ship was made fast to the wharf and before the discharge of the cargo.

The statute declares that when the voyage is ended, and the cargo or ballast discharged, the seamen shall be entitled to their wages. If by the terms of the contract or the usage of the place, the seamen are bound to remain in the vessel and assist in unlading the cargo, then on common principles they will not be entitled to their wages until the cargo is discharged. The contract is entire, and they are not entitled to their pay until it is completed. But if by the terms of the contract or the usage of the place, their term of service and with it their wages terminate with the end of the voyage, and before the unlading of the vessel, then on the same principle they are entitled to their wages when their term of service expires. In such a case, when do the ten days begin to run; is it from the end of the voyage, or from the discharge of the cargo? It cannot be from both. My opinion is, that the intention of the legislature was, that they should begin to run from the time when the wages become due, that is from the day when the term of service is completed. They are then of common right entitled to their pay. The statute couples the two phrases, the end of the voyage and the discharge of the cargo at the last port of delivery, and declares that the seamen shall then be entitled to their wages. Now it cannot without violence be presumed that the legislature intended to establish any new and peculiar principles of law to be applied to contracts of seamen in this particular. But if it is contended that the time begins to run from the time when the cargo is discharged at the last port of delivery, and that is not the port of final destination where the voyage ends according to the contract, then the statute would declare the wages to be due before the contract was fully performed. If the final port of destination is the last port of delivery, and by the usage of the place the term of service expires with the end of the voyage, that is, when the vessel is safely moored at the wharf, then a similar inconsequence will result in an opposite sense, and the legislature will be made to declare that the wages are not due until an indefinite period after the contract has been fully performed, that is, until the cargo is completely discharged. The difficulty will be avoided by holding that the time runs from the day the men are discharged. The wages are then completely earned, and of common right are due, and this, I think, was the intention of the legislature. This is the construction which has been given to the statute by Judge Peters. Edwards v. The Susan [supra]; Thompson v. The Philadelphia [Case No. 13,973]; The Happy Return [Id. 13,697]. It is also the settled construction of the statute in Massachusetts district. Holmes v. Bradshaw [Id. 6,635], Dist Ct. Mass. Dec., 1823; Dunl. Adm. Prac. 99. And though some hesitation has been expressed as to the soundness of this construction, it appears to me to be open to fewer objections than any other. Abb. Shipp. 635, note. In the present case process was not issued until the expiration of ten days including the day of discharge.

We come then to the principal question in the cause, whether any extra wages are due in consequence of the crew being put on short allowance. By the ninth section of an act of July 20, 1790, c. 56 [1 Story's Laws, 106; 1 Stat. 135, c. 29], every vessel of 150 tons burden or more, bound on a voyage across the Atlantic, is required to have 100 pounds of salted meat, and 100 pounds of bread for every person on board, independent of any other stores of live-stock which

shall be put on board by the master or passengers, and in a like proportion for a longer or a shorter voyage; and if not so provided, and the crew shall be put on short allowance, then each of the crew shall be entitled to one day's wages extra for every day they shall be kept on short allowance.

It is admitted that there was not in this case the quantity of provisions on board which is required by law, and it is also proved and admitted that during part of the time, on the return voyage, the crew was put on an allowance; but it is denied that it was a short allowance. The law fixes with precision the amount and kind of provisions which a vessel is required to have on board. In its terms it does not admit of any substitutes for the kinds prescribed. But courts have thought that when a vessel happens to be in a port where it is not in the power of the master to obtain provisions of the amount and description directed by the law, other articles may be substituted which are of equivalent value. Mariners v. The Washington [Case No. 9,086]. This temperament has been introduced in the construction of the statute upon the reasonable presumption that the law does not intend to require of the master impossibilities. But when the courts by an equitable construction have introduced a qualification, and liberated the owners from the penal operation of the law against its letter, they are bound to see that the substitutes offered are a full equivalent, both in quantity and quality, for that required by the text of the law; the more so as the policy of the law addresses itself so strongly to the interests of humanity, it being intended to guard against the dreadful sufferings of famine while the ship's company are isolated from all the world and under a positive impossibility of relieving themselves.

This vessel, on her departure from Cape Bonavista, had considerably less than half the amount of bread and salted meat required for a vessel crossing the Atlantic. And all she had, which can fairly be considered as a substitute, was less than one fourth of a barrel of flour and about a half a barrel of beans. The whole live-stock was one pig and three goats, with about a bushel of corn to feed them, but this is expressly excluded from being admitted as a substitute for salted provisions. It is unnecessary to waste words to prove that these trifling stores could be no equivalent for the deficiency of the bread and salted meat. The master endeavored to replenish his stores at Cape Bonavista, but provisions could not be purchased at any price. He was obliged to sail with what he had, and nine days after leaving port the men were put on an allowance of three biscuits a day, and a few days after on an allowance of one pound of beef.

Whether the required quantity of provisions is on board or not, it is the duty of the master to oversee and regulate their expenditure. It does not follow that because they are dealt out in fixed and limited quantities, the men are put on short allowance. It must be shown that the allowance is not in a reasonable amount, not enough for the ordinary consumption of a man. What that reasonable quantity is, has not been determined by the statute. But in fixing the rations of the army and navy, the legislature has shown what they consider a proper allowance. The army ration is fixed at one pound and a half of beef, or three quarters of a pound of pork, and eighteen ounces of bread. Act March 16, 1802, c. 9, § 6 [2 Story's Laws, 831; 2 Stat. 134, c. 9]. The navy ration varies with the different days of the week, and is not made up exclusively of bread and meat, but is on the whole rather larger than that of the army. Act March 3, 1805, c. 91, § 3. A seaman in the merchant service requires as much food as one in the navy, and the navy ration has been assumed as the standard by which the allowance in the merchant service ought to be regulated. Mariners v. The Washington [supra]; Gardner v. The New Jersey [Case No. 5,233]. In the present case the allowance was one pound of beef, and, at most, not more than twelve ounces of bread. This is precisely two thirds of the army ration, and a little less than that proportion of the ration for the navy. To make up this deficiency there was, for the whole passage of thirty-two days, not more than forty pounds of flour and about half a bushel of beans to be divided among nine persons. This would make but a very small addition to the allowance, and if we assume the navy ration as the standard, it is quite clear that the men were on a short allowance.

But it is urged, as an argument that the allowance was sufficient, that some of the men did not consume the whole of what was allowed. This is true; but it should be added that they took care to have their savings carefully locked up in their chests. They knew that their stock of provisions was short, and that it was altogether uncertain when they would obtain more, and how long they would be under the necessity of sustaining life on what they had. It was therefore prudent and natural that they should practise the utmost frugality, and save all that could be spared from the urgent calls of nature, against a time of need, which they might reasonably have contemplated as not a very remote possibility; for if the voyage had been prolonged but a few days more, the crew must have suffered from absolute famine. I have no doubt that it was owing to unexpected contingencies that the vessel was left with this short supply of provisions, and not to the want of ordinary prudence or forecast on the part of the owners. Their intention was to have had an addition made to her stores for the return voyage, in a foreign port. But unfortunately, and without any fault on their part, they could not be obtained. A court, however, which

is bound to administer the law, cannot take these circumstances into consideration. The text of the law is imperative, and it is framed in the spirit of wisdom and humanity; and the interests of commerce as well as humanity require that it should be carried into effect. The putting the crew upon an allowance, was, under the circumstances of the case, if not a matter of absolute necessity, one of prudence, and there cannot be a reasonable doubt but that it was a short allowance. According to the testimony of the cook, they were upon allowance twenty-two days, but the statement of the mate is, that they were upon allowance nine days after leaving Bonavista, and the allowance was discontinued five days before their arrival in this port. As the passage was thirty-two days, that will leave eighteen. In addition to the balance of wages, I shall allow extra pay for eighteen days.

MARY, The (MINORS v.). See Case No. 9,644.

MARY, The (O'HARA v.). See Case No. 10,467.

Case No. 9,192.

MARY v. TALBURT.

[4 Cranch, C. C. 187.] [1]

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

SLAVES—SUIT FOR FREEDOM—RUNNING AWAY.

1. A slave, brought into the county of Washington, D. C., from Virginia, by her owner, afterwards ran away, and her owner sold her "running." *Held*, that she did not thereby lose the benefit of the provision of law in her favor.

2. A person coming to reside here may, under the 2d section of the Maryland statute of 1796, c. 67, lawfully bring his slaves with him; but if he sells them within three years after his removal, he loses the benefit of the exception in his favor, continued in the 2d section, and they are entitled to their freedom under the 1st section of the act.

Petition for freedom.

R. S. Coxe, for defendant, prayed the court to instruct the jury, that if the petitioner was brought here from Virginia by her lawful owner, and afterward ran away, and her owner sold her running, supposing her to be then in Virginia; the running away in fraud of the law will prevent the slave from the benefit of the provision in her favor.

THRUSTON, Circuit Judge, stated the construction of the statute to be this: By the 1st section of the Maryland act of 1796, c. 67, a slave imported, for sale or to reside, is free. The 2d section contains an exception in favor of those who come here to reside. The 3d section is an exception to the 2d so as to prevent it from operating in favor of an owner so removing, who shall sell the slave within three years after his removal.

THE COURT said that THRUSTON, Circuit Judge, stated the law correctly, as it had been decided lately in a case in Alexandria, in which Mr. Taylor was engaged. Harris v. Alexander [Case No. 6,113], at April term, 1830.

THE COURT refused to give the instruction prayed by Mr. Coxe.

Verdict for the petitioner.

MARY, The (TUNNO v.). See Case No. 14,237.

MARY, The (WILSON v.). See Case No. 17,823.

Case No. 9,193.

The MARY A. HOWES.

[Cited in The W. D. B., Case No. 17,306. Nowhere reported; opinion not now accessible.]

Case No. 9,194.

The MARY ANN.

[Abb. Adm. 270; [1] 13 Betts, D. C. MS. 12.]

District Court, S. D. New York. April, 1848.

SEAMEN'S WAGES—ILLEGAL VOYAGE—KNOWLEDGE—RIGHT TO PREVENT CRIME—MERE SUSPICION—TAKING POSSESSION—RIGHT TO LEAVE.

1. It seems that seamen employed on board a vessel forfeited under the act of 1800, (2 Stat. 70,) as fitted out for the slave-trade, are entitled to wages, notwithstanding the forfeiture, if they were not knowingly or willingly connected with the criminal purpose of the voyage.

2. Seamen are authorized under the general maritime law to prevent or restrain their officers from the commission of open and flagrant crimes in the ship, attempted in the presence of the seamen.

3. But the crew are not justified, by circumstances affording reasonable ground of suspicion merely that the master is about to engage the vessel in the slave-trade, in taking possession of her at sea, or in a foreign port, and bringing her back to her home port; and their undertaking so to do, forfeits both the wages already earned and those for the residue of the voyage. [See The Almatia, Case No. 254.]

4. The right of seamen to leave the vessel on the ground of her being chartered for a voyage in gross deviation from that for which they shipped, will not justify them in taking possession of the vessel while at sea.

5. Costs of a suit for seamen's wages imposed on libellants, where the crew had taken possession of the vessel while on her voyage and brought her home, under reasonable grounds of suspicion that she was to be engaged in the slave-trade.

A libel in rem was filed by James States, William Gray, Edward Davis, Thomas Holden, and Peter Johnson, crew of the schooner Mary Ann, against that vessel, to recover wages. There was also filed a libel in personam, by Peter Johnson alone, against William F. Martin, the owner of the schooner, to recover the same wages as were claimed by the libellants in the other suit. The facts

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

[1] [Reported by Abbott Brothers.]

in the case were, in brief, that the crew shipped on board the Mary Ann for a voyage to the coast of Africa. Arriving there, they became suspicious that the master intended to engage the vessel in the slave-trade. Resolving to prevent this, they took possession of the vessel, and after navigating her along the coast, in search of an American cruiser, under whose authority they might place her, but without success, they brought her back to the port of New York. Proceedings were taken in this court by the United States authorities, to procure the condemnation of the vessel as a slaver. The court decided that, upon the whole evidence, the charge was not sustained, but that there was probable cause for her arrest. The seamen having filed their libels, the causes were now argued upon the facts disclosed on the trial of the vessel.

The counsel in the personal action were—

Burr, Benedict & Beebe, for libellant.

J. M. Smith, Jr., for respondent.

The counsel in the action against the schooner were—

William Jay Haskett, for libellants.

J. M. Smith, Jr., for claimants.

BETTS, District Judge. These causes are connected in the argument with that of the United States against the same vessel, the final decree in which was rendered a few days since. The proofs presented in that cause form the basis of proceedings in the two cases under consideration.

The actions are by the crew of the vessel jointly against the schooner in rem, and by one of them separately against her owner in personam, to recover wages for the entire voyage to the coast of Africa and back to this port.

The schooner, on her return to this port, was delivered to the United States authorities, by the libellants, and was arrested upon a libel of information, in the name of the United States, charged with having been fitted out for the purpose of carrying on a traffic in slaves from one foreign country to another. Her forfeiture for that cause was demanded under the provisions of the act of congress of May 10, 1800 (2 Stat. 70), the offence being held by the supreme court to be embraced in the act of fitting out and preparing the vessel, with intent that she should be so engaged, although not actually employed in the business. U. S. v. Morris, 14 Pet. [39 U. S.] 464.

Immediately on the seizure of the vessel by the United States, the seamen filed their joint libel against her for wages. This was on December 12, 1847; and on the 20th of the same month, the libellant Johnson commenced his separate action for the same cause against the respondent as owner.

The court decided, in the suit brought by the United States, that upon the whole evidence the libel was not sustained, and decreed the surrender of the vessel to her owner, but held that probable cause for her arrest on the charge preferred against her, had been established.

Had the prosecution on the part of the United States resulted in the condemnation of the vessel, the seamen would have been entitled to their wages notwithstanding the forfeiture, if it appeared that they were not knowingly or willingly connected with the criminal voyage. The case of The St. Jago de Cuba, 9 Wheat. [22 U. S.] 417, is directly in point to substantiate this principle.

The peculiarity of this case is, that the vessel was not condemned, nor was she brought in or diverted from her voyage by capture under authority of the United States. The seizers, if they may be so called, are not those who claimed the condemnation of the vessel for a violation of the acts in relation to the slave-trade, but they are the seamen composing her crew, who brought her off the coast of Africa clandestinely, and navigated her to this port, under apprehension that the master was about to employ the vessel and themselves in carrying slaves from Africa to Brazil.

The conduct of the crew is insisted, by their counsel, to have been justifiable and meritorious, because they acted bona fide under circumstances affording reasonable cause to believe that the master intended to engage the vessel immediately in the slave-trade, and in the full belief, on their part, that such was the fact. They accordingly had the right to withdraw themselves from connection with such a criminal enterprise, and did no more nor less than their duty in also saving to the owner his vessel, by putting it out of the power of the master to employ her in that felonious pursuit.

It is just to the crew to remark, in vindication of their good faith in the transaction, that they did not, under the influence of their alarm and apprehension, take the schooner immediately to the United States, but they honestly sought along the coast an American cruiser, in order to put themselves and the vessel under the protection and authority of the American flag, and to take the advice of an American officer in the emergency.

It is manifest, however, that though they might rightfully, under the circumstances, appeal to an American officer, the failure to find one could not be regarded as clothing them with an authority to act as they supposed he might have done in view of the facts. The interference with merchant vessels, by seizing them or altering their destination or employment, by public officers of high intelligence and responsibility, and free from personal bias or apprehension in the matter, is a most delicate power, the exercise of which is, by all free governments, placed under careful supervision and guarded by appropriate checks. No considerate jurisprudence would entrust such powers to common sailors, and permit them to act as umpire between the master and the owner, or the own-

er and the government. Nor would they on any account be authorized to assume the command of the vessel, or break up her voyage, or leave her master in a foreign port, on suspicion that the vessel was designed for illegal traffic, or even for a piratical expedition. Seamen are not a class of men whose prudence or discretion could be trusted with the exercise of such delicate and extraordinary powers. The utmost that has been allowed the crew by modern or ancient maritime codes is, to interpose by force, and restrain and prevent the officers in command from committing open and flagrant crimes in their presence, or through their agency. In such extreme case, they may refuse to obey an unlawful order, or even arrest and confine the officer who attempts to perpetrate a piracy or felony. U. S. v. Thompson [Case No. 16,492].

On this occasion, the crew, upon consultation, united in the determination to put or leave the master on shore, and carry off the vessel and endeavor to deliver her up to some American man-of-war upon the coast. Let it be admitted that a train of circumstances existed and had come to the knowledge of the crew, which afforded reasonable ground to suspect that the master contemplated employing the vessel in the transportation of slaves from Africa to Brazil, and that the liberty or lives of these men might become implicated by that attempt; still no act of guilt had been committed or avowed in their presence, nor do they show that an immediate interposition by them was necessary, or that abandoning the master on the coast, and going off with the vessel, was requisite for their protection and safety, or that that course was adopted to secure the rights of the owner, supposing that he was ignorant of the wrongful purpose of the master.

The vessel lay close into Gallinas, a place of resort for American, English, and French cruisers stationed on the coast to detect and prevent the prosecution of the slave-trade. An English vessel of war was then at anchor directly in the vicinity of the schooner, and if the crew could not find safe shelter on shore, they could at once have placed the ship and themselves under the guard of that ship, and there is no reason to doubt that on application to the British commander, and showing him probable cause for the proceeding, he would have extended his protection to them until some proper American authority could be communicated with. No imminent necessity accordingly is found for taking off the schooner by the libellants, even if it had been placed beyond question that she intended to take on board a slave cargo the next day. It is not shown that the libellants applied to the English vessel for protection; and that their flight was regarded as needless and suspicious by the commander of that ship, would appear from his sending his cutter, at the request of the captain of the schooner, in pursuit of her, to bring her back to Gallinas by force.

I do not, however, determine this point on the supposition that the libellants gave way to a groundless alarm. Admitting that there was probable foundation for their fears, there is no sound and safe principle of the maritime law which justifies their extraordinary determination to remove the schooner from her moorings, and the still more reprehensible one of breaking up her voyage and running her across the Atlantic to the United States, in charge of men of no known capacity for such an undertaking. She would lose the protection of her insurance; and the peril of actual loss of the vessel, on a voyage so conducted, would scarcely be less than that of abandoning her on the coast to enter upon a piratical trade. The subjection of the vessel and cargo to the arbitrament of the crew, as to the legality or propriety of such an adventure, would expose distant mercantile operations to uncertainties and perils of the most appalling character; and it can never be expected that the right of a crew to interfere at their discretion, and take forcible possession of a vessel on mere circumstances of suspicion against the master, can be countenanced by the courts as a general principle of law. Their interposition to that end must always be limited to extreme cases, where the facts are palpable, and leave no room to doubt that such interference had become indispensable to the safety of their own lives, or at least to avert the commission of some heinous crime.

The case then demands, not only that the conduct of the crew in running off with the vessel and bringing her to the United States should be pronounced excusable under the circumstances, but that it be held meritorious to such a degree as to entitle them to maintain an action in rem against the vessel, or in personam against the owner, to enforce payment of full wages during the whole period that she was so controlled by them and diverted from her voyage. This claim must be pronounced incompatible with every sound and safe principle of law.

If this branch of the case cannot be supported, it is contended that there is an equity in behalf of the crew, sanctioning their claim to wages on the outward voyage. That was faithfully performed, and the cargo safely landed at Gallinas.

This demand is supposed to be sustainable on either of two grounds—First, that the crew have given sufficient evidence that the vessel had deviated from her voyage, and was about to be employed in the slave-trade, to justify them in abandoning her service; second, that the act of the master in chartering her from Gallinas to Bahia, was a deviation which released the crew from their contract, and empowerd them to recover wages for the services already rendered.

1. The conduct of the master, at Gallinas, wore a very mysterious and suspicious appearance. The voyage stated upon the shipping articles was "from New York to one or more ports on the coast of Africa, and back to her

port of discharge, in the United States." The evidence, on the part of the owner, showed that the voyage was intended for purposes of traffic up and down the coast, according to the usage of the trade on the western coast of Africa. The period that it was to continue was not stipulated in the agreement, or stated in his letter of instructions; and without admitting that this omission imported an understanding between the owner and master, that the latter was expected to do something else with the vessel than to run her upon the voyage proposed, there is no question that, if he protracted the services of the seamen along the coast to an unreasonable extent, they might, for that cause, leave the vessel at a suitable time and place. Abb. Shipp. 608; The Crusader, [Case No. 3,456]. The crew were not under his absolute power as to the direction of their services; much less could this indefiniteness as to the continuance of their engagement be used by the master to put them on a service wholly foreign to that agreed upon, and it would be, moreover, occasion for serious distrust as to his purposes, on their part. The chartering the vessel by the master to transport passengers to Bahia, without consulting his crew, and without stipulation as to the period she was to be employed on her destination after the charter-party should expire, taken in connection with the preparations before ordered by him on board of the vessel, and the notorious courses employed in carrying on the slave-trade, were all calculated to awaken their alarm. Had the men refused to perform that voyage, or left the ship to avoid being forced to make it, the court would, without doubt, have held that the circumstances fully excused the act, and that they were entitled to wages to that period.

2. Whatever question might be raised upon the first point, it is, however, most clear that they had a right to abandon the vessel, on the ground of her being chartered for a voyage in manifest and unreasonable deviation from that for which they shipped. The law on this point is precise and well settled. Cases to the point are collected, and the principles well stated in the elementary books. Curt. Merch. Seam. 24, 25; Abb. Shipp. 173, note 1.

But these doctrines, looking to the protection and indemnity of seamen in vindicating their rights under the shipping contract, give no countenance to the inference now sought to be deduced from them, that a crew may exercise that right of withdrawing from the contract, by also taking away with them the vessel in which they engaged to serve. Such a consequence has no legitimate connection with the right itself, or the means necessary to its exercise. It is a naked aggression upon the rights of the owner—certainly no less when committed in port, where the men could find protection from coercion and personal violence, than at sea—and it will hardly be claimed that a crew may arrest the master and ship at sea, and take command of her, to avoid a deviation from the voyage contracted. The authorities justify them in refusing, when in port, to perform service or remain on board after the vessel has deviated from her voyage (U. S. v. Mathews [Case No. 15,742]), but in no case is it intimated that they have the power to redress themselves for a past deviation, or to prevent an anticipated one, by seizing the vessel abroad and carrying her back to her home port.

This act of the crew was illegal. In an action by the owner against them for compensation because of the loss and injury occasioned to him thereby, they could not defend themselves on a plea of necessity, or on the ground of prudent precaution. They were entitled to leave the ship and abandon their engagement, or to defend themselves, in the harbor, from any attempt by force to compel them to go on the voyage to Brazil. Their privilege extended no further; and if, instead of furnishing grounds for strongly suspecting that the master was preparing to pervert the shipping engagement into a slave voyage, they had proved the fact explicitly, they would have no right in such case to do more than abandon the vessel. The ignorance and inexperience of the men, the suggestions made to them by others exciting or increasing their apprehensions, and the peculiar situation in which they were placed, tend to exonerate them from all mutinous or improper motives in what was done. They no doubt thought they were acting for the best interests of the owner, and in maintenance of the laws of their country; but most clearly these matters were not within their competency to determine, and in a civil action it is no justification for an illegal act that the party committed it with rightful and commendable intentions.

If fully persuaded that the libellants acted from worthy motives, and in the belief that what they did was for the benefit of the owner, yet the court could not countenance so glaring a dereliction of duty on the part of sailors, by permitting them to recover wages against the ship or owner, on facts and circumstances such as are disclosed in this case. If there was reasonable ground to apprehend danger to themselves, personally, in remaining on board and remonstrating with the master against his proposed voyage, and refusing to perform it, it was their duty to leave the vessel; and on such a termination of the engagement they would have recovered, certainly, the wages earned on the outward voyage, and probably, also, satisfaction for the return voyage thus lost. By absconding with the vessel and bringing her to the United States, from the coast of Africa, they have been guilty of a violation of their duty to the ship and to the owner, and deprived themselves of all rightful claim to wages for any portion of the time they were connected with her.

The libellants having been each examined as a witness in the cause, have had the oppor-

tunity of disclosing every fact and circumstance within their personal knowledge conducing to prove a guilty purpose on the part of the master of the vessel, or in excuse or extenuation of their imputations against him, and of their own conduct. They were not able, however, to present particulars which, reasonably considered, could establish the criminality of the master's conduct, or justify the determination adopted by them, and the means they took to carry it into effect.

Yet, upon the consideration that they acted under the influence of terror, and not from insubordination or dishonest motives, I should feel inclined to regard that state of excitement as so far palliating the conduct of the seamen as to warrant a decree leaving them to pay their own costs alone, without further punishing them, by imposing on them the costs of the owners; and if they possessed means which could be appropriated by the process of the court to the satisfaction of the costs created under these prosecutions, I should forbear giving authority to use it against them.

[2] [In pronouncing the opinion as first prepared, this view of the case was presented, and it was stated that such inclination would have prevailed if the crew had limited themselves to their suit in rem, prosecuted in connection with the seizure of the vessel by the government.

[But it was suggested that such favorable view of the case was overweighed by the act of the crew in commencing severally actions in personam against the owner, for their wages, and by different proctors, subsequent to the suit in rem, when no necessity existed for multiplication of actions and accumulation of costs, and the decree against the libellants for costs was placed substantially upon these reasons. Before the decree was entered it was pointed out to me by the counsel for the libellants, that only one of the crew had instituted a suit in personam, and that this was done before the return of the process in rem, and without the knowledge of his proctors that his name had been connected in fact with that suit.

[I have re-examined the original files and find I was mistaken in both these particulars. The first libel was filed the 11th or 12th of December, and the suit in personam was commenced the 20th, by the cook and steward alone: the other seamen having brought no action, against the owner. I have accordingly reconsidered the subject of costs to determine whether under the case first supposed and now found substantially to be its true position, the decree for costs ought to be revoked or modified.

[If the seamen had given stipulations for costs, or if discharging the order for costs against them would also absolve their proctors from liability to disburse the costs of prosecution created by the libellants, I should consider the condition in which the crew were placed at Gallinas, and their fright and unpremeditated departure with the vessel as reasonable grounds for adhering to my first impression, and for relieving their sureties and proctors, from paying these costs.] [2]

It is manifest that there is no equity in the case justifying the court in imposing costs upon the owner, who has sustained wrong and serious loss by the proceeding of the crew, and that the costs created in their behalf, in their own suit, must justly fall upon them. Their proctors, moreover, would derive no relief from a decree which only exonerated the libellants from paying costs to the claimant and respondent; and there being no sureties to protect it, it becomes, in the disposition of final costs, merely a naked question of equity between the seamen and the owner. The judgment of the court upon the merits has determined that the owner was clear of all culpability in the matter, and that there was not proof sufficient to fasten guilt upon the master. It results, that the right of the suit is on the part of the owner, and the mistake and the wrong on the part of the sailors, and that accordingly they should be subjected to bear at least their own costs.

Independent of that consideration, it seems to me that the owner can properly claim the award of costs against the libellants, as a protection and immunity against subsequent suits on their part. It is by no means clear that a decree merely dismissing the libel would bar after actions by any of these parties; but if there is connected with the order an award to the owner of his costs of suit, there would be a positive judgment for the amount rendered against them, and no tribunal would permit the cause of action to be again litigated until that judgment was satisfied. I shall, therefore, decree, that the action in rem and that in personam against the owner be dismissed, with costs to be taxed.

[2] [From 13 Betts, D. C. MS. 12.]

Case No. 9,195.

The MARY ANNE.

[1 Ware (104) 99.] [1]

District Court, D. Maine. Dec. Term, 1826.

ADMIRALTY — EFFECT OF DECREE — FORFEITURE — RIGHT TO INTERVENE — CREDITOR.

1. A decree of a court of admiralty on a proceeding in rem for a forfeiture is conclusive on all persons claiming an interest in the thing.

[Cited in The Hendrik Hudson, Case No. 6,358; Gillingham v. Charleston Tow-Boat & Transp. Co., 40 Fed. 651.]

[Cited in Whitney v. Walsh, 1 Cush. 32.]

2. Any person claiming an interest in the thing may intervene and make himself a party to the cause, and contest the forfeiture, so far as the decree would be conclusive on his rights.

[Cited in The Velocity, Case No. 16,911; The Old Concord, Id. 10,482; Bartlette v. The

[2] [From 13 Betts, D. C. MS. 12.]

[1] [Reported by Hon. Ashur Ware, District Judge.]

Viola, Id. 1,083; Wilson v. Bell, 20 Wall. (87 U. S.) 222.]

[Cited in Whitney v. Walsh, 1 Cush. 32.]

3. A creditor who has attached the thing in a suit against the owner, before the seizure, may intervene in the case as a claimant.

[Cited in Crapo v. Allen, Case No. 3,360; The Old Concord, Id. 10,482; Topfer v. The Mary Zephyr, 2 Fed. 825.]

This was a case of seizure made by the collector of Saco, for an alleged violation of the act of congress for the registering and recording of ships or vessels. The owner interposed no claim, but a claim was filed by Messrs. William J. and Charles E. Quincey, with a stipulation for costs, setting forth a claim against the vessel as attaching creditors, they having attached her, before the seizure, for a debt due to them from Dunlevie, the owner. The right of the Messrs. Quincey to intervene in the case as claimants, was denied on the part of the United States.

Mr. Shepley, Dist. Atty., for libellants.
C. S. Daveis, for claimants.

WARE, District Judge. It is contended by the district attorney that the Messrs. Quincey, upon the facts set forth in their claim and answer, cannot be admitted to appear as claimants, and make themselves parties, because the legal title to the vessel, and with it all their proprietary interest, passed by the bill of sale to the Howlands; and the lien which they acquired by attachment is not such an interest in the thing as will entitle them to maintain a claim in a court of admiralty. As a general principle, it is certainly true that in admiralty process in rem, all persons having an interest in the thing may intervene pro interesse suo, file their claims and make themselves parties to the cause, to defend their own interest. The process acts on the thing itself, and places it in the custody of the court. When thus in its possession, the court is bound to preserve it for all who have an interest in it, and not to deliver it but to those who prove a title. It follows as a necessary consequence that all who have a legal interest may appear, and by suitable allegations and proofs, show what that interest is, and claim to have it allowed. If it were not so, the greatest injustice would be done, because a decree of the court in rem is binding on all the world as to the points which are directly in judgment before it.

When property is brought into court on a revenue seizure, upon an allegation of forfeiture, the service having been regularly made according to law, it is deemed to be a service on all the world, and all persons who have an interest in the thing are presumed to have notice of the pendency of the suit. If no one appears to claim, and dispute the allegations of the libel, the act of congress prescribing the course of the court in revenue cases, directs that "the court shall proceed to hear and determine the cause according to law." Act March 2, 1799, c. 128, § 89 [1 Story's Laws, 653 (1 Stat. 695, c. 22)]. The practice of the court, when no person intervenes and files a claim, is to proceed by default and decree a forfeiture for want of a claim. This was the course prescribed by former laws. Act July 31, 1789, c. 5, § 36 [1 Stat. 29]; Act Aug. 4, 1790, c. 62, § 67 [1 Story's Laws, 155 (1 Stat. 176, c. 35)]. And this appears to be according to the course of the admiralty in its ordinary practice, and constitutes the law of the court. The legal notice of process having been given, the law presumes it to be brought home to all who have an interest in the thing, and if they do not appear and enter their claims they are held to be in contumacy, a decree passes on the motion of the libellant, the property is sold, and the proceeds brought into the registry; and on proof of the debt, upon a summary hearing, the libellant is entitled to be paid his debt and costs out of the proceeds. 2 Browne, Civ. & Adm. Law, 399–405; Clerke, Praxis Adm. tit. 35. The excess is retained in the registry, for any one who shall claim and prove his title. In the case of libels for forfeiture in the name of the United States, if there be no claim, no proof of the facts is, in the ordinary practice of the court, required, but the allegations are taken to be true. The decree thus pronounced, conclusively ascertains the forfeiture, and is binding on all who claim an interest in the thing. The title acquired by forfeiture is good against all the world, and cannot be called in question in any other court. If it is so, what reason can be given why every person having an interest in the thing, whether it be a proprietary interest or a mere lien or privilege, should not be admitted to intervene for his own interest and contest the forfeiture so far as his right or interest would be prejudiced by the decree.

But it has been contended at the argument that the decisions of the courts lead to an opposite conclusion. It has been repeatedly held that a lien is not such an interest as will support a claim in a prize court. The Eenrom, 2 C. Rob. Adm. 5; The Tobago, 5 C. Rob. Adm. 221; The Marianna, 6 C. Rob. Adm. 26; The Frances (Irvin's claim) 8 Cranch [12 U. S.] 418; The Mary, 9 Cranch [13 U. S.] 126. The principle on which this decision rests is that the person who has the lien cannot contest the title acquired by the captors, jure belli, but that the captors hold the property discharged of the burden. But there is one lien respected by prize courts, and that is the right of the neutral carrier to freight on enemy's goods, which is always awarded to him, this being a lien created by the general maritime law. But liens created by the act of the parties, which depend for their validity on the municipal laws of the country where the parties have their domicil, or where the liens are created, are not regarded by prize courts. "The difficul-

ties," says Judge Washington in the case of The Frances, "which an examination of such claims would impose on the captors, and even on the courts in deciding them, and the door which such a doctrine would open to collusion between the enemy owners and the neutral claimants, have excluded such claimants from the consideration of the courts." In all these cases, the courts professedly take their stand on the principles of prize law; the reasoning by which the decision is vindicated applies peculiarly to that law, and has but a limited application on the instance side of the court.

It is, however, further contended that when the proceeding is for a forfeiture, a person having a lien cannot intervene and make himself a party in this stage of the cause, but must await the decision of the court, and in case of a decree of condemnation, file his petition to be paid out of the proceeds after they are brought into the registry. The case of The Louisetta [Case No. 8,535] is referred to, to show that this is the correct practice. That, like the present, was a case of revenue seizure, and there were attachments of private creditors. The vessel was sold on an interlocutory decree, and finally ordered to be restored. The counsel for the claimants moved for an order to the registrar to pay over the proceeds to them, the clerk having declined to do it without an order, as it was understood there were attachments on the property. The court merely said that they would take no notice of the attachment unless a caution were first filed. The question did not arise whether an attaching creditor could sustain a claim for the specific thing. The case of The St. Jago de Cuba, 9 Wheat. [22 U. S.] 409, was a seizure under the slave-trade acts. Two claims were interposed, founded on liens; the first, of the seamen for their wages, and the second, of certain material-men for supplies for repairing and refitting the vessel. These claims were dismissed on the merits, but the faculty of the claimants to make themselves parties in the cause, was not called in question. But the question in this case did not present itself whether these privileged creditors could be admitted as parties to contest a forfeiture, because it was admitted that if the claims were valid they would overreach the forfeiture, and would entitle them to be first paid from the proceeds. Nor does it distinctly appear whether the claim was originally filed against the vessel, or the rights of the claimants came up on a petition against the proceeds in the registry.

The question then returns, as one not directly settled by any of the cases cited at the bar, whether a person who has acquired a lien on a vessel, and she is subsequently seized and libelled for a forfeiture, can be admitted to intervene in the cause, and show, in defence of his rights, that no forfeiture has been incurred. To say that he must wait until after a decree, and then come in and petition against the proceeds, would be little better than a mockery. For if the decree is against the vessel, it annihilates his claim and he can maintain no claim to the proceeds. It is not a claim, like that of seamen's wages, or that of material-men, which overreaches the forfeiture. The attachment operates only to the extent of the debtor's interest, to whose rights, so far as his lien goes, the attaching creditor succeeds, while the maritime lien of seamen for their wages, and of material-men for supplies and repairs, is a species of proprietary interest in the thing itself, which is independent of the title of any particular individual. It inheres in the thing, whoever may be the general owner. But the interest of an attaching creditor can only be defended by the same means which will be a defence for the owner whose interest is attached, that is, in this case, by showing that no forfeiture has been incurred. To decide that he cannot make himself a party to the cause, before a decree on the merits, is to decide that he cannot be admitted to defend his rights at all. My opinion, upon the whole is, that the claim may be admitted.

Case No. 9,196.

The MARY ANN GUEST.

[1 Blatchf. 358.] [1]

Circuit Court, S. D. New York. Oct. Term, 1848.[2]

SALE—BONA FIDE PURCHASER—BILL OF LADING—RIGHTS OF VENDOR.

Goods were purchased on credit and shipped by the vendor on board of a vessel whose master gave a bill of lading for their delivery to the consignee or his order. Before the vessel reached her port the bill was endorsed to A., who advanced cash upon it. After she arrived, and before A. demanded the goods, they were replevied by the vendor, on an allegation that the vendee had agreed to pay for the goods on delivery, but had become insolvent, and had not paid for them: *Held*, that A. was a bona fide purchaser, that the seizure of the goods by virtue of the writ of replevin constituted no bar to his right to the delivery of the goods, and that, on a libel in rem, the vessel was responsible to him, irrespective of the suit between vendor and vendee.

[Cited in The M. M. Chase, 37 Fed. 711.]

[Cited in Michigan State Bank v. Gardner, 81 Mass. (15 Gray) 372.]

This was a libel in rem filed in the district court by Townsend Underhill against the schooner Mary Ann Guest, for the non-delivery of goods shipped by that vessel from Philadelphia to New-York. The goods had been purchased on credit and shipped by the vendor, and a bill of lading in the ordinary form was given by the master for the delivery of the same to the consignee or his order. The bill of lading was transmitted to

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

[2] [Affirming Case No. 9,197.]

New-York previous to the arrival of the vessel, and endorsed to the libellant, who advanced on it $1,050 in cash. After the vessel arrived, the delivery of the goods was demanded of the master in pursuance of the terms of the bill of lading, but they were not delivered. On the same day on which the vessel arrived, and before the demand was made, the goods were replevied in a suit brought by the vendor against the vendee, upon an allegation that the latter had agreed to pay for the goods on their delivery at New-York, but had become insolvent, and had not paid for them. The court below decreed in favor of the libellant, and the claimant appealed to this court.

THE COURT held that the libellant was to be regarded in the light of a bona fide purchaser, that the seizure of the goods by virtue of the writ of replevin constituted no bar to his right to have them delivered by the master, and that the vessel was responsible to him, irrespective of the suit between the vendor and the vendee.

Decree affirmed.

Case No. 9,197.

The MARY ANN GUEST.

[1 Olc. 498.] [1]

District Court, S. D. New York. March, 1847.[2]

SALE—BILL OF LADING—ENDORSEMENT — ACTION AGAINST CARRIER—DEFENCE—STOPPAGE IN TRANSITU—DUTY OF CARRIER.

1. By the endorsement, for a valuable consideration, of a bill of lading of goods already at sea, the endorsee becomes, as against all the world, the owner of the goods, free from any equities subsisting between the consignor of the goods and the consignee.

[See Balderston v. Manro, Case No. 793.]

2. It is no defence to an action by such endorsee of a bill of lading against the vessel, for damages for the non-delivery of the goods, to show that immediately on the arrival of the goods at the port of consignment they were seized in an action of replevin at suit of the consignor, he claiming a right of stoppage in transitu on the ground of insolvency of the consignee.

3. The master of the vessel had the right to hold the goods against the sheriff; and should have interposed in the replevin suit, and contested the claim to take the goods from his possession.

[Cited in The M. M. Chase, 37 Fed. 711.]

This was an action in rem for the recovery of $1,050, upon a bill of lading assigned to the libellant, Townsend N. Underhill. He alleges in his libel that Whitney, Schott & Co., merchants of Philadelphia, on the 18th of February, 1846, shipped on board the said schooner, then lying in Philadelphia and bound to New-York, twelve cases of merchandise, marked and numbered as in the bill of lading, to be delivered in good order to Mr. W. C. Noyes, or his assigns, he or they paying freight at the rate of three cents per foot—five dollars forty cents in all; which bill of lading was duly executed and delivered to the said W. C. Noyes. He further alleges that said schooner arrived with said goods on board in New-York on or about the 27th of February aforesaid. He further alleges that on or about the 19th of said February he advanced to the said Noyes, $1,050, on the faith of one of said bills of lading, then in the possession of said Noyes, who then endorsed and transferred to him said bill of lading. That after the arrival of said vessel in New-York he went on board of her by his agent, and demanded the twelve cases of merchandise, and was informed by the mate, the captain being absent, that they had been delivered to some other person. He further alleges that he was ready and willing to pay the freight. He further avers that he is informed and believes that said merchandise was delivered to the sheriff of the city and county of New-York upon a writ of replevin, issued at the instance of Whitney, Schott & Co. against said W. C. Noyes; that the damage to said libellant by the non-delivery of said merchandise has been $1,050, and the interest, commission and charges thereon. Wherefore he prays process of attachment against said schooner, and that she be sold, &c. The respondent, for answer to said libel, admits the shipment of said merchandise, and the execution and delivery of the bills of lading as alleged, and avers that Whitney, Schott & Company caused to be issued from the supreme court of the city of New-York a writ of replevin, in which it was alleged that W. C. Noyes unjustly had taken and detained the said merchandise, and that by virtue of said writ the sheriff of said county, on the 24th of February, entered on board of said vessel, and there seized and took and carried away from said vessel said twelve boxes of merchandise. He denies that any loss or damage was caused to libellant by any act of the master of said schooner; and says that said merchandise could not be delivered for the reasons above set forth. Wherefore he prays that the libel be dismissed. The bill of lading and its execution was admitted. It was also in proof that on the 19th of February, the libellant was applied to by Noyes, the purchaser and consignee of the goods, for $1,050, which he advanced; that the bill of lading was endorsed by Noyes and delivered to libellant at the time he advanced him this money; that as far as the witness, who was in the employ of Noyes, knew, Noyes was in fair standing for solvency. Libellant had been in the habit of advancing him money. It was also proved that a demand had been made for the goods, and the reply of the mate of the vessel was, that they had already been delivered to the sheriff, under a writ of replevin. It was also proved that the libellant offered to pay the freight upon the merchandise.

Mr. Nash, for libellant.

Mr. Sanxay, for claimants.

[1] [Reported by Edward R. Olcott, Esq.]

[2] [Affirmed in Case No. 9,196.]

BETTS, District Judge. This was an action for the recovery of $1,050, with interest upon the same, money advanced by libellant to the consignee of certain packages of goods shipped by him from Philadelphia to New-York. The consignee, desirous of raising that amount of money, applied to the libellant for the same upon the security of the bill of lading, which, upon the loan being made, was duly endorsed and delivered to him. There is nothing in the evidence to impugn the fairness of the transaction between the parties, and although it appears that the purchaser of the goods was probably insolvent at the time of the sale of the goods, it does not appear that the libellant was aware of the fact.

There is no doubt that if the purchaser had fraudulently induced the seller to part with his goods by representing that he was solvent when the fact was otherwise, the vendor would have a right, by a stoppage in transitu, to reclaim the goods. Such fraudulent purchase, as between the vendor and vendee, would not divest the owner of his right and title to the goods. But when the vendor has, for a valuable consideration, parted with the possession of the goods, and third parties have innocently and in good faith purchased them from the vendee, the title of such third person cannot be disturbed by any equities which the original owner might have possessed. 6 Metc. [Mass.] 68.

For the convenience of commercial transactions, bills of lading have been allowed to become negotiable instruments: and upon the faith of them it is usual and customary for commission merchants to make advances. By such endorsement of the bill of lading the holder of it becomes, as against all the world, the owner of the goods. Conard v. Atlantic Ins. Co., 1 Pet. [26 U. S.] 385; Nathan v. Giles, 5 Taunt. 558. The bill of lading transfers the property to the consignee; and it seems to be conceded that the assignment of it by the consignee, by way of sale or mortgage, will pass the property, though no actual delivery of the goods be made, provided they were then at sea. 2 Kent, Comm. 549; McNeill v. Glass, 1 Mart. [N. S.] 261.

It is no defence to the claim of the consignee, that the goods have been attached or seized by virtue of any judicial process. The contract of the carrier is, that he will deliver the goods in good order and condition to the shipper or to his assigns, (the dangers of the seas only excepted.) He thus guarantees to protect the right of possession of the shipper and his assigns. He had the right to the possession of the goods as against the sheriff, and could have interposed in the replevin suit, and had an immediate trial of the right of the sheriff to take them from his possession. 2 Rev. St. p. 432, §§ 13, 16, 17.

The libellant is, upon the proofs and the law, entitled to a decree in his favor for the value of the goods claimed by him and his costs, and the cause must be referred to a commissioner to report upon such value.

This case was appealed and the decree affirmed upon the grounds of the decision here reported. [Case No. 9,196.]

Case No. 9,198.

The MARY A. RICH.

[9 Ben. 187.] [1]

District Court, E. D. New York. July, 1877.

MARITIME LIENS—PRIORITY — SEAMEN'S WAGES—SUPPLIES.

Seamen *held* entitled to priority of payment out of proceeds of the sale of the ship in court, over material men who furnished supplies to the vessel during their employment.

In admiralty.

W. W. Goodrich, for libellants.
Weeks & Foster, for claimant.

BENEDICT, District Judge. This case presents a question of priority between the claims of seamen for wages and the claims of material men for supplies. The voyage began in Boston—thence the vessel proceeded to Brunswick, Georgia, thence to Rio, thence to Pernambuco, and thence to New York where she was sold by a decree of this court. Part of the seamen were shipped in Boston for a period of eight months, part shipped at Pernambuco for New York, as I suppose. In Pernambuco the material men furnished supplies to the vessel, and now claim that their demand takes precedence over the wages accrued at the time of making the advances.

The wages claimed by the libellants are due by reason of a continuous contract ending on the arrival of the vessel in New York. In accordance with the general rule therefore, their claims are entitled to be paid in preference to the demands of material men for supplies furnished during the period of the employment. The case is stronger in favor of the libellants than the case of The Louisa Bertha, 1 Eng. Law & Eq. 665, for in this case there is no room to doubt that the material men may resort to the personal liability of the owners of the vessel for any deficiency that remains after the proceeds of the vessel now in the court are exhausted.

Case No. 9,199.

The MARY BELL.

[1 Sawy. 135.] [2]

District Court, D. Oregon. April 18, 1870.

MARITIME LIENS — SUPPLIES — HOME PORT—FOREIGN PORT—BILL AGAINST VESSEL AND OWNERS.

1. The maritime law does not give a lien upon a vessel for supplies furnished at the home port.

2. The residence of the owner is the home port of a vessel, although she may be enrolled

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

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

elsewhere; the enrollment is only prima facie proof of the owner's residence, and therefore of the home port.

[Cited in The Albany, Case No. 131.]

3. Supplies furnished vessel in foreign port. To whom or what credit presumed to be given.

[Cited in The Mary Morgan, 28 Fed. 198.]

4. When a bill for supplies is made out against the vessel by name and the owners, it is evidence that credit was given to the vessel, and that the personal responsibility of the owners was not exclusively relied upon.

In admiralty.

Erasmus D. Shattuck, for libellant.

J. W. Whalley, for respondent.

DEADY, District Judge. This suit was commenced by C. H. Myers, on February 9, 1870, to enforce a lien against the Mary Bell, for materials and work furnished to said boat at Portland, by the libellant as a plumber and fitter, between December 19 and January 26, previous. The work and materials are alleged to be of the value of $576.25.

R. C. Smith, intervening for his interest as master and sole owner, appeared and answered the libel. The furnishing of the materials is not denied, but that any lien was given therefor upon the boat which can be enforced in this court, is contested upon two grounds:

1. That the materials and work in question were furnished to the Bell at her home port, and therefore that the admiralty law of the United States does not give a lien therefor.

2. That the owner was present with the boat when the work, etc., was furnished, and on this account the credit is presumed to have been given to such owner and not to the boat, and therefore the admiralty gives no lien upon the boat.

The rule for the determination of the legal question involved in the first objection is as follows:

"By the maritime law of continental Europe, no distinction is made between the cases of domestic and foreign ships, nor between supplies furnished in a home port and abroad. But by the maritime law of England and this country, supplies furnished to a domestic vessel, in a home port, are presumed to be furnished on the personal credit of the owner or master, and do not create a lien which can be enforced in a court of admiralty by proceeding in rem." Jackson v. The Kinnie [Case No. 7,137].

"Material-men, also, who furnish materials or supplies for a vessel in a foreign port, or in a port other than the port of the state where the vessel belongs, have a maritime lien on the vessel as a security for payment of the price of all such materials and supplies." The Belfast, 7 Wall. [74 U. S.] 643. "Such a lien does not arise in a contract for materials and supplies furnished to a vessel in a home port, and in respect to such contracts it is competent for the states, under the decisions of this court, to create such liens as their legislatures may deem just and expedient, not amounting to a regulation of commerce, and to enact reasonable rules and regulations prescribing the mode of their enforcement." Id. 645, 646.

The Bell was enrolled, under the act of February 18, 1793 [1 Stat. 305], at the port of Astoria, Oregon, on January 10, 1870. The enrollment states that she was built at the Cascades, in Washington Territory, 1865, and that R. C. Smith was her owner and master; and she is styled and described therein as the "Mary Bell, of Portland," but the residence of Smith is not stated, as it should have been. Smith was examined as a witness, and from his testimony it appears that he bought the boat in Portland in June, 1869, and took her to Ranier, on the Columbia river in Oregon, and rebuilt her, and then took her to Monticello, in Washington Territory, where he then and for a long time prior, resided and still resides, and where the boat now is. That about November 10, 1869, he brought the boat to Portland, for the purpose of having her machinery put into her, and her roof tinned, and the plumbing and fitting done for her. The port of Monticello, although within the collection district of Astoria, where the Bell was enrolled, is not within the state of Oregon, neither is it a port of entry or delivery established by law, but only a port or place on the Cowlitz river, near its junction with the Columbia river, where steamboats may, and do arrive from, and depart to ports or places upon the navigable waters of Oregon and Washington Territory.

Upon this state of facts, the first objection to the lien must fail. The only evidence that Portland was the home port of the Bell is furnished by her enrollment. Waiving the consideration of the fact that this enrollment was made after four fifths of these materials had been furnished, at best it is only prima facie proof that the boat belongs at Portland, which may be overcome by evidence to the contrary. Dudley v. The Superior [Case No. 4,115]; Hill v. The Golden Gate [Id. 6,492].

The evidence of the owner is conclusive upon this point. It shows that his residence is without the state, and at the port or place of Monticello, in Washington Territory. This being so, his boat belongs there in fact, although he may have procured her to be otherwise described in the enrollment. Whether a vessel is to be deemed foreign or domestic depends upon the residence of her owners, rather than the port of enrollment, but in the absence of evidence to the contrary, such residence will be presumed to be at the port of enrollment. For the purpose of this suit, and in the port of Portland, the Bell, being owned in Monticello, is to be considered a foreign vessel upon which the admiralty law gives a lien for materials or work. The reason for this is well stated by Mr. Justice Wells, in Hill v. The Golden Gate, supra: "It is important to observe that the character of the vessel is only referred to for the purpose of

ascertaining to whom and to what the credit was given; and in no other respect, so far as regards this case, is it important. If the owners reside in a foreign country, or in another state the material-man is presumed to give credit to the boat and also to the owners, who live so remote, and who are beyond the jurisdiction of the courts of the state. If the owners reside in the same state with the material-man, the latter can easily resort to them for payment, and readily enforce it in the courts, therefore he may well be supposed to give credit to the owners alone. It is apparent, therefore, that the place of enrollment has nothing to do with the credit that is given; and has, therefore, nothing to do with the question of lien."

It is clear that the Mary Bell was owned at Monticello, and that was her home port or place. Therefore in the port of Portland, for the purpose of this suit, she is to be regarded as a foreign vessel, subject to a lien by the admiralty law in favor of material-men.

As to the second objection, the rule of law is substantially stated by Chief Justice Taney, in his dissenting opinion in Thomas v. Osborne, 19 How. [60 U. S.] 38, as follows: By the maritime law, repairs and supplies furnished at the request of the owner, are presumed to have been furnished upon his personal credit, unless the contrary appears. In The Chusan [Case No. 2,717], Mr. Justice Story states the rule more comprehensively, and, in my judgment, more correctly:

"We all know, that, by the general principles of the maritime law, material-men have a three-fold remedy for supplies and materials furnished for a foreign ship. First, the ship itself; secondly, the owners; and thirdly, the master; and neither of these remedies is displaced, except by conclusive proof, that an exclusive credit has been in fact given to one or more of the parties so liable, or to the ship itself."

Here the master and owner are the same person, and it seems to me that in such a case, unless the contrary appears, the presumption ought to be that the party furnishing the supplies dealt with him as master only, and therefore gave credit to the boat. This controversy does not arise between different creditors, as in Pratt v. Reed, 19 How. [60 U. S.] 359, but between the owners and the creditors. That was a case between mortgagees and persons claiming a lien for coals furnished the boat at the request of the owner and master, during a period of nearly two years. The court ruled in favor of the mortgagees, upon the ground that there was no proof of the necessity of procuring the supplies in question, upon the credit of the vessel. There was very little ground for claiming a lien as against the mortgagees, although it was allowed in the court below, but the opinion of Mr. Justice Nelson is an extreme one against the allowance of liens at all. See The Grapeshot, 9 Wall. [76 U. S.] 137. But as between the owner and material-men, when the supplies are furnished at the request of, or with the knowledge of the former, I do not think the question of whether they were necessary for the vessel, or whether they could have been procured otherwise than upon her credit, ought to arise. The owner should be estopped under these circumstances, from asserting the falsity or impropriety of his own conduct, to the detriment of his creditors.

It only remains, then, to ascertain to whom or what the credit was given when these supplies were furnished.

The facts bearing upon this question, are these: The libellant undertook to furnish the material and labor at the solicitation of the engineer, Wilcox, who seems to have had the immediate charge of putting in the machinery, and fitting up the boat. From him, Myers learned that Smith was owner, and that the boat came from Monticello, where Smith lived. Libellant refused to do the work for Smith on the ground that he had once done some work for him on a steamboat, and was not paid for it. The engineer then assured libellant that he had or would have an interest in the boat, and that the boat was good for it. Upon this understanding, libellant undertook the job, and, as he testifies explicitly, not upon the credit of Smith or the engineer, but that of the boat. The engineer was not examined as a witness. It took about five weeks to complete the work, and once or twice—the first time soon after the commencement of the work—Smith came into Myers' shop, and obtained some of the material himself. At the beginning, Wilcox desired the clerk of libellant to charge the articles to the Mary Bell, and the clerk testifies that he did so; and, further, that about the time the boat was enrolled, and when the material, etc., amounted to $400, he presented a bill to Smith for the amount, and he promised to call and pay a portion of it that afternoon. He also testifies that this bill was made out "to Mary Bell and owners," and that no objection was made to it by Smith on that account or otherwise.

On the stand, Smith stated that he expected the engineer to have procured these supplies at the Wallamet Iron Works, but admitted that the latter informed him at the time that he had employed the libellant. He also admitted that the bill was presented to him as stated by clerk, but could not remember how it was made out. He further admitted that the bill was left with him, and that he supposed he had it somewhere, but not with him. If this bill had not been made out to the Bell it would have been a strong circumstance against the conclusion that the credit was given to the boat. On the other hand, if it was so made out and presented to Smith and not objected to by him, it is pretty certain that not only the credit was given to the boat by the libellant, but that Smith so understood it, and assented to it. That the bill was so made out and presented, we have

the uncontradicted and altogether probable testimony of the clerk. In addition to this, there is the presumption that if the bill was not made out against the boat, Smith would have produced it on the trial. It is the best evidence of the fact. He admits that he had it, and has made no effort to find it. Indeed, for aught that appears, he could lay his hand on it at any time. I think the evidence fully warrants the conclusion that the bill was made out and presented as the clerk states. Where an account for supplies and materials furnished was stated, "Barque Chusan bought of John and George Ring," it was held to be evidence that the credit was given to the vessel, and "to repel the notion that any mere personal responsibility of the owners was exclusively relied on or taken." The Chusan [supra].

Add to this the other circumstances disclosed by the testimony, the refusal of Myers to trust Smith for the work, the explicit pledge of the boat for payment by the engineer, with the immediate knowledge and implied assent of Smith, and the reasonable conclusion is, that the libellant credited the boat exclusively, and also that Smith, by his agent the engineer, obtained the supplies with the direct understanding that the credit was given to the boat and not to themselves, and that the boat was not only tacitly but expressly pledged for the payment of the bill.

The bill is made out in currency, at eighty cents on the dollar; it will be changed to the rate of ninety cents, and a decree given that the libellant recover that amount, with costs and expenses of suit; and in case the same is not paid into court within ten days herefrom, that execution issue therefor against the stipulators in the bond for the delivery of the boat to the claimant.

Case No. 9,200.

The MARY BELLE ROBERTS.

[3 Sawy. 485.] [1]

District Court, D. California. Sept. 30, 1875.

SEAMEN'S WAGES—ABANDONMENT IN FOREIGN PORT.

Defense by master that the seaman was detained on shore by the municipal authorities of the port: *Held*, unsupported by the proofs.

In admiralty.

D. T. Sullivan, for libellant.

Millon Andros, for claimant.

HOFFMAN, District Judge. The libel, in substance, alleges that the libellant, who was a seaman on board the above vessel, was abandoned and left behind by the master thereof at Iquiqui, in the republic of Peru, the libellant being then on shore on liberty, and willing and anxious to return on board. The answer was, that the libellant was taken out of the vessel by order of the captain of the port of Iquiqui without the consent and against the wishes of her master; that the master requested the captain of the port to allow the libellant to rejoin the barque, but the captain of the port refused so to do, and the vessel thereupon sailed away without the libellant. The answer further alleges that libellant was not prevented from rejoining the ship by any act of the master, but by the act of the harbor authorities of said port, and not otherwise.

The evidence shows, that on the day previous to the sailing of the vessel, a dispute occurred between the libellant and the master, in consequence of which the former was, by the master's order, put in irons, and, as he alleges, "triced up." The next morning he requested leave to go ashore to see the captain of the port. This the master refused, until he should first have seen the captain. The master accordingly went ashore about nine o'clock in the morning, saw the captain of the port, and, as he says, "told him just how the thing was."

The captain of the port had, it would seem, already heard of the affair through some workmen and the master insists that he made no complaint against the seaman. By his own admission, however, he voluntarily sought the captain and related the whole occurrence. The result was that a boat with a policeman on board was dispatched to the vessel and the libellant brought ashore. The master testifies that this occurred about nine o'clock a. m., and in this he is corroborated by the mate. The libellant states very positively that he was taken ashore after dinner and between two and three o'clock, and David Oakshott, a seaman, testifies to the same effect. The point is not very material except as showing that the man was taken ashore not more than an hour and a half before the vessel sailed, and as tending to show that little opportunity was afforded him to rejoin the ship, and no very strenuous effort was made to recover him.

The libellant states that on landing he saw the master on the mole, and said to him that he desired to see the captain of the port. The master showed him his office, and not finding him in, said he would go up town and see where he was. He did so, and on his return informed the libellant that the captain would be down within half an hour. The master then returned to his vessel and the libellant waited for the return of the captain of the port. On his arrival the libellant informed him that he belonged to the vessel which he saw was beginning to make sail. The captain told him he must wait until the master came ashore again. The libellant then offered a boatman one dollar to put him on board. The captain of the port said something to the boatman, or to a policeman that was near, which the libellant did not understand. The boat proceeded a short distance towards the ship and then turned around and brought the libellant back, notwithstanding that he offered three dollars to be put on board the vessel.

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

The ship continued her course out of the harbor without stopping.

The master's account of the occurrence differs from that of the man in a few particulars: 1. He states, as already noticed, that the man was brought ashore at nine o'clock, and not at about half past two or three, shortly before the vessel sailed. He denies having told the man he would go up town to look for the captain of the port, and states that he told the latter several times that he was about to sail and wanted the man, but the captain refused to give him up, saying he would look out for him, and would put him in jail. The captain made no investigation and assigned no reason for keeping the man. The master then returned to the vessel and was under way in fifteen minutes after he got on board. With respect to this statement it is to be observed: 1. That assuming it to be true, the master's justification is by no means clear.

The policy of the laws of all maritime nations, and notably of the United States, discountenances in the most emphatic manner the discharge of seamen in foreign ports. By various acts of congress, it is provided that the master shall, before sailing, give bond for the return of his crew to the United States. If a seaman be discharged abroad, he is in general required to pay to the consul three months' extra wages, of which two-thirds are to be paid to the seaman upon his engagement on board any vessel to return to the United states; the remaining third to be retained to form a fund for the payment of the expenses home of other destitute seamen. Consuls are also required to provide passages to the United States for any destitute American seamen found within their districts. Masters are required to receive on board their vessels, and transport to the United States, on the request of the consul, such seamen in number not exceeding two to every one hundred tons burden of their vessels. And, finally, the malicious forcing on shore, or leaving behind, of any mariner in any foreign port or place is denounced and punished as a crime.

These various provisions clearly exhibit the deep solicitude of the legislature to secure in all cases the return of the mariner to the United States, and they indicate with equal clearness the duty of the master, viz., to bring back the mariner in his vessel, unless the circumstances are such as to render it impossible, or to relieve him from the obligation to do so.

It is not pretended that in the case at bar the master had any right to expel the seaman from the vessel. The defense rests upon the allegation that the seaman was in the custody of the local authorities from which the master was unable to liberate him. But the inquiry arises, did the master, on his own showing, make a reasonable and sincere effort to perform what, as we have seen, the law regards as one of his most important duties.

The man, he says, was brought on shore at nine o'clock; the vessel sailed at three p. m. He had been sent for by the captain of the port without any complaint on the part of the master, as the latter asserts. But he admits that he went to the captain of the port and "told him just how the thing was." It is not to be presumed that his narrative was very favorable to the seaman. The captain of the port at once dispatches a policeman to bring him ashore. To this proceeding the master makes no opposition. The man is brought on shore, and the master, as he says, requested the captain of the port "several times" to give up the man; and on his refusal, and without delaying his intended departure a single hour, sails away, leaving the man without clothes or money in a remote foreign port. I cannot consider that the master, under these circumstances, fulfilled his whole duty. A more resolute effort should have been made, and more decided measures taken, to procure the restoration of the man, and the departure of the vessel reasonably delayed for the purpose. I have little doubt that such an effort would have been successful. Had the man been a relative or ward of the master, or had a valuable bale of merchandise been removed from the ship, the master's reclamations would, I doubt not, have been far more energetic and persistent, nor would he have deemed the reasons he now assigns for not bringing back the man to his port of shipment a valid excuse for failing to deliver any part of his cargo to its owner. I consider his duty to restore the seaman to his home quite as imperative as his duty to deliver his cargo to its consignees.

If the account of the transaction given by the libellant be accepted, the master's breach of duty can hardly be denied. The man swears that he was taken on shore not more than an hour and a half before the vessel sailed; that when the master went off to the ship he said he would be back in half an hour; instead of doing so, he at once made sail. He denies that he was in custody, and states that when he discovered the vessel was about to sail, and mentioned it to the captain of the port, the latter told him to wait until the master came ashore. The man was certainly sufficiently at liberty to be able to make an effort to reach the vessel in a boat. But the boat, after proceeding a part of the way, turned back, against the remonstrances of the man, and in pursuance, he thinks, of previous instructions by the captain of the port. This circumstance seems to me extremely suspicious. It suggests very strongly the idea of a secret understanding between the master and the captain of the port, by which the former was to be rid of the man—an idea, favored by the facts that the master had had trouble with him, and had received on board two stowaway seamen by whom the libellant's place could be supplied. On the master's statement, the conduct of the captain of the port is unaccountable. The man had committed no violation of the municipal law of the place. The vessel lay a mile from the shore. A difficulty, such as are unhappily too common on board

ships, had occurred between the master and one of the men. The offense, if any, was against the discipline and internal police of the ship. What motive had the captain of the port to seize and hold the man, when the master had made no complaint against him, when he was anxious to receive him back, and the man was desirous of returning, and this without any investigation whatever into the facts of the case? None has been suggested, except the mere wantonness of brief authority. I require more convincing proofs than have been furnished in this case, to induce me to believe that from such a motive, without any personal interest or hope of advantage to himself, an officer charged with important duties in a foreign port, and who was on friendly terms with the master (for the latter testifies that he shook hands with him, and bade him good-bye when he left), would have been guilty of so high-handed an outrage upon the commerce of the United States. If the master really supposed the officer was committing the offense he now charges upon him, the cordiality of his leave-taking is not a little extraordinary. Nor does the subsequent conduct of the captain of the port toward the man in any degree tend to corroborate the master's version of the occurrence. On the man's return from his unsuccessful attempt to reach the vessel, he was not consigned to a jail, or subjected to the slightest restraint of his liberty. He applied at once to the captain of the port for a passage to San Francisco, but this the latter declared himself unable to afford him; but when some six days afterwards the man procured a passage on a mail boat for Callao, the captain of the port gave him a letter to the American consul at the latter place, who paid his board while at Callao, and gave him, on his departure, a letter to the consul at Panama, by whom, in like manner, his board was paid until a passage to San Francisco could be obtained.

It seems highly improbable that an officer who was thus ready to do everything in his power to facilitate the man's return to his country, would have forcibly taken him from the vessel and detained him in custody against his own wishes, and in spite of the remonstrances of the master. After a careful consideration of the whole case, my opinion is, that the master desired to be rid of the man, and voluntarily abandoned him. And the defense now set up that he yielded to authority he was unable to resist, is not sustained by the proofs.

In this view of the case, it is unnecessary to consider whether if the facts had been as alleged by the master, the seaman would not still have been entitled to his wages up to the end of the voyage. A decree will be entered in favor of libellant for his wages up to the end of the voyage, and his expenses, deducting intermediate earnings, if any.

MARY BELLE ROBERTS, The (SPEYER v.). See Case No. 13,240.

Case No. 9,201.

The MARY C.

[1 Hask. 474.] [1]

District Court, D. Maine. Jan., 1873.

PLEADING IN ADMIRALTY — AMENDMENT TO ANSWER—COLLISION—BAFFLING WIND—RIGHT OF WAY—ITEMS OF DAMAGE.

1. An answer cannot be amended after the cause has been heard, so as to contradict a material admission in it.

2. A vessel on the starboard tack, nearly close-hauled with the wind one or two points free and baffling, need not give way to a vessel on the port tack close-hauled, when the vessels are crossing.

3. A vessel having the right of way must keep a proper lookout and use proper seamanship to avoid collision.

4. Freight money lost by the master of a sinking vessel when hurrying from the wreck and sails used for covering the deck-load are proper items of damage in cases of collision.

A cause of collision heard on libel in rem, claim, answer and proofs.

Nathan Webb, for libellant.
Almon A. Strout, for claimants.

FOX, District Judge. This collision took place between the Schrs. Sarah Buck of Belfast and Mary C. of St. Johns, about fifteen minutes after twelve in the morning of Dec. 12, 1872, and about seven miles southwesterly from Monhegan, and resulted in the total loss of the Sarah Buck, she having sunk. The night was very clear, with a whole-sail breeze. The Sarah Buck was on her port tack, without cargo, and on her return to Belfast from Salem. The Mary C. left Seal Harbor, near White Head in Penobscot Bay, about 8 p. m. Dec. 11, in the prosecution of her voyage from Rockport, N. B. to New Haven with a cargo of grindstones. She was on her starboard tack. Each of the vessels laid within about six points of the wind. The libel avers that at the time of the collision, the Sarah Buck was close-hauled, and the Mary C. free. These allegations are denied in the answer; but it does admit that the Sarah Buck was sailing on a course "about northeast," and avers that the wind was then north-northwest; this would be within six points of northeast, and I therefore consider it as established from the claimant's answer, that the Sarah Buck was close-hauled as is set forth in the libel.

Cook, master and part owner of the Mary C. alleges in his answer, which is subscribed and sworn to by him, that when he left Seal Harbor, "the wind was baffling from northwest to north-northwest;" after the case had been fully heard and the arguments closed, a motion was made by his proctor for leave to amend this averment in the answer by changing northwest to northwest by west. The amendment was not allowed;

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[1] [Reported by Thomas Hawes Haskell, Esq., and here reprinted by permission.]

and on further reflection, I am satisfied that the ruling was correct. The cause had been fully heard and argued to the court, with this admission in the answer as to the course of the wind; it was a deliberate, sworn statement by the master, of the fact as he understood it to have been when called upon to respond to the charges against him in the libel, and it is not the practice of any court, at such a stage of the cause, to permit a material amendment which will destroy the effect of an admission of so much importance, relative to a matter which had been a principal subject of controversy before the court for more than ten days. The amendment, if allowed, would at once produce a conflict with the testimony of the master given by him upon the stand, as he had stated, that the wind was northwest when he left Seal Harbor, baffling a half point each way; and the only advantage to be derived from the amendment would be, that the statement in the answer would then more fully agree with the testimony of some of the witnesses produced by the claimant, by whom the wind was represented to have been still more westerly than is asserted by the master, either in his answer or testimony, and which the court is not convinced is in accordance with the truth.

The libel alleges that the wind at the time of collision was north, and that the Sarah Buck was on a course of northeast by east, and her master reiterates this statement when examined as a witness. Her crew, all of whom assert that they were on deck at the time, testify that their course was northeast by east, one half east, as this vessel did not sail nearer than within six points of the wind; it is manifest that these statements of the master and his crew are not correct, as with the wind north, a course of northeast by east would be within five points, which this vessel could not accomplish. There is therefore, to say the least of it, a mistake on their part in relation to the wind, or the course they were sailing, and perhaps they are incorrect in both particulars.

The crew of the Sarah Buck represent that the Mary C. when first discovered was one and one half to two points on their lee bow; the libel states her as being one and one half points, about half a mile distant; the answer on the contrary represents that when the Sarah Buck was first seen from the Mary C., she was on her lee bow. The claimant has produced in court a diagram in explanation of the position of the two vessels when first seen and as they came in collision; and he has stated it was substantially correct as laid down in this diagram; the Sarah Buck is clearly to the windward of the Mary C. and it fully corroborates the allegations on this point in the libel.

Upon one other matter there is a very severe conflict; every man on board the Sarah Buck swears that her regulation lights were in place and burning brightly, and that after the collision, one was taken down, was then burning and was extinguished by the master and brought on board the Mary C. The crew of the Mary C. all testify that they saw no lights on the Sarah Buck, that their attention was called by Capt. Cook to the absence of her lights, and upon this, they are said to be corroborated by the testimony of the master and mate of the Favorite of Cornwallis, who testify that at the time of the collision, they were within one eighth of a mile, and they run down and hailed both vessels immediately afterwards, offering assistance; that they run round the Sarah Buck and saw no lights upon her. The testimony of these men from the Favorite is presented in such a manner as to impress upon the mind of the court strong doubt as to its truthfulness. The case was in hearing for a number of days, the entire crew of each vessel had been fully examined, and the testimony of Capt. Cook had been very minute and protracted; a number of other witnesses had been examined as to the course of the wind, and it was then suggested that each party might desire to take further testimony on that point, and for that purpose the hearing was postponed. Up to that time, no suggestion or intimation had been thrown out from either side, that any other vessel was at the time in the immediate vicinity, or that either had been hailed by a third party with an offer of assistance; on the contrary, the master of the Mary C., when inquired of in relation to other vessels, stated, "I saw other vessels one-fourth to one-half a mile off. Three or four to leeward, two or three to windward. Some were steering about same course I was, others were running off more. I passed a great many of the vessels which came out of Seal Harbor." From the testimony on both sides, the court formed the opinion that no vessel came near or offered any assistance. If Jenkins, the master of the Favorite, has testified truly, the court was led into a very great error by the testimony of Capt. Cook, "that he saw vessels one fourth to one half a mile off," when he was well aware that he had been hailed by the Favorite at the time the Sarah Buck was in a sinking condition. If such was the fact, when asking for further time, he should have frankly stated that another vessel was near by and had offered assistance at the time, and that he wished to procure the testimony of her officers and crew if practicable; but instead of so doing, under the pretence of proving the course of the wind, he obtains the opportunity of producing this testimony, all knowledge of which he had concealed from the court as well as the adverse party. The course he has adopted leads me to conclude, and I think it is not unjust to him under the circumstances, that this testimony from the Favorite is an afterthought, especially as Jenkins admits that Capt. Cook had informed him as to the points in dispute, and he

also had occasion to prompt him as a witness when under examination, and his testimony in some respects does not agree with Capt. Cook's statements, especially in regard to the course of the two vessels, which he gives west by south, and the wind which he states northwest by north, one point more westerly than Capt. Cook, and also the time of the collision, which he says was before twelve o'clock by his time, which was St. Johns, some fifteen or twenty minutes earlier than the real time, and that his watch was not called till a short time afterwards.

The court is satisfied that the Sarah Buck had her proper lights burning. The testimony from all of her crew is positive upon this point, and they must all have committed wilful perjury in relation to it if their statement is untrue, whilst that from the other vessels is of a negative character, as to their not seeing any lights; this matter of the lights is really quite immaterial in determining the rights of the parties, as both sides admit that the night was very clear, so that the vessels could be seen by each other in season to have done whatever was incumbent to have avoided the collision.

Sixteen witnesses have been examined on the part of the libellants, and seventeen for the claimants; the most material points in controversy being as to the course of the wind, and whether the Mary C. was or not close-hauled at the time the collision took place. The court has prepared a full abstract of the testimony, and it is very certain that it is utterly impossible to reconcile the evidence on these matters; no great benefit can result from a prolonged statement of the testimony of each witness, and the court therefore will confine its remarks in a great extent to the conclusions at which it has arrived in relation to them.

The answer states that when the Mary C. left Seal Harbor, the wind was varying from northwest to north-northwest. In his testimony, the master says, after getting by White Head, he headed west-southwest and sometimes southwest by west, and on that course passed north of Monhegan close-hauled to the wind; that as the wind changed to the north, he still held close up to the wind until his course was west. He has called various masters of vessels who left Seal Harbor the same night bound to the westward at about the same hour with the Mary C.; most of them represent the wind to have been northwest at Seal Harbor. Woodward, master of the Telegraph says it was baffling from northwest to northwest by west. Foster, master of the Laura represents it as west-northwest to northwest by west; none of the witnesses give the wind as far to the north as the answer N. W. to N. N. W; on the contrary they represent it as being from one to three points further west than the answer; but they all concur in their statements that when sailing westerly they were all running close-hauled to the wind. The libellants have produced two witnesses, one of whom came out of Seal Harbor and the other from Lobster Cove near by the same evening with the Mary C. Tate who sailed from Seal Harbor says the wind was north-northwest at eight o'clock, and that he passed the Mary C. half way over to Mosquito Island standing the same course with him; that the wind was then northwest by west and he was sailing two points free. He further states that from 10½ to 12, the wind was north by east to north-northeast, which is from one to two points further east than is claimed by the libellant, and which would not have permitted the Sarah Buck to run the course she was making as stated in the libel. Trenergy, from Lobster Cove, speaks of the wind as being nearly north at White Head at eleven o'clock that night.

The master of the Mary C. claims that with the wind northwest, the vessel making seven knots, he was close-hauled on a course of southwest by west and passed Mosquito Island. Six witnesses, who for many years have been acting as pilots and masters in and about Penobscot Bay, testify that thus running close-hauled, she would not have been able to have passed Mosquito Island, but would have gone ashore either on the island or inside of it; and the argument drawn from this testimony is, that notwithstanding the statements of Capt. Cook and his crew, the Mary C. must to some extent have been running free.

From the discrepancies which exist between the allegations of the respective parties in their pleadings and the witnesses they have produced, as well as from the discrepancies between the witnesses themselves, it is extremely difficult to decide what was the exact course of the wind, and whether or not the Mary C. was absolutely close-hauled. I am satisfied the wind was changing northerly after ten, though Tate says it was N. W. by W. when he passed the Mary C., sometimes very baffling; and to some extent these facts may harmonize the statement of the witnesses, as they probably took notice of the wind at different hours and when differently situated. The nearness to the coast may also have had its effect in changing the course of the wind. The answer of the Mary C. states the wind was baffling from northwest to north-northwest, and I am inclined to adopt northwest by north as being probably the mean course of the wind at White Head when blowing steadily at the time the Mary C. left the harbor. The master says his course was more, southwest to southwest by west up to time of collision, whilst Tate, who says he passed the Mary C. sailing a like course with his own, gives his course as southwest by west, which is the true course from White Head to a point seven miles southwest of Monhegan. Admitting that at this season of the year it is usual for coasting vessels to sail as close to the coast as they well can, and that Cook, being a comparative stranger to

this vicinity, would not be likely to strike seaward beyond what was customary, I adopt his statement that his course varied from west-southwest to southwest by west, and with the wind, as I find it to have been baffling about northwest by north when they left Seal Harbor, it results that the Mary C. was not absolutely close-hauled, but that as she ran down the coast, she was sailing at times one or two points free with a baffling wind, which at times might head her off her course. Capt. Cook says, that from the time of leaving White Head until after the collision, his main sheet was not slackened, but that as the wind veered toward the north, he changed his course by following up the wind, and that he was making a west course when the collision took place. Having followed the wind, so that he must have changed his course at least two points more westerly, as he made no alteration he says in the trim of his sheets, it follows that the wind must have changed two points at least to the north, and I am therefore warranted in the conclusion that the wind must have been about north by west, not being steady, but baffling about that course.

Having thus determined that the Sarah Buck was close-hauled on her port tack, and that the Mary C. with a wind baffling about north by west was on her starboard tack, running west and within one to two points of being absolutely close-hauled, what was the duty of each vessel in a clear night, with a full breeze, each vessel having been discovered by the other in season to avoid a collision, but each having a poor lookout, as in such a night, each should have been seen from the other before they had approached within a half mile?

The claimants insist that it appears from the allegations in the libel, that these vessels were approaching end on or nearly end on, so as to involve risk of collision, as the Sarah Buck is thus stated to have been heading northeast by east, and the Mary C. southwest by west, which would make them within one point of being direct end on, and so bring them within article eleven of the regulations adopted by congress, which requires both vessels to port when approaching end on, or nearly so, so as to involve risk of collision, and which the Sarah Buck neglected to do, but starboarded her helm just before the collision took place. The answer, instead of admitting that the libel states correctly the true course of the two vessels, and submitting for the decision of the court the question, whether two vessels when approaching on opposite courses within one point are brought within the eleventh article, joins issue on the fact, and charges that the course of the Mary C. was west, making a difference of three points, and from the evidence, I believe this statement to be substantially correct; as the case stands therefore, the two vessels in fact were crossing instead of approaching end on, and the case is brought within the twelfth article, which provides that "when two sailing ships are crossing, so as to involve risk of collision, then if they have the wind on different sides the ship with the wind on the port side shall keep out of the way of the ship with the wind on the starboard side, except in the case in which the ship with the wind on her port side is close-hauled and the other ship free, in which case the latter ship shall keep out of the way."

The Sarah Buck had the wind on her port side, and was close-hauled and should have kept out of the way of the Mary C. unless she had the wind free. I find that she was nearly close-hauled with the wind at best but one or two points free and baffling, and I do not hold that she was therefore deprived of the right of way and compelled to give way to a vessel on the port tack, close-hauled. It was therefore the duty of the Sarah Buck, under the twelfth article to have kept out of the way of the Mary C., and her prudent course would have been to have ported her helm instead of starboarding. By pursuing the course which she did, she placed herself in such a position as to greatly increase, instead of diminish the risk, and she must be answerable for the consequences. If the master intended to luff, he should have done it much sooner, and not have delayed it until the vessels were in such close proximity. I therefore hold that the Sarah Buck violated the twelfth article, and that her management contributed to the injury.

I am also of the opinion that the conduct of those in charge of the Mary C. was inexcusable, and that she is not exonerated from liability. She had but one man, her master, on the lookout. He states that until the vessels came within an eighth of a mile of each other, he could not discover whether or not the Sarah Buck was approaching towards him. I am satisfied that she had her proper lights, and of course, with proper attention her course could have been determined; but without lights, the Sarah Buck was in plain sight that night, and a diligent lookout under such circumstances should have discovered her course before she approached within that distance; after she was discovered, her course should have been constantly noticed by the lookout, so as to find out what means she intended to adopt, and so that the Mary C. might be in readiness to do all that the law required of her, if she should be in danger; for although by the 12th article she had the right of way, yet that must be taken in connection with article 18, which requires that "where, by the above rules, one of two ships is to keep out of the way, the other shall keep her course subject to the qualifications contained" in article 19, viz.: "In obeying and construing these rules, due regard must be had to all dangers of navigation, and to any special circumstances which may exist in any particular case, rendering a de-

parture from the above rules necessary in order to avoid immediate danger." By article 20, it is declared that "nothing in these rules shall exonerate any ship * * from the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case." Similar regulations on this subject have been adopted in England. It is declared by the privy council, in The Agra and Elizabeth Jenkins, L. R. 1 P. C. 501, "that if a ship bound to keep her course under the 18th sailing rule, justifies her departure from that rule under the 19th rule, she takes upon herself the obligation of showing not only that her departure was at the time it took place necessary in order to avoid immediate danger, but also that the course adopted by her was reasonably calculated to avoid that danger;" and the opinion says: "Their lordships therefore have come to the conclusion, that both vessels were to blame, and that the collision is attributable to both, the Agra for not sooner observing and getting out of the way of the Elizabeth Jenkins, and the Elizabeth Jenkins for departing from her course without sufficient necessity, and for departing from it in a manner calculated to increase and not to diminish or avoid danger."

In the case of The Havre [Case No. 6,232], Judge Shipman says: "I now come to another point in the case. It is a rule of prudence and sound sense, often reiterated in judicial opinions, that every vessel is bound to avoid a collision if she can; the fault of one approaching vessel does not authorize the other to run her down because she happens even through her own folly to lie in her wake. I am well aware that where the law charges one vessel with the duty of keeping out of the way of another, the corresponding duty of the other, to keep her course, is to be rigorously enforced. But it is to be enforced with intelligence and in the interest of safety, and not to be enforced, or even permitted blindly to destructive ends. It is therefore proper, in view of the fact that the Havre clearly saw the Scotland for fifteen minutes before the collision, watched her approach with more or less care for two miles, and without the slightest change in her course, struck the latter only a few feet forward of her stern, to enquire whether she did her whole duty; in other words, whether the slight change in her wheel to starboard, in order to have enabled her to clear the Scotland, might not and ought not to have been made;" and later on says: "There was risk of collision apparent for several minutes before it took place; the responsibility of avoiding it rested chiefly on the Scotland. She was bound to keep out of the way, and the Havre was bound to keep her course until it was apparent that the collision could not be avoided without a change on her part; I hold her responsible on the sole ground, that after it was clear that the only way of escape was for her to starboard her wheel she failed to do it, and that if she had done it no accident would have occurred."

The case of The Maria Martin, 12 Wall. [79 U. S.] 47, fully sustains this principle.

When the Sarah Buck began to luff, it was the duty of the Mary C. to have held her course or take such steps, if a collision was imminent, as would be calculated to diminish, rather than to increase the danger; but instead of doing anything of that kind, the Mary C. also luffed, necessarily bringing the two vessels into collision; and to accomplish this, she swung round so much that her port side struck the Sarah Buck aft of the fore rigging. It is apparent from the position of the vessels on claimant's diagram, that when the Mary C. commenced to luff, the Sarah Buck had ranged ahead of her, so that a lookout forward could have perceived her well on the starboard bow, instead of right ahead, thereby indicating that if the Mary C. held her course, there would be no danger; and it was the duty of the lookout on the Mary C. to have carefully noticed the position of the two vessels before giving any order to luff, which was wholly inexcusable, if the vessels were then bearing from each other as laid down on the diagram. A careful examination of all the testimony and this diagram convinces me that the statement of Capt. Cook, that if he had held his course he would have struck the Sarah Buck with his starboard bow a little further aft, and if he had starboarded she would have paid off some, but would still have struck her, is not correct. On the contrary I think the statement of the master of the Sarah Buck is true, that if each vessel had held her course, they would have gone clear. The luffing of the Sarah Buck did not increase the danger to the Mary C. if she had held her course, while if she had starboarded her helm in the slightest degree after the Sarah Buck had luffed, a collision would have been impossible.

In his direct examination Capt. Cook testified that he heard some one on the Sarah Buck cry out to luff, and that this was addressed to his vessel; on his cross examination he stated, he heard the cry of luff from the Sarah Buck, but was uncertain whether it was before or after she luffed, and did not know whether it was or not addressed to his vessel. Some of the crew of the Mary C. would have the court understand that she was ordered to luff by those on board the Sarah Buck, and from this it is claimed that the Mary C. luffed in compliance with such orders; but the answer does not attempt to cast the responsibility of her luffing upon the Sarah Buck, on the contrary, it states that "the Mary C. held her course until the Sarah Buck approached nearer, when the helm of the Mary C. was put to port in order that she might lay close to the wind, and finding that the course of the Sarah Buck rendered a collision possible, the helm of the Mary C. was put hard to port," to which has been

added, "to lessen the force of the blow, collision being imminent;" and in his testimony Cook says: "I gave orders to put helm hard down, thinking she would come up more side to, and break off the blow." The Mary C. therefore is accountable for having luffed and for the consequences of deviating from her course. If she had held her course, I find the collision would not, in fact, have occurred; and she could have avoided it likewise by changing her course in an opposite direction, instead of producing it by the course she pursued. I am therefore obliged to hold her accountable jointly with the Sarah Buck; and the result is, that the damages of the two vessels must be apportioned between them.

The court can place but very little dependence on the statements of witnesses as to time or distances. Capt. Cook for instance testifies he saw the Sarah Buck one fourth to one half a mile off, and afterwards called the watch four or five minutes before the collision. It is not disputed that the vessels were approaching each other at the rate of twelve or thirteen miles per hour, less than five minutes for a mile, and at this rate, if the watch was called four or five minutes before the accident, the vessels must have been more than a mile apart when the Sarah Buck was first seen from the Mary C.

The claimant relies on the opinion of the court in The Nichols, 7 Wall. [74 U. S.] 656, where it was decided that "mistakes committed in moments of impending peril by a vessel, in order to avoid a catastrophe made imminent by the mismanagement of those in charge of another vessel, do not give the latter, if sunk and lost, a claim on the former for any damages." I do not consider this principle as applicable to the present case, because I have no doubt, that if the Mary C. had held her course, there would have been no collision; and secondly because ordinary seamanship would have satisfied a lookout attending to his duty, that the Sarah Buck when she began to luff had then ranged so far to the eastward of the Mary C., that there could be no collision if she held her course; and lastly, at the distance the vessels then were, a competent skillful master with nothing to distract his attention, the peril not being then imminent, and there being no occasion for excitement, would never have given an order to luff, which must inevitably occasion the collision. Upon the imminency of the peril at the moment, it may be well to refer to the statement in the answer, which says "that the Mary C. held her course until the Sarah Buck approached nearer, when the helm of the Mary C. was put to port in order that she might lay close to the wind, and finding that the course pursued by the Sarah Buck rendered a collision possible, the helm of the Mary C. was put hard to port." Since the answer was completed, there has been added in pencil (which additions the court does not sanction) the words "to lessen the force of the blow, collision being imminent." The imminence of the peril does not appear to have occurred either to the claimant or proctor in the early stage of the defense, as the answer itself only states that he put his helm to port when he saw the Sarah Buck approaching, thus in the very outset altering his course by laying closer to the wind, and after that, finding that the course of the Sarah Buck rendered a collision possible, not imminent or impending, he put his helm hard to port. Such a case, in my view, is not brought within the doctrine laid down by Judge Clifford in The Nichols [supra], for the answer admits that as the Sarah Buck came nearer he put his helm to port, that he might lay closer to the wind, thus changing his course without any justifiable cause, as there was then no danger, and after that, when there was only a possibility of collision, he turned towards the track on which the Sarah Buck was sailing, instead of holding his course or running away from her, and thereby produced the very result which would otherwise not have happened. It rather appears to the court that the Mary C. acted upon the theory, that under all circumstances she was bound to go to windward and compel the Sarah Buck to pass to leeward, even if a collision was occasioned thereby. Her answer shows, either inattention and want of seamanship, or a determination to go to windward, whatever might be the consequences.

The damages sustained by the loss of the Sarah Buck are testified to amount to $2,300, which includes $200 secured for freight of a cargo of hay to Salem, and which amount was lost by the master from his person, he having taken it from his cabin in an account book in which it had been put, and placed the book with the money in it under his coat for protection at the time he was getting into his boat to go on board the Mary C., when the Sarah Buck was sinking. In the confusion, the book and money were lost. This amount I find to have been lost, and I consider it a proper item of damage, and I do not find the master to have been so negligent as to relieve the Mary C. from accountability for its loss. Two sails used for covering the deck-load of hay were also lost, which are valued at $100. The boat and some of the vessel's furniture were saved. I assess the loss sustained by the Sarah Buck at $2,200. If the parties agree upon the damages sustained by the Mary C., the court will adopt that amount, otherwise an assessor will be named by the court to determine them.

Damages to be apportioned.

Case No. 9,202.

The MARY CELESTE.

[2 Lowell, 354.] [1]

District Court, D. Massachusetts. Dec., 1874.

SHIPPING—FORFEITURE—TITLE—INNOCENT PURCHASER—FRAUDULENT CERTIFICATE OF REGISTRY—SIGNATURE.

1. Where absolute forfeiture to the United States is the statute penalty for an act, the title accrues when the penal act is committed.

2. If the forfeiture is alternative, property or its value, the title does not vest until the election is made. Meanwhile, an innocent purchaser may acquire a title not subject to forfeiture by subsequent seizure.

3. Under St. 18 July, 1866, § 24 (14 Stat. 184), "If any certificate of registry . . . to any vessel shall be knowingly and fraudulently obtained or used for any vessel not entitled to the benefit thereof, such vessel, with her tackle, apparel, and furniture, shall be liable to forfeiture," the forfeiture is an absolute one, and vests the property in the United States when the fraud is committed. "Liable" only implies that the United States may not discover or may not enforce the forfeiture.

4. If the papers, by means of which such registry is obtained, are identified, and come from the possession of government, it is not necessary to prove the signature to each paper.

The United States seized the brig Mary Celeste, July 9, 1872, and at once filed a libel against her as forfeited; alleging that in December, 1868, Richard W. Haines, the then owner of said brig, knowingly and fraudulently obtained a certificate of registry for said brig, to the benefit of which she was not entitled.

The answer denied the allegations of the libel; and further averred that the claimants were bona fide purchasers of the brig since the certificate was obtained, and without notice of any fraud. No objection was taken to the very general form in which the charge was made in the libel. There was evidence tending to show that the brig came into the port of New York in November, 1868, from Matanzas; that she was then the British brig Amazon; that she was sold at auction on or about Nov. 28, and bought by R. W. Haines, an American citizen and shipmaster, for $2,800; that she was repaired by him, at a cost of about $10,000, and was not worth much more than the cost of the repairs; that Haines applied to the secretary of the treasury to issue a register to the brig, under the statute of Dec. 23, 1852, 10 Stat. 149, which authorizes such action when a foreign-built vessel is wrecked in the United States, and bought and repaired by a citizen thereof; provided it shall be proved to the satisfaction of the secretary that the repairs amount to three-fourths of the value of the vessel when repaired. The application was granted, and a register was issued to the brig, under the name of the Mary Celeste. The government maintained that the brig never was wrecked in the United States; and introduced evidence that she arrived in New York from Matanzas without any appearance of having been wrecked, and that the protest and portwarden's certificate forwarded to the secretary of the treasury were false and fraudulent. There was evidence that the present owners of the brig bought their respective shares innocently.

The forfeiture was said to have accrued under section 24 of the act of 18th of July, 1866 (14 Stat. 184): "that, if any certificate of registry . . . to any vessel shall be knowingly and fraudulently obtained or used for any vessel not entitled to the benefit thereof, such vessel, with her tackle, apparel, and furniture, shall be liable to forfeiture."

G. P. Sanger and P. Cummings, for the United States.

M. F. Dickinson, Jr., for claimants.

LOWELL, District Judge. The first question is, whether the papers said to have been forwarded to Mr. McCulloch, secretary of the treasury, are duly proved. A package of papers fastened together, of which the first and one other are positively sworn to, is produced from the custody of the government. Three witnesses, through whose hands they passed, recognize the package generally, though two of them can positively identify only the wrapper. The broker who got up the case, and gave the papers to the proper officer of the custom-house in New-York, swears to his letter, which contains a list of the papers, and the papers correspond to the list. He swears to the protest which was taken before him as a notary. The papers were put in evidence at the first hearing, which was some weeks before the close of the case; and it would have been easy to prove fraud or forgery in the documentary evidence, if any such existed. The papers are sufficiently identified.

The principal question of fact is, whether Haines knowingly and fraudulently obtained a register for the brig to which she was not entitled. In construing such a statute, it is right to give the citizen the benefit of any doubtful phrases, and that the offence is not committed unless the vessel is not entitled to the register which she obtained; that is to say, misstatements, though false and wilful, will not forfeit the vessel, if it can be proved as a matter of fact that the vessel, after all, was fully entitled to the benefits which she received. But I agree with the district attorney, that, if fraud and falsehood are proved, it cannot but be very strongly inferred that the truth would not have served the purpose. It is entirely clear that the protest was a tissue of gross fabrications from beginning to end. The man who swore to it as master was not master; the voyage he testified to was antedated about a month, to give time for an imaginary wreck on the shores of the United States; the cargo was not taken out of the brig, as he swears it was; nor was she

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

towed to New York: from all which, it is safe to conclude that she never was wrecked at all. It is further proved that the port-warden's certificate, which purports to describe a wreck and uses that word, is spurious. As the protest is the only evidence which was before the secretary, or has been put into the case, that the vessel was wrecked in the United States, it is hardly necessary to examine the other and less startling falsehoods which are said to be found in the papers.

The question of law is, whether the brig can be forfeited in the hands of innocent purchasers; it being admitted that one-quarter part of the vessel is held by such persons, and argued that the whole is so held. When an act of congress denounces an absolute forfeiture as the consequence of an act, the title of the United States accrues when the prohibited act is done (U. S. v. 1960 Bags of Coffee, 8 Cranch [12 U. S.] 398; Henderson's Distilled Spirits, 14 Wall. [81 U. S.] 44); and it is equally well-settled, that, when the forfeiture is in the alternative, the property or the value, then the title does not vest in the government until they have elected which they will take; and, in the mean time, an innocent purchaser may acquire a title which cannot be forfeited by a subsequent seizure (U. S. v. Grundy, 3 Cranch [7 U. S.] 338; Caldwell v. U. S., 8 How. [49 U. S.] 366).

The claimants insist that the statute governing this case is within the reason of the second class of decisions rather than the first. The words are, "shall be liable to forfeiture;" which they interpret to mean, that the property does not vest until the seizure. It is true of all forfeitures that they must be completed by seizure and the other requisite proceedings, before the title will vest in possession; but, when the seizure is made, it relates back to the time of the forfeiture, excepting when the statute has expressed a different intent. Such a difference was found when the forfeiture was alternative; but there is no alternative in this statute. The vessel is forfeited, if any thing is; and I can see only the contingency that the government may not choose to prosecute, or may not discover the liability; and this is all, I think, which is meant by the phrase in question.

The learned counsel have collated, with much pains, the very numerous provisions of the internal revenue laws, by which penalties are affixed to acts and neglects; and I have examined many of them. The enactments are very various in form. There are many in which it is clear that only the title of the individual wrong-doer is to be taken; as where, upon conviction, certain instruments or articles of the defendant are forfeited, or where the collector may seize distilled spirits which have not been sold by the manufacturer who has broken the law, or which have not passed out of his possession, &c. A large number use words of present forfeiture; a few have the alternative of "the goods or their value;" and a few the expression, "liable to forfeiture." I cannot discover, by an inspection of these last-mentioned sections, that there is any thing in the character of the offence to lead us to expect a different sort of forfeiture from those which are plainly absolute. The reason given in 3 Cranch [supra], that you cannot tell which of the two things is the property of the United States until they have made their choice, fails to apply; and I am bound to say, that I cannot find any legal distinction between the various forms of expression by which a forfeiture without an alternative is expressed.

Decree for the United States.

Case No. 9,203.

The MARY CLINTON.

[Blatchf. Pr. Cas. 556;[1] Betts, Pr. Cas.]

Circuit Court, S. D. New York. Oct. 26, 1863.

PRIZE—BLOCKADE—ENEMY PROPERTY — NEUTRAL — LOYALTY OF OWNER OF PROPERTY USED IN ILLEGAL TRAFFIC — LIEN ON CAPTURED PROPERTY.

1. Objections taken, in the claims, to the sufficiency of the libel, in point of pleading, overruled.

2. The hostilities subsisting between the government and the rebels have the character and attributes of a public war, and the rules of national law applicable to wars of that description govern the rights and liabilities of persons whose property is captured, as prize of war, during such hostilities.

3. A lawful blockade had been imposed by the government, and put in force, at the time of the arrest of the vessel in this suit.

4. The property of persons domiciled or residing within the rebel states is a proper subject of capture on the sea as enemy property.

5. The proclamation of the blockade is, of itself, conclusive evidence that a state of war existed which demanded and authorized a recourse to a blockade, under the circumstances existing in the case.

6. Property devoted to illegal traffic becomes thus stamped as enemy property, and the quality of hostility does not depend exclusively upon the personal sentiments or lawful allegiance of the party, but arises often from its actual or business residence; so that the produce of the soil of the hostile country, engaged in the commerce of the hostile power, is legitimate prize without regard to the domicile of the owner.

7. A neutral friend to both belligerents cannot transport over the sea the effects of one to the use of the other, though also his friend. He is not allowed to aid and benefit the commerce of one belligerent to the prejudice of the other.

8. By investing his means, and participating in the trade and mercantile concerns of a belligerent nation, a neutral has, in effect, affixed to him the national character of the places at which he carries on his commerce.

9. The produce of the enemy's soil and country, owned by a neutral, while it remains in the enemy's country, particularly if obtained therein by a resident agent of the neutral merchant, has imparted to it the stamp of enemy property, and the owner is, pro hac vice, an enemy.

10. Vessel and cargo condemned for an attempt to violate the blockade and as enemy property.

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

11. The interest or expectancy of creditors in enemy property arrested as prize, even though amounting to a lien upon it, does not exempt it from capture as prize.

In admiralty.

BETTS, District Judge. The above vessel and cargo were captured May 29, 1861, by the United States vessel-of-war Powhatan, in the Gulf of Mexico, near one of the mouths of the Mississippi, steering towards the river, and bound to the port of New Orleans, and were brought into this port for adjudication as prize. A libel for that cause was filed in this court against the prize, July 3 thereafter. The vessel was laden at Charleston with a cargo of rice on the 12th of May, 1861, bound to the port of New Orleans. Several parties intervened, and interposed claims and defences in the cause. On the 23d of July aforesaid, Patrick Henry Ryan filed a claim as sole owner of the schooner, alleging that he was a citizen of the United States at the time the vessel sailed from Charleston, and so continued to the time of filing his claim. On the 13th of July aforesaid, the firm of Trenholm Brothers & Co. (of which firm one member resided in New York, one in Liverpool, and six in Charleston) filed their answer and claim in the cause, as agents of, and intervening for, John R. Armstrong, of Liverpool, and claimed that 102 tierces of rice, part of the cargo of the vessel, belonged solely and exclusively to the said John R. Armstrong. They deny, by their answer, the rightful capture of the vessel. They also, by their answer, except to the sufficiency of the libel, in not charging against the vessel or cargo any act committed in violation of law; and they further allege that the libel does not, on its face, show any cause whatsoever for the detention of the vessel or cargo, or charge the existence of war between the United States and the state of South Carolina, or the state of Louisiana, or between the said states themselves, or the existence of any blockade, or the legal notification thereof, if one was imposed in fact. On the 6th of July aforesaid, D. M. Fry & Co., of New York, filed a claim to the proceeds of 283 casks of rice, part of the cargo of the vessel, to be paid and accounted for to them by the consignee in New Orleans, towards payment of an indebtedness due to them by the shippers of the rice, in case the rice was delivered and sold in New Orleans; and they deny that the rice was subject to seizure, detention or forfeiture, by reason of any matters alleged in the libel, and they also submit exceptions to the libel for insufficiencies in its allegations: (1) That it does not appear that a state of war subsisted, whereby the goods were subject to seizure, detention, or condemnation as prize of war. (2) That it does not appear that, at the time of the seizure alleged in the libel, any blockade existed or was duly notified, by reason whereof the goods were liable to seizure or condemnation. On the 10th of July aforesaid, the firm of Sturges, Bennet & Co., of New York, filed their claim in the suit, to 75 tierces of rice, part of the same cargo, alleging that J. A. Buchmeyer, in Charleston, South Carolina, shipped the said quantity of rice on the vessel, to be delivered at New Orleans to S. L. & E. L. Levy, consignee there, to be sold, with a view to operate as a remittance for the payment of debts owing by Buchmeyer to the claimants, his creditors; that, subsequently to that shipment, Buchmeyer transferred to the claimants the said rice, to be received and sold by them to the end aforesaid, and that, at the time, Buchmeyer was indebted to the claimants to an amount exceeding the value of the said rice; that, at all times, Buchmeyer and the claimants were citizens of the United States, the former residing at Charleston, and the latter in the city of New York; and the claimants deny that the rice is liable to seizure or condemnation. To this claim the same exceptions to the libel were annexed as to the one preceding. The firm of Grinnell, Minture & Co., of the city of New York, on the same day, July 10, filed a claim to 235 tierces and 3 half tierces of rice, part of the cargo seized in this suit on board the vessel. They allege that the aforesaid parcels of rice were shipped May 10, 1861, in the vessel, at Charleston, South Carolina, by Henry Cobea & Co., of the same place, consigned to S. L. & E. L. Levy, of New Orleans, and, at the time of shipment and capture, belonged to the said shippers; that, on the 20th of June, the said shippers transferred the said rice to Street & West, of Charleston; that, on the next day, Street & West transferred the rice to the claimants, to be received and sold by them on account of Street & West, and the proceeds to be applied to the payment of the amount owing by Street & West to the claimants, and they to hold the surplus for their account, which indebtedness to the claimants was $4,200 and upwards; and that, at all the times before mentioned, Henry Cobea & Co. and Street & West were each a commercial firm, doing business at Charleston, South Carolina, and the claimants were citizens of the United States doing business in the city of New York.

The above issues were noticed by the United States attorney for hearing at the present October term of the court, and the defaults of all the claimants, except John R. Armstrong, the claimant of 102 tierces of rice, were taken, they having failed to appear and make defence. The case has now been heard upon such defaults of the other claimants as against them, and on the contestation of the claimant Armstrong, and the argument of his counsel, in regard to his interest and defence in this suit. The objection sought to be raised through the claims, to the sufficiency of the libel in point of pleading has no foundation or support in the prize practice in the English or American courts. The Fortuna, 1 Dod. 81; Halleck, Int. Law, c. 31, § 32.

The judicial history of this case, patent upon the pleadings on file, and the concomitant action of the parties and the court in respect to the litigation involved in this suit, demonstrate that the points attempted to be brought into renewed discussion at this time were all definitely disposed of by the supreme court, in December term last, in the prize cases brought before that tribunal from various circuit courts of the United States. The Hiawatha, 2 Black [67 U. S.] 635. The main questions of law raised on this case were distinctly made upon the claims and answers filed by the several parties in the decision referred to, and are all resolved therein, against the defences. The bar interposed by those defences consisted of these cardinal positions: That the hostilities subsisting between the government and the rebels had not the character and attributes of a public war, and that, accordingly, the rules on national law applicable to wars of that description did not govern the rights or liabilities of the respective parties assailed in this suit; that a lawful blockade had not been imposed by this government and put in force at the time of the arrest of the vessel in this suit; and that the property of persons domiciled or residing within the rebel states was not a proper subject of capture on the sea as enemy property. But the judgment of the supreme court determines that the proclamation of the blockade is, of itself, conclusive evidence that a state of war existed which demanded and authorized a recourse to such a measure under the circumstances existing in the case; that property devoted to illegal traffic becomes thus stamped as enemy property; and that the quality of hostility does not depend exclusively upon the personal sentiments or lawful allegiance of the party, but arises often from his actual or business residence, so that the produce of the soil of the hostile country, engaged in the commerce of the hostile power, is legitimate prize, without regard to the domicile of the owner.

Ryan claims to be the owner of the vessel. Her register shows her ownership to be in New Orleans. The master testifies that he has no domicile, and that he resides with his vessel, and was born in Virginia. The mate knows no domicile of the master and his wife, except where his vessel is. The testimony shows that the vessel was laden at Charleston, and was despatched thence for New Orleans, in May, 1861. The vessel, on going out of the harbor of Charleston, was arrested and a warning was indorsed on her register by the United States boarding officer, not to enter any port in the Southern states. That indorsement, which is introduced in evidence before the court, is perfectly legible and intelligible in its terms and signature, and is in this form: "May 12, 1861, boarded and warned off the Southern coast by the U. S. S. Niagara, H. P. Dekrafft, Lt. U. S. navy." When the vessel arrived off the Mississippi she was seized by the United States ship-of-war Powhatan. The master testifies that he does not know for what she was arrested. The mate says it was for attempting to break the blockade.

It is very plain, from the statements of the master and mate, independently of the above notice, that they were well aware that New Orleans had been declared under blockade when the vessel directed her course there subsequent to her warning; and that, finding the proclamation fulfilled by a blockade efficiently enforced on her departure from Charleston, and her arrival at New Orleans, she repeated the violation of it, with full knowledge, and designedly. There is, accordingly, no room for doubt that the violation of the blockade at both ports was direct and intentional.

It appears, by the pleadings, that the cargo on board of the vessel was procured at Charleston, by residents domiciled there, who acted as agents for John R. Armstrong, who is represented to be the owner of the cargo, and to be a neutral, resident in Great Britain. It matters not that Armstrong has a co-partnership interest with his agents domiciled in the enemy's country, in the trade conducted in the products of that country with the enemy of the captors. A neutral friend to both belligerents cannot transport over the sea the effects of one to the use of the other, though also his friend. He is not allowed to aid and benefit the commerce of one belligerent to the prejudice of the other. By investing his means, and participating in the trade and mercantile concerns of a belligerent nation, a neutral has, in effect, affixed to him the national character of the places at which he carries on his commerce. Halleck, Int. Law, c. 29, §§ 26, 27; Upt. Mar. War. 124; The Dree Gebroeders, 4 C. Rob. Adm. 232. The produce of the enemy's soil and country, owned by a neutral, while it remains in the enemy's country, particularly if obtained therein by a resident agent of the neutral merchant, has imparted to it the stamp of enemy property, and the owner is, pro hac vice, an enemy. Sup. Ct. U. S. Decisions, note; Wheat. Int. Law (Lawrence's Ed.) Supp. p. 20; The Vigilantia, 1 C. Rob. Adm. 1.

The interest of the claimant Armstrong in the cargo procured by him in Charleston, and shipped on the voyage in question, falls within the principle, and is confiscable as enemy property. It is, also, directly so in consequence of its having been knowingly transported from an enemy port under blockade, and designed to be carried to another blockaded port, and being arrested in the effort to break the blockade of New Orleans. The knowledge of the master and his culpable purpose are established by the written warning indorsed on the register of his vessel, and are proved, against his denial on his examination in preparatorio, by that document, and also by the testimony of the first mate of the vessel, on the same examination. The fact of the blockade, both at the port of

the departure and the port of destination, at the time of the appearance of the vessel before those lines, and its efficiency, are demonstrated by the actual arrest of the vessel at each on its attempt to pass them.

The other claimants had no fixed property in the cargo captured. They had no higher interest than a privilege or lien, at the utmost, for the payment of pre-existing debts from the proceeds to be realized out of the various shipments of rice, on the sale thereof in New Orleans. It is clear, that the interest or expectancy of creditors, in enemy property arrested as prize, does not exempt it from capture as such, and, accordingly, the libellants are entitled to its condemnation and forfeiture. Wheat. Capt. c. 3, § 15; The Sally Magee [3 Wall. (70 U. S.) 451], in which C. M. Fry & Co. are also claimants in part, and where like points of law are considered by this court.

For the reasons above suggested, the vessel and cargo prosecuted in this suit are subject to condemnation and forfeiture.

An appeal was taken to the supreme court from this decree, as to a part of the cargo, but not as to the vessel. Affirmed by default February 27, 1866. [Case unreported.]

Case No. 9,204.

The MARY COE.

[6 Adm. Rec. 440.]

District Court, S. D. Florida. Jan. 5, 1860.

SALVAGE—COMPENSATION—AMOUNT.

[Cited in Baker v. The Slobodna, 35 Fed. 542.]

[This was a libel for salvage by John Barthun and others against the cargo and materials of the bark Mary Coe.]

Miner Bethel, for libellants.

S. J. Douglas, for respondent.

MARVIN, District Judge. This cause having been heard upon the proofs and allegations of the parties, it is now ordered, and decreed, that the schooner Flying Arrow, recover for saving two hundred and ninety nine bales of cotton, from said wreck, valued at thirteen thousand one hundred and fifty six dollars, the sum of three thousand two hundred and eighty nine dollars, and also twenty nine dollars for saving portions of the materials and stores of said vessel, and also five hundred and ninety one dollars and sixty cents, for saving 67 bales of wet cotton, and breaking out seventy three other bales afterwards saved by the Texas. That the smacks Pinkney and Dudley, recover for saving one hundred and thirty one bales valued at five thousand seven hundred and sixty four dollars, the sum of fourteen hundred and forty one dollars, and also ten dollars and twenty eight cents for saving portions of the stores and materials. That the smack Welcome recover for saving twenty four bales, valued at one thousand and fifty six dollars, two hundred and sixty four dollars, and also ten dollars and ninety seven cents for saving portions of the materials and stores. That the schooner Eliza Catherine, recover for saving thirty nine bales and a half, valued at seven hundred and sixty five dollars and twenty five cents, the sum of three hundred and six dollars and ten cents. That the Sarah and Julia, recover for saving two bales, nineteen dollars. That the sloop Texas recover for saving seventy three bales valued at fourteen hundred and twenty three dollars and fifty cents, the sum of four hundred and ninety six dollars and forty cents, and sixty eight dollars and fourteen cents for saving portions of the materials. That the schooner Florida recover for saving materials fifty eight dollars and thirty five cents,—the total salvage on the cotton being six thousand four hundred and seven dollars and ten cents, and the total salvage on the materials, one hundred and seventy six dollars and seventy four cents. That upon the payment of the salvage and expenses as aforesaid, the Marshal restore said cotton and proceeds of the materials sold, to the master thereof, for and on account of whom it may concern.

MARY C. PORTER, The (TUCKER v.). See Case No. 14,223.

Case No. 9,205.

The MARY DOANE.

[2 Lowell, 428.] [1]

District Court, D. Massachusetts. Sept., 1875.

COLLISION—ON STARBOARD TACK—FOUL WEATHER—OFFICER ON DECK—INTEREST ON DAMAGES.

1. It is the duty of a vessel on the port tack to clear a vessel on the starboard tack.

[Cited in The Abby Ingalls, 12 Fed. 218.]

2. In thick or foul weather it is especially the duty of a vessel on the port tack to exercise all possible vigilance and care; there should be some one on deck competent to give necessary orders instantly upon an emergency.

3. Interest not allowed as damages when the bills of repairs had not been actually paid at the time the cause was tried.

Libel for damage to the fishing-schooner Alice P. Higgins, by collision with the fishing-schooner Mary Doane, on the afternoon of June 17, 1874, on Nantucket Shoals. Both vessels were lying-to in a fog, with their helms hard down, and relying chiefly on their foresails; and the witnesses for each party testified that their vessel was making from two knots to two and a half knots. The libellants' vessel was on the starboard tack, and the Mary Doane on the port tack.

The case for the libellants was, that they discovered the Mary Doane at a considerable distance, estimated to be half a mile,

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

about a point under their lee bow; that they blew a horn and shouted, but that nothing was done by the other schooner, excepting, perhaps, to haul aft the mainsail, and that the vessels came together near the bows, causing the damage described.

The respondents admitting the collision and the state of the wind, denied all negligence on their part, and asserted the fog to have been so dense that it was impossible for them to do anything after the time that they discovered, or could have discovered, the Alice P. Higgins.

The Mary Doane had her helm lashed, and, when the master was called up by the lookout, he found he could not go astern of the libellants' schooner, and tried, by hauling aft his mainsail and letting go his jib, to bring his vessel up alongside the Higgins.

There was conflicting testimony upon the amount of fog, and as to certain admissions said to have been made by the master of the Mary Doane.

H. P. Harriman, for libellants.
J. M. Day, for claimants.

LOWELL, District Judge. It is not denied that the libellants complied with the statute in their use of the fog-horn, though the sound does not appear to have been heard on board the Mary Doane. It was argued that the vessel to leeward is, or may be bound to give way, under the peculiar circumstances of such a case as this; but I cannot yield to this suggestion. The vessels were under way, though not in the ordinary mode of navigation in clear weather, and the vessel on the port tack was bound to give way. If the libellants had undertaken the responsibility of going to leeward, it would have been at their own risk, and would most probably have brought about a collision, if it had happened that they had been seen a little sooner. In this respect the case is like one of great importance, from the very large damages involved in it, which came up in this district a few years since, between two whaling-ships, which were lying-to in the Arctic Ocean in a gale, in which it was decided that the ship on the port tack was bound to clear the ship on the starboard tack. The Ontario [Case No. 10,543]. This ruling was affirmed in the circuit court: Swift v. Brownell [Id. 13,695].

The libellants, then, having the right of way, and having made such signals by fog-horns as they should have made, are the claimants excused by the state of the weather? Upon this point the evidence is not to be reconciled. In a matter where estimates and comparative statements are necessary, there is great opportunity for unconscious exaggeration on either side.

It is plain that in a fog of considerable density it was peculiarly the duty of a vessel on the port tack to exercise all possible vigilance and precaution; and the evidence shows that no one competent to navigate the Mary Doane was on her deck. When the young man on the lookout saw something under the lee bow, and had satisfied himself that it was a vessel, he ran aft and called the master from the cabin. To be sure, there was a man, and perhaps a good navigator, on deck, but it was not his watch, and he was doing nothing, and he disclaims all responsibility. Suppose this man, or any other person corresponding to the officers of a merchant vessel, to have been in charge, the boy would have notified him at once, when he first saw the object, and would have had the benefit of his skill and experience, not only in handling the ship, but in ascertaining the nature of the danger. Where a ship was sailing before the wind in such a position that another ship approaching towards the bows could not be seen from the quarter-deck, Judge Sprague held that the lookout himself should have been a person competent to give the requisite order to the helmsman in case of meeting a ship: Allen v. Mackay [Case No. 228]. So in this case there should have been some one on deck whose duty it was to give the necessary directions instantly.

Then, was the fog so dense that no reasonable amount of vigilance and preparation would have availed? I do not think so. Whatever deductions are to be made from the libellants' estimates of the distance at which they saw the Mary Doane, I think the preponderance of the evidence is, that they saw her some time before they were seen. And I consider it altogether probable that the time which the claimants might have had, if they had used their opportunities, would have been enough to enable them to keep off, and go under the stern of the Alice P. Higgins.

I must hold the defendant vessel responsible.

I find the aggregate of the bills of repairs produced at the trial to be $197.80, and I award for detention $60, making the total $257.80 and costs.

I do not allow interest, because the largest bill, more than half the total, has not yet been paid. Decree accordingly.

MARY EDDY. The (MORDECAI v.). See Case No. 9,790.

Case No. 9,206.

The MARY ELIZABETH.

[3 Sawy. 491.] [1]

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

SEAMEN—WAGES—CONDITIONAL SALE.

Where the owner of a vessel agreed to sell her to two purchasers for a certain sum, to be

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

paid for in monthly installments, and gave immediate possession to the vendees; and it was further agreed that in case of default in the payments, the vessel should be returned to the owner, and the contract of sale rescinded; and the proposed purchasers were in that case to pay $125 per month for her use, while in their possession, deducting all sums paid on account of the purchase money, and default was made in the payment stipulated; but before the owner resumed possession under the contract, the libellant sold out his interest to his partner and was immediately employed by the latter to serve as pilot and mate: *held*, that the libellant had no lien on the vessel in the hands of a subsequent vendee of the owner.

In admiralty.

Daniel T. Sullivan, for libellant.
Charles Page, for claimants.

HOFFMAN, District Judge. The libellant in this case has proved that he served on board the above barge as pilot and mate from July 8 until August 28, 1874, at the rate of one hundred dollars per month, as agreed on between himself and Captain Bradbury, her acting master.

The defense relies on the following facts: On the fifth day of January, 1874, the Sacramento Wood Company, the owner of the barge, entered into a contract with the libellant and Captain Bradbury, by which they agreed to sell her for the sum of eight hundred dollars, to be paid for in monthly installments. Captain Bradbury and the libellant, on their part, agreed to purchase and pay for the barge as stipulated in the contract.

It was further agreed that should default be made in any of the payments, the barge was to be immediately returned to the possession of the company, the obligation on its part to convey title to her should cease, and the proposed purchasers were to be charged, and they agreed to pay, rent at the rate of one hundred and twenty-five dollars per month for the time she might have been in their possession, but credit was to be allowed on such rent for all sums paid on account of the purchase-money. It was also agreed that if the barge were lost before the full payment of the purchase, the loss should fall on the purchasers, and they should remain liable for the purchase-money.

Under this agreement Bradbury and the libellant took possession of the barge, and employed her in connection with the steamer Alvarado, with the owners of which they had made a somewhat similar contract. They failed, however, to make the stipulated payments to the company, but the possession was not demanded by, nor surrendered to, the company, nor were any steps taken to assert the rights of the latter until August 27, when the barge was sold to one Carroll, to whose vendees it was delivered by Captain Hutchins, who had bought out Bradbury's interest in the original contract.

On the eighth of the previous July, after the default in the payments had occurred, and while the barge still remained in the possession of Kates (the libellant) and Bradbury, Kates sold out his interest in the contract to Bradbury, and was immediately employed by the latter to serve as pilot and mate. He now claims that his demand for wages constitutes a lien on the barge in the hands of purchasers who derive title from the wood company.

But this claim cannot, in my opinion, be maintained. It is obvious that if the lien exists against the vessel in the hands of her present owners it would equally have existed against her if she were still owned by the wood company—and this whether the vendees of the company had or had not notice of Kates' claim. The lien was created, if at all, by his service on board the vessel, and not by the fact that the vendees of the company knew of his services. A lien may sometimes be lost by a transfer to a purchaser for value and without notice, but it cannot be created by the fact of such notice if it otherwise had no existence. If the vessel was free from the lien when the company resumed possession, the protection of its rights demands that it should be able to convey an unincumbered title to purchasers. If a mere notice of Kates' claim to a party proposing to purchase would subject the vessel in his hands to the lien, the effect would be the same as if she were subject to the lien in the hands of the company, her value in its hands would be diminished to the amount of the lien. But the point is too clear to need argument.

Could then the libellant, in the relation in which he stood to the owners of the vessel, acquire a lien upon her by virtue of services rendered in the employment of his associate after an assignment to the latter of his interest under the contract? It cannot, I think, be pretended that before that assignment either Kates or Bradbury could have acquired any lien for their services on board the vessel. They were not employed by the owners, and were rendering no services to them. They were on board a vessel of which they were the provisional owners. They had agreed to pay for her, and were put into possession to run her on their own account, and at their own risk. If she should be lost, the loss was to fall on them. In case of default in the payment of the purchase money, they were to pay a monthly rent for her use, and immediately surrender her to her owner.

They were thus quasi, or provisional, owners of the barge, or quasi hirers of her. But in either case their services were rendered to themselves, and for their own benefit, and not to or for the benefit of the legal owner. If an owner of a vessel of which he retains the possession takes service on board of her as mate or seaman, it is plain that he could not assert any lien upon her for his wages; his wages would be due from himself to himself. There would, therefore, be no debt to support the lien, or for which it could serve as security. The same consequence would fol-

low, and for the same reason, if the person rendering the services were the charterer in possession.

It may be objected that these instances furnish no argument, for they merely present this question in dispute under another form. This objection has some plausibility, but these simple illustrations serve to point out what is the true principle to be applied to the case at bar where the circumstances are more complicated. I think it plain, therefore, that before the assignment Kates could have acquired no lien on the vessel. Did the fact that he assigned his interest in the contract to his associate alter his position with regard to the owners, or enable him to acquire, or his associate to create, a lien in his favor on the barge? It appears to me that it did not. His assignment to his partner conveyed his rights, but it did not relieve him of his obligations under the contract. The contract was not by its terms assignable. The company bound itself to sell and give title to Bradbury and Kates on receiving from them the purchase money. It did not agree to sell to their assignee. It may have been content to assume the risk of liens created by them in favor of strangers, but it could not have contemplated the creation by them of liens in their own favor on a vessel of which they were the provisional owners, and were bound, by paying the purchase money to become the absolute owners. And this result could not be brought about either by a joint assignment to a third party nor by assignment by one associate to the other; neither could, without the company's consent, alter his relation to the vessel or to the company. That relation, as established by the contract, remained unaffected by any assignment to which the company did not assent, and which it was under no obligation to recognize for any purpose; and especially when resorted to for the purpose of enabling one of the purchasers to impair, and it might be wholly absorb, the value of the property by creating liens upon her in favor of his associate.

My opinion is that under the circumstances, no lien attached to the vessel in favor of the libellant. Under this view of the case, it will be unnecessary to consider the novel, and, perhaps, embarrassing questions, which arise from the circumstance that the libellant's services were rendered to the barge and the steamer jointly; both vessels being engaged in a common enterprise, in the prosecution of which both were necessarily used, and which were taken possession of by the libellant and his associate under nearly similar contracts, but with different owners. In the contract with the owners of the steamer they appear to have stipulated against the creation of any liens whatever upon her. Disregarding for the moment this latter provision, the inquiry arises: to which vessel did a lien for services rendered to both, attach; or did it attach to both? Could they be libelled jointly, or would each be liable for the whole? And if not for the whole, how should the proportionate liability of each be determined? Or, if the whole debt was collected from one, could contribution be claimed from the other? And if so, whether for one half of the amount paid, or for a part of it, proportioned to the relative values of the vessels? These and other questions naturally suggest themselves, but it is unnecessary now to attempt to solve them.

The libel must be dismissed.

Case No. 9,207.

The MARY E. PEREW.

MILLS v. The MARY E. PEREW.

[15 Blatchf. 58; 6 Reporter, 293; 8 Ins. Law J. 59; 10 Chi. Leg. News, 371.] [1]

Circuit Court, N. D. New York. July 12, 1878.

MARINE INSURANCE — ABANDONMENT — TITLE DERIVED THEREUNDER — RELIEF EXPEDITION — FUNDS CONTRIBUTED THEREFOR — MARITIME LIEN—REPAIRS.

P., the sole owner of a vessel, procured marine insurance on her in four insurance companies, for an aggregate sum of $11,000, on account of himself, for one year. The policies valued the vessel at $13,500, and contained these clauses: "No abandonment, in any case whatever, even when the right to abandon may exist, shall be held or allowed as effectual or valid, unless it shall be in writing, signed by the insured, and delivered to the said company, or to their authorized agent, nor unless it shall be efficient, if accepted, to convey to and vest in the said insurance company an unincumbered and perfect title to the subject abandoned; and the valuation of said vessel, expressed in this policy, shall be considered the value in adjusting losses covered by this policy." "It is also agreed, that this policy shall become void, if any other insurance is or shall be made upon the vessel interest hereby insured, which, together with this insurance, shall exceed the sum of $11,000." The vessel was wrecked. P. paid 5-27ths of the contribution of the vessel in general average to the expenses of an unsuccessful expedition for her relief, the companies paying 22-27ths, under a clause in the policies. Thereafter P. gave to the companies notice of abandonment, and, two months after that, he signed and delivered to each company a paper, saying: "I, P., owner of the schooner M. E. P., insured under policy" of such a number, in such a company, for so much, of such a date, "do hereby abandon to said company all right, title, and interest possessed by me in said vessel, tackle, and apparel, under said policy, notice of said abandonment having been given" at such a date. The companies accepted the abandonment, and paid P., as for a total loss, $11,000, and afterwards, at their own expense, saved the vessel, and procured repairs to be made to her. On a libel against her for such repairs, P. claimed to be the owner of 5-27ths of her, and answered setting up that the claim was not a lien on his share of the vessel: *Held*, that P. had no interest in the vessel when the libel was filed, and was not entitled to defend the suit.

[Cited in The Two Marys, 10 Fed. 925; The Manitoba, 30 Fed. 131.]

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

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission. 6 Reporter, 293, contains only a condensed report.]

[This was a libel for repairs by Robert Mills and others against the Mary E. Perew. From the decree of the district court in favor of the libellants the claimant appeals.]

Williams & Potter, for libellants.
Sprague, Gorham & Bacon, for Perew.

BLATCHFORD, Circuit Judge. The libellants, ship carpenters at Buffalo, filed their libel in the district court against the schooner Mary E. Perew, to recover the sum of $4,021.93, with interest from October 11th, 1877, for repairs made to said schooner at Buffalo, in September and October, 1877, claiming a lien on the vessel for the value of such repairs, under the laws of the state of New York. Frank Perew, claiming to be the owner of 5-27ths of the vessel, put in an answer to the libel, setting up a defense to the claim as respects his interest in the vessel, and praying for a decree that such claim is not a lien on the share of the vessel belonging to him, and that it is a lien only upon the other interests in the vessel, and that the libel be dismissed as to his interest.

In July, 1875, Perew, being sole owner of the vessel, procured an insurance on her in each one of four several insurance companies, the sums severally insured by them being $3,500, $3,500, $2,000 and $2,000. One policy is a specimen of the four. The insurance is on account of Perew, and insures the sum named, on the vessel, for one year. The policy states that the vessel is valued at $13,500, without any further account to be given by the assured to the assurers for the same. The insurance covers marine disasters in the navigation of the upper lakes. The policy contains these clauses: "No abandonment, in any case whatever, even when the right to abandon may exist, shall be held or allowed as effectual or valid, unless it shall be in writing, signed by the insured, and delivered to the said company, or to their authorized agent, nor unless it shall be efficient, if accepted, to convey to and to vest in the said insurance company an unincumbered and perfect title to the subject abandoned; and the valuation of said vessel, expressed in this policy, shall be considered the value in adjusting losses covered by this policy." "It is also agreed, that this policy shall become void, if any other insurance is or shall be made upon the vessel interest hereby insured, which, together with this insurance, shall exceed the sum of eleven thousand dollars." In the fall of 1875 the vessel was wrecked in the upper lakes. An expedition was sent to her immediately by the agent of the insurance companies, but was unsuccessful in getting her off. Perew paid 5-27ths of the contribution of the vessel in the general average to the expenses of that expedition, the insurance companies paying 22-27ths, under a clause in the policies which authorizes the insurers to recover the vessel, in case of loss or misfortune, and provides that they shall contribute to the expenditures according to the proportion the sum insured bears to the valuation aforesaid, and that the rest paid or incurred by them shall be a lien on and recoverable against the vessel, or against the insured, at the option of the insurers. Thereafter, the vessel was regarded by Perew and the insurers as a total loss. He gave to them notice of abandonment on the 7th of December, 1875. His right to abandon was recognised under a clause in the policy which provides that "the insured shall not have a right to abandon the vessel in any case, unless the amount which the insurers would be liable to pay under an adjustment as of a partial loss, shall exceed half the amount insured." On the 7th of February, 1876, he signed and delivered to each company an instrument in writing, which says: "I, Frank Perew, owner of the schooner Mary E. Perew, insured under policy" of such a number, in such a company, for so much, of such a date, "do hereby abandon to said company all right, title and interest possessed by me in said vessel, tackle and apparel, under said policy, notice of said abandonment having been given December 7th, 1875." The four companies accepted the abandonments, and each paid to Perew, as for a total loss of the vessel, the amount it had insured, the total amount he received from them being $11,000. Afterwards they sent out an expedition and got the vessel off and brought her to Buffalo. So far as appears, Perew had not paid, or been called on to pay, any part of the expense of this successful expedition. The insurance companies procured the repairs to be made for which this suit is brought. No defence was made to the suit by any one but Perew. The district court decreed for the libellants and Perew has appealed to this court.

The contention on the part of Perew is, that he abandoned to the insurance companies only 22-27ths of the vessel; that he owned 5-27ths of her when the repairs were made; that the repairs were made without his consent; and that her co-owners could not bind his interest in the vessel by procuring the repairs to be made. If, by the abandonments, Perew ceased to have any interest in the vessel, that disposes of the case, for he has no standing to be heard in defence.

The argument on the part of Perew is, that the insurance companies, by the abandonments, became the owners of only a so-called insured interest in the vessel, namely 22-27ths, because the insurance was only $11,000 on a valuation of $13,500, and that they did not thereby become the owners of a so-called uninsured interest, namely 5-27ths, as to which Perew took the risk himself, and that he retained that, after and notwithstanding the abandonments. This is an erroneous view. Authorities are cited to the effect that, by an abandonment, the assured transfers his insurable interest as far as it is a subject of the policy; and that an abandonment

cannot transfer the interest of the assured any further than that interest is covered by the policy. But there is nothing in those well settled principles which upholds the claim made by Perew. Perew's insurable interest in the vessel was the whole vessel, which he owned, and it was the whole vessel which was insured and was the subject of the policy. If he had owned only an undivided half of the vessel, his insurable interest in the vessel would have been only an undivided half of the vessel, and the subject of the policy, while it could not have exceeded an undivided half of the vessel, might have been only an undivided quarter of the vessel. In such case, the abandonment would have been of only an undivided quarter of the vessel. So, if the interest covered by the policy was only an undivided half of the vessel, no more than the undivided half of the vessel could be transferred by the abandonment. But, where the interest covered by the policy is, as here, the whole vessel, the abandonment can transfer the whole vessel. The interest covered by the policy is not to be confounded with the extent of the insurance made on such interest. In the present case, the interest covered by the policy, or the subject of the policy, was the entire interest in the vessel, or the whole vessel, and not an undivided share of the vessel. Perew owned the whole vessel, and the policy states that the company, "on account of Frank Perew, do make insurance, and cause" so much "to be insured, upon the body, tackle, apparel and other furniture of the schooner called the Mary E. Perew." The entire interest in the vessel, or the whole vessel, was valued in the policies at $13,500. That interest, that is, the whole vessel, was insured for $11,000. The companies put at risk on the whole vessel $11,000. If she was totally lost, they were to pay, and Perew was to receive, only $11,000, although, if not lost, he might have sold her for $13,500. An insurance company will not insure a vessel to her full value, lest there may be a temptation to the insured to make a good sale of her by losing her. In this case, the extent of the insurance on the whole vessel was $11,000, but the policies covered the whole vessel, as the interest insured or the subject of the policy. When the policy speaks, in the clause above cited, of "the vessel interest hereby insured," it means that the insurance shall not exceed $11,000 on that interest which is spoken of in the commencement of the policy as the interest insured, that is, the whole vessel. The clause providing that the company shall contribute to the expenditures of recovery according to the proportion the sum insured bears to the valuation of $13,500, taken in connection with the provision that the valuation of $13,500 shall be considered the value in adjusting losses covered by the policy, shows a harmony with the foregoing views. If the expenditures of recovery were $3,000, the companies, insuring $11,000, would pay $2,444.44. If the damage, in case of loss, was one-quarter of the value of the vessel, it would be one-quarter of $13,500 or $3,375, and the companies, insuring $11,000 on the whole vessel, would pay $2,750. On the theory that the companies insured only 22-27ths of the vessel, they would be insuring up to the full value of the subject insured, for they would be insuring $11,000 on $11,000, 22-27ths of $13,500 being $11,000.

Moreover, the terms of the abandonment are very distinct. Perew, owner of the whole vessel, insured under the policy for so much, abandons to the company all right, title and interest possessed by him in the vessel, tackle and apparel, under the policy. The instrument declares that he is owner of the whole vessel, that the whole vessel was insured under the policy for the amount of insurance named in the policy, and that he abandons to the company all the right, title and interest possessed by him in the vessel, under the policy. The right, title and interest possessed by him in the vessel was the entire interest in the vessel, the whole vessel. He could not abandon all of that by abandoning only a part of it. He abandons under the policy, that is, in accordance with the provisions of the policy respecting abandonment, all his interest in the vessel, that is, the whole vessel. He does this to get payment for a total loss. He was satisfied that the vessel was in such a state that it was better for him to receive the $11,000 and give up the vessel wholly to the companies, and they met him on that ground. The instruments of abandonment carry out the provision of the policies. They were accepted by the companies, and they convey to the companies "an unincumbered and perfect title to the subject abandoned." The subject abandoned is the vessel, the whole vessel, all the interest of Perew in the vessel as owner of her, the entire ownership of her.

As Perew had no interest in the vessel when the libel was filed, he was not entitled to defend the suit, and the libellants are entitled to a decree for $4,021.93, with interest from October 12th, 1877, and for their costs in the district court. They are also entitled to their costs of appeal, in this court, against Perew.

Case No. 9,208.

The MARY E. RIGGS.

[Cited in Baker v. The Slobodna, 35 Fed. 544. Nowhere reported; opinion not now accessible.]

Case No. 9,209.

The MARY E. TABER.

[1 Ben. 105.] [1]

District Court, E. D. New York. Jan., 1867.

CHARTER-PARTY—DEMURRAGE—DEFAULT OF CHARTERER—SUNDAY—LIEN—EXPENSES OF UNLOADING CARGO.

1. Where a charter-party specified that the charterer should pay demurrage for detention of the vessel, "provided such detention shall happen by default" of the charterer, and the master having delivered his deck load at one dock, was required by the charterer to deliver the rest at another (which was according to the custom of the trade), and lost several days in getting there by reason of the weather, *held*, that no demurrage could be recovered under the charter for such detention, nor for Sundays.

[Cited in The Glover, Case No. 5,488; Thacher v. Boston Gaslight Co., Id. 13,850; Two Hundred and Sixty-Eight Logs of Cedar, Id. 14,295; Moody v. Five Hundred Thousand Laths, 2 Fed. 608; Houge v. Woodruff, 19 Fed. 138. Cited, but not followed, in McLeod v. Six'een Hundred Tons of Nitrate of Soda, 55 Fed. 530, 531.]

2. Where the charterer had men and carts at the dock on a specified day to receive the cargo, but the vessel did not arrive till two days after, and then the master, without notice to the charterer, discharged the cargo and employed persons to cart it from the side of the vessel up the wharf and there to pile it, *held*, that the master could not throw upon the charterer this additional expense, without having first notified him of his intention to land and remove the cargo at the charterer's expense.

[Cited in Addicks v. Three Hundred and Fifty-Four Tons Crude Kainit, 23 Fed. 729.]

This action was brought by John Arnold, the owner of the schooner Mary E. Taber, to enforce an alleged lien upon a cargo of wood transported in that vessel from Holmes' Landing to the port of New York under a charter made with Bonnel, the claimant of the cargo. The charter-party provided, among other things, for certain lay days in loading and discharging, and for demurrage at a certain rate, to be paid for every day's additional delay, "provided such detention shall happen by default of the party of the second part" —the charterer. The claim was for $1,121.50, freight and demurrage, and $72.25, disbursements. Of this sum, $772, not really in dispute, had been paid by order of the court after the commencement of the action, and the controversy was only as to the demurrage and the disbursements.

P. C. Crooke, for libellant.

Benedict, Tracy & Benedict, for claimant.

BENEDICT, District Judge. Under the proofs in this case the objection to the four days' demurrage while loading, was properly abandoned. To that the libellant is clearly entitled. He is also, in my opinion, entitled to demurrage on the discharging, but not to the full amount claimed. By the custom of the trade, as conceded here, the vessel was bound to deliver the cargo at different places in the port, if requested. The deck load was accordingly delivered at the foot of Canal street, and the remainder at Clinton Avenue dock. No objection was made to going to Clinton avenue, but, on the contrary, the master, rejecting the charterer's offer to get a tug, expressly undertook to procure a tug for himself and tow there from Canal street. Some days were lost, however, in getting there because, as the master says, of the weather. This delay was not caused by any default on the part of the charterer, and under this contract, neither that portion of the detention, nor the detention of Sundays, can be charged to him. 1 Pars. Mar. Law, p. 265; Sprague v. West [Case No. 13,255]; Towle v. Kettell, 5 Cush. 18.

One day was also lost by reason of the vessel being aground when ordered to go to Canal street, which must be borne by the libellant. There was some delay at Canal street, which the claimant insists should also be charged to the libellant upon the ground that, by reason of being aground when he received orders, he lost his turn at Canal street. But the delay in getting to Canal street did not, as it appears, prevent the vessel from getting a berth there and being ready to discharge as soon as she arrived. The only reason why she did not then discharge was, because the dock was full of wood which it was necessary first to remove. The master testifies that this wood which filled the dock at Canal street was not discharged from any vessel which arrived after he had notice to proceed there, and this evidence does not seem to be overborne by the testimony of the claimant. The burden of excusing the delay in receiving the cargo at Canal street was upon the claimant, and no person having been produced from the dock to contradict the evidence of the master, I shall hold the claimants to be responsible for that delay. According to these views the libellant is entitled to recover, in addition to the four days in loading, three days' demurrage in the discharging.

As to the disbursements claimed, the facts are these. On Saturday the charterer designated Clinton avenue as the place of discharging the remainder of the cargo, and the master then undertook to procure a tug and be towed there; and on that day the charterer had men and carts at Clinton Avenue dock to receive the cargo on its arrival. The vessel did not proceed to Clinton avenue until just at night on the following Monday. On Tuesday the berth was occupied so that no cargo could be discharged, and on Wednesday, in the absence of the claimant, and without further notice to him, the master began to discharge the wood upon the wharf, and also employed persons to cart it from the vessel's side up the wharf and then pile and cord it.

The wharf is a long one, where cargoes can only be discharged at the end, and the master testifies: "I carted it for my own necessity,

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

to make room for landing, as a canal boat was discharging at the same time. It would have filled up the wharf, if I hadn't carted it up the wharf. There was no other practicable way. I paid for carting and cording the wood up, $72.25."

This sum is claimed to be recoverable in this action upon the grounds that the disbursement was made necessary by the charterer's selection of such a wharf as the place of unloading.

But the non-delivery of this cargo on Clinton Avenue wharf upon the arrival of the vessel there, did not arise from any peculiarity in the wharf or any permanent obstruction which rendered a landing in the usual manner, within a reasonable time, impossible or improbable. It was simply a case of delay on the part of the charterer to take the wood as fast as landed. For this delay, the charter-party provided, and a compensation for it was fixed, and a lien on the cargo created for the amount. Before the master could justly cast upon the charterer the additional expense of carting away and cording the wood, it was incumbent on him to give a further notice to the charterer of his intention to land and remove the wood at the expense of the charterer. The Stephen Crowell [Case No. 13,362], Betts, J., 1859; Blossom v. Smith [Id. 1,565], Nelson, J., Oct., 1856. It is not pretended that any notification of such intention was given in this case, and in the absence of any such notice, I must reject the claim for these extra disbursements, which are not shown to have resulted in any benefit to the claimant, and which arose from the master's taking upon himself a labor not cast upon him by the contract, nor necessary to enable him to reap the full benefit of his charter.

This decision I prefer to rest upon the view here taken of the shipmaster's duty, rather than upon the ground that the disbursement was for service in the nature of stevedore service, and so, according to the decisions, not recoverable in a court of admiralty. But it is proper to add, that a claim for like disbursements was held by Judge Betts, in the case of Goughran v. One Hundred and Fifty-Seven Tons of Coal [Case No. 5,634], 1858, not to be enforceable in the admiralty. See, also, Regan v. The Amaranth [Id. 11,664], Hall, J., 1859.

A decree will accordingly be entered in favor of the libellant for the freight and seven days' demurrage according to the rates of the charter-party, with interest, less the sum paid by order of the court.

A reference may be had to ascertain the amount, if it be not agreed on by the parties.

Case No. 9,210.

The MARY EVELINE.

[Affirming The Mary Eveline, Case No. 9,211. Nowhere reported; opinion not now accessible.]

Case No. 9,211.

The MARY EVELINE.

PETTY et al. v. MERRILL et al.

[3 Ben. 438.] [1]

District Court, E. D. New York. Oct., 1869.[2]

COLLISION IN EAST RIVER — SAILING VESSELS IN NARROW CHANNEL—DANGEROUS MANOEUVRE.

1. A vessel, sailing free, and meeting a vessel beating, has no right, by going ahead, instead of astern of the vessel beating, to compel the latter to go about before beating out her tack.

2. Where, in a narrow channel, a sloop sailing free, and able to take either side of the channel, met two schooners beating close to each other, and taking the chance of passing them before or after they should tack, attempted to pass ahead of them, and was in the act of passing, where she could neither luff nor keep off, when the rear schooner came into the wind, and so was run into by that schooner: *Held*, that the sloop was in fault for placing herself in such a position, when she had no room to pass. She should have gone astern of the schooners before they tacked.

[Cited in The City of Alexandria, 44 Fed. 361.]

[A collision occurred on September 20, 1868, in the East river, N.Y., between Blackwell's Island and Long Island between the schooner Mary Eveline and the sloop Ethan Allen. The schooner was damaged and the sloop sunk and so injured as to be unfit to repair. Henry B. Merrill and others, owners of the Ethan Allen, filed their libel in rem against the Mary Eveline, John Petty and others, claimants, in the district court for the Southern district of New York. Petty and others, owners of the Mary Eveline, filed their libel in personam against Merrill and others in the district court for the Eastern district of New York. By agreement of counsel the two cases were tried in this court together.]

F. A. Wilcox and W. R. Beebe, for the Ethan Allen.

R. C. Huntley, for the Mary Eveline.

BENEDICT, District Judge. These are cross-actions; one brought in the Southern district of New York, by the owners of the sloop Ethan Allen to recover the damages caused by a collision between that sloop and the schooner Mary Eveline, which occurred in the Narrows, between Blackwell's Island and Long Island, on the afternoon of the 20th of September, 1868; the other brought in this district by the owners of the Mary Eveline to recover the damages sustained by their vessel in the same collision.

The actions were tried together before me, and the following facts were made to appear: The wind, at the time of the collision, was a strong sailing breeze, blowing six to eight knots from the westward; the tide was two hours ebb, the weather fair. The schooner Mary Eveline, with a reef in her

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

[2] [Affirmed by the circuit court; case unreported.]

mainsail, was beating toward New York, between Blackwell's Island and Long Island, and was just behind, but gaining upon the schooner Charles Hawley, a vessel also beating in the same direction. On the last tack before the collision, both the schooners tacked close to the Long Island shore, and stood over for a point below the coal dock, and nearly opposite the lunatic asylum, on Blackwell's Island, the legs being nearly equal. When near the Blackwell's Island side, the Hawley again tacked, and filled away up on her starboard tack, and the Mary Eveline, which was at the time very near, swung close to her stern, her larboard fore shrouds just clearing the Hawley's boom, and so she came up to the wind in the act of tacking. At this moment, the sloop Ethan Allen was passing up the Narrows close to Blackwell's Island, with her main-sheet off full-length, her boom off to port—her main peak slacked a little, her main-topsail clewed up and hanging, and was struck by the Mary Eveline, just as the latter came up to the wind, the Eveline hitting the Ethan Allen, at the starboard cat-head, the jib-boom of the Eveline going between the mast and the lee-rigging of the Allen. The blow caused the Allen to sink in a few moments, and injured the Eveline to a considerable amount.

It is obvious from this statement that, according to well-settled law, the burden is upon the Ethan Allen to show a good reason for not avoiding the Mary Eveline. This she has endeavored to do. She shows very satisfactorily that she could not have avoided the Mary Eveline by keeping away, for she was on a course as close to the west shore, as her boom would permit at that point; and, moreover, if she had kept off, she would have been in danger of receiving the blow on her broadside. She also shows that it was impossible for her to have avoided the Mary Eveline by porting after the Hawley luffed, as the three vessels were situated. But she fails to justify placing herself where she could neither port nor keep off to avoid the Eveline, but, of necessity, must strike that vessel without any false manoeuvre on the part of the latter. A fault is charged upon the Mary Eveline in the pleadings, that she stood on too far to leeward of the Hawley, whereby the Ethan Allen was prevented from passing her. But the evidence shows that the Eveline tacked about in the wake of the Hawley. The order, "Hard-a-lee," was given on the Eveline, as her fore shrouds cleared the Hawley's boom, and the fore sheet was at once let go. The Eveline was entitled to beat out her tack, and was compelled, by her proximity to the Hawley, to swing round her stern, and she had the right to do this in the way she did.

The Ethan Allen, by passing ahead, instead of astern, sought to force the Eveline to tack to the east of the Hawley, or run the risk of hitting the Allen when she passed. Whereas, the Eveline, being close-hauled, should have been left to beat out her tack and the Ethan Allen should have kept out of her way by passing astern on the Long Island side instead of attempting to pass ahead of the schooners, and on the Blackwell's Island side. She had a fair and full breeze, which enabled her to stem the tide, and was carrying her at the rate of some three miles an hour by the land. She saw the schooners beating down, and when they stood over from the Long Island shore upon their larboard tack, she had then two courses open; one to hug Blackwell's Island, trusting to the chance of passing the schooners before or after they should tack at Blackwell's Island. The other to luff out into the stream, and pass the schooners on the Long Island side. It is clear that the latter was the proper course, and that she could thus have avoided all danger of collision.

It was urged upon the argument that, in such a tide, the sloop could not, with safety, leave an eddy, which is supposed to make along Blackwell's Island, and attempt to pass up in the tide-way; and, inasmuch as she could not stop, must be held free from fault. No evidence in the case sustains this position, and I have no doubt that she could have luffed out into the stream without difficulty or danger.

In the absence of any evidence tending to show such a course to have been impracticable, I hold the sloop to be in fault for not thus avoiding the Eveline.

Let the decree in the action of John W. Petty v. Henry B. Merrill be for the libellants, with an order of reference to ascertain the amount; and, in the action of Henry B. Merrill against the Mary Eveline, let the libel be dismissed, with costs.

[NOTE. Appeals in each of these cases were taken by the owners of the Ethan Allen to the circuit court. The decree in the case in the Eastern district (Petty v. Merrill) was modified by the deduction of one item of damage claimed (Case No. 9,212), and a final decree affirming the district court was then entered for $1,292.81 (case unreported). From this decision an appeal was taken to the supreme court, where the case was dismissed, Mr. Justice Clifford delivering the opinion, for want of jurisdiction, the amount decreed being less than $2,000. Merrill v. Petty, 16 Wall. (83 U. S.) 338.

The case in the Southern district was heard in the circuit court on November 20, 1870, and the decree dismissing the libel was affirmed. Decree formally entered on February 1, 1871 (case unreported). From this decree likewise an appeal was taken to the supreme court, which reversed the decree of the circuit court. Mr. Justice Hunt, delivering the opinion, dismissed the libel, and directed that a decree be entered in favor of the libelants, the owners of the Ethan Allen. 16 Wall. (83 U. S.) 348.

In the case of Petty v. Merrill in the circuit court for the Eastern district, the defendants, Merrill and others, owners of the sloop Ethan Allen, moved after this last judgment of the supreme court for a rehearing in the circuit court. This motion was denied. Case No. 11,051. The case of the Mary Eveline was again heard in the Southern district upon the question of interest upon the items of damage, and for expenses incurred in raising vessel. Id. 9,212.]

Case No. 9,212.

The MARY EVELINE.

[14 Blatchf. 497.] [1]

Circuit Court, S. D. New York. June 13, 1878.

COLLISION — DAMAGES—FULL VALUE OF VESSEL—INTEREST ALLOWED—RATE PER CENT.

1. Where, in a suit in admiralty, for a loss by a collision, items of damage are allowed as for a total loss, interest is to be allowed at 6 per cent., from the date of the loss, and not at 7 per cent.

2. Where an allowance is made for the full value of a vessel sunk and lost by a collision, as for a total loss, the expense of raising the vessel, to ascertain the extent of the loss, is a proper charge.

[Cited in The Havilah, 1 C. C. A. 519, 50 Fed. 334.]

[See The America, Case No. 285.]

In admiralty.

Richard H. Huntley, for libellants.

Franklin A. Wilcox, for claimants.

HUNT, Circuit Justice. After listening to the arguments of the counsel for the respective parties, I have carefully perused the testimony presented to the commissioner to whom it was referred to ascertain the damages sustained by the libellants by reason of the collision set forth in the libel. As the result of my examination, I overrule absolutely all of the exceptions to the report of the said commissioner, except the tenth exception. The tenth exception is, that "the commissioner reports interest on such erroneous findings at seven per cent., when he should not have reported any interest, or not to exceed six per cent., on the amount of the damage, when properly found." The items allowed by the commissioner amount, in the whole, to $4,454 75, and, with one exception, are as for a total loss. The item forming the exception consists of "cost of raising the vessel, $1,000," which is for money expended. This item is immediately followed by a credit of $550, "cash from sale of the sloop," which, it is proven, was deducted from the $1,000. This makes the exception so trifling that we are justified in looking at the whole allowance of $4,454 75 as one for a total loss. Upon this aggregate the commissioner allowed, as interest, the sum of $1,484 35, being at the rate of seven per cent. from the date of the collision and loss to the date of his report.

In allowing interest at the rate of seven per cent., for the damage sustained, as upon a total loss, I think the commissioner erred. The rate in such cases is established, in admiralty, at six per cent., and the exception under consideration is allowed, unless the libellants shall, within ten days after the entry of the order in pursuance of this opinion, file their stipulation deducting one-seventh of said interest, to wit, the sum of $212 05, from the decree to be entered in this case. If such stipulation be filed as above provided, the said tenth exception is overruled. This point is decided after a conference with Judge Blatchford, and with his concurrence and approval. See The Aleppo [Case No. 158]; Lincoln v. Claflin, 7 Wall. [74 U. S.] 132, 139; Hemmenway v. Fisher, 20 How. [61 U. S.] 255, 259; Allen v. Mackay [Case No. 228]; Egbert v. Baltimore & O. R. Co. [Id. 4,305].

When the point was started, that there could be no charge for raising a vessel, where the owner was allowed its full value, as upon a total loss, I was somewhat impressed with it. But, both the authorities and the principle of the cases are clear, that, when the vessel is raised for the purpose of ascertaining the extent of the loss, although it turns out that the loss is total, the charge is a proper one. There is, in many cases, no other mode in which it can be determined, whether the loss is total or partial, and a recovery as for a total loss oftentimes could not be had without incurring the preliminary expense of raising the vessel. The value of the raised vessel, in the present case, was credited to the expense of raising her. The America [Case No. 285]; The Falcon, 19 Wall. [86 U. S.] 75; The Clyde, Swab. 23; The Nebraska [Case No. 10,076].

Let an order be entered in accordance with this opinion.

[For prior proceedings, see note to Case No. 9,211.]

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

Case No. 9,212a.

The MARY FORD.

[3 Dall. 190.]

District and Circuit Courts, D. Massachusetts. 1796.[1]

SALVAGE—DERELICT—CAPTURED AND ABANDONED VESSEL — RIGHTS OF ORIGINAL OWNER AND CAPTORS—JURISDICTION OF DISTRICT COURT.

[1. The rule as to compensation in the case of an abandoned vessel found on the high seas, and sent in by a salvage crew, should be to give such a reward as would be sufficient inducement to engage reasonable persons to encounter the peril and expense of such undertakings, and this must depend upon the estimate which the judge may make of the expense, labor, peril, and suffering of the salvors.]

[Cited in Tyson v. Prior, Case No. 14,319.]

[2. One-third of the gross proceeds awarded to the salvors, where the vessel was derelict, her rigging partly gone, the salving vessel bound on a foreign voyage without supernumerary hands, and the salvage crew found the vessel difficult to manage, and brought her in with great exertion and considerable risk of their lives.]

[Cited in note to The Divina Pastora, 4 Wheat. (17 U. S.) 68.]

[3. Jurisdiction as to salvage being vested in the district court, that court necesarily has jurisdiction to determine, as between adverse claimants, the right to the balance of proceeds after

[1] [The decree of the district court was reversed in part by the circuit court. Decree of circuit court affirmed by supreme court in 3 Dall. (3 U. S.) 194.]

the salvage award is paid; and this is true notwithstanding the fact that the adverse claimants are enemies, and the determination of their rights requires an adjudication upon the validity of a capture at sea and the effect of a subsequent abandonment of the vessel by the captors.] [1]

[Cited in L'Invincible, 1 Wheat. (14 U. S.) 258. Cited in note to The Divina Pastora, 4 Wheat. (17 U. S.) 68. Cited in The Tilton, Case No. 14,054; The Henry Ewbank, Id. 6,376.]

[4. In awarding surplus proceeds after deduction of salvage in the case of a vessel captured at sea and subsequently abandoned by the captors, the courts of a neutral nation will regard the fact of capture and possession by the captors as decisive in their favor, and hence cannot regard the subsequent abandonment as restoring the rights of the original owner.] [1]

[This was a libel against the derelict ship Mary Ford to recover salvage. Thomas McDonnough, British consul, appeared as claimant in behalf of British subjects, and J. B. Thomas Dannery, consul of the French republic, claimed the ship in behalf of said republic by right of capture by a French fleet.]

On the 4th of November, 1794, the owners and crew of the ship George, filed a libel in the district court of Massachusetts, in which they set forth: That the said ship George was an American vessel, owned and navigated by American citizens, loaded with a very valuable cargo, principally on freight, and bound from Virginia for Rotterdam; and that on the second day of October last, on the high seas, in latitude 44° and longitude 40°, they fell in with the ship Mary Ford, which they found utterly deserted, and abandoned, without any person on board, and in a most perilous state. That the captain and crew of the said ship George, took possession of the Mary Ford, and with the intention of saving the said ship and her cargo, the mate, and three of the said crew, entered on board the Mary Ford, and at great peril of their lives, and suffering great hardship, with the assistance of two men from a fishing vessel, whom they hired, brought her into the port of Boston; whereupon they pray that the said ship and cargo, may be adjudged to them. On the 5th of November, 1794, Thomas M'Donnough, consul of his Britannic majesty, for the states of Massachusetts, Rhode Island, Connecticut and New Hampshire, filed a claim in the district court of Massachusetts, and suggested, that the ship Mary Ford, and her cargo, at the time she was taken possession of by the crew of the ship George, was, and, now is, owned by certain merchants, subjects of his said Britannic majesty, and prayed that the same might be delivered to him, in behalf of said owners on the payment of a reasonable salvage, or, if sold, that the proceeds thereof might be delivered to him, in behalf of said owners, deducting therefrom such salvage, with costs and charges. On the 2d of December, 1794, J. B. Thomas Dannery, citizen and consul of the French republic, resident at Boston, in behalf of said republic, and the citizens thereof immediately concerned, likewise filed a claim for the said ship Mary Ford, and her cargo; and suggested, that the said ship and her cargo, on the twenty-eighth day of September last, were the property of some of the subjects of the king of Great Britain; and afterwards, on the same day, between two and three o'clock, in the afternoon, on the high seas, were attacked, subdued, and taken by a squadron of ships, to wit, the Filaburtier, Charant, Postilion, Semiellante, Jean Bart, and Ranger, all in the public service of and belonging to the French republic, commanded by Commodore Vil Maudarine; and that the French republic, and all the citizens thereof, were then, and still are, at open war with the king of Great Britain, and all his subjects; and that some of the seamen of said squadron, entered on board the said ship Mary Ford, took compleat and entire possession of her, and took and brought away the British captain and seamen of said ship, and still hold them prisoners of war; and that they took and brought away the papers belonging to her;—by all which, and the laws of nations, the said ship Mary Ford, and her cargo, became the property of the French republic and the captors, by the rights of war. The said last mentioned claimant further suggested, that afterwards, on the twenty-ninth day of the same September, about three o'clock in the afternoon, the said ship and her cargo, by order of the commodore of said squadron, from an apprehension of weakening his force, were left at sea from necessity. The said consul prays a restoration of the said ship and cargo, to be adjudged to him, to the use of the French republic, on his paying reasonable salvage, with costs and charges, or that the said ship and cargo may be decreed to be sold to the use of the French republic, and her citizens concerned, after paying such salvage, costs and charges.

The facts which appear in evidence in this case are, that the Mary Ford and her cargo were, before the twenty-eighth day of September, the property of certain British subjects; that she was bound on a voyage from the West Indies to London;—that, on that day she was attacked on the high seas by the squadron mentioned in the claim of the consul of the French republic, or one of the ships belonging to the same to which she struck;—that an officer and some of the crew of one or more of the ships of said squadron entered on board, took out her captain and all her crew, and the greatest part of the ship's papers, and that she sailed some time, probably more than twenty four hours, with said French crew on board her, in company with said squadron, and was then left by order of the commander of said squadron, who directed her to be burnt; that some attempts were made unsuccessfully to effect this pur-

[1] [The decree of the district court was reversed in part by the circuit court. Decree of circuit court affirmed by supreme court in 3 Dall (3 U. S.) 194.]

pose;—that several British vessels had been captured and manned by said squadron, and many of the people of the squadron were sick, and incapable from that cause to do duty;—that from an apprehension of weakening his force, the said commander had given the said orders; that the said ship George, met with the said Mary Ford at the time and place mentioned in the libel, and brought her and her cargo into the harbour of Boston under the circumstances set forth in the libel;—the ship Mary Ford and her cargo have been sold by order of the court, and with the consent of all parties.

LOWELL, District Judge. The libellants have prayed, that the whole of the ship and cargo should be decreed to their use. There have been times in the history of nations, in which vessel and goods, left by necessity on the high seas, have been decreed the property of the finders; and where wrecks on the shore have been with-held from the original proprietors, by the sovereigns of the country, or some great man, on whose lands they have happened to be cast: but in very early times, they have, in both cases, been considered as the property of the original owner. Several of the Roman emperors made their edicts and decrees, for the preservation of such property, and the restoration of it; and for a long time, the law of nations has been settled on principles consonant to justice and humanity, in favour of the unfortunate proprietors; and the persons who have found and saved the property, have been compensated by such part thereof, or such pecuniary satisfaction, as the laws of particular states have specially provided, or, in want of such provision, (as the writers on the law of nations agree) by such reward as in the opinion of those who, by the municipal laws of the country, are to judge, is equitable and right. In our country, no special rule being established, this court is to determine what, in such case, is equitable and right. The rule in estimation, which ought, in my opinion, to be adopted, would be to give, if possible to ascertain it, such compensation or reward as would be sufficient inducement to engage reasonable persons, to encounter the peril and expense of the undertaking; what this may be, must, in almost every case, depend on the estimation which the judge, who is to decide, may make of the expense, the labour, the peril, and the actual suffering of those, by whose exertions the property is saved. And, as several of the most important of these are really mental, to which no measure of weight or capacity can be actually applied, it is probable, different persons would vary considerably in their estimation of them. It may, therefore, be a thing to be wished, that every nation would make, at least, some general rules for determining such cases: but as there are none established in this country, I am bound to exercise my own judgment, in determining what is a just and equitable compensation. Admiralty courts having the thing saved under their controul, may either adjudge a portion of such thing to the persons who have saved it, or a sum of money to be paid by the proprietor, or from the produce of the thing sold. And in either case, the same principle ought to operate, and such parts of the thing saved, or sum of money, be decreed to those who save it, as may fully compensate them, and will encourage others to like efforts. In this case, the Mary Ford, when found, was at the mercy of the seas, her sails and rigging partly taken away or lost; very little or no provisions on board her; the George was bound on a foreign voyage, with a valuable cargo, and it does not appear that she had any supernumerary hands; those who undertook to carry her into port, found her greatly disabled and difficult to manage; the risque of their lives must have been considerable, and their exertions great. I think few cases will happen, when the compensation ought to be higher.

Under all circumstances, therefore, I am of opinion, that one third part of the gross proceeds of the value, ought to be paid to the owners and crew of the ship George, for salvage of the said ship Mary Ford and her cargo, and in full compensation of their services, peril and expenses, in the following proportions which have been since settled by three merchants, named by them, and appointed by the court, viz.—to the owners of the George, nine thousand five hundred and eighty dollars, and twenty-eight cents, being two third parts of the sum decreed for the owners of the George and her crew, after deducting three hundred and seventy dollars and forty-two cents, for the owners, for expenses incurred and paid by them, on the joint account of the owners and the crew —and the remaining one third, viz. four thousand seven hundred and ninety dollars and fourteen cents, to the captain and crew of the George, in the following proportions, viz. to the captain, eleven hundred and fifty-six dollars and twenty cents—Lemuel Foster, eight hundred and twenty-five dollars and ninety cents—John Classin, four hundred and ninety-five dollars and fifty-four cents—five seamen, three hundred and thirty dollars and thirty-six cents each—one other, two hundred and eighty-nine dollars and seven cents—the cook, two hundred and forty-seven dollars and seventy-seven cents—and the boy, one hundred and twenty-three dollars and eighty-six cents.

The next question is, to whom shall the residue be decreed? To settle this question, passages have been read from many books written on the laws of nations, and others in which the municipal regulations, and decisions of several nations have been reported or commented on; and which have been supposed to be applicable to this case. The gentlemen who have been of counsel for the parties, have ingeniously supported their respective claims; I have, I trust, carefully

perused their authorities and attended to their arguments;—very few of their authorities appear to me to apply; their arguments have been pertinent. I lay out of the case, the whole doctrine of postliminy, as applied to re-captures, which I consider as depending on the municipal regulations of states, which every sovereign has a right to make, as far, at least, as their own citizens only, are concerned, in such manner as may appear to them best. Under this head, though blended by some writers with the law of nations, are to be placed the regulations made, variously however, by the European nations, and the late congress of the United States, by which the property is divested from the former owners, by capture, after twenty four hours possession by the enemy; and all other arbitrary rules, made to settle questions of like nature; also, all questions about total and partial losses on policies of insurance. I embrace as sound doctrine, the principle, that neutral nations ought not to decide respecting the lawfulness or unlawfulness of capture, if it appears that the captor, and the nation from whom the property is taken, are at war with each other, and the captors or their vendees, are in possession of the property, save where the territorial rights of the neutral, or the rights of their citizens, are involved in the question; and that neutrals are always to take the existing state of things as right; so that if either of the powers at war, or those to whom they have transferred it, are in possession of a thing taken from their enemy in war, neutral powers are to suppose them lawfully possessed, and ought not to enquire how long, or under what circumstances, they have possessed them. To interfere and decide in such cases, must necessarily imply a partiality contrary to the idea of neutrality; for, they must either give greater firmness to the capture by deciding it to be lawful, or weaken and render it less secure, by determining it to be unlawful. Neither are neutral powers to give aid to either party, by conducting their prizes for them, when they are too weak to protect and conduct them.

These principles, I think, will serve as a guide to a decision in this case.—Neither of the belligerent powers was in possession of this property when found;—the British claimants say, it has been theirs;—this is admitted by the French claimants;—and we have evidence of this fact by the construction of the ship which is in our sight, by the cargo on board, and divers ship's papers which were found with her. The French claimants say, we took her in open war,—we firmly possessed her,—and she ought to be restored to us. The reply in behalf of the British claimants is, you did not complete your capture; you did not firmly possess her;—you were too weak, consistent with other views you held more important, to retain her. Is it necessary that we should decide these questions between them? Shall we try the legality of the capture, and decide the firmness of the possession? Will it not be to aid, to make the capture and possession firm and legal, which is said to be incomplete? The French claimants say, we were under apprehension of weakening our force and so left her from necessity. The vessel had been British,—of this, there is no question: did she by capture and firm possession, according to the law of nations, become French? Of this there is at least a doubt. On considering the whole matter, I do adjudge, order, and decree, that one third part of the money, arising from the sales of the ship Mary Ford and her cargo, be paid to the persons who saved them, in the proportions before mentioned. And that the duties and all other costs and charges be first deducted from the other two third parts, and the residue remain in court for the use of the British owners of said ship and cargo, or such other persons, who may derive right thereto from them, when the same shall be ascertained in court.

From the decree of the district judge, so far only as it respects the British owners, the French consul appealed, and the appeal being argued before the circuit court, the following decree was there pronounced, (LOWELL, District Judge, declining however to give any opinion:)

CUSHING, Circuit Justice. The court having fully heard the parties on the appeal in this case, by their counsel, it appears that the said ship Mary Ford and her cargo, being the property of some British subjects, were, on or about the 28th day of September, A. D. 1794, captured on the high seas, by a French squadron of ships, under the command of Commodore Vil Maudarine, and were taken into actual and quiet possession of said fleet, and so held for above twenty-four hours, and were then left on the high seas, without any hands aboard, after some unsuccessful attempts, by his order, to burn her, which was in consequence of many of the people of his squadron being sick, and incapable of doing duty, and from an apprehension of weakening his force in parting with any of his people, to keep on board and to conduct the said ship Mary Ford. That the said ship George, met with the said ship Mary Ford, and brought her and her cargo into the harbour of Boston, as set forth in the libel; not with intent to aid either party, in the war subsisting between the French republic and the British nation, but to save the property from absolute loss, or in expectation of proper compensation for the trouble. On which case the operation of the law of nations appears to the court to be, that by the said capture, the property became immediately the captor's. The questions about firm possession, appearing to relate chiefly, if not only, to cases of postliminy or recapture, or to that of a neutral vendee; things which 'tis apprehended have no place in this cause; and about which the municipal laws and regulations of different countries are very different.

The property, then, in this case, becoming the captor's immediately by conquest, and the right of war, must so continue, until divested by recapture, or by some legal means or act to that effect. And it is not conceived, that the abandoning the ship from the occasion stated in the evidence, could amount to a recapture, so far as to invest the property in the original owners, or prevent the captors from reclaiming the possession, when opportunity offered at any time previous to a recapture. It is, therefore, considered and decreed by the court, that the decree made in the district court, as far only as it decrees, that the said residue of the said two third parts of the money arising from the sales of the said ship Mary Ford and her cargo, remain in court for the use of the British owners of the same ship and cargo, or such other persons who may derive right thereto from them, when the same should be ascertained in court, be, and hereby is, reversed. And it is now further adjudged and decreed by this court, that the same residue of the said two-third parts of said money, remain in court for the use of the French republic, and those concerned in said capture.

From this decree of the circuit court, the British consul appealed; but the appeal being disallowed, the proceedings were removed into the supreme court by writ of error; and the plaintiff assigned for error the decree in favor of the French claimants, and also the disallowance of his appeal: the defendant pleaded in nullo est erratum, and thereupon issue was joined.

[The decree was affirmed. 3 Dall. (3 U. S.) 194.]

MARY FROST, The (DAVEY v.). See Cases Nos. 3,591 and 3,592.

MARY GRATWICK, The (WHITNEY v.). See Case No. 17.591.

Case No. 9,213.

The MARY HALE.

GEIGER et al. v. The MARY HALE.

[5 Adm. Rec. 471.]

District Court, S. D. Florida. March 3, 1856.

SALVAGE—RISK—EXPOSURE — AMOUNT — SEAMEN ON BOARD—EXTRAORDINARY SERVICE.

[1. Eight vessels saved materials and cargo of a vessel lost on Keysal Bank, of the value of $35,364. The services were rendered in bad weather, and under circumstances of some exposure and risk to the salving vessels. *Held*, that the salvors were entitled to from 36 per cent. to 45 per cent. of the value of the property saved.]

[Cited in Baker v. The Slobodna, 35 Fed. 542.]

[2. The services of the mate and four men of the wrecked vessel in crossing the gulf in an open boat to procure assistance, being extraordinary and beyond the line of their duty, were salvage services, for which they were entitled to $300,—$100 to the mate, and $50 to each of the men.]

[This was a libel by John H. Geiger and others against the cargo and materials of the ship Mary Hale for salvage services.]

Wm. R. Hackley and S. J. Douglas, for libellants.

Winer Bethel, for respondent.

MARVIN, District Judge. This ship, laden with cotton, from New Orleans bound to Trieste, was lost on Keysal Bank. The mate with four men, at the request of the master, crossed the gulf in an open boat, and brought information of the ship's condition to the wreckers in this port. Eight wrecking vessels, within a few days proceeded to the wreck, and saved the ship's materials and nine hundred and seventy bales of cotton. The ship's materials and two hundred and seventy three bales of the cotton have been sold; the residue of the cargo and materials saved is $35,364.37. These services were mostly rendered in bad weather, and under circumstances of some exposure and risk to the salving vessels; and, in my judgment, thirty six per cent. on the value is a reasonable salvage except as to the Relampago, which vessel ought to be allowed forty-five per cent. on the amount saved by her.

The services of the mate and the four men in crossing the gulf in an open boat to procure assistance were extraordinary and beyond the line of their duty, and entitle them to compensation. One hundred dollars to the mate and fifty to each of the men is a reasonable compensation.

Case No. 9,214.

The MARY JANE.

[Blatchf. Pr. Cas. 363.] [1]

District Court, S. D. New York. May, 1863.

PRIZE—VIOLATION OF BLOCKADE — FALSE PAPERS —ADDITIONAL PROOFS—REHEARING.

1. Vessel and cargo condemned for an attempt to violate the blockade.

2. False papers as to the voyage of the vessel.

3. A rehearing on further proofs denied to the claimant.

In admiralty.

BETTS, District Judge. The libel of information charges that the above vessel and cargo were captured, as lawful prize of war, March 24, 1863, on the Atlantic Ocean, off New Inlet, North Carolina, by the United States steamer Mount Vernon, and sent into this port for adjudication. The libel was filed April 3d, and process of attachment, and a monition thereon, were on the same day issued, and were returned in court on the 21st of the same month. On the 28th of April, 1863, separate parties intervened as owners of the vessel and cargo, and filed, by the same proctor, distinct claims and answers to

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

the libel, each denying that the vessel and cargo are prize of war, and each also giving detailed allegations and statements, as by way of special plea, substantially with common averments. Proofs were taken in preparatorio before the prize commissioners on the 8th and 9th of April, 1863, and the case was submitted to the court for decision, on written briefs and points, by the counsel for the respective parties, on the 28th of May thereafter.

The vessel and cargo having been captured by a blockading vessel, near the land, and on a course to the blockaded port, the claimants are called upon to justify her position under the circumstances. The defence is attempted to be maintained upon the documentary proofs found on the vessel, and the testimony of the witnesses examined in preparatorio, and the fitting reply to that defence is supplied by the same testimony. The vessel was of British build and ownership, as shown by a certificate of British registry to William A. Fraser, of Pictou, N. S., dated at Halifax, January 24, 1863. The only other papers produced from the prize, on her seizure, are the shipping agreement between W. A. Fraser, named as master, and five men, dated at Halifax, January 26 and 27, 1863, for a voyage to ports in the West Indies, and back to the port of Halifax, term of time not to exceed six months; a note, indorsed thereon, of the arrival of the agreement at Turk's Island, February 25, 1863, and its deposit there, February 28; a letter of instructions, from Thomas S. Reid to Captain Fraser, of the schooner Mary Jane, dated Halifax, January 23, 1863, directing the master to proceed with his cargo to Turk's Island, as by charter party of that day, and there trade off or sell the goods shipped on the vessel, and purchase therewith a cargo of salt, and sail with the same for Halifax, any balance, after paying for the salt, to be remitted to the shipper; a clearance at the port of Nassau, for Halifax, given March 9, 1863, for 8 barrels of flour, 9 barrels of pork, 1 bucket of butter, 5 boxes of soap, 12 boxes of fancy soap, and 1,268 bushels of salt; and a custom-house certificate, dated at Turk's Island, February 28, 1863, that Captain Fraser, of the British schooner Mary Jane, having on board the above mentioned cargo, (except the salt,) had entered the same at that port, and had also cleared the same there for Nassau, with the addition of the before-mentioned quantity of salt. Fraser, the master, testifies that the vessel and cargo were captured March 24, last, in five fathoms of water, between six and seven miles north of Fort Caswell, Wilmington, N. C., and fully a mile off from land; that he owned the vessel; that she was of about 50 tons burden; that Reid, of Halifax, owned the cargo; that the vessel was sailed under a charter-party; that the vessel had bills of lading of her cargo on board when captured, all of which was taken by the captors; that he knew that Little River Inlet and the southern coast was under blockade, before he left Halifax; and that the vessel had suffered the loss of water in a storm, and was seeking the blockading squadron for relief when captured. Brown, the mate, testifies that the vessel was captured about four miles off from Wilmington; that she was bound to Halifax; that he understood she was going, when captured, to the blockading vessels to get water; that there was no charter-party signed; that he knew that the ports along the southern coast were blockaded; and that the vessel did not alter her course on seeing the blockading squadron. Power, a passenger, says that no guns were fired on the capture, except on a fort from shore; that he supposed that the vessel was bound from Nassau to Halifax; that, when she was chased by the blockading vessels, she was keeping along the land; that she then altered her course, so as to bear up towards the pursuing ships; and that he does not know whether her course was at all times towards Halifax.

This recapitulation of the occurrences of the voyage, and of the statement of the three witnesses examined, leaves, it appears to me, but one conclusion to be reasonably deduced from the facts. This small British craft started from Halifax on a trading voyage, purporting to be from her home port to Turk's Island and back to Halifax, with the instruction to dispose of her outward cargo at Turk's Island, and, out of the proceeds, purchase a cargo of salt, and bring the same back to Halifax, the balance of the proceeds, after paying for the salt purchased at Turk's Island, to be remitted to the shipper of the outward cargo. After making the run to Turk's Island, and performing her mission at that place, the vessel was cleared at Nassau, for her return voyage, on the 9th or 10th of March, and was captured off Wilmington, N. C., on the 24th of the same month, by the United States ship-of-war before named, which was guarding the blockade of that port. No log-book or other document furnishes further evidence than her clearance does of the day of her departure from Nassau, or of the course she was to pursue thence. It is to be intended that the passage was made under no circumstances of extraordinary detention or delay, and was most probably effected with all the expedition of a direct voyage. It appears, from the examination of the witnesses on board, that the vessel was discovered on the morning of the 24th of March by the capturing ship, and was immediately chased by her, when found crawling along close to the shore, bearing in towards the land, within about a mile of the fort off Wilmington, and was there captured, whilst the guns of the fort were brought to bear against the United States ship, in an attempt to cover and defend the prize with the enemy's fire. The prize was found to be laden with provisions and soap, and chiefly with commodities of the first importance to

the enemy at the port she was about entering, and to the enemy in that whole section of country. She carried no letter of instruction, no invoice or bill of lading, no manifest of her cargo, and no documents in relation to the cargo or voyage, other than her clearance at Nassau. She was, as before stated, proceeding without any log-book or other memorandum of her time of departure, her destination, or the course of her route; and the only evidence given to the court, in respect to her position, is in the statement made by the master, on his examination in preparatorio, that she encountered a violent gale, after leaving Nassau, in which her water casks were stove or lost, and that he was compelled to bear away from his true line of navigation, and go in pursuit of the blockading squadron off the Carolina coast, for relief, under the necessity so incurred. He also avers that he bore up for that squadron, with the intent to speak them, as soon as they were discovered by him. Neither of the other two witnesses speak of such necessity having occurred, or states that the vessel had been put off her true course; and one of them asserts that the prize continued her way, under the pursuit of the United States ship-of-war, until the chase ended by her capture.

The case appears to me to be one of a manifest attempt by the master of the prize, under falsified papers and representations touching his voyage from Nassau, to run the blockade of Wilmington, N. C., he well knowing that the port was in a state of efficient blockade. A decree of condemnation and forfeiture against both vessel and cargo must be entered.

The counsel for the claimant, in his brief of argument, solicited leave to have a rehearing, upon further proofs, in this case. The impression of the court is, that the evidence upon the first hearing is so decidedly against the defence attempted to be established as to afford no reasonable ground for opening the case, to allow a new issue and a hearing on further proofs.

Case No. 9,215.

The MARY JANE.

[1 Blatchf. & H. 390.] [1]

District Court, S. D. New York. Sept. 24, 1833.

PLEADING IN ADMIRALTY—SWORN ANSWER—REPLICATION—PRACTICE IN ENGLISH ADMIRALTY.

1. In admiralty practice, in the absence of any specific rule regulating the proceeding, a replication is necessary to put in issue the facts set up by a sworn answer.

2. If no replication is filed, the libellant will be taken to have admitted the truth of the answer.

[Cited in Thomas v. Gray, Case No. 13,898.]

3. The method of procedure in the English admiralty, in matters of practice, and its origin and forms, considered.

4. New rule promulgated in regard to replications.

This cause was noticed for hearing and proofs. The claimants contended that, no replication having been filed to their sworn claim and answer, the libellants must be deemed to have admitted the facts set up by the answer, and that the claimants were not obliged to support it by proofs. The libellants contended that the issue was complete on the filing of the answer, unless, under peculiar circumstances, a special replication was demanded. Upon an examination of the files by the clerk, under the direction of the court, it was ascertained and reported that the general course of practice had been to file a replication, when proofs were to be taken in the cause. And such was the established practice in the old New-York colonial court of admiralty. See the Minutes, A. D. 1727, 1751, 1753, 1758.

Edwin Burr and Erastus C. Benedict, for libellants.

William S. Sears, for claimants.

BETTS, District Judge. This point of practice is not regulated by the standing rules of this court, and, accordingly, it must be governed by the principles and practice prevailing in courts of admiralty, or under the civil law, which is the common source of procedure to the forums both of this country and of England. The course of procedure in the English admiralty, which is the immediate source of our practice, is in conformity to the practice of the courts of the canon law, being administered substantially in the methods and with the formulae of the Roman law. Browne, in his treatise on Civil and Admiralty Law, adopts that principle as the basis of his work. Clerke, who is regarded as a standard authority, is the earliest authentic writer on the subject. He compiled, in Latin, a praxis for each tribunal, making that of the ecclesiastical courts the authoritative one, and refers throughout, in the other, for the rules of proceeding in admiralty, to the usages and practice of the ecclesiastical courts. No other treatises on the admiralty practice are recognized in the English court as authority. And, indeed, it may be said, that the admiralty in England appears to be governed by no determinate system of practice, but to conduct its business conformably to what is there understood to be the usage and custom of the court, evidenced by its files and archives, or by the report of the registrar.

Two modes of procedure prevail in the ecclesiastical courts—the one termed plenary, the other summary, from a distinction observed also in the Roman law. Code, 3, 9. In the first, every act in the suit is carried on with great fulness and particularity. The pleadings are on paper, and are drawn with

[1] [Reported by Samuel Blatchford, Esq., and Francis Howland, Esq.]

minuteness and technical accuracy; and it is understood that any deviation from established forms, up to the final contestation of suit, vitiates the whole proceeding. 2 Browne, Civ. & Adm. Law (Ed. 1799) 90; Consett, Ecc. Prax. 22. Summary actions are free from strictness of form. It seems that they may be conducted ore tenus, although a common usage appears to have been to exhibit short statements of the promovent's demand and impugnant's defence, in writing. 2 Browne, Civ. & Adm. Law (Ed. 1799) 90, 136; Cockb. Ecc. Prax. 24; Consett, Ecc. Prax. 178; Wood, Inst. Civ. Law, bk. 4, c. 3, §§ 3, 5. Whether, however, the proceedings in summary causes are oral or written, the like order and rules of pleading are to be observed as in plenary suits. "In omnibus est petendum per procuratores, etc., ut in titulo de contestatione litis in causa plenaria." Clerke, Ecc. Prax. tit. 34. When an issue is to be formed in the nature of the general issue at law, it is called, contesting the cause negatively. 2 Browne, Civ. & Adm. Law, 104. Clerke, in his work, (Ecc. Prax. tit. 31,) describes the course of pleading as follows: "Sed si intendit contestari litem negative, dicendum est in hunc modum. Ego, sub protestatione de nimia generalitate, ineptudine, obscuritate, nullitate, et indebita specificatione dicti libelli, respondendo eidem, dico narrata, prout in eodem libello narrantur, vera non esse, et ideo petita prout petuntur fieri non debere, animo litem contestandi negative. Tunc actor: Libellus est articulatus, et ideo eundem in vim positionum et articulorum repeto, et per denominationem eam sic repeti et admitti peto."

This reaffirmance of the substantive matter of the libel or replication to the answer of the defendant, seems always to have constituted an essential part of the procedure to an issue, whether the court adopted the practice of the civil law, or that of the common law. And, in a formal contestation of suit, when no explicit confession of the libellant's demand was made by the defendant, a replication was deemed necessary to constitute an issue. Code, lib. 3, tit. 9, note i, by Gothofrede. When matters in bar or in avoidance were set up by an exception, the civil law provided replications, duplications and triplications, by means of which the respective parties might avoid or deny new allegations, until the subject matter was reduced to a point asserted upon one side and denied upon the other. These were rather in the nature of special pleadings at common law, than mere re-assertions of prior pleadings. Inst. bk. 4, tit. 14; Vinnius, Comm. ad. id. 856; Heinec. Inst. bk. 4, tit. 13. The pleadings would continue their counteracting allegations until both parties agreed upon some matter of law to be referred to the praetor, or some matter of fact to be submitted to the judex or judices. Heinec. Antiq. lib. 4, tit. 7; Adams, Rom. Antiq.

The canon law transferred to its tribunals the practice of the civil law, and adhered so strictly to its text as to be perplexed with regulations not adapted to the nature and organization of the new courts. And it will be found that many rules, with respect to exceptions, interrogatories, &c., would apply most awkwardly to modern courts as they are now constituted. In the preparation of the cause for proof, however, all seem to have adhered to one course. An issue of law or of fact was formed by a replication to the exception. Consett, Ecc. Prax. 87; Cockb. Ecc. Prax. 24; Gilb. Forum Rom. So, also, in the common law courts, whilst the proceedings were, in effect, ore tenus, the plaintiff narrated his case, the defendant made his defence, and the plaintiff reiterated his own allegations, when they were denied, or repelled those of the defendant, if he brought forward any forming a new point for issue. Cases in illustration of this abound in the year books and other early reports. 2 Hen. IV. 12; 11 Hen. IV. 37; 2 Hen. V. 25; 2 Rich. III. 8. A replication is necessary, in chancery, to put the answer in issue. Gilb. Forum Rom. 113; Eq. Rules Sup. Ct. U. S. 13, 25. And, even to this day, at common law, issue is not complete on filing a plea denying at large the plaintiff's ground of action, but a similiter, in the character of a replication, must be added on the part of the plaintiff.

The concurrent usages of all the courts, with respect to the necessity of a replication, show evidently that it has always been regarded as an indispensable link in the chain of procedure in all properly conducted pleadings, of whatever construction or before whatever forum. There is, in the admiralty practice, by reason of the character and effect of answers, a propriety in requiring a replication, which may not have existed in the civil law. The answer, as a pleading or method of defence, was not known to the civil law, or introduced in the early practice of the ecclesiastical courts. It was drawn compulsorily from the defendant as part of the libellant's proof, (Mitf. Eq. Pl. 199; Cockb. Ecc. Prax. 25,) and might be obtained by calling the defendant into court, and having him there interrogated by the judge to the articles of the libel, or by the defendant's giving his answers in the form of a deposition. Id. The practice of requiring an answer of the defendant, on oath, to every species of libel, seems to have been introduced by the ecclesiastical courts, and not to have prevailed generally in the Roman practice. It arose, probably, from the supposed action upon the conscience of the parties, on which the jurisdiction of those courts was administered. In the civil law, the praetor had, undoubtedly, a right to exact an oath from the defendant as to the truth of his defence. This was, however, considered as a judicial oath, and as the act of the court, to avoid frivolous litigations. Dig. lib. 11, tits. 1, 21. And, in interrogatory actions, the defendant might be required, by the party petitioning,

to answer, in the first instance, on oath. But it is denied, in the notes to the Code, that a party could, of right, impose the general oath on his adversary. Gothofrede, ad. id. loc. Wood, however, supposes that the defendant answered the articles of the libel on oath in all cases. Wood, Inst. Civ. Law, bk. 4, c. 3, § 5. See, also, Gammell v. Skinner [Case No. 5,210]. Browne shows clearly, that in this there is a misapprehension of the doctrine of the civil law, and his views are supported by Gothofrede. Browne, Civ. & Adm. Law, 42–45, note; Dig. lib. 11, tits. 1, 21, note. And, to this practice, proceedings in England conform. Marr. Forms, 363; Consett, Ecc. Prax. p. 3, c. 3, §§ 2, 4. As no oath could be compelled until after contestation of suit, which determined what points were in controversy between the parties, and the oath was then required, not to the whole case, but to the positions or specific interrogatories propounded by the promovent, it might well be that, in the civil law, the answer was hardly regarded in the character of a pleading, and was not, necessarily, followed by a replication. Cockb. Ecc. Prax. 28. The oath of the defendant did not conclude the plaintiff, or militate against him. It does not appear to have been allowed to have the effect of testimony in behalf of the defendant himself, and was called for and employed by the plaintiff alone, in aid of the case he had not other sufficient proof to support. Clerke, Ecc. Prax. tits. 31, 34; Cockb. Ecc. Prax. 25; Consett, Ecc. Prax. p. 3, c. 3, § 2. So, also, the defendant could support his defence by exacting the answer of the plaintiff to positions or interrogatories added to the proceedings after the pleadings were complete and after issue had been formed between the parties. Neither party could demand the oath of his adversary unless he had previously himself sworn to the truth of his own pleading.

From the principles recognised in the civil law, and the early practice of the common law, the course of proceeding which afterwards was established and now prevails in chancery and in the admiralty court in this state, appears to have been moulded—that the libel sets forth the full case of the actor, and is verified by his oath when filed, and that the answer is a full reply to all its important allegations, and is also sworn to by the party putting it in. The admiralty court in this state has always recognised the answer as a competent mode of pleading matters ordinarily stated by way of exception or special plea. Colonial Court MSS. 1727, 1758. Having adopted that course of procedure in regard to the structure and manner of interposing the answer, and its effect, the courts of admiralty would, by parity of reasoning, pursue the same course of pleadings to the completion of the issue. In chancery, since the pleadings have taken the shape of a case asserted under oath on one side by bill, and denied or evaded on the other by answer, it has been held, as a fundamental principle, that the answer should be regarded by the court as entirely true, unless a replication is filed to it, and it stands contradicted by full proof. Peirce v. West's Ex'r [Case No. 10,909]; Gilb. Forum Rom. 45. This proceeds upon the ground that the plaintiff, having referred to the defendant for the verification of his charge, can only displace his evidence by full proof. Inst. bk. 4, tit. 13; Dig. bk. 44, tit. 1. By bringing a case to hearing upon the pleadings alone, the plaintiff, in judgment of law, admits every fact asserted in the answer. It is also equally well settled, that the plaintiff cannot go into proof against the answer without having taken issue upon it by a general replication. Brinckerhoff v. Brown, 7 Johns. Ch. 217; 1 Moult. Ch. Prac. 277, 299. The obvious reason of this rule is, that the defendant cannot know that his answer is controverted, and be prepared to sustain it, unless a formal issue is taken upon it. Nor even then is a party permitted, in some of our highest courts, to go into evidence without due notice to the defendant that he intends taking proofs. Eq. Rules Cir. Ct. U. S. S. D. N. Y. 73, 75, adopted January 15th, 1833. The fundamental principles of chancery practice are referred to in elucidation of those appertaining to the procedure of admiralty courts, because, originally, equity took its rules, both of decision and of action, from the civil law, and the usages in chancery supply strong evidence of the true import and spirit of those principles.

The only authorities which seem to hold that, by the civil law, a replication to an answer is an unnecessary pleading, are Wood and the Code of Practice of Louisiana. Wood is not minute or explicit in his statement of this point, and his observations ought, perhaps, to be limited to exceptions or formal pleas, and not to embrace answers as used in the civil law. He says that, with the answer, the defendant may give in his allegations to the plaintiff's libel, and that, after this, both parties prepare to produce their proof. Wood, Inst. Civ. Law, bk. 4, c. 3, § 6. From the manner in which he has represented the proceedings, it may be implied that he considered no allegation necessary on the part of the plaintiff after the defendant had put in his answer, unless new positions or interrogatories were interposed. The original shape of the libel and answer ought probably to be considered in connection with this statement of Wood. The sworn answer was, in effect, no part of the pleadings, but a portion of the evidence which the promovent presented with his proofs, and it was to be placed with and to be considered as his testimony. There might be, accordingly, no occasion or propriety in putting him to reply formally to the answer so brought in.

Article 357 of the Louisiana Code of Practice, is, "The cause is at issue when the defendant has answered, either by confessing or by denying the facts set forth in the petition, or by pleading such dilatory or peremptory

exceptions as he is bound to plead in limine litis, pursuant to the provisions of this Code." Considering the petition, in that state, as equivalent to the libel in admiralty proceedings, this Code would furnish a highly respectable and enlightened exposition of what should be deemed the true spirit of the practice according to the civil law, if it were not obvious that it is more particularly modelled upon the system of French jurisprudence, than drawn directly from the civil law. Its provisions throughout conform almost in letter to the rules collected in Pothier's different treatises, or to the modifications introduced by the Code Napoleon. In relation to this point, it is manifest that both Pothier and the French Code contemplate a replication as an essential part of the pleadings to constitute an issue. "Le demandeur à qui le défendeur a signifié des défenses contre le demande par lui donnée, peut répliquer à ses défenses par un acte signifié au procureur du défendeur, mais il le doit faire en trois jours. Ces répliques, ainsi que les défenses, se fournissent par un acte signifié de procureur à procureur." Pothier, Traité de la Proc. Civ., c. 2, § 7, art. 1; Code Nap. de Proc. Civ. liv. 2, tit. 6, arts. 97, 98. "Dans les affaires qui s'intruisent par écrit, la cause sera en état quand l'instruction sera complète, ou quand les délais pour les productions et réponses seront expirés." Code Nap. de Proc. Civ. liv. 2, tit. 17, art. 343. It may be thus implied, that the Louisiana Code introduced a new rule for determining when a case shall be at issue, and is not to be regarded as an exposition of the French rule, and, through that, of the principle and mode of proceeding in the civil law.

It thus appearing, that in all courts of this class, and at nearly all periods, a replication has been deemed an essential part of the pleadings, and that there is no rule of this court dispensing with it, but that, on the contrary, the usage has been to exact it, I consider, that by noticing the cause for hearing without filing a replication, the libellant must be held to admit the truth of the answer, and cannot go into proof in opposition to it. This is a technical point of practice, touching formalities in a suit, and not the essential merits of the cause; and, to avoid all perplexity or surprise hereafter, I have directed a rule to be entered regulating proceedings in this particular. The object of the replication not being to advance any new allegation, or present an issue varying in any particular from that formed by the libel and answer, but in effect to operate as notice to the respondent or claimant that his answer will not be admitted as true, I shall leave it optional, in this case, with the libellant, either to file a general replication, or to give notice, in writing, that proofs will be offered at the hearing in opposition to the answer.

The libellant having declined going to hearing upon the pleadings alone, it is not necessary for the court to enter any special order in respect to these proceedings, and it will, accordingly, confine itself to announcing what would be the correct course of practice.

The question having arisen incidentally, without any specific motion on the part of the claimants, no costs are allowed.

NOTE. In Dunlap's Admiralty Practice, (page 198,) it is said: "A replication, even as a matter of form, is seldom filed. It has not been the practice in the district court of Massachusetts, to file the general replication to the answer." It seems, however, that in that district "answers are not required to be on oath, unless at the instance of the plaintiff." Id. p. 298. Benedict, in his Admiralty Practice (section 367), says "The libellant, if he desires to dispute the answer, files a general denial, called a replication, and the cause is at issue." "To the answer of the defendant, if the libellant does not admit its statements, he replies by a replication." Id. § 481. Judge Betts, in his Admiralty Practice, (page 50,) says: "Replications need not be filed to answers without oath, taking issues in fact to the allegations of the libel. The respondent will be required, and the libellant will be permitted, each to give testimony in support of their respective allegations, the issue being complete without any replication being filed. but the allegations of a sworn answer, responsive to the charges of the libel, will be deemed admitted by the libellant, unless, within four days from the time the answer is perfected, or from the time allowed to except thereto, he files a replication or serves on the respondent's proctor a written notice that, on the trial, proofs will be offered in opposition to the allegations of the answer. Such notice, when given, supersedes the necessity of a replication." The 88th rule of the district court for the Southern district of New York, is as follows: "The matter set up by a sworn answer, responsive to the allegations or interrogatories of the libel, shall be deemed admitted on the part of the libellant, unless, within four days from the time the answer is perfected, or from the expiration of the time allowed for excepting thereto, replication is filed, or a written notice served on the proctor of the respondent, that on the trial of the cause proof will be offered, on the part of the libellant, in opposition to the allegations of the answer. No replication need be filed for any other purpose, to an answer taking an issue in fact upon the allegations of the libel." See, also, rule 27 of the Rules in Admiralty prescribed by the supreme court of the United States.

Case No. 9,216.

The MARY JANE VAUGHAN.

[Cited in Quinn v. The Transport, Case No. 11,516. Nowhere reported; opinion not now accessible.]

Case No. 9,217.

The MARY J. VAUGHAN.

The TELEGRAPH.

Ben. 47; 7 Int. Rev. Rec. 12; 1 Am. Law T. Rep. U. S. Cts. 9; 2 Am. Law Rev. 577.] [1]

District Court, S. D. New York. Dec., 1867.[2]

DAMAGES IN COLLISION CASES—LOSS OF CARGO—PLACE OF SHIPMENT—CURRENCY—INTEREST.

1. The measure of damages for cargo lost by a collision, is its value at the time and place of its shipment.

[Cited in The Aleppo, Case No. 158; Dyer v. National Steam Nav. Co., Id. 4,225.]

2. Where cargo was put on board a canal boat, in Canada, to be carried to New York, and was lost in a collision on the Hudson river, the currency of the place of shipment being shown to be United States gold coin, and the cargo, in that coin, being shown to be worth a certain number of dollars: *Held*, that the decree for damages must be for that number of dollars.

[Cited in Baker v. Ward, Case No. 785.]

3. The interest must be allowed at the rate of six per cent. per annum.

[Cited in The Aleppo, Case No. 158; Dyer v. National Steam Nav. Co., Id. 4,225.]

[Cited in Parrott v. Knickerbocker Ice Co., 46 N. Y. 369.]

This case came before the court on separate exceptions taken by each of the claimants of the two vessels sued, to the report of a commissioner. The libel was filed in rem, by the firm of Gordon, Bruce & McAuliff, merchants of the city of New York, as consignees of certain barley, against the two vessels, to recover damages for the loss of the barley, caused by a collision which took place on the Hudson river between Newburgh and Cold Spring in October, 1864, whereby a canal boat on which such barley was laden was sunk. The canal boat in tow of the propeller, was on a voyage from Troy to New York. The steamboat was bound up the river, with barges in tow, one of which struck the canal boat so as to sink her. The barley was laden on board of the canal boat at St. Timothy, in Canada. On the hearing, the court decreed a recovery against both of the vessels sued, and referred it to a commissioner to ascertain and compute the amount of the damages sustained by the libellants. The barley was laden at St. Timothy, October 7th, 1864. Other barley, consigned to the same consignees, was laden at the same place at the same time on board of another canal boat, which was in tow of the same propeller at the time of the collision, and arrived safely at New York, and was sold there for $1.70 in currency per bushel of 48 pounds, about October 27th, 1864. On this basis, the commissioner fixed the value of the barley lost at $1.70 per bushel, which, for 3,480 bushels, the quantity fixed by him, amounted to $5,916.00. As the price of $1.70 per bushel at New York, included, as an element going to make it up, the usual commission of 2½ per cent. to the consignee, which he would have received for selling the barley, and the freight on the barley, the commissioner deducted from the $5,916.00, the sum of $147.90, for 2½ per cent. commission on the $5,916.00, and also the sum of $676.51 for freight, being at the rate of 19 44/100 cents per bushel, that is, 9 cents in gold per bushel, computing gold as worth 216 per cent. premium in currency at the time of the collision, the 9 cents in gold per bushel being the rate of freight which the canal boat was to receive for transporting the barley from St. Timothy to New York. These deductions left remaining the sum of $5,091.59, on which the commissioner allowed interest to the date of his report, two years and six months, at the rate of 7 per cent. per annum, amounting to $889.02. This addition of interest made a total of $5,980.61, which the commissioner reported as the damages. To this report the claimants of both of the vessels sued excepted, on the ground that the commissioner erred in fixing the value at $1.70 per bushel.

The claimants insisted that the commissioner should not have taken the value at New York or at the place of collision, but should have taken it at the place of shipment. The value at the time and place of shipment was shown to have been from 67 to 72½ cents per bushel of 48 pounds, in United States gold coin, which was the currency then in circulation at such place, and the currency in which barley was then bought and sold there. The libellants insisted that the value at the place of shipment was what the commissioner did, substantially, in fact, take, but that he took it in the legal tender currency of the United States, by taking such currency value at New York, and deducting commission and freight computed in the same currency. The libellants also insisted that, as they sued here, they were entitled to have the damages computed in the current currency of the United States, and that, if such damages were computed in gold and were to be discharged in currency, they would not receive indemnity. The claimants insisted that they were entitled to have the damages computed at the value of the barley in the currency prevalent at the place of shipment, and that, as that currency was United States gold coin, and did not require to be converted into such coin, as would be the case with any other foreign currency, they were entitled to have the value in dollars so ascertained stated as the damages, without reference to any premium on gold, or to the fact that the claimants could discharge such damages in legal tender currency. The claimants further insisted that, even if the value in New York should be taken, it must be the

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission. 2 Am. Law Rev. 577, contains only a partial report.]

[2] [Affirmed by circuit court; case unreported. Decree of circuit court affirmed by supreme court in 14 Wall. (81 U. S.) 258.]

value in gold, found by reducing the currency value stated by the commissioner to gold value according to the rate of premium on gold which ruled at the time at New York. That gold value they stated at 79 1/6 cents per bushel.

S. E. Lyon, for libellants.
C. Van Santvoord, for the Vaughan.
F. J. Fithian, for the Telegraph.

BLATCHFORD, District Judge. The law is well settled, that, in case a contract to deliver goods is broken, the party is entitled to recover the full value of the goods at the place of delivery. And such value is to be computed in the currency prevalent at such place. This was the rule applied by Judge Shipman, in the case of The Patrick Henry [Case No. 10,805], cited in this court for the libellants. [In that case, the suit was on a bill of lading to deliver sovereigns at New York, and on proof that the sovereign was worth at that place at the time $7.05, in the currency then and there prevalent, the court decreed a recovery on that basis.][3] If, in this case, the action was on the bill of lading of the barley, for its non-delivery at New York, the proper rate of damages would be $1.70 per bushel. But, in cases of loss of cargo by collision, or other tort, the rule is equally well settled, that the value of the lost property at the time and place of its shipment is the measure of damages. In a case of illegal capture as prize, where the property is wholly lost to its owner, the damages allowed are only the prime value, or invoice price, and interest, and no supposed profits or allowance of damages, on the basis of a calculation of profits. Murray v. The Charming Betsey, 2 Cranch [6 U. S.] 64; Maley v. Shattuck, 3 Cranch [7 U. S.] 458; The Lively [Case No. 8,403]; Del Col v. Arnold, 3 Dall. [3 U. S.] 333; The Anna Maria, 2 Wheat. [15 U. S.] 327; The Amiable Nancy, 3 Wheat. [16 U. S.] 546, 560. The same rule of damages has been established by the supreme court for collision cases. In Smith v. Condry, 1 How. [42 U. S.] 28, a collision occurred in the port of Liverpool. The plaintiff offered to prove, at the trial, that his vessel was laden with salt, and was so delayed in her voyage by the collision, that the salt was worth considerably less at her port of destination, when she arrived there, than it would have been worth if she had not been so delayed, and claimed to recover such difference as damages. The court excluded the evidence, and the supreme court held that the evidence was properly excluded, and that, in cases of loss by collision, the injured party could not recover for the loss of probable profits at the port of destination, and that the value of the property at the place of its shipment was the measure of compensation. That was the rule adopted by this court in the case of Adams v. The Ocean Queen [Case No. 64], before Judge Shipman, November, 1866, where the commissioner, in assessing the amount of damages caused to the cargo of a vessel by a collision, took as the measure the price it would have brought at the port of destination, instead of the price paid at the port of shipment. This court held that the proper measure was the value of the property at the port of shipment, with interest at the rate of 6 per cent. per annum, from the time of the collision. The circuit court, on appeal (September, 1867), affirmed this decision. As the commissioner, in the present case, did not adopt, as the measure of damages, the value of the barley at the port of shipment, in the currency then and there prevalent, the first exception of the claimants to his report is allowed. The second, third, fourth, fifth, sixth, seventh and eighth exceptions of the claimants to his report necessarily fall with the allowance of their first exception, and no decision is necessary as to the points involved in those exceptions. They are neither allowed nor disallowed, but are ordered to be stricken from the record.

The damages computed on the principles above set forth will amount to a certain number of dollars in the money of the United States, and the decree will be for that number of dollars. The case will stand the same as if the barley had been shipped from England, in which event the value of the barley there, in sterling money of Great Britain, converted into the coined money of the United States, at the commercial value of such sterling money at the time in such coined money, would be the legal measure of damages, the only difference in the present case being, that, as the currency prevalent in Canada is the coined money of the United States, it does not require to be converted into such coined money. The rule is the same as if the action were one for the breach of a contract to deliver the like quantity of barley at a foreign port, whether in England or in Canada, or for the breach of a contract for the payment of money, made abroad and to be performed abroad, in a foreign currency. In a case of the latter description, this court has held that the proper rule of damages is the commercial value of the foreign money in the coined money of the United States, without any allowance for any premium on such coined money. The Blohm [Case No. 1,556]. The fact that, under the act of February 25, 1863 (12 Stat. 345), the debtor can discharge a judgment entered for the amount of damages so ascertained by paying it in the United States notes or legal tender currency, without any allowance for any depreciation in the value of such currency or notes, cannot affect the question as to the proper measure of damages, or the proper mode of computing them. A debt contracted in the United States before such notes were made a legal tender, and payable in the United States, can be dis-

[3] [From 7 Int. Rev. Rec. 12.]

charged by such notes, dollar for dollar, according to the tenor of the contract. Such is the law, and the privilege of so discharging any judgment which may be entered in this case for damages computed on the principles herein set forth, is one which the debtor is entitled to as an incident of the bringing of the suit in this forum. The creditor, if he comes into this jurisdiction to bring his suit, must accept the right to sue with the incident.

The ninth exception of the claimants must be allowed, as the proper rate of interest was six per cent. per annum, and not seven. [The exceptions on the part of the libellants are all of them overruled.][3]

An order must be entered disposing of the exceptions as above stated, and referring the case back to the commissioner to ascertain the damages on the principles above set forth, and report the same to the court.

[NOTE. Both parties appealed to the circuit court—the libellants on the question of damages, the respondents upon the collision. Considering further argument by the counsel necessary, the consideration of the case was postponed. Case No. 5,618.

[The circuit court finally affirmed the decree of this court (case unreported), and the cause was taken, on appeal, to the supreme court, where the decree of the circuit court was affirmed. Mr. Chief Justice Chase dissenting. 14 Wall. (81 U. S.) 258.]

MARY J. VAUGHAN, The, and The TELEGRAPH (GORDON v.). See Case No. 5,617.

MARY, The KATHLEEN. See Case No. 7,625.

Case No. 9,218.

The MARYLAND.

GEIGER v. The MARYLAND.

[4 Adm. Rec. 358.]

District Court, S. D. Florida. Dec. 26, 1849.

SALVAGE — AMOUNT OF PERIL — BAD WEATHER — COSTS—UNNECESSARY LIBEL.

[1. Eight vessels with one hundred and twenty men were engaged in bad and boisterous weather in saving cargo and materials of a ship lost on Alabainian Reef, under circumstances of some peril to the lives and property of the salvors, and succeeded in saving cargo valued at $50,227. *Held*, that the salvors were entitled to $18,468, less 36 per cent. of expenses, etc., as compensation.]

[Cited in Baker v. The Slobodna, 35 Fed. 542.]

[2. The vessels engaged in the service before the weather became bad were allowed 25 per cent. on the value of the property saved by them, as they would also share in the salvage upon all the property; the others were allowed 40 per cent. to 50 per cent. on property saved by them.]

[3. Two libels having been unnecessarily filed the increased costs thereby caused should be borne by the libelants in the second libel.]

[This was a libel by Packer Geiger and others against the cargo and materials of the ship Maryland for salvage services.]

A. Gordon, for libellants.

S. R. Mallory, for respondent.

MARVIN, District Judge. The ship Maryland, bound on a voyage from Baltimore to New Orleans, laden with a cargo of coffee and dry-goods, got ashore upon a reef known as the "Alabainian Reef," about fifteen miles to the eastward of this place. The master, in the hopes of forcing the ship over the reef by lightening her, commenced very promptly to heave overboard cargo, but very soon discovered that the tide was falling, he ceased this operation. The wrecking sloops Mystic, Lizzy Wall, George Eldridge and Eliza, arrived at the ship soon after she had struck the reef; and their respective masters offered their assistance. The master, becoming satisfied that the ship must be lightened in order to get her off, accepted their assistance. During the night and the next morning the wreckers loaded the schooner Lizzy Wall and sloop Mystic. The wind increased, and during the next day blew violently in squalls, causing a heavy sea. The salvors succeeded in loading the George Eldridge in part, but before night many of the wrecking vessels were obliged by the violence of the wind to leave the ship and make a harbor. The schooners Champion, St. Dennis and Lafayette arrived at the ship during the night of her first being ashore. Their assistance was accepted, but as the wind had increased in violence, they were, at this stage of the business, of but little service. The ship beginning to leak, and she still being hard aground, her main and mizzen masts were cut away to ease her. In the bad weather which succeeded, notwithstanding the efforts of the salvors to keep the ship free, she finally filled with water, destroying more than half of her cargo. The ship became a total loss.

The value of the cargo and materials saved from the ship is $50,227. Eight vessels with their crews, amounting in the aggregate to about one hundred and twenty men, were employed in saving this property. The service was rendered in very bad and boisterous weather, and under circumstances of some peril and danger to the lives and property of the salvors. Under these circumstances they are entitled to a fair and reasonable compensation for their services.

I have examined the cases of the Jean Key [unreported]; The Cora Nelly [Case No. 3,217]; The Yucatan [Id. 18,194]; The New England [Id. 10,151]; and several others heretofore decided in this court; and comparing this case with those, I think the whole salvage in the present case should be $18,468, less 36 per cent. of the wharfage, storage bills for labor, &c. It is difficult to distinguish this case from that of The New England [supra] in any other particular than that a larger amount of property was saved in the case of the New England. In that case the cargo and materials saved amounted to a little over $80,000, the number of salvors was about

[3] [From 7 Int. Rev. Rec. 12.]

the same as in the present case, and the weather was equally bad. The total salvage allowed in that case was $20,807. The amount of property saved in that case was greater than in this. Consequently the rate per cent. of the salvage was less than it is in the present.

In decreeing the salvage in this case a difference in the rate per cent. should be made as between the different wrecking vessels. Upon the amount saved by the Mystic, Lizzy Wall, George Eldridge and Eliza, constituting the first consort, and which was saved before the other vessels came to their assistance, I think twenty-five per cent. should be allowed. This first consort saved $13,690. This was saved before the weather had become so bad as to make it dangerous to lie near the wreck. A less rate of salvage would therefore be a sufficient compensation. But in addition to this consideration, these vessels will draw their share of salvage upon all the property subsequently saved by other vessels, whereas, the latter vessels are excluded from any participation in the salvage earned by them. The second consortship, which includes the first named vessels with the others, saved $33,635. To this consortship I think forty per cent. should be allowed, deducting, however, a proportional share of the wharfage, storage, bills for labor, &c. To the Lavinia, Champlain and the other vessels saving small amounts, fifty per cent. will be allowed. Two libels have been filed by the wreckers in this case, giving rise to two answers, and increasing the costs in the case. One libel was sufficient in the case. There was no conflict of interest, and one libel could be made to present the claims and secure the interests of all the principal salvors. The increased costs must, therefore, be paid by the libellants, and I think they should be paid by the party of libellants filing the second libel.

It is therefore ordered, adjudged and decreed that the libellants have, recover and receive in full compensation for their services rendered in saving the cargo and materials of the wrecked ship Maryland as follows, to wit: That the masters, owners and crews of the sloop Mystic, the schooner Lizzy Wall, the sloops George Eldridge and Eliza recover and receive three thousand five hundred and sixty-three dollars, being twenty-five per cent. upon the value of the property saved by them, deducting, however, from their salvage their proper proportion of the costs and expenses of this suit, and of the wharfage, storage and bills for labor in landing and storing the cargo. That there be allowed to the masters, owners and crews of the vessels constituting the second consortship, to wit, the Mystic, the Champion, the St. Dennis, Lafayette, Eliza, Lizzy Wall, and George Eldridge, thirteen thousand and four hundred and fifty-four dollars, being forty per cent. upon the value of the property saved by them, however deducting from the salvage their proper proportion of the costs and expenses of this suit, the wharfage, storage and bills for labor in landing and storing the property. That there be allowed to the Lavinia, Champlain, and to the several smaller boats fifty per cent. of the amount saved by them, such amounts being small and saved with much difficulty and labor. That the increased costs and expenses growing out of the filing of the second libel, or the one filed by Geiger and others, be charged to the libellants in that libel. That the residue of the costs and expenses and of the wharfage, storage and bills for labor be charged to the cargo and materials saved. That upon the payment of the aforesaid salvage, wharfage, storage, and bills for labor be charged to the cargo and materials saved. That upon the payment of the aforesaid salvage, wharfage, storage and bills for labor, the marshal restore said cargo and materials to the master of the wrecked ship Maryland, for and on account of whom it may concern.

Case No. 9,219.

MARYLAND v. BALTIMORE & P. R. CO.

[1 Hughes, 337.] [1]

District Court, D. Maryland. April, 1877.

RAILROAD COMPANIES — NEGLIGENCE — DEATH OF EMPLOYE—MARYLAND STATUTE.

1. Responsibility of employer for injury to employé.

2. Construction of statute for wrongfully caused death.

By the statute of Maryland, similar to Lord Campbell's act, an action is given in the name of the state, for the use of the person entitled to damages, whenever death shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not occurred, have entitled the person injured to damages; such action to be for the benefit of the wife, husband, parent or child of the person whose death shall have been so caused.

The equitable plaintiff [Anna Murtaugh] brought this action for damages for the killing of her son, an unmarried man, twenty-one years of age, by a collision of an express train of defendant, on which deceased was fireman, with a construction train, caused by a switch being negligently left open at the junction of the main track with a siding on which the construction train was standing. The proof was that the express train was proceeding towards Washington, at its usual speed of thirty miles an hour, and the construction train which had been on the main track was moved off to and on the siding in order to allow the express to pass. By negligence of the hand in charge of the construction train, the switch, having been opened to allow it to pass on the siding, was not closed afterwards. That as the express train was approaching the siding, and nearing the

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

Washington turnpike road, which the main track there crossed, the engineer saw the construction train on the siding, and at the moment of perceiving it his attention was necessarily directed to a wagon on the turnpike, which was approaching very near the track, and, as the train got close to the road, the top of this wagon hid from the view of the engineer the switch target until it was too late to stop, and the train ran in on the siding, crashing into the construction train, and, among other damage, killing plaintiff's son. That, but for this wagon, the engineer would have seen in time that the red side of the target was toward him, and could have stopped in time. That the place where the track crossed the turnpike was about seven miles from Baltimore. That the road was much travelled by market people, and that the engineers of trains approaching it were compelled to look out for vehicles. It was also proved that the deceased had materially contributed to the support of his mother.

It was contended for plaintiff that there was negligence on the part of the general management of the company in not providing proper precautions at the point of turnpike crossing, and at the station where the switch was, and that if these had been provided, the collision, though caused by the negligence of the hands of the construction train, would have been prevented. The defendant denied this, and also contended that if such negligence was proved, yet as the deceased had as fireman passed daily over the road, where this alleged lack of proper care in providing for safety by the general management existed, he must be taken to have known the risk and incurred it as part of his service, and that, as there was no proof he had complained of any such risk, no recovery could be had. All the cases on the subject were referred to by counsel, and defendant especially relied on Maryland decisions.

William F. Giles, Jr., and Archibald Stirling, Jr., for plaintiff.

Bernard Carter, for defendant.

GILES, District Judge, in instructing the jury, said he approved the decision in 20 Md. 220, but was not disposed fully to approve the subsequent decisions of that court to the extent to which they seemed to go on the point. That he was disposed to limit this to cases where the employé injured was managing machinery the defects of which he knew, or where the damage caused by negligence of the employer or his general agent was in some particular in reference to which the employé was chargeable with the duty of operating and reporting to the employer if any danger existed, but he would not carry the principle so far as to affect with such responsibility any employé injured by negligence of the general management of a railroad, in some matter under the scope of the general management, and which they alone controlled and determined.

On the point raised that, as the son of the plaintiff was over twenty-one, no recovery could be had, THE COURT decided that the true meaning of the statute was to give an action where an actual pecuniary damage had resulted by the death of the child, no matter what his age.

THE COURT then gave the following written instructions to the jury:

1st. If the jury shall find from the evidence in this case that, when Patrick Murtaugh was killed by the collision between a passenger train and a gravel train on defendant's road, he was a fireman in the employment of defendant, and that this collision was caused by the neglect of the conductor, engineer and flagman of the gravel train to close the switch, after they had backed said train on the siding to enable the passenger train to pass, then the plaintiff is not entitled to recover, against the defendant, for such injury, unless she should satisfy the jury that the defendant had not used ordinary and reasonable care in the selection of officers in charge of said train; and, as she has offered no evidence on this point, she cannot recover in this case unless she recover the second instruction of the court.

2nd. If the jury shall find from the evidence, that the siding on which the gravel train had backed is quite near the Washington turnpike road, that said road is much used by market-people with their wagons, and which is here crossed by defendant's road, and which requires the engineer of a passenger train, as he approaches the said turnpike, to give his attention to vehicles coming along the same, and that but for this necessity the engineer of the defendant's passenger train, going south, would have seen on this occasion the signal that the switch was open, and would have been able to slow his train in time to avoid the collision, then ordinary care and prudence required of defendant the appointment of a flagman, to be stationed at this junction of the two roads; and, if the jury shall find that defendant had no such officer, and that if there had been such an officer stationed at this point the collision would have been prevented, the defendant is liable in this action for such damages as she, the plaintiff, may prove she has sustained by the death of her said son.

3rd. If the jury shall find for the plaintiff, they shall give such sum as they shall find from all the evidence will be an adequate compensation for the loss of such pecuniary support as the jury shall find the plaintiff would have received from the deceased; and in making such estimate they shall consider the age of the plaintiff and the probable duration of her life.

Verdict for plaintiff for $2,500.

Case No. 9,220.

MARYLAND v. TODD.

[1 Biss. 69.] [1]

Circuit Court, D. Indiana. Nov., 1854.

STATUTE OF LIMITATIONS — IN MARYLAND — ABSENTEES—HOW OPERATION SUSPENDED—INDIANA STATUTE—RELEASE BY ADMINISTRATOR.

1. Suit on an administrator's bond executed in the state of Maryland; plea that by the laws of Maryland no suit could be maintained on such a bond after the expiration of twelve years from the time it was executed. Replication that defendant removed from Maryland to Indiana before the twelve years had expired and before the suit was barred. Demurrer to this plea. *Held*: There being no provision in the law of Maryland suspending the operation of the statute as to non-residents or absentees, the removal of the defendant made no difference.

2. The operation of the statute, after it commences to run, can only be suspended by positive law, and if the time expires while the statute is in force, and before the suit is brought, the right to bring the suit is barred, and no subsequent statute can renew that right.

3. The statute of Indiana on this subject, passed in 1852, gives full effect to the statutes of other states, and places debtors removing here in precisely the same condition in which they are placed by the law of the place which governed the contract.

4. Plea setting up a release from the former administrator, without showing that full payment was made, is bad, it being a general principle that an administrator can not release or compromise a debt, except upon full payment.

5. Plea of non damnificatus can only be pleaded to indemnifying bonds.

[This was a suit by the state of Maryland, on the relation of Partridge, against Todd. The case is now before the court on demurrer.]

David McDonald, for plaintiff.

I. G. Marshal and W. McKee Dun, for defendant.

HUNTINGTON, District Judge. This action is founded on an administrator's bond, executed in the state of Maryland, in 1835, the present defendant being one of the sureties in the bond. The declaration contains five counts. The first sets up a bond and condition, and assigns three breaches. The other counts are on the penal parts of the bond only. There have been thirteen pleas filed, only part of which is it necessary to mention. The eighth plea sets up the Maryland statute of limitations, which limits suits upon administrators' bonds to twelve years "after the bond is passed," that is, after it is approved. To this plea the plaintiff replies, that the suit was not barred when the defendant left Maryland, and came to Indiana to reside. To this there is a demurrer; and this brings up the really important question in the case.

It is said that the statute of limitations of the state of Maryland has no force here, except so far as our own statute of 1852 gives it force. See Story, Confl. Law, §§ 581, 582. The general doctrine, that "the recovery must be sought and the remedy pursued within the times prescribed by the lex fori, without regard to the lex loci contractus, or the origin of the cause," is not without its exception; at least there is, says Judge Story, a distinction to be observed which deserves consideration. For example, where the lex loci contractus declares the debt extinguished, or a nullity, after the lapse of a certain period; and after the expiration of that period, the debtor removes into a jurisdiction which has a longer period of prescription, or in which there is no prescription at all; in that case there can be no doubt, according to modern authorities, that the suit is barred. Id.

Quaere. Is not a statute extinguishment lege loci equally effectual? And if not, upon what principle is it not? In the one case the right is extinguished, in the other the remedy. This is the distinction in the books, and has always appeared to me to be a distinction without a difference; for in both cases the intention of the legislature was to deny to the creditor the right, after the lapse of a certain time, to collect his debt. But the replication sets up the fact that Todd, the defendant, left the state of Maryland before the twelve years had expired, and this is the ground on which the plaintiff rests his right to recover. Does this make any difference? Could Todd, were he now to return to Maryland (having removed from there before the twelve years had expired), be sued upon this bond? Clearly he could not; for there is no provision in the statutes of Maryland which suspends the operation of the statute as to non-residents and absentees. If the debtor was in the state when the statute commenced running, and in this case the statute commenced to run when the bond sued on "was passed," according to the language of the law,—that is, when it was approved and filed by the proper authority,—it could only be suspended by positive law, and there being no law suspending the operation of the statute as to absentees, etc., it continued to run.

If the time limited by statute expires while the statute is in force, and before the suit is brought, the right to bring the suit is barred, and no subsequent statute can renew that right. McKinney v. Springer, 8 Blackf. 506; Ogden v. Blackledge, 2 Cranch [6 U. S. 272]. In this case, without reference to the statute of 1852, passed by our own legislature, it would be doubtful, upon principle, whether a suit could be maintained on this bond. But, it seems to me, this statute relieves the case of all difficulty. This is the provision (2 Rev. St. 1852, p. 77): "Where a cause has been fully barred by the laws of the place where the defendant resided, such bar shall be the same defense here, as though it had arisen within this state." No argument or exposition can add clearness to this simple provision. If it means anything, it means to give effect to the statutes of other states in regard

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

to the remedy upon contracts made under and governed by their own domestic policy—to place debtors removing here in precisely the same condition in which the law which governed the contract and the remedy placed them; and it seems to me that this is not only law but justice.

It was deemed sound policy in Maryland to enforce a prompt settlement of decedents' estates, and they have extinguished the right to sue on administrators' bonds after the lapse of twelve years, and it will be perceived that, in this particular, this class of obligations differ from all others known to the Maryland laws.

In Horton v. Horner, 16 Ohio, 145 (decided in 1847), this same doctrine was maintained. The Ohio statute is similar, viz: "That all actions founded on a contract, made between parties resident without this state at the time the contract was made, and which are barred by the laws of such state, shall be barred when brought in this state." The facts of that case were, that one of the parties was actually a citizen of Ohio; but the contract was made in New York, and the court held that he was a "resident" of another state, within the meaning of the statute.

Assuming, then, that by the laws of Maryland, where the contract was made, this suit would be fully barred, it follows that it cannot be maintained here. The demurrer, therefore, to the replication to the eighth plea is sustained.

For a discussion of the statute of limitations, and the principles of the lex fori, see opinion of Story, J., in Le Roy v. Crowninshield [Case No. 8,269].

MARYLAND COAL CO. (POLAND v.). See Cases Nos. 11,244 and 11,245.

MARYLAND FIRE INS. CO. (BENNETT v.). See Case No. 1,321.

Case No. 9,221.

The MARY McRAE.

[Blatchf. Pr. Cas. 91.] [1]

District Court, S. D. New York. Dec., 1861.

PRIZE—ENEMY PROPERTY—LIEN FOR OUTLAYS IN FITTING—RELIEF FROM FORFEITURE.

1. Part of the vessel condemned, under the 6th section of the act of July 13, 1861 (12 Stat. 257), as belonging to a citizen of a state in insurrection. Part of vessel acquitted.

2. The claim of the owner of the acquitted part to a lien upon the condemned part for outlays in fitting the vessel was disallowed, and the claimant was referred to the power of the secretary of the treasury, under the 8th section of the act, to remit the ferfeiture.

In admiralty.

BETTS, District Judge. This is a libel of information by the United States, demanding the forfeiture of the above-named brig, under the 6th section of the act of congress of July 13, 1861 (12 Stat. 257). It is ordered by the court that three fourth parts of said brig be adjudged forfeited to the libellants with costs, and that one fourth part, claimed by James Crocker, be acquitted. The claims of Crocker for outlays in fitting the vessel are no lien in law upon the remaining three fourth parts, and whether any portion of that forfeiture will be remitted to him rests in the discretion of the secretary of the treasury, under the 8th section of the act above named. Judgment accordingly.

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

MARYMAN (REILLY v.). See Case No. 11,672.

Case No. 9,222.

The MARY MERRITT.

[2 Biss. 381.] [1]

Circuit Court, E. D. Wisconsin. Oct., 1870.[2]

FORFEITURE—SHIPPING—STATUTE—PROVISO—FOREIGN VESSEL.

1. If an information sets forth a proper cause of forfeiture within the main part of a statute, the fact that it does not allege that the case is not within the proviso, under which there was an exemption from forfeiture, does not prevent the operation of the statute.

2. If the claimant relies upon the exemption under the proviso, he must allege it. That is matter of defense to be set up by him.

3. A barque built in Canada and owned in the United States is not a vessel of the United States; nor is it a foreign vessel of the character described in the first section of the act of March 1, 1817 [3 Stat. 351].

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

Libel for forfeiture, under the act of March 1st, 1817, against the barque for the reason that there was imported in her into this district, in 1868 and 1869, from Canada, a quantity of goods, wares, and merchandise, the product of Canada, the barque being foreign-built, and at the time of importation, wholly owned by citizens of the United States. The case was disposed of by the district court upon an exception allowed to the libel that it did not set out that either Canada or Great Britain has adopted a regulation similar to that contained in this act of congress. The court below sustained the exception and dismissed the libel. [Case No. 15,733.] The only question was, whether this ruling was correct.

The first section of the statute is as follows: "After the thirtieth day of September, next, no goods, wares, or merchandise, shall be imported into the United States from any

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

[2] [Reversing Case No. 15,733. Decree of circuit court affirmed in 17 Wall. (84 U. S.) 582.]

foreign port or place, except in vessels of the United States, or in such foreign vessels as truly and wholly belong to the citizens or subjects of that country, of which the goods are the growth, production, or manufacture; or from which such goods, wares, or merchandise, can only be, or most usually are, first shipped for transportation: Provided nevertheless, that this regulation shall not extend to the vessels of any foreign nation which has not adopted, and which shall not adopt a similar regulation."

Levi Hubbell, U. S. Dist. Atty.
Norman J. Emmons, for respondent.

DRUMMOND, Circuit Judge. It is clear that if the information sets forth a proper cause of forfeiture, within the main or principal part of the statute, the fact that it does not allege that the case is not within the proviso will not prevent the operation of the statute. That is a matter of defense to be set up by the claimant. If he relies upon the proviso as exempting him from the operation of the main cause of forfeiture set forth in the statute, he must allege it. The construction which I place upon this statute of 1817, is that it applies in either contingency to vessels of the United States, or of foreign nations having a national character. I do not understand that the barque Mary Merritt is a vessel of the United States. It was built in Canada, and is owned by citizens of the United States. It is a settled rule that in all cases in order to give vessels a national character as vessels of the United States, and entitle them to registry, they must be built in this country. Some question has been made whether the barque Mary Merritt was not a British vessel, and various acts of parliament have been cited upon that point; but so far as I can understand the application of these various laws to this case, it cannot be considered the vessel of any foreign nation, built as it was, in Canada, and owned here. It follows, therefore, from what has been said, that the exception made to the libel should have been overruled by the district court, and therefore, the order dismissing the libel will be reversed, and the defendant have leave to withdraw his exception and answer the libel.

NOTE. It is not necessary in a libel to anticipate and deny a matter of defense. The Aurora v. U. S., 7 Cranch [11 U. S.] 382.

In this case, which was a libel of goods under the non-intercourse acts, objection was made to the libel on the ground that it did not negative the American property in the goods: but the court held that this would constitute ground of defense, and in no case would it be necessary to state such defense or exception.

[On appeal to the supreme court, the decree of the court forfeiting the vessel was affirmed. 17 Wall. (84 U. S.) 582.]

MARY MERRITT, The (UNITED STATES v.). See Case No. 15,733.

Case No. 9,223.

The MARY PATTEN.

The STAR OF THE EAST.

[2 Lowell, 196.] [1]

District Court, D. Massachusetts. Dec., 1872.

COLLISION—BOTH IN FAULT—CLAIM FOR SALVAGE—TOWAGE—COSTS.

1. In a collision cause in which a steamer and a sailing-vessel were both found to be in fault, and the steamer, after the collision, had towed the schooner into port,—*Held*, an allowance might be made for towage as part of the damage suffered by the steamer, but not for salvage.

[Cited in Leonard v. Whitwill, 19 Fed. 549.]

2. When, in such a case, both vessels were injured, and there was no ground for discriminating between them, the costs as well as damages were divided.

[Quoted in Vanderbilt v. Reynolds, Case No. 16,839. Cited in Memphis & St. L. Packet Co. v. H. C. Yaeger Transp. Co., 10 Fed. 396.]

3. It seems, that if one party suffers all the damage, and both are in fault, the libellant recovering half damages, should usually recover full costs.

[Cited in Vanderbilt v. Reynolds, Case No. 16,839. Disapproved in The Pennsylvania, 15 Fed. 815. Cited in The Hercules, 20 Fed. 205.]

In admiralty.

LOWELL, District Judge. The parties have agreed to accept the assessor's report upon all matters of fact, and have submitted to me the questions of salvage and of costs. The steamer took the schooner in tow after the collision, and, still later, hired a tug that completed the service. When deciding the general merits of the case, I intimated the opinion that towage might perhaps be allowed; and I then understood that the libel for salvage would not be pressed if the steamer was found to be in fault. But my decision being that both vessels were in fault, the question has been brought up again. If the steamer had been solely to blame, there could be no claim for either towage or salvage, because all the loss which the other party had sustained, including towage and salvage, would be chargeable to the steamer; and whether she did the work herself, or paid others to do it, would be immaterial. On the other hand, if the fault were wholly that of the injured vessel, and she chose to accept salvage services, she might perhaps be bound to pay for them as such. How is it in case both were in fault? The master and crew of a vessel which has been in collision with another vessel, and has not been crippled, are morally bound to stand by and save life at least, and often to aid in saving property too, if possible. In England, a statute makes a neglect of this duty presumptive evidence of fault in respect to the collision itself; and

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

possibly without the statute a judge might find it to be so under some circumstances. It was the practice of the admiralty before the act was passed to refuse costs to a ship in such cases, though it was otherwise blameless.

This duty cannot be said to be of strictly legal obligation; because no law has yet visited the offender with damages for a breach of it. Nor, indeed, would it be obligatory at all where life was safe, and a very great disproportion of the value of one vessel to the demurrage of the other made it inexpedient.

My view about the towage was this: It was necessary that the schooner should be towed; and, if a tug was hired and paid by either party, the towage was a part of the necessary and proper damage to be divided; and it was not a matter of importance which actually made the bargain or paid out the money. I have more doubt about allowing towage to the steamer herself; but, granting that the act was proper and necessary, and for the benefit of both parties, it seemed to me I might consider it as part of the damage which the common fault had caused to the steamer herself, and thus bring it into the aggregate of the losses. In this way the assessor has made it up. This, in effect, gives the libellants half towage, or it may be called half demurrage for time properly spent in consequence of the collision. Such an allowance may tend to render steamers more prompt to lend their aid, and thus reinforce the imperfect obligation above mentioned.

The libellants say they should likewise have half salvage. But that stands very differently. In the first place, the relations of the parties were such, as now appears, that it was for the interest of both that the damage should be diminished as much as possible. If it had been necessary to pay salvage to a stranger, both must have contributed; but that a salvage service should arise out of a disaster that was partly the fault of the salvors would be unheard of. The argument for the libellants is based upon the absence of a legal obligation to perform the service, such as prevents officers or men from being salvors of their own ship. No doubt, the usual definition of salvage would cover this case; for it was a maritime service in saving property by persons not already legally bound to its performance. This is an excellent definition. But it must not be forgotten that a salvage reward, in so far as it exceeds a mere quantum meruit for work and labor, is dependent upon a rule of public policy for the encouragement of promptness, skill, honesty, and enterprise on the part of seamen and ship-owners, and is forfeited not only by misconduct, but by incompetency, after the work is begun. I think it fairly follows, by parity of reasoning, that previous misconduct may have a similar effect. It was said that the seamen on board the steamer were not in fault, and that they at least should have salvage. But the towage here was done by the steamer: the seamen took no actual part in it of any consequence; and there is no reason to suppose they have lost any thing by the slight delay which it occasioned. Besides, where a vessel is in fault, the crew are often involved in its consequences, without any actual fault of their own. The cases are many where salvage has been lost or diminished by conduct which was really that of the master of the salving vessel only. He is the agent by necessity of the ship and all persons interested in her. If the fault had been wholly with the steamer, no discrimination could have been made in favor of the seamen to give them a reward which their vessel could not share. I do not mean to decide that individual seamen could never, under any conceivable circumstances, have salvage in such a case. The counsel for the libellants very candidly cited The Capella, 1 Adm. & Ecc. 356, which is against his recovery. I have found nothing else so directly in point.

Whether the costs, like the damages, should be added together and divided, or each should bear his own, seems to be one of doubt. Judge Sprague decided that where both parties were in fault, yet if one was very much the more so, he should bear all the costs: The Rival [Case No. 11,867]; see The Celt, 3 Hagg. 321. No question was made of the correctness of that decision, nor that the court has full legal discretion over the whole matter of costs to adapt its decrees to the equities of each case. But no facts are relied on here to take this case out of the ordinary rule, if there be one applicable to an equality of fault.

It is very difficult to find any rule from the decisions, in no one of which is there any argument or reason given at the bar or by the court. In the leading case of Hay v. Le Neve, 2 Shaw, App. 395, costs as well as damages were divided. So in The Washington, 5 Jur. 1067; while in The Wansfell, 1 Spinks, 271, costs were given to neither party. In this district we have always followed Hay v. Le Neve. Judge Davis divided the costs in a case decided in 1832: Sancry v. Farrow [unreported], and in Dimock v. Hathaway [unreported]; and Judge Sprague, in Lenox v. Winisimmet Co. [Case No. 8,248]; O'Neil v. Sears [Id. 10,530]. I did so in The Monticello [Id. 9,739], though this point is not reported, and Judge Leavitt, in Lucas v. The Thomas Swann [Id. 8,588]. On the other hand, costs have been refused to both parties in The Bedford [Id. 1,216]; Foster v. The Miranda [Id. 4,977]; The Nautilus [Id. 10,058]; The Favorita [Id. 4,694].

There is one aspect of the question which does not appear to have received sufficient attention. If the loss is all suffered by one vessel, and her owner brings his libel, he will recover half his damages; and there is no reason why he should not, in general, recover

his full costs. It is the ordinary case of a prevailing party recovering less than he asks for; and if there has been no tender or offer of amends, and no equity peculiar to the individual case, it is according to the sound and reasonable law of all courts that he should recover costs. It would take a very long and uniform course of practice to establish any other rule in collision causes; and, although some of the decisions above cited were of that character, the point appears to have been overlooked. In examining some late authorities, since the above paragraph was written, I am happy to see that the recent practice in New York conforms to what I have suggested as the true rule, and gives costs to the libellant, if he alone has been injured and recovers half his loss. The Austin [Case No. 663]; The Baltic [Id. 824]; The Paterson [Id. 10,821]; The Avid [Id. 678].

Returning to the case of injury on both sides, and of cross-libels to recover them, and no very substantial difference of fault or other equity, there appears to be authority for dividing the costs, and for refusing them to both parties. The former practice, which has always been ours, seems to me quite consistent with the theory which divides the damages; and I shall adhere to it until the direct authority of an appellate court, or a very decided preponderance of general practice, shall be against it. Decree accordingly.

Case No. 9,224.

The MARY PAULINA.

MARDER et al. v. BOYNTON et al.

[1 Spr. 45.] [1]

District Court, D. Massachusetts. Feb., 1843.

SEAMEN—RATIONS—BREAD—EXTRA MEAT—RECEIPT IN FULL—DOUBLE WAGES.

1. The usual standard of a full allowance of bread to a seaman is the navy ration.

2. Five pounds of bread a week, to each man, is a short allowance, within the statute of July 20th, 1790, § 9 [1 Stat. 135].

3. No over abundance of meat can be substituted for the bread required by the statute.

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

4. A receipt given by a seaman in full of all demands, will not bar a claim for which he has not received compensation.

[Cited in The Topsy, 44 Fed. 632.]

5. If there be a short allowance within the statute, of any one of the three articles, the seaman is entitled to the double wages.

[Cited in Collins v. Wheeler, Case No. 3,018.]

This was a libel promoted by William Marder and four others of the crew of the brig Mary Paulina, for extra wages, under the statute of July 20th, 1790 (section 9), which provides that "every ship or vessel, belonging as aforesaid, bound on a voyage across the Atlantic Ocean, shall, at the time of leaving the last port from whence she sails, have on board, well secured under deck, at least sixty gallons of water, one hundred pounds of salted flesh meat, and one hundred pounds of wholesome ship-bread, for every person on board, over and besides such other provisions, stores and live stock as shall by the master or passengers be put on board, and in like proportion for shorter or longer voyages; and in case the crew of any ship or vessel which shall not have been so provided, shall be put upon short allowance in water, flesh or bread, during the voyage, the master or owner of such ship or vessel shall pay to each of the crew one day's wages beyond the wages agreed on, for every day they shall so be put to short allowance." The libel alleges a short allowance of bread for forty days, on a passage from the Atlantic coast of Africa to Boston. It appeared that the vessel sailed from Acra, on the coast of Africa, to Prince's Island, and thence to St. Thomas' Island, (both being on the coast,) and from the latter place to Boston. The passage being fifty-seven days. On the seventeenth day out from St. Thomas, the crew were put upon an allowance of five pounds of bread, per week, to each man. This continued for two weeks, when the allowance was reduced to four and a quarter pounds; and in one week more the ship-bread was exhausted. This continued for two weeks, when they spoke a vessel off the coast of the United States, which supplied them with bread and beans. The allowance was then five pounds a week, until the arrival at Boston. It also appeared that a part of the trading cargo of the vessel was ship-bread, and that the master sold a quantity of it while at Acra.

R. H. & E. T. Dana, for libellants.
Fuller & Andrew, for claimant.

SPRAGUE, District Judge. The first question which has been raised is, whether a voyage from the coast of Africa, near the equator, to Boston, is a voyage "across the Atlantic," within the meaning of the statute, or one requiring a larger supply of bread than the one hundred pounds specified in the statute. In the view I have taken of the case, it becomes unnecessary to decide that point, as I think it clear that this vessel had not even the one hundred pounds. The next question is, whether Acra, or St. Thomas, is to be deemed the "last port of departure;" and I have no doubt that it is St. Thomas. That island is to the eastward of Acra, and more distant from Boston. It was the port of destination when the vessel sailed from Acra, and not one at which she merely touched on her passage home. Was there, then, a short allowance of bread on the voyage from St. Thomas to Boston? The usual standard of a full allowance is the navy ration, which is fourteen ounces a day, or a little over six pounds a week, to each man. During the time specified there was never over five

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

pounds a week, and sometimes less. This was a short allowance.

It is contended by the claimant that there was an abundance of other provisions, so that the crew had always sufficient. I have doubts whether this would be any defence, if proved. At all events, the burden is on the claimant to show what the other provisions were. This he has not done, and the fact of the master's supplying himself with beans from the vessel he fell in with, indicates that there could not have been an adequate supply of vegetable food. No overabundance of meat, fresh or salted, can be substituted for the bread required by the statute.

The claimant has produced receipts, given by the libellants, in full of all demands, and introduced evidence to show that it was understood at the time of the settlement of the voyage, that this claim was relinquished. It appears, however, that the libellants, in fact, received nothing but the wages they had actually earned. It is quite time that the owners and masters of vessels understood that a seaman's receipt in full, given only for money actually due him, and with no additional consideration, cannot be used in bar of a suit for damages. This mode of depriving a seaman of his just right has been often attempted, and has been uniformly repelled by the court.

It is contended that the double wages given by the statute is for a deficiency of all the three articles therein named; and that if there be a short allowance of one only, then only one-third of the additional wages can be given. And Coleman v. The Harriet [Case No. 2,982], is cited as an authority. The court there gave only one-third of the additional wages for a short allowance of one of the articles. No reasons are assigned, and the case is a solitary one, I am unable to follow that precedent. The statute is in the disjunctive, and in my opinion does not admit of such a construction, but gives one day's pay for a short allowance of any one of the specified articles.

It is said that bread could not be procured at St. Thomas. If this were proved, it would constitute no defence, since the cargo consisted partly of bread, which was sold at Acra. The master should have retained enough to insure his having the statute quantity when he should leave St. Thomas.

Decree of double wages for each of the libellants for the time alleged in the libel.

In the course of the argument of the above case, Judge Sprague remarked that the rule laid down in Dunl. Adm. Prac. 284, that "when the answer is required by the libellant to be upon oath, it becomes, when responsive to the libel or interrogatory, evidence for the respondent, which must be disproved by the evidence of more than one witness," had never prevailed in admiralty, and had been distinctly disavowed in this district and circuit. Cushman v. Ryan [Case No. 3,515]; Huston v. Jordan [Id. 6,959].

As to short allowance, see Foster v. Sampson [Case No. 4,982]; Collins v. Wheeler [Id. 3,018].

On the construction of the statute, see Mariners v. The Washington [Case No. 9,086]; The Mary [Id. 9,191]; Ferrara v. The Talent [Id. 4,745]; Piehl v. Balchen [Id. 11,137]; The Elizabeth Frith [Id. 4,361]; s. c., The Elizabeth v. Rickers [Id. 4,353].

As to the effect of seamen's receipts, see The Rajah [Case No. 11,538].

Case No. 9,225.

The MARY SANDFORD.

The DORIS.

[3 Ben. 100.] [1]

District Court, S. D. New York. Dec., 1868.

COLLISION ON LONG ISLAND SOUND — STEAMERS MEETING—CONFUSION OF SIGNALS—LOOKOUT.

1. The propeller D., bound to New York, was on the north side of the channel east of Execution Light in Long Island Sound, heading southwest by west, when she discovered, about a point on her port bow, both the green and the red lights of the propeller M. S., which was also on the north side of the channel, heading northeast half north. The true course of the D., after passing the buoy at Execution Light, would have been southwest half south, but, as soon as she had passed the buoy, she ported her helm and blew one blast of her whistle. The answer to this was two blasts of the whistle from the M. S., to which the D. replied with a single blast, and immediately stopped and reversed her engine. The M. S. saw the lights of the D. a point or a point and a half on her starboard bow, she blew two whistles when about a mile off, and then, hearing the single whistle from the D., she again blew two whistles and starboarded, and, on hearing the second single whistle from the D., stopped and reversed her engine. Her first two whistles were not heard on board the D. The vessels came in collision, the stem of the D. striking the M. S. on her starboard bow: *Held.* That the vessels were meeting end on or nearly so, and were both bound to port their helms, in accordance with the 13th article of the Steering and Sailing Rules, and that the M. S. was in fault in starboarding.

[Cited in The Free State, Case No. 5,090.]

2. If there is a confusion of signals between two approaching steamers, each vessel is bound to stop, as soon as it perceives the confusion, in accordance with the 16th article.

[Cited in The Manitoba, Case No. 9,029.]

3. The M. S. therefore, was in fault in not stopping and reversing her engine when she heard the first single whistle from the D., which she understood to be in answer to her first two whistles.

4. As each vessel saw the other at a sufficient distance, there was no question of lookout.

5. The D. was not in fault.

In admiralty.

Benedict & Benedict, for the Doris.

Dudley Field and Dimock & Whitney, for the Mary Sandford.

BLATCHFORD, District Judge. These are cross actions to recover damages for a collision which took place at about four o'clock on the morning of the 15th of September, 1865, between the steam propeller Mary Sandford and the steam propeller Doris, between Hart's

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

Island and Execution Light in Long Island Sound. The Mary Sandford was on her way from New York to Boston, and the Doris was on her way from Boston to New York. The Doris was on the north side of the channel, heading southwest by west, and eastward of Execution Light, when she discovered ahead, about a point on her port bow, the lights of the Mary Sandford. Both the green and red lights of the Mary Sandford were visible from the Doris. Just to the westward of the place where the Doris was when she discovered the lights of the Mary Sandford, was a buoy off Execution Light, which buoy the Doris, in her course, would leave to the northward. Off the buoy, the course of the Doris, if nothing had intervened, would have been changed, by the chart, to southwest half south, a change of a point and a half to the southward from the course she had previously been running on, and which would have required, to effect it, a starboarding of her helm to an extent sufficient to produce such variation. But the Doris, having seen the Mary Sandford, and perceiving that the two vessels were meeting end on, or nearly end on, so as to involve risk of collision, obeyed the rule laid down by article 13 of the "Steering and Sailing Rules" prescribed by the act of April 29th, 1864 (13 Stat. 58), and, inasmuch as the two vessels were steamers, put her helm to port, when she had passed the buoy and there was room for her to swing to the northward. At the same time she blew one blast of her steam whistle, as an indication to the Mary Sandford that she was porting. In reply to this one blast from the Doris, there was heard on the Doris a signal of two blasts from the Mary Sandford, indicating to the Doris a confusion of signals and that the Mary Sandford was starboarding. The Doris immediately gave orders for her engine to stop and reverse, which orders were obeyed with all practicable rapidity, and she gave another single blast with her steam whistle and put her wheel hard-a-port. Before her headway had been stopped entirely, her stem came in collision with the starboard side of the Mary Sandford, not a great way back from the stem of the latter, cutting into her some distance. Both vessels were damaged by the collision, the Doris less than the Mary Sandford.

The Mary Sandford, for some time before she sighted the lights of the Doris, and at that time, was also on the north side of the channel. Her course, at the time she sighted the lights of the Doris, was, as nearly as I can make it out from the evidence, about northeast half north, a course diverging a point and a half to the northward from a line parallel to what was the course of the Doris up to the time the Doris ported her helm after passing the buoy off Execution Light. This course of the Mary Sandford, if northeast half north, was parallel to what would have been the chart course of the Doris after passing the buoy off Execution Light, northeast half north being the counterpart of southwest half south; and, although the Mary Sandford was on the north side of the channel, it is not at all probable that, in the comparatively confined channel extending from off the southerly point of Hart's Island to off the buoy at Execution Light, she was running upon any other than the chart course, and the testimony also leads clearly to that conclusion.

The fact that the two vessels were in these respective positions and on these respective courses when they first sighted each other's lights is also made evident by the fact that these must have been their courses and positions or they could not have seen each other's lights in the respective bearings shown by the testimony. The testimony of those on board of the Doris is that they first saw the lights of the Mary Sandford bearing from a point to a point and a half on the port bow of the Doris. The testimony of those on board of the Mary Sandford is that they first saw the lights of the Doris bearing from a point to a point and a half on the starboard bow of the Mary Sandford. These are just the bearings which the lights of each vessel would have had to the persons on board of the other vessel, if the course of the Doris had been southwest by west, and that of the Mary Sandford had been northeast half north.

On this state of facts, as the Doris was not far to the eastward of Execution Light when her lights were first sighted by the Mary Sandford, and the latter was at that time a considerably greater distance to the westward of Execution Light, it must have been, or ought to have been, quite apparent to those on board of the Mary Sandford, that the Doris, when compelled to change her course off Execution Light to correspond with the chart course from that point westward, would be brought to meet the Mary Sandford end on, or nearly end on, so as to involve risk of collision. This was apparent to those on board of the Doris, for her helm was put to port as soon as that manoeuvre could be safely executed after passing the buoy off Execution Light. On the same state of facts, the helm of the Mary Sandford ought to have been put to port. Instead of this being done, her helm was starboarded, and she persisted in keeping it to the starboard and thus running across the proper and lawful course of the Doris, until the collision occurred. In thus starboarding her helm instead of porting it, the Mary Sandford violated the requirement of article 13, before cited, and was in fault. The story of the witnesses on the part of the Mary Sandford, that they saw only the green light of the Doris, and did not see her red light at all, which is offered as an excuse for the starboarding of the Mary Sandford, on the idea that the Mary Sandford was some way to the northward of the course of the Doris, and therefore could not safely port, is not credible. Besides, the evidence shows satisfactorily that the single whistle of the Doris, indicating that she was porting, was heard on board of the Mary Sandford, be-

fore the helm of the Mary Sandford was starboarded.

The testimony shows that the Mary Sandford blew a signal, of two blasts of her steam whistle, when she was about a mile off from the Doris; that that signal was not heard on board of the Doris; that, after the Mary Sandford had blown that signal, the Doris blew her signal of one blast, before-mentioned, which was blown at the same time that the Doris ported her helm; that that signal from the Doris was heard on board of the Mary Sandford, and was understood by those on board of her to be an answer by the Doris to the signal of two blasts blown by the Mary Sandford; that, on that signal of one blast, from the Doris being heard on board of the Mary Sandford, a second signal, of two blasts, was blown by the Mary Sandford, and her helm was starboarded; that this last signal, of two blasts, from the Mary Sandford, was heard on board of the Doris; that the Doris, on hearing it, immediately blew a second signal, of one blast and stopped and reversed; that this last signal from the Doris was heard on board of the Mary Sandford; and, that the Mary Sandford, immediately on hearing it, stopped and reversed. When a steam vessel is approaching another steam vessel, so as to involve risk of collision, and there is a confusion or misunderstanding apparent to either of them, in reference to the signals made by either, the necessity arises for stopping and reversing, on the part of the vessel which perceives such confusion or misunderstanding. Such necessity is the necessity referred to in article 16 of the act of April 29th, 1864, which provides, that "every steamship, when approaching another ship, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse." The Doris perceived such confusion or misunderstanding of signals, when, and only when, after she had blown her first signal of one blast, she heard what was really the Mary Sandford's second signal of two blasts, and the Doris immediately, in compliance with the law, stopped and reversed. The Mary Sandford perceived such confusion or misunderstanding of signals, when, after having blown her first signal of two blasts, she heard the Doris answer by a signal of one blast. But she did not then stop and reverse, as she ought to have done. On the contrary, she blew another signal, of two blasts, and then waited to hear the second signal of one blast, from the Doris, before giving the order to stop and reverse. This was another fault on the part of the Mary Sandford. If she had stopped and reversed when she heard the first signal, of one blast, from the Doris, as she ought to have done, there would, probably, have been no collision, even with the wrongful starboarding of the Mary Sandford.

I do not think the question of the lookout, on either vessel, has any bearing in the case. Each vessel saw the other at a sufficient distance off to make the proper manoeuvres to avoid a collision.

It is urged as a fault, against the Doris, that her engine would not stop its forward motion, and take on a reverse motion, as quickly as some other engines would. But it is not shown that the engine was an improper or unsafe one, or that it was not in order. Nothing amounting to any fault is shown, in respect to the engine of the Doris; and the court cannot speculate as to whether the Doris might not, with a different engine, have stopped short of colliding with the Mary Sandford.

There must be a decree, dismissing the libel against the Doris, with costs. In the case against the Mary Sandford, there must be a decree for the libellants, with costs, with a reference to a commissioner, to ascertain and report the damages sustained by them, by the collision.

Case No. 9,226.

The MARY STEELE.

[2 Lowell, 37.] [1]

District Court, D. Massachusetts. Dec., 1874.

COLLISION—DAMAGES—PROBABLE PROFITS — FISHING VOYAGE.

1. In assessing damages for a collision, a fishing-boat, making weekly trips or voyages for the market, which has lost a trip as the necessary result of the injury, may be allowed the probable profits of the trip.

[Cited in The Iberia, 46 Fed. 303.]

2. These may be allowed when the only actual injury was to a seine, which could neither be repaired nor replaced in less time than a trip would require, and which was of so great value, that to assess it as a total loss would exceed the damage incurred by the loss of the trip.

Libel by the owners and crew of the schooner Hattie N. Reed, of Swampscott, and by the owners of a large and valuable seine used in connection with said schooner in the mackerel fishery, against the schooner Mary Steele, of Wellfleet. The allegations were, that all the libellants were associated together in the fishing business upon the coast of New England, dividing the catch in certain definite proportions; that the crew were engaged on the thirtieth day of July, 1874, at noon, in casting the seine about a school of mackerel, at a point near Boothbay, on the coast of Maine; that many vessels were in the neighborhood, and among them the Mary Steele; that the latter vessel came down before the wind near to the seine, and suddenly changed her course and shot directly into the seine, and damaged it, rendering it useless, so that the libellants were obliged to carry it to Boston to be repaired, whereby they lost their trip and were detained one week, and suffered damage to the amount of $1,000, besides the cost of repairing the seine.

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

The answer, admitting the collision, alleged that it happened without fault of the Mary Steele.

C. P. Greenough, for libellants.
F. Dodge, for respondents.

LOWELL, District Judge. The responsibility for the collision is upon the Mary Steele. She began by trying for the same school of fish; but seeing that the other schooner had the first right, her boats lay near by, hoping to catch the fish if they should escape the libellants. All of the crew, excepting the ship-keeper and a boy, were thus engaged in the boats, and the schooner was keeping near her boats, for convenience. Of course, it was for the schooner, while under way, to keep clear of the boats that were casting a seine, and the only excuse given for a failure to comply is, that the vessel missed stays. But if she was on such a course as to need to go about in order to avoid the seine, she is bound to take the risk of missing stays, as there was nothing in the wind or sea that can account for the misfortune, and make it, in law, an inevitable one.

The most serious question in the case is that of damages. These seines, it seems, are large and valuable, costing nearly as much, perhaps, as some fishing schooners. In this case the ship drew one-fourth, and the seine one-sixth of the catch. The libellants' counsel has cited many of the latest cases to the point, that where the voyage or business of a vessel is broken up, the probable profits may be given as damages for detention, if the character of the trade is such that an ordinary allowance in the nature of freight would not meet the justice of the case. The Cayuga [Cases Nos. 2,535, 2,537]; 14 Wall. [81 U. S.] 270; The Favorita [Cases Nos. 4,694, 4,695]; Id., 18 Wall. [85 U. S.] 598; and other cases, where the loss of the probable earnings of a ferry-boat, and other damages of like nature, have been allowed.

The objection taken to this allowance resolves itself into two: (1) Whether any damages should be assessed for the loss of the use of the seine; and (2) whether they should be assessed in the mode asked for by the libellants. It is proved that the Hattie N. Reed was a market-boat, accustomed to make trips which averaged about a week in length, bringing to Boston fresh fish for immediate sale, netting from $700 to $1,000 for a trip. She was fitted with ice and various other appliances, and, among others, with this seine, and with hooks and lines. At this time the fish would not bite freely, and must be caught in the net, or not at all. Without the seine the trip was certain to fail, and when it was damaged, the master thought best to carry it to Boston to be repaired.

There was some conflict in the evidence as to whether the seine could have been mended at Boothbay. Upon the whole evidence, I think the preponderance is that the work could not be done there to any better advantage, in point of time, than at Boston.

Under these circumstances, is the Mary Steele bound to pay for a broken voyage, or only for the immediate injury to the seine? It seems a hardship that a damage of $45 to a net should involve some hundreds of dollars by way of loss of the use of the net. Supposing a boat had been stove, would that carry like consequences, on the ground that the seine could not be set without a boat? And suppose a thole-pin in the boat were broken, is the voyage to be paid for?

The answer is, that the injury or destruction of any thing which cannot be replaced, and which entails the loss of the voyage, however insignificant the thing itself may be, will often carry with it damages for the loss which is its necessary consequence. A comparatively small injury might sometimes oblige a considerable deviation and delay, such, for example, as the loss of all the nautical instruments. The damages would not be the mere value of these instruments on shore, if the consequence is a further loss occasioned by the necessity of supplying them.

It is true that in collision cases loss of profit on the cargo is not allowed; but this is an old rule, which Mr. Sedgwick considers out of harmony with recent decisions. Sedg. Dam. (4th Ed.) 541, note 1. The loss of profits of a voyage is assessed in the form of freight and demurrage, and the mode of estimating cargo, while it does not give profits, gives interest instead. The general rule now is, that, in actions like trespass, profits may be assessed if they were reasonably certain to have accrued, and that they have been destroyed by the trespass; and in the case of a voyage broken up we have this certainty, because the enterprise is in such a state of forwardness that its results may be foreseen.

In salvage cases, which are neither contract nor tort, the probable profits of a fishing voyage which has been lost are sometimes allowed, if the voyage had already been entered on. It is said that if the loss of the voyage will be very great, and the danger is not of the most pressing kind, the master of the fishing-vessel ought to warn the master of the vessel in distress of the great expense he is incurring. But this is a consideration which cannot apply in collision. See The Salacia, 2 Hagg. Adm. 262; The Louisa, 3 W. Rob. Adm. 99; The Hedwig, 1 Spinks, 24, and note a; The Norden, Id. 185.

If a contract had been made to furnish this seine off the coast of Maine, the contractor being informed that the vessel and men would be waiting to receive it, the damages for not delivering would be the probable profits that were lost by the failure to deliver, because this loss must have been foreseen by the parties. Taken either as being a consequence sufficiently direct to be within the expectation of any one dealing in the

subject-matter, or as being, in this particular case, unavoidable, I think profits may be recovered for the loss of the use of the seine.

Then as to the time. If the seine were an instrument of small value, damages could not be allowed for waiting to have it repaired, when it might have been replaced at less cost than that of the demurrage. But that, I understand, is not the case. Its value was more than the damages sued for.

As to the mode of ascertaining the value of the time lost, there seems to be no other that can be applied than the profitable profits. The schooner had a much larger number of men than merchant vessels carry, and different outfits. There is no customary rate of hire or market price for such vessels, and cannot be, from the mode in which the business is conducted. The precedent of the ferry-boat seems to be a strong one, because the reasons are the same.

It was stated by the libellants' witnesses that their trip was not a total failure, for they had caught thirty barrels of mackerel that morning, which they sold in Boston for about $300. In estimating the lost trip less the salvage, I think I ought to take a rather low average, and I accordingly assume that a trip would be worth $800; and, deducting the $300, we have $500 as the damages, besides the cost of repairs, which is $45, making $545 and costs. Decree accordingly.

Case No. 9,227.

The MARY STEWART.

[Blatchf. Pr. Cas. 210.] [1]

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

PRIZE—VIOLATION OF BLOCKADE.

Vessel and cargo condemned for an attempt to violate the blockade.

BETTS, District Judge. The above vessel and cargo were seized, as lawful prize, June 1, 1862, off South Carolina, at sea, by the United States bark Gem of the Seas, and sent into this port for adjudication, and were here libelled and attached, July 7, 1862. On the 29th of the same month an interlocutory order was granted by the court, directing the sale of the schooner and her cargo as perishing property. It being proved to the court that the vessel was chased by the bark off the South Carolina coast, and was abandoned by all the persons on board of her before she was seized, and that, when she was arrested she was found wholly deserted, it was ordered, that persons present on board of the capturing vessel be examined in preparatorio in the suit.

It is proved that the schooner and her cargo were captured about six miles off North Santee river, on the coast of South Carolina, she appearing to be running the blockade of some Southern port. She was cleared from Nassau for St. John, N. B., and such was her voyage, according to her crew list. The invoice of her cargo, found on board, was from Nassau for Baltimore. Her manifest was for a cargo of salt, and some oil and tea. The log-book produced contains no entry of the schooner's being chased or abandoned. The entries are continued from May 22, 1862, at Nassau, to Monday, June 2, and were kept as if the vessel was keeping a regular course of sailing.

The preparatory proof given by the captors shows that the vessel was making a direct course towards an inlet off the port of Charleston when chased by the capturing vessel. The crew all deserted her, and have never since been apprehended. No appearance has been entered for vessel or cargo. On the evidence, there is no room for doubt that she was engaged in the endeavor to violate the blockade of the port of Charleston, and a decree must be entered condemning vessel and cargo to forfeiture for the offence. Decree accordingly.

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

Case No. 9,228.

The MARY TERESA.

[Blatchf. Pr. Cas. 286.] [1]

District Court, S. D. New York. Dec. 24, 1862.

PRIZE —VIOLATION OF BLOCKADE — GOODS FORMING CARGO—LAST EMPLOYMENT—AGENTS.

Vessel and cargo condemned for an attempt to violate the blockade.

BETTS, District Judge. This vessel was built in Wilmington, North Carolina, in 1862, and was provisionally registered at Nassau, New Providence, to Edward Gardner, a merchant of Charleston, South Carolina, April 29, 1862. Her shipping agreement was dated at Nassau, New Providence, in May, 1862, for a voyage thence to Halifax, Nova Scotia, and back to Nassau, and she was cleared at Nassau with a cargo consisting of 100 sacks of salt, 2 barrels of mackerel, 2 cases and 5 barrels of drugs, 2 bags of coffee, and 1 case of shoes. She was captured at sea off Charleston harbor, May 10, 1862, by the United States gunboat Unadilla, and sent to this port for adjudication. She was libelled as prize in this court May 29. A claim was filed in favor of British subjects having an interest, June 24, by the acting British consul, and one November 22 thereafter, by Edmund Gardner as owner. No party appeared personally to argue the cause on the trial, but the papers in the cause were submitted to the court by the district attorney and the counsel for the claimant. Silliman, the mas-

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

ter of the vessel, an American citizen, testifies, on his examination in preparatorio, that the vessel came into Nassau with a cargo of cotton from Charleston about a week before this voyage; that Nassau was her next clearing port after that voyage; that the mate owned the cargo on that voyage, and came out in the vessel as master or mate from Charleston; that Henry Adderly & Co., of Nassau, were consignees of that cargo; that they are agents of several mercantile houses in Charleston, and many of the vessels arriving from Charleston are consigned to them; that all on board knew that Charleston was under blockade; that the vessel had no log; that she was directed to the northward after she left Nassau, and along the coast of the United States; and that she was captured about twenty miles south-southeast from Charleston bar. Gardner, the mate, says that he lived at Charleston, where his family lives, for two years; that he owns the vessel and most of the cargo; and that he knew that the port of Charleston was under blockade. Thomas Heffman, a passenger, testifies that he heard the captain or mate (he thinks the mate) say on the voyage that Adderly & Co., of Nassau, owned the vessel, and the mate and the cargo; and that he thinks that firm loaded the cargo on board at Nassau. William O. Bourke, a seaman, testifies that he is a native and resident of Charleston; that he heard it said on board that the vessel was going into Port Royal, South Carolina, for water; and that he has heard Gardner, the mate, say that he was owner of the vessel and cargo.

It is quite clear upon the registry that the legal ownership of the vessel was in a resident of Charleston, South Carolina. In that character she was subject to capture as prize by our own municipal law. But, in reality, she most probably was the property of Adderly & Co., of Nassau, whose practices in like methods of evading the blockade of the Southern ports are flagrantly notorious. The testimony establishes an unmistakable purpose, preparation, and attempt to run the vessel and cargo into Charleston. The master says that she was captured about twenty miles off that port. She was there in contradiction of the destination indicated by her shipping papers, and without a shadow of evidence justifying such departure from her declared voyage. The character of her ship's company, her last employment, her agents at Nassau, and the description of goods forming the cargo, speak very distinctly as to the intent with which she ran from the place of her departure directly to within eighteen or twenty miles of Charleston, under the semblance of seeking the port of Halifax.

The condemnation and forfeiture of the vessel and cargo are decreed.

MARY VAUGHAN, The (GORDON v.). See Case No. 5,618.

Case No. 9,229.

The MARY WASHINGTON.

[1 Abb. U. S. 1; [1] Chase, 125; 5 Am. Law Reg. (U. S.) 692.]

Circuit Court, D. Maryland. April Term, 1865.

CARRIERS—DELIVERY—NOTICE OF ARRIVAL — OPPORTUNITY TO REMOVE—CUSTOM—INJURY—DAMAGES —AFFREIGHTMENT — ADMIRALTY JURISDICTION.

1. The duty of a common carrier by water is not fulfilled by simple transportation from port to port. The goods must be delivered; or at least landed, and a reasonable opportunity given to the consignee to inspect them.

[Cited in The City of Lincoln, 25 Fed. 839; Constable v. National Steamship Co., 154 U. S. 51, 14 Sup. Ct. 1074.]

[Cited in Barker v. The E. M. Wright, 1 Mackey, 24.]

2. The general rule requires the carrier to notify the consignee of the arrival of the goods. If a carrier relies on circumstances as excusing this duty, he must prove them.

[Cited in The Boskenna Bay, 22 Fed. 665.]

3. To show that the carrier was accustomed to store goods in his warehouse, on their arrival, and let them remain there until the consignee should learn from the consignor that they had come, without showing that the consignor knew of and assented to this practice, is not enough to excuse the carrier from the duty of giving notice himself to the consignee. He will continue liable as carrier, until the consignee has received, from some quarter, information of the arrival of the goods and an opportunity to remove them.

4. The fact that after receiving such notice the consignee refuses to take the goods, cannot relieve the carrier from liability for injury sustained by them before that time.

5. The courts of the United States have not jurisdiction of actions against warehousemen, as such, prosecuted between citizens of the same state.

6. The fact that a contract of affreightment is to be performed wholly between ports within the same state, does not exclude it from the admiralty jurisdiction of the courts of the United States. The admiralty jurisdiction conferred by the constitution upon these courts, extends to all contracts of a maritime character to be performed upon navigable waters.

[Cited in The Belfast v. Boon, 7 Wall. (74 U. S.) 642; The Leonard, Case No. 8,256; Re Long Island, etc., Transp. Co., 5 Fed. 607; U. S. v. Burlington & Henderson County Ferry Co., 21 Fed. 336.]

7. A carrier transported goods to the port of delivery, and then, without notifying the consignee that they had come, stored them in his warehouse; where they were injured before the consignee knew of their arrival. *Held*: (1) That the carrier was liable as such, and not as warehouseman only; in the absence of affirmative proof of some facts excusing him from the duty of giving notice. (2) That, as the contract was for transportation over navigable waters, the consignor might proceed for damages, in the district court, in admiralty; notwithstanding the port of shipment and the port of delivery were both in the same state.

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

The libel in this cause was filed by Ayres and others against the owners of the Mary Washington, to recover damages for their

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[1] [Reported by Benjamin Vaughan Abbott, Esq., and by Bradley T. Johnson, Esq., and here compiled and reprinted by permission.]

failure to deliver in good order merchandise entrusted to them for transportation. It appeared by the evidence on the hearing in the district court, that the respondents below undertook, in consideration of a specified freight to be paid by the libelants, to transport the merchandise in question from Baltimore to a place called "Hill's Landing," on the Patuxent river, to be delivered to one Pumphrey. The respondents were in business as common carriers between these points. The goods reached Hill's Landing in safety; and, there, were landed from the steamboat, the Mary Washington. The consignee, Pumphrey, was not present to receive them; and they were placed in a warehouse occupied by the respondents, and connected with their wharf. While remaining there stored, the goods received the injuries for which this suit was brought. The respondents were accustomed, in the regular course of their business, to deposit goods arriving at Hill's Landing, which could not for any reason be immediately delivered, in the warehouse above mentioned, for safe keeping until delivery should be made. No additional charge was made for such storage; it was regarded as an incident to the carriage, and as paid for in the freight. It did not appear that any notice of the arrival of the goods was given to Pumphrey. Upon the above facts, the district court gave judgment for the libelants [case unreported], from which the owners of the steamboat now appealed.

P. W. Crain and William M. Addison, for appellants.

William Pinkney Whyte, for respondents.

CHASE, Circuit Justice. Under the circumstances of this case, I think that the contract of affreightment bound the carriers not only to carry the merchandise to the landing, but to deliver it to Pumphrey, or excuse non-delivery by proof of equivalent action or waiver. The duty of a carrier by water is not fulfilled by simple transportation from port to port. The goods must be delivered, or at least landed, and a reasonable opportunity given to the consignee of ascertaining their condition. In order that opportunity for inspection and for the removal of the goods may be given, the consignee must be notified of the arrival of the goods. This is the general rule. If exceptions are made by usage, circumstances, or special arrangements, they must be shown by proof.

In the present case, the respondents allege that it was not their practice to give notice to consignees, but instead of giving such notice, to deposit goods in their warehouse, where the consignees were expected to call for them, on learning from their correspondents, or otherwise, of their arrival. They insist that this arrangement was for the benefit of the owners of the goods, and was understood and agreed to by them. The evidence does not sustain this claim. It shows, clearly enough, the practice of the respondents; but it does not show any understanding, on the part of the owners of the goods, that the respondents were to be relieved from their responsibility as carriers until actual delivery of them, or an equivalent deposit in their warehouse, with information conveyed to the owners in some way that their goods had arrived. The warehouse arrangement was rather for the convenience of the carriers than of freighters or consignees. The storage, with information of arrival, however obtained, may be regarded properly enough as a substitute for actual and direct notice; and it may be admitted that opportunity for removal, after such information, would discharge the carriers from responsibility as such, in the same manner as actual notice and the like opportunity. But to hold that mere deposit in their own warehouse, under the circumstances of this case, terminated their special responsibility, would be a dangerous relaxation of the salutary rule on which the security of commerce so largely depends.

It is clear, from the proof, that the merchandise was damaged after the landing, and while in the custody of respondents, before Pumphrey had information of its arrival, or opportunity to take it away. It seems, however, that the merchandise was not ordered from the libelants by Pumphrey, and that he declined to receive it; and it is alleged that the carriers, therefore, were not liable. And there was proof that no order for the merchandise was actually given, and that Pumphrey, on learning its condition, refused to have any thing to do with it. But it is not easy to perceive the importance of this circumstance. It is plain enough that the libelants acted in good faith upon an expectation founded on a conversation with Pumphrey, that he would like to have the merchandise sent to him, and that he would receive and pay for it, if of good quality and in good condition, and the proofs show that this expectation was warranted. Whether warranted or not, the duty of the carriers was in no way affected. Their obligation, both to shippers and consignees, was to convey and deliver (or at least offer to deliver) safely. It is true that after Pumphrey had information of arrival, and declined to receive the merchandise because of its bad condition, the respondents could not be held responsible as carriers, to the libelants, for subsequent injuries in the warehouse; but their responsibility for prior injuries was not changed, and it is that responsibility only which is now in controversy.

In the present case, the question whether the respondents were liable as common carriers or as warehousemen is of little importance, except as a question of jurisdiction. The proof shows a degree of negligence which would make them liable in either character. But if their liability were as warehousemen only, they would not be

responsible in this court. A court of the Union has in general no jurisdiction of suits against warehousemen by citizens of the same state. Remedies for violation of these contracts must be sought by their co-citizens in state courts.

It is not questioned, however, that the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction. This is a provision of the national constitution. Nor is it questioned that this whole jurisdiction is vested by law in the district courts of the United States, and, on appeal, in the circuit courts. This was expressly enacted by congress, in 1789 [1 Stat. 73]. Nor is it questioned that a contract of affreightment, to be performed by traversing tide waters, or other navigable waters, is in general a maritime contract, or that a suit upon such a contract makes a case of admiralty jurisdiction. This is settled by repeated decisions. But it is insisted that the contract of affreightment in this case was to be performed wholly within the state of Maryland, and that this case, therefore, having arisen from an alleged breach of it, is not within the admiralty jurisdiction. Upon this I remark, in the first place, that there is nothing in the nature or history of admiralty jurisdiction which excludes from its cognizance contracts to be performed within the country or state in which it is exercised. On the contrary, such contracts, if maritime in their character, were constantly held, before the organization of the Union, to be proper subjects of that jurisdiction.

Within a comparatively recent period, however, doubts have been expressed whether such contracts can be enforced by national courts sitting in admiralty. Such doubts were expressed, in 1848, by Justice Nelson, speaking for a majority of the justices of the supreme court of the United States in the case of New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 392. They were founded on the assumption that "the exclusive jurisdiction in admiralty cases was conferred on the national government as closely connected with the grant of commercial power," and were cautiously stated as follows: "It is a maritime court, instituted for the purpose of administering the law of the seas. There seems to be ground, therefore, for restraining its jurisdiction, in some measure, within the limits of the commercial power, which would confine it, in cases of contracts, to those concerning the navigation and trade of the country upon the high seas and tide waters with foreign countries, and among the several states. Contracts growing out of the purely internal commerce of the state, as well as commerce beyond tide waters, are generally domestic in their origin and operation, and could scarcely have been intended to be drawn within the cognizance of the federal courts."

The principle thus intimated rather than asserted was applied, ten years later, in the case of Allen v. Newberry, 21 How. [62 U. S.] 244, to a contract of affreightment to be performed on Lake Michigan, between two ports in Wisconsin; but the decision against the jurisdiction over the contract was placed quite as much upon the act of congress of February 26, 1845 [5 Stat. 726], which restricts admiralty jurisdiction on the lakes and interior navigable waters to contracts relating to vessels employed between ports in the different states,—as upon the more general restriction derived from the limitation of the commercial power.

It cannot escape observation that this denial of jurisdiction to the national courts of affreightment contracts to be performed between ports of the same state, but on navigable waters, where, in cases of tort, the admiralty jurisdiction is undoubted, rests wholly upon the assumption that the restriction upon the commercial power operates as a constitutional limitation of the jurisdiction in admiralty over contracts.

Now, without more than a reference to the difficulty of assigning a reason for such a limitation of that jurisdiction in matters of contract which would not require the like limitation in matters of tort, and to the admitted doctrine that in matters of tort no such limitation exists, it is proper to observe that it has been more than once distinctly denied by the supreme court that any inference whatever in respect to the jurisdiction in admiralty can be drawn from the constitutional provision concerning commerce. Thus in the case of The Genesee Chief, 12 How. [53 U. S.] 452, the late chief justice, speaking for the court, and speaking with special reference to admiralty jurisdiction, said: "Nor can the jurisdiction of the courts of the United States be made to depend on regulations of commerce. They are entirely distinct things, having no necessary connection with one another, and are conferred in the constitution by separate and distinct grants."

So, too, in the case of The Propeller Commerce, 1 Black [66 U. S.] 578, in 1861; the supreme court, noticing an objection to its jurisdiction on the ground that it did not appear that the propeller was engaged in foreign commerce, or in commerce between the states, and speaking through Justice Clifford, said: "Admiralty jurisdiction was conferred upon the government of the United States by the constitution, and in cases of tort is wholly unaffected by the considerations suggested in the proposition."

This is the latest judgment of the supreme court; and unless it can be shown that jurisdiction in matters of contract is not as "wholly unaffected by the considerations" referred to, as jurisdiction in matters of tort, it seems to be my duty, being fully satisfied that this court has jurisdiction, under the constitution and the law, over the con-

tract of the respondents, to award to the libellants that justice to which the proofs clearly entitle them, without turning them out of this and requiring them to resort to another court. I do not think this can be shown, and therefore affirm the decree of the district court. Decree affirmed.

MARY WASHINGTON, The, v. AYRES. See Case No. 9,229.

MASCOUTAH (BALCHELLER v.). See Case No. 792.

MASI (MASON v.). See Case No. 9,244.

MASON (ABORN v.). See Case No. 19.

Case No. 9,230.

MASON et al. v. The BLAIREAU.

[2 Cranch (6 U. S.) 240.] [1]

District Court and Circuit Court, D. Maryland. 1803.

SALVAGE — DERELICT — AMOUNT ALLOWED—LEFT ON BOARD—EMBEZZLEMENT—APPRENTICE.

[1. A ship and cargo abandoned in a sinking condition by its crew at sea is saved and brought three thousand miles into port without boats or anchors and at great risk. *Held*, that three-fifths part of the gross value of the ship and cargo is a fair compensation to the salvors.]

[2. One man left, either by design or through carelessness, on board of a ship abandoned at sea, is thereby discharged from his contract of service, and may claim salvage for assisting in saving the vessel.]

[3. Embezzlement of salved property by any one assisting in the salvage service forfeits his share of the salvage.]

[4. An apprentice who renders salvage service is entitled to receive compensation, which is to be paid to himself and not to his master.]

This was a libel for salvage, filed in the district court of the United States for Maryland district, by [William Mason and others] the master, officers, crew, owner, and freighters of the British merchant ship the Firm, against the French ship Le Blaireau.

The facts stated in the proceedings and evidence were as follows: The ship Le Blaireau, James Anquetil, master, on a voyage from Martinique to Bordeaux, laden with sugar, on the 30th of March, 1803, at 10 o'clock at night, in lat. 35. 46 N., long. 46. west from Paris, was run down by a Spanish 64 gun ship, called the St. Julien, commanded by Francisco Mondragora, which struck the bow of the Blaireau, carried away her bowsprit and cutwater close to the seam of the stem, started three planks of the bends, and all above them, and crushed to pieces the larboard cathead. Before morning there were three and a half feet of water in the hold, and the Spanish commander not being able to wait for an attempt to repair the Blaireau, he took her crew and passengers on board his ship, excepting one man, Thomas Toole, an Irishman, who could not be found, as it was alleged by the officers and crew of the Blaireau in their protest, but who was, as he himself alleged, prevented by force from getting into the first boat, and afterwards refused to go in the second boat, being determined to remain on board the Blaireau. Toole, being thus left alone, cut away, as he alleged in his libel, the anchors, and the bowsprit, (which had been left hanging,) to lighten her bows, put her before the wind, and hoisted a signal of distress. In this situation she was, the next day, found and boarded by the ship Firm bound on a voyage from Lisbon to Baltimore. The persons on board of the Firm were: Charles Christie, one of the charterers of the ship. William Mason, master. William Stevenson, mate, shipped at £4 sterling per month. John Falconer, carpenter, at £5. 5. 0. Daniel Ross, boatswain, £2. 10. 0. George Glass, cook, £2. 10. 0. Samuel Monk, Martin Burk, John Brown Hall, John Blackford, John Wilson, and Mark Catlin, mariners, £2. 0. 0. Joachim Daysontas, a boy, £1. 1. 0. John Moat and John M'Mon, apprentices to the owners of the Firm. And Negro Tom, a slave of the Rev. Mr. Ireland.

It was admitted that the ship Firm is about the burden of 330 tons, carpenters' measure, but 500 tons can be laden on board of her; that she is of the value of ten thousand dollars, and is owned by John Jackson, of London, but chartered to Charles B. Young and Charles Christie, who had a cargo of salt on board, of the value of 4,000 dollars. The proper complement of men to navigate the Blaireau was at least sixteen hands. She was a faster sailer than the Firm. They laid to together for two or three days during the bringing in the Blaireau, for the purpose of taking out part of her cargo, and rendering assistance from the Firm. The sum of £2,000 sterling was insured upon the Firm to cover her value and freight.

Upon taking possession of the Blaireau she had about four feet of water in her hold, and could not have swam more than twelve hours longer. There was great risk and peril in taking charge of her. She was brought into the Chesapeake Bay after a navigation of nearly three thousand miles, by six persons who went on board of her from the Firm, and the man who was found on board. Part of her cargo was taken out to lighten her forward, and put on board the Firm; and part of it shifted aft. The Blaireau was navigated by the people of the Firm without boat or anchors. She was obliged to be pumped in fair weather by all hands every two, three or four hours, half an hour at a time, and in blowing weather every hour, a quarter of an hour at a time. Her bow was secured by coverings of leather, copper and sheet lead nailed on, and pitch and turpentine in large quantities poured down hot between the planks and the coverings. The labor of working the Blaireau by the men on board was great and severe, and they had frequently thought of

[1] [Affirmed in part by supreme court in 2 Cranch (6 U. S.) 240.]

abandoning her, but fortunately persevered. She was a slight built vessel and constructed without knees, and was very weak. The forestay was gone, and the foremast was secured by passing a large rope through the hawse holes, and securing it to the foremast head. It was the opinion of several experienced sea captains that the bringing in the Blaireau was a service of great risk and peril, and nearly desperate, and such as they would not have undertaken.

The persons who went on board the Blaireau from the Firm were, Charles Christie, super-cargo, and one of the charterers of the Firm; William Stevenson, first mate; John Brown Hall, and John Wilson, seamen; John Moat, a boy, and Negro Tom. Mason, the master, and Stevenson, the mate, were the only persons capable of taking an observation and navigating the vessels or either of them, into port.

A claim was put in by the French consul in behalf of the owners of the Blaireau. It appeared in evidence that William Mason, the master of the Firm, had embezzled part of the cargo of the Blaireau, to the amount of at least 1,760 dollars and 71 cents.

WINCHESTER, District Judge. The counsel for the parties respectively intervening in this cause were heard by the court, and their argument, together with all and singular the proceedings and testimony in this cause, were by the court maturely considered. And it appearing to the court that the circumstances of extreme danger under which the salvage of the ship Blaireau and cargo were effected, required a salvage and compensation as liberal as is consistent with precedents and legal principles; that the danger, labor and service of the persons actually employed in navigation and bringing in the said ship, greatly exceeded the danger, labor and service of the persons who remained on board the ship Firm; and that their compensation should exceed at the rate of fifty per cent. the compensation of those who remained on board the ship Firm; that among the persons on board the Blaireau, the station, trust and services of William Stevenson and Charles Christie, entitle them to a compensation exceeding that of seamen, at the rate of 50 per cent., and that the apprentices, cook, and negro slave should not be classed with seamen, nor seamen with the carpenter and second mate, and there not being any general rule by which to settle the proportions of salvage among persons of those different stations, but that the same must depend upon the sound discretion of the court, applied to the circumstances of every particular case; that William Mason, captain of the said ship Firm, having fraudulently embezzled and secreted, with intent to appropriate the same to his own use, lace, and other articles of a large value, which constituted a part of the cargo of the said ship Blaireau, is not entitled to any salvage or other compensation; that in strictness the officers and crew are the only salvors; and the owners of the ship Firm and cargo, as such can only come in for any share of salvage, upon the consideration of the risk to which their property was exposed; that upon these principles salvage should be paid to and among the persons entitled thereto, at the rate of three fifths of the net proceeds of the sales of the said ship and cargo; and that of this sum one-ninth part of the net salvage will be a just and liberal compensation to the owners of that ship and her cargo for any hazard to which their property was exposed.

It is, this 14th day of July, 1803, by me, JAMES WINCHESTER, judge of the district court of the United States, for Maryland district, and by the power and authority of this court, ordered, adjudged and decreed, that the net amount of sales of the said ship Blaireau, her tackle, apparel, and furniture and cargo, (after deducting the costs in the cause, and the sum of three hundred and eighty-eight dollars, heretofore decreed by consent to Charles Christie for expenses and disbursements relative to the said ship Blaireau and cargo,) amounting, as stated by the clerk of this court, to the sum of sixty thousand two hundred and seventy-two dollars and sixty-eight cents, shall be paid, applied and disposed of, to and among the persons, and in the manner following, to wit: To the owners of the ship Firm and cargo, the sum of four thousand and eighteen dollars and fourteen and three quarters cents, to be divided between them in the proportions of their respective interests agreeably to the admitted estimation thereof. to wit: To the owners of the ship Firm, for the value of the said ship and freight on eighteen thousand dollars; and, to the owners of the cargo of the said ship on four thousand dollars. To the persons on board the said ship Blaireau, as follows, to wit: To William Stevenson, the sum of three thousand four hundred and three dollars, and sixty-three and a quarter cents. To Charles Christie, the sum of three thousand and four hundred and three dollars and sixty-three and a quarter cents. To Brown Hall, John Wilson and Thomas Toole, seamen, each the sum of two thousand two hundred and sixty-nine dollars and eight and three-quarter cents. To John Moat, an apprentice boy, the sum of eleven hundred and thirty-four dollars and fifty-four and three-quarter cents. And that there be retained a like sum of eleven hundred and thirty-four dollars and fifty-four and three quarter cents in this court, to and for the benefit of such person or persons as may hereafter make title to the same as owner or owners of the said Negro Tom. To the persons on board the said ship Firm, as follows, to wit: To John Blackford, second mate, the sum of eighteen hundred and ninety dollars and ninety and three quarter cents. To John Falconer, carpenter, the sum of eighteen hundred and ninety dollars and

ninety and three quarter cents. To George Glass, the cook, and John M'Mon, an apprentice, each, the sum of seventeen hundred and fifty-six dollars and thirty-six and three quarter cents. To Daniel Ross, Samuel Monk, Martin Burk, Mark Catlin, and Joachim Daysontas (sailors of the Firm), the sum of fifteen hundred and twelve dollars, and seventy-three cents each. That no salvage or compensation whatever shall, for the cause above recited, be paid to the said William Mason, but that the libel in this cause filed, so far as it relates to the claim of the said Mason personally and only, shall stand, and the same is hereby dismissed.

And it is by these presents further ordered, adjudged, and decreed, that the residue of the proceeds of the sales aforesaid shall be deposited in the Bank of Baltimore, in the name of this court, and to the credit of this cause, to the use and the benefit of such person or persons as may in this court make title thereto, as owner or owners of the said ship Blaireau and cargo, or such person or persons as may be legally authorized by them to receive the same.

From this decree, an appeal to the circuit court was prayed by William Mason, the master of the Firm; by the owner of the Firm; by the claimants of the Blaireau, and by the charterers of the Firm.

Upon the appeal, additional testimony was adduced, in the circuit court, but it does not seem to affect the principles upon which the rates of salvage ought to be awarded.

On the 27th of December, 1803, the circuit court, held by CHASE, Circuit Justice, decreed as follows: The court having heard the parties on the appeal in this cause, by their counsel, and fully examined the evidence, exhibits and proofs, and maturely considered the same, do order, adjudge and decree, and it is hereby ordered, adjudged and decreed by the said court, that the decree of the said district court be, and hereby is in all things affirmed, (and, with respect to the said Mason, with the costs of his appeal,) except only so far as the said decree shall hereinafter, by this decree, be changed or altered.

And it is now further ordered, adjudged and decreed by this court as follows, to wit: That there be paid to John Jackson of St. Paul's parish in the county of Middlesex, in the United Kingdom of Great Britain and Ireland, (who appears to this court to be the owner of the ship Firm,) the sum of two thousand eight hundred and seventy dollars twelve cents and eight dimes, on the amount of the value of the said ship estimated at the sum of ten thousand dollars.

That there be paid to Charles Bedford Young and Charles Christie, Jun. (who appear to this court to be the owners of the cargo on board the said ship Firm) the sum of one thousand one hundred and forty-eight dollars and five cents on the amount of the value of the said cargo, estimated at the sum of four thousand dollars.

That there be paid to William Stevenson, the sum of two thousand two hundred and sixty-nine dollars eight cents and nine dimes.

That the salvage money adjudged by the district court, and affirmed by this court to be paid to John Moat, (who appears to this court to be an apprentice to the above-named John Jackson, owner of the ship Firm,) be paid by the clerk of this court to the said John Moat, or to his proctor or attorney in fact for the use and benefit of the said John Moat; and that the said salvage money be not paid to the said John Jackson, or to his attorney, or to any other person or persons whatsoever, who shall claim the said salvage money as owner or master of the said apprentice; and that the said salvage money remain in court until paid according to this decree.

That the salvage money adjudged by the district court, and affirmed by this court, to be paid to John M'Mon, (who appears to this court to be an apprentice to the above-named John Jackson,) be paid by the clerk of this court to the said John M'Mon, or to his proctor or attorney in fact, for the use and benefit of the said John M'Mon; and that the said salvage money be not paid to the said John Jackson, or to his attorney, or to any other person or persons whatsoever, who shall claim the said salvage money as owner or master of the said apprentice; and that the said salvage money remain in court until paid according to this decree.

That the salvage money adjudged by the district court, and affirmed by this court, to be retained for the owner of Negro Tom, be paid to the Rev. John Ireland, (late of this state, but now of the United Kingdom of Great Britain and Ireland,) who appears to this court to be the owner of the said Negro Tom, or to the Rev. Joseph G. I. Bend, and Lewis Atterbury, who appear to this court to be the attorneys in fact of the said John Ireland, and who have expressed in writing to this court, that they, being duly authorized by the said John Ireland, will immediately, on the receipt of the said salvage money, manumit the said Negro Tom, according to the law of the state of Maryland, and will pay the said Negro Tom one-fifth part of the said salvage money, and have consented that the same may be retained by the clerk of this court for the use of the said Negro Tom.

And it is further ordered, adjudged and decreed, that the appellants (except William Mason) pay no costs in this court on the appeal.

Upon this judgment separate writs of error were sued out by William Mason, the master, John Jackson, the owner, William Stevenson, the mate, Charles Christie and Charles B. Young, the chartereis of the Firm, and by the French claimants of the Blaireau.

William Mason assigned for error, that no part of the salvage was decreed to him for his own use, on account of his merits and services.

John Jackson, the owner of the Firm, assigned for error, that he was not allowed a reason-

able proportion of salvage; that the whole sum allowed and decreed to the owner and freighters, ought to have been decreed to him; and that the sums decreed to the two apprentices ought not to have been ordered to be paid to themselves or their proctor only.

William Stevenson, the mate, assigned for error, that the share assigned him was inadequate to his services, merits and situation.

Christie and Young, the freighters of the Firm, alleged that the proportion allowed to the owner and freighters of the Firm was too small, in proportion to their risk; and that the proportion awarded the freighters was too small compared with that awarded to the owner.

[The judgment of the circuit court was affirmed in part by the supreme court, where it was carried by writ of error. 2 Cranch (6 U. S.) 240.]

Case No. 9,231.

MASON et al v. The BLAIREAU.

[See Case No. 9,230.]

Case No. 9,232.

MASON et al. v. BOOM CO.

[3 Wall Jr. 252;[1] 20 Leg. Int. 12.]

Circuit Court, W. D. Pennsylvania. Sept. Term, 1858.

CONSTRUCTION OF STATUTES—FEDERAL AND STATE RIGHTS—GRANTS—PROVISIONS.

1. Although it is a settled rule of law, that when a proviso to a grant of any kind is repugnant to the grant itself, the grant is good and the proviso only void, yet this is a rule which is to be taken with modifications. And in the construction, especially of American statutory grants in derogation of common right, passed as private acts, oftentimes are in our legislatures inconsiderate, and after having been ingeniously drawn beforehand, by persons who had a special and not allowable interest of their own in view, and who have contrived language to carry their object, in such a way that the legislature less acquainted than they with exact facts, could not discover the precise import of the words used, the rule is always to be taken in subordination to the greater rule of law, that the true intention, as apparent from the whole grant, is to be effectuated.

2. Hence, if on a whole case, reference being largely had to the public interests, in determining this point, it appears that a grant meant to give rights in case those rights could be enjoyed in a certain way, in which way it is plain, after experiment, that they cannot be enjoyed, then the whole grant is void. And in such case it makes no difference whether the qualification to the grant be put in adjectitiously and after an absolute previous grant, or whether it be put in previously and as a condition precedent.

3. No state of the federal Union, by declaring, in a grant which it makes of certain rights, that any question which arises under that grant, shall be determined in such or such a way, can prevent any class of citizens from suing in the federal courts, if, by the constitution and statutes of the United States, they have a right to sue in such courts.

4. Semble, that the Pennsylvania statute of 1806, which enacts that in "all cases where a remedy is provided or duty enforced, or anything directed to be done by an act or acts of assembly of this commonwealth, the directions of the said act shall be strictly pursued, and no penalty shall be inflicted, or anything done agreeably to the provisions of the common law, in such cases, further than shall be necessary for carrying such acts into effect" has reference to legal remedies only, and having been passed, when the equitable remedy of injunction was unknown in Pennsylvania, does not enjoin injunction.

This was a bill for injunction against stopping the complainants' lumber while it was floating down the Susquehanna; the case being thus:

A statute of Pennsylvania—Act March 29, 1849 [Laws 1849, p. 245]—made certain persons a corporation, under the name of the West Branch Boom Company, and authorized them to erect at a certain point on the Susquehanna, (a public highway of Pennsylvania,) such boom as might "be necessary for stopping and securing" lumber floating upon that river; giving them tollage; with a proviso that the boom should not extend more than half way across the river, and be so constructed as to admit the safe passage of rafts, boats and lumber, and not impede the navigation of the river. A second proviso not very consistent with the general scope of the law, enacted, that no lumber should be stopped without a written request from the owner, and that "a free and unobstructed passage shall at all times be kept open, so that the navigation shall be as free as it is now;" i. e., before the boom was constructed. It then provided that if any persons should "suffer damage by the exercise of the powers herein granted," and the parties injured and the boom company could not agree on the damages, "the court of common pleas having jurisdiction in the county where the boom is," should cause them to be ascertained by three freeholders, whom the court should appoint; and their report being confirmed, should have the effect of a judgment: with a right of appeal to a jury.

A previous well known general statute of Pennsylvania, passed in 1806,—Act March 21, § 2 [Thompson's Laws Pa. 1805-06, p. 569],—it is here necessary to say, enacts that in "all cases where a remedy is provided or duty enforced, or anything directed to be done by an act or acts of assembly of this commonwealth, the directions of the said act shall be strictly pursued, and no penalty shall be inflicted, or anything done agreeably to the provisions of the common law, in such cases, further than shall be necessary for carrying such acts into effect."

In this state of the law, the complainants, who were citizens of Rhode Island and Connecticut, were floating rafts down the Susquehanna, which got into the boom of the defendants, and were detained there several weeks; and having filed their bill as above stated against the defendants, praying that they might be enjoined from stopping it, the case came on to be heard on this bill and the answer to it.

The answer did not deny that the logs were detained, nor that the complainants might be damnified by such detention, but it alleged

[1] [Reported by John William Wallace, Esq., and here reprinted by permission.]

that the defendants could not help what occurred; that they were doing their best to prevent all unnecessary detention; that their boom was constructed in the best manner, and according to their act of incorporation, and that if any detention occurred, not authorized, it was unavoidable, and an incident to the lawful exercise of their franchise: damnum absque injuriâ. It submitted, impliedly, that the power to make a boom of specific dimensions, which dimensions were here complied with, was clearly and primarily given; and if the law, subsequently, and by way of proviso, declared that in making the boom, impossibilities should be accomplished—that is to say—if it declared (which it seemed to do) that while the boom came one-half across the river, the navigation should be just as absolutely unobstructed as if there was no boom there at all—such a proviso it was—a proviso which provided for a physical impossibility, and for a thing inconsistent with and repugnant to the main object of the grant—which was void, and not the enacting clause which expressed the chief scope of the act, viz.: the power to build the boom. It then opposed to the prayer for an injunction, these objections:

I. That the rivers of Pennsylvania, though highways for its citizens, were not necessarily so for the citizens of other states.

II. That the act authorizing the boom prescribed the manner in which any one aggrieved should get satisfaction, and the more ancient, well known and general statute of 1806, declared that in such a case no other remedy could be had.

Messrs. Armstrong and Maynard, for complainants.

Mr. Linn, for the Boom Company.

GRIER, Circuit Justice. The objection that the river is made a highway only for citizens of Pennsylvania, and that the complainants claim rights as Pennsylvanians, while they deny their character as citizens, is answered by that article of the constitution of the United States which declares that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." The complainants have a right to hold land in Pennsylvania, to erect mills and use the public highways by land or water, as freely as citizens of Pennsylvania, and have, moreover, a right to sue a citizen of Pennsylvania, or a corporation, the members of which are presumed to be citizens of Pennsylvania, in this court.

To the second objection—that one founded on the specific remedy given by the act of incorporation and the general Pennsylvania statute of 1806—there are several answers, each of which is conclusive.

I. The legislature of a state cannot take away the privilege conferred by the constitutional laws of the Union upon citizens of other states, to sue in the courts of the United States, by enacting a special remedy in their own county courts.

II. It has never been decided that the act of 1806 has reference to any other than legal remedies and penalties. At the time that act was passed the equitable remedy by injunction was unknown, or at least not in use in Pennsylvania.

III. The act of incorporation gives the special remedy only in cases where persons suffer damages "by the exercise of the powers granted to the corporation;" whereas the complainants charge that they have been injured by an exercise of powers not granted to the corporation. If this were a case where complainants' land was taken, or the water diverted from or turned upon it, or any other injury, direct or indirect, caused by the legitimate exercise by the defendants of the powers granted in their act of incorporation, the remedy provided by the act might have been pursued. But has no application to the present case; and more especially so, as the bill does not demand the removal of the boom as a nuisance, but only an injunction against the exercise of powers not granted by law to the corporation.

The only question, then, that remains, is whether the company have a right to stop the logs of the plaintiffs, and detain them for weeks from passing down the river without their consent. Confused and contradictory as the language of the statute is, we need not grope for its meaning through its various sections. This much, however, we may assert as quite plain: That when the legislature granted this franchise to the defendants, it was on the representation of the grantees, and the understanding of all concerned, that a boom could be kept up, which would not necessarily infringe the public right of navigation. It is a condition of the grant, that the corporation shall not detain the logs of those who do not wish it; the company have no power to do so, and in accepting the franchise and acting under it, they have admitted their ability to exercise their powers without injury to the rights of others.

The assertion involved in the answer that it is impossible to construct the boom which is authorized, so as to separate the logs and give those a free passage which they have no right to detain, amounts to a confession that their boom is a nuisance. If they cannot so construct it as to detain only the logs of those who request this duty of them, and not detain the property of those who do not, they have a franchise which, by their own showing, is impossible to be exercised. They must take it with its burthens as well as its benefits, or not take it at all. It would be a strange construction of their franchise, which would permit them to exercise prohibited powers, because convenient for the exercise of those granted.

Injunction decreed.

MASON (BRONAUGH v.). See Case No. 1,923.

MASON (CHESAPEAKE & O. CANAL CO. v.). See Case No. 2,650.

MASON (CHOMQUA v.). See Case No. 2,693.

Case No. 9,233.

MASON v. CLAPP.

[Holmes, 417;[1] 21 Int. Rev. Rec. 268; 7 Leg. Gaz. 277.]

Circuit Court, D. Massachusetts. Sept. 3, 1874.[2]

INTERNAL REVENUE—SUCCESSION TAX — LIFE ESTATE—TERMINATED AFTER REPEAL.

1. Under the internal revenue acts of June 30, 1864 [13 Stat. 223], and July 13, 1866 [14 Stat. 98], no succession tax accrued against a devisee of real estate in fee, after a life estate in another, until the termination of the life estate.

2. Such tax therefore cannot lawfully be assessed against such devisee where the life estate began before, and terminated after, the date fixed for the repeal of the succession tax by the act of July 14, 1870 (16 Stat. 256), the seventeenth section of which provided that the repeal should not prevent the levy and collection of "taxes properly assessed, or liable to be assessed, or accruing under the provisions of former acts," and that the act should "not be construed to affect any act done, right accrued, or penalty incurred under former acts."

[Cited in United States v. New York Life Ins. & Trust Co., Case No. 15,873.]

[This was a suit by William P. Mason against Otis Clapp for the recovery of tax claimed to have been paid after the repeal of the succession tax act.]

Russell & Putnam and J. B. Warner, for plaintiff.

George P. Sanger, for defendant.

SHEPLEY, Circuit Judge. This is an action brought in the state court, and removed by the defendant to this court by certiorari, to recover a succession tax paid under protest to defendant as collector of internal revenue for the Fourth Massachusetts district. The writ is dated Nov. 20, 1873.

William P. Mason, the plaintiff's testator, died Dec. 4, 1867. By his will, the real estate upon which the tax in question was levied, was devised to his widow for her life, or until she should cease to occupy the same as a place of residence, and upon her death or ceasing so to occupy the same, to the plaintiff. The widow occupied the said real estate as her residence until her death, on June 17, 1872. May 15, 1873, the tax in question was assessed by [Jonathan H. Mann,][3] the assessor of said district; and, May 31, 1873, plaintiff paid defendant said tax under protest, to avoid distraint or other forcible process to collect the same. June 9, 1873, plaintiff duly made claim upon the commissioner of internal revenue for the refunding of said tax, for the reason that the said property did not vest in possession in the plaintiff until the death of the testator's widow, which occurred after Oct. 1, 1870, the date at which the repeal of the succession tax went into effect, and that the tax had not accrued at said date so as to come within the saving clause of the act of repeal. Act July 14, 1870, § 17 (16 Stat.). Nov. 15, 1873, the commissioner of internal revenue rejected the appeal, "for the reason that the tax was due, properly assessed, and collected," within said saving clause, "as held by the circuit court of the United States for the district of Massachusetts, in the case of May v. Slack" [Case No. 9,336]. If upon the above facts the court are of opinion that the tax was wrongfully assessed and collected, judgment is to be entered for the plaintiff for six hundred dollars, with interest from May 31, 1873; otherwise judgment for the defendant.

The act of July 14, 1870 (16 Stat. 256), repealed the special tax "on legacies and successions" imposed by the internal revenue act of 1864. This repeal took effect on the first day of October, 1870. The seventeenth section of the act of July 14, 1870, provides that "all acts and parts of acts relating to the taxes herein repealed, and all the provisions of said acts, shall continue in full force for levying and collecting all taxes properly assessed, or liable to be assessed, or accruing under the provisions of former acts or drawbacks, the right to which has already accrued or which may hereafter accrue under said acts; and for maintaining and continuing liens, fines, penalties, and forfeitures incurred under and by virtue thereof; and this act shall not be construed to affect any act done, right accrued, or penalty incurred under former acts, but every such right is hereby saved."

The tax in this case was not assessed, or liable to be assessed, before the first day of October, 1870. It is, however, claimed that the beneficial interest of the plaintiff having accrued Dec. 4, 1867, on the death of William P. Mason, the testator, its liability to the succession tax or duty, when it became vested in possession, was saved by the exceptions of the seventeenth section in relation to taxes "accruing" and "rights accrued" under former acts.

Section 126 of the act of 1864 (13 Stat. 287), defined a "succession" to denote the devolution of title to any real estate. By the provisions of the succeeding section, "every past or future disposition of real estate by will, deed, or laws of descent, by reason whereof any person shall become beneficially entitled, in possession or expectancy to any real estate, or the income thereof, upon the death of any person dying after the passing of this act, shall be deemed to confer on the person entitled, by reason of any such disposition, a 'succession,' and the term 'successor' shall denote the person so entitled." The duty payable in case of such succession

[1] [Reported by Jabez S. Holmes, Esq., and here reprinted by permission.]

[2] [Affirmed in 94 U. S. 589.]

[3] [From 21 Int. Rev. Rec. 268.]

varied according as the successor's degree of consanguinity was nearer or remote to the predecessor, from one per centum in case of a successor of lineal issue, or a lineal ancestor of the predecessor, to a duty of six per centum in case of a stranger in blood, or one far removed in degree of collateral consanguinity. Provision was also made, that where, before any successor became entitled to the estate in possession, his interest, by reason of death, passed to any other successor, only one duty should be paid, and should be due from the successor who first should become entitled in possession; but such duty should be estimated at the highest rate which, if every successor had been subject to duty, would have been payable by any one of them. The duty was not payable until the successor became entitled in possession. Act 1864, § 137 (13 Stat. 289). By the provisions of section 145, the duty became a lien on the succession after assessment. By the act of July 13, 1866 (14 Stat. 140, 141), the assessment was to be made at the expiration of thirty days after the successor came into possession.

Thus, it will be seen that on the first day of October, 1870, when the repealing act took effect, it was uncertain when any duty was to be paid, upon what value it was to be paid, at what rate of duty it was to be assessed and payable, and against whom it would be assessed. No tax had then accrued or was accruing against William P. Mason. Before any one became entitled in possession, the succession might pass by death, by the laws of descent or otherwise, through many different persons. Although, when a successor became entitled in possession, the duty would have been assessable at the highest rate to which any successor in the line would have been liable had he come in possession, the duty did not accrue against that one or any other of the successors in the line, except the one who became entitled in possession, and not against him until he became so entitled. When he became so entitled in possession, the duty accrued against him; the "right accrued," although the assessment could not be made until the expiration of thirty days. Only one duty accrued against only one successor, however many there might have been in the line of succession. If the successor who became entitled in possession died before the first day of October, 1870, and the thirty days had not elapsed and the assessment had not been made, the case would have been within the exception, because the duty would have accrued against him. The right to the duty would have become absolute; the rate of duty would have become fixed; and the person liable to pay it would have been determined.

The evident intention of this exception was to provide for levying and collecting such sums as should have been assessed before Oct. 1, 1870, and such duties as before that time had accrued against any particular person, where, as against him, the right had accrued and become absolute, although the assessment had not been made. The expression used in section 134, "but such duty shall be at the highest rate, which, if every successor had been subject to duty, would have been payable by any one of them," recognizes the fact that only that successor was subject to duty who entered into possession. The definition of a succession in section 127, making it embrace interests "in expectancy," does not aid in the construction of this excepting clause, as it could not for a moment be contended that a duty accrued against one having only a contingent interest. In sections 125 and 128 the duty is referred to as accruing at the time of the final ascertainment of the tax, and the interest in the succession as accruing when the successor is entitled to possession. As the act of 1870 provided that taxes upon real or personal estate which may by any disposition become subject to trusts for charitable purposes are repealed, and no such taxes, whether already levied or not, shall thereafter be collected, the plaintiff might have disposed of his interest before the termination of the life estate, by a conveyance in trust for charitable purposes, so that no tax would have been payable upon it. A duty could not have accrued as against him, when it was in his power so to dispose of the estate that no duty would ever be payable upon that succession.

The case of May v. Slack [supra] was a case where the testator died in February, 1870, having made by will certain pecuniary legacies, which were paid by his executors in April, 1871. It is plain that the duty had accrued on these legacies, because they were then absolutely due to the specific legatees. The legacy was debitum in praesenti, even if it was solvendum in futuro. The amount was fixed; the rate was determined; the person ascertained who was to receive the legacy; the person ascertained who was to pay the duty. No one of these elements exists in this case, and the case before the court cannot fall within the rule or the reasoning in the opinion in that case. If the duty in this case was rightly assessed, then it follows that it would be necessary to continue the whole machinery of the internal revenue system to assess and collect duties upon remainders, whenever, after the lapse of years, the life estate determines. It is clear, from the general policy of the statute, that the excepting clause was never designed to have that effect.

Judgment for plaintiff for six hundred dollars, with interest from May 31, 1873.

[This judgment was affirmed by the supreme court, in writ of error. 94 U. S. 589.]

Case No. 9,234.

MASON et al. v. CROSBY et al.

[1 Woodb. & M. 342.] [1]

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

FRAUD—SALE OF LAND—EXAMINATION—MATTERS WITHIN VENDOR'S KNOWLEDGE—PART OWNER—RATIFICATION—LIABILITY.

1. Where a bill claims relief on account of fraud in a sale, it may be sufficient or broad enough, in form, to justify a decree against the sale, if a gross mistake appears.

2. But a sale will not, on account of such a mistake alone, be rescinded, if a party had full opportunity to examine the land sold, and did examine it.

[Approved in Shaddle v. Disborough, 30 N. J. Eq. 381. Cited in Greene v. Harris, 10 R. I. 384.]

3. Such an examination, however, will not prevent a recovery for fraud, if falsehood was practised in respect to some of the examination, and the quality of timber and size of the streams on it to float timber, or any matter more within the vendor's knowledge; and the purchaser, relying in part on the false representations, made only a slight and general examination himself.

[Cited in Smith v. Babcock, Case No. 13,009; Clark v. Manufacturers' Ins. Co., Id. 2,829; Simpson v. Wiggin, Id. 12,887.]

4. If such falsehood is practised by one of two owners of the paper title, and one of six owners in interest under subordinate contracts, it vitiates the whole sale; and the same result follows, if it was practised by a third person, who had a bond for a deed from some of the owners in equity, and who made the contract of sale, and the terms of which the owners of the paper title, and the grantors in the sale, adopted and carried into effect.

[Cited in Foster v. Swasey, Case No. 4,984; Iowa Economic Heater Co. v. American Economic Heater Co., 32 Fed. 737.]

[Cited in Pratt v. Philbrook, 41 Me. 133; Grant v. Beard, 50 N. H. 133.]

5. The grantors thus ratify the whole sale, and cannot take the benefit of it, by receiving the price agreed on, without being liable at the same time civiliter on account of the false representations made in order to procure that price and the sale.

[Cited in Veazie v. Williams, 8 How. (49 U. S.) 157.]

6. If the sale be rescinded, the grantors being the only respondents, are liable severally to refund the money each has received and retained for his equitable share in the premises; but are not responsible after the lapse of several years for the money, which was immediately paid over to the other equitable shareholders. Nor are they now responsible for that part of the money, which was paid to the agent for his services, and never came into their hands, when the lapse of time has been such that he is dead and insolvent.

7. A delay in rescinding a contract, and in instituting proceedings for a recovery of the money, though not so long as to be a technical or equitable bar, by the statute of limitations, to any relief, yet may be so long as to change the positions of the parties and their remedies over on third persons, and thus excuse them in equity for the sums paid over to such third persons.

[Cited in Packard v. The Louisa, Case No. 10,652; Smith v. Babcock, Id. 13,009; Almy v. Wilbur, Id. 256.]

8. If a vendor or his agent make a false representation, which is material, it vitiates the sale, though it was not known at the time to him to be false.

9. The notes given to the respondents for the benefit of all interested and not yet paid by the plaintiffs, are to be refunded and cancelled so far as in their possession and control.

10. On doing this and making the payments aforesaid, equal in amount to their shares in equity, the plaintiffs must reconvey to the respondents respectively all interest in their shares of the premises, and another deed to them in trust for the other owners in equity, of all interest in so much of the residue of the land as the excess of the notes given up bears to the whole consideration.

11. Where one of the complainants had released all his interest in the land to the others, it was held to be no bar to a joinder of him in the bill to set aside the original trade and refund what had been paid.

[Cited in Veazie v. Williams, 8 How. (49 U. S.) 159.]

12. If the parties to the conveyance are made respondents, but not all those interested in equity in the land, it is no ground of objection to a recovery on the merits against the respondents for their shares.

This was a bill in equity, in behalf of Horatio Mason, David Daniels and Amos C. Leland, against James Crosby and Deodat Barstow. It was filed August 20th, 1841, and alleged, that on the 24th of August, 1835, the respondents were owners of about six thousand acres of land, called the "Munroe Gore," in the county of Washington and state of Maine. That about the 1st day of said August, they authorized Joseph Porter and William F. Boynton to give to one Nathaniel Fifield a bond or contract in writing, conditional to convey said gore, on certain terms therein mentioned; and this contract was given to enable Fifield to negotiate a sale for the benefit of Crosby and Barstow and others. It next averred, that Fifield, acting under said contract, and with the knowledge of Crosby and Barstow, and for their benefit, and for the purpose of selling the land at an exaggerated price, and to deceive the plaintiffs, did procure, by sinister means, Samuel Sawyer and Joseph Sawyer to execute certificates, dated April 20th, 1835, at Stephens, saying that the average quantity of pine timber then standing on said gore, would exceed six thousand feet per acre, and the spruce four thousand five hundred to five thousand feet per acre, and a large part of the timber was "handy to haul," or put in, and Samuel said he had "recently explored it," and that it was situated on the Schoodiac waters. It further averred, that these certificates were false, and so known to be to Fifield and the respondents, or might and ought to have been so known to the latter. The bill, after several other averments, either not material or not proved, alleged that Fifield further declared the timber could be cut and floated to market twice a year from said land, whereas in truth it cannot be done without great difficulty oftener than once in two years. The bill next charged that, influenced by

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

such false declarations and certificates, the complainants agreed with Fifield to purchase said gore at $8 per acre, and on the 24th of August, 1835, obtained a bond from the respondents to convey the same, (which was in terms at the price of $6 per acre) and gave a bond to them in return to pay for the same within eight days, one fourth in money, and the residue in three notes, one to be paid each year with interest, and all to be secured by a mortgage of the premises. That before the deed and notes were executed, and to induce the complainants to give the latter, Barstow, one of the respondents, averred, that there was more timber than the certificates stated, and that the land was worth $15 per acre, contrary to the truth, and they were thus persuaded, about the 1st of September, 1835, to complete said agreement, and pay the money and execute the notes, and take the deed of the land, as before mentioned. That this amounted in all to about $48,000, of which near $10,000 was then paid, and in the whole $22,000 has been paid in money, and the rest, viz., $26,000, or thereabouts, in notes to the respondents and others their agents and creditors. Fifield was averred to have received of this in money and notes about $12,000, or at the rate of about $2 per acre. The bill concluded with a prayer to have the money repaid, and the notes to be delivered up to be cancelled, and to pay all sums expended on the premises.

Among other averments in the bill was one, that Fifield was dead, so as not to be liable for prosecution; and in a supplemental bill, which the plaintiffs had leave to file and did file, October, 1845, it was further alleged, that Fifield, beside procuring and using false certificates by others, did himself make false representations as to the quantity of timber on said land, representing it to be twelve thousand feet of merchantable pine on one occasion, and eight thousand on another; that relying on Fifield's representations, they were induced to agree to look at the land, with a view of purchasing it, and started for that purpose, but by false statements of Fifield, were led to return without examining the premises, and to purchase the same on the terms before detailed; and in reliance on the falsehoods stated by him and by others through his procurement, they obtained the bond for the land, arranging with Fifield to pay $6 per acre to Crosby and Barstow, and the other $2 to Fifield, as his share or commissions in the purchase money for his agency; that Crosby and Barstow ratified all the doings of Fifield, and while the papers were preparing to complete the purchase, Barstow, in order to induce the plaintiffs to take the deed, averred that more timber would be found on the land than had been stated in the certificates, and that there was no doubt of the facilities in getting it off, and that the certificates could be relied on; whereas Barstow knew the falsehood of all this, and meant thereby to deceive the complainants. It was further averred, that Edward Munroe, in 1830, purchased this gore of land of the state of Maine for $1,500, or about twenty-five cents per acre; and then sold a permit to one Todd, to cut the timber therefrom, for the sum of $1,500; and it was cut accordingly before 1835, not leaving thereon over five hundred thousand feet of both pine and spruce; and that all this was known or ought to have been known to the respondents.

The answer of Crosby alleged, that he had given no authority to Boynton to employ Fifield, nor had himself employed Fifield to sell the Munroe Gore; that he had no knowledge and gave no assent to Fifield's statements or doings, nor to the obtainment or use of the certificates of the Sawyers. That in the spring of the year 1835 he purchased one sixth of this gore of Edward Munroe, who had the equitable title; but the deed was given by the commonwealth of Massachusetts, and run to him and Barstow for the whole. That he never owned any more of the land than one sixth, and paid therefor $2.25 per acre. That before the purchase it was agreed by the parties to the same that he, Crosby, should own one sixth, Barstow and Boynton two sixths, and Stephen Smith three sixths. That before the sale to the plaintiffs, Smith assigned his three sixths to J. D. Wilson, Samuel Thurston, Brazier Barstow and Joseph Porter, so that when the sale took place, Crosby owned one sixth, D. Barstow one sixth, Boynton one sixth, J. D. Wilson one eighth, Thurston & Barstow, as a firm, one eighth each, or equal to two eighths, and Joseph Porter one eighth. That the respondent Crosby took no part in the negotiation for the sale of the gore, being much engaged in other business, and saying merely that he would sell his interest to any person for $6 per acre. That about the 24th of August, 1835, he understood from D. Barstow, that the plaintiffs were ready to give said price per acre, having been on the land and explored it to their satisfaction, and that all those equitably interested therein were willing the land should be thus sold. That he and Barstow therefore executed a deed of the same to the plaintiffs for that price, receiving $6,275.40 in cash, and the rest of the $35,352 in notes, payable as before specified, secured, except two, by mortgage, of the date of the 1st of September, 1835, and which notes he and D. Barstow agreed in writing to account for with the other owners, when paid, in the ratio of their respective interests. That he knew nothing of any false representations by any one, and authorized none; that he received only the sum of money and notes before named, and has divided them as agreed, except that two notes are still unpaid. That on the 4th of June, 1836, he sold to D. Barstow all his remaining interest in the notes, being $3,332, for $2,741 from which he has since made a further deduction of $1,000, and took a conveyance of real estate of little value for the balance. That he has had no interest therein since. The answer further averred,

that prior to the purchase by the plaintiffs, he was informed and believes that they explored the land in dispute, and were satisfied with it; that after the purchase they again visited the same, and continued to think well of their purchase; and that they have since stated the respondents to be innocent of any fault in the sale thereof. It then asked that the other parties in interest should be made parties to this bill, and subjected to pay over all they received if the complainants prevail; and averred, that the mortgage back of the land has not been foreclosed; that the plaintiff Daniels conveyed all his interest in the land to the other plaintiffs March 6th, 1837, and the others afterwards, in 1838, compromised the controversy with D. Barstow, and that no fraud had at any time been practised by him in relation to this subject.

Crosby filed an answer also to the supplemental bill, which, besides denying the material allegations, similar to those in the original bill, averred that, though Boynton was partly interested in said land, he was not authorized by the other owners to give any bond to Fifield or others for the sale thereof, nor does he know that Boynton had or used the Sawyer certificates to aid in the sale, and professes ignorance of most that is not denied. He averred, that he traded with the plaintiffs himself in person, and under a belief that they had explored the land for themselves, and was not aware that Fifield had employed any misrepresentations to, or made any agreement with, the plaintiffs; nor did he ratify or intend to ratify any such; nor did he or D. Barstow make any allowance to Fifield of $2 per acre for selling the land. Nor have the plaintiffs offered to restore it, nor has he been guilty in any way of any fraud towards them.

The original answer of D. Barstow stated, that he and Crosby jointly, in April, 1835, bargained with Munroe for the Munroe Gore, and Munroe obtained a deed thereof to them from the state of Massachusetts the 2d of May, 1835, at $2.25 per acre. The other averments were similar to those in Crosby's answer, except that Thurston and Brazier Barstow each owned one eighth, and that the respondent gave a verbal refusal to Boynton of his interest in the land at $6 per acre, but made no contract whatever with Fifield, nor authorized any. Nor did he know of any connection of Fifield with the sale, till a few days previous he understood Fifield had gone with the plaintiffs to explore the same; and on the morning of the 24th of August, 1835, Fifield told him that the plaintiffs had been on the land and refused to buy on certificates. The respondent then supposed that Fifield claimed to act under a belief that he, Barstow, was willing to sell his interest in the land at $6 per acre, and that Fifield was entitled to any sum over $6, which should be obtained; and the respondent was informed that Boynton and Porter had given to Fifield such a premium to sell the land, and that it had expired some days before the 28th of August, 1835. That having stated his willingness to sell at this price, he was ready to do it, and that it was no higher than other lands were then selling for. That the plaintiffs applied to him that day to purchase the same at $6 per acre; said they had been on it, and the timber had not been represented too high, and, after consulting with the others in interest, he agreed to sell to them the same and did sell it, as described in Crosby's answer. He denies any knowledge of any false representations, or certificates, or making any such representations himself, but admits that he carried the deed from Crosby and himself to Boston, to deliver it, if the money was paid and the notes executed in conformity with the bond, though the business was not finished there, but afterwards at Bangor. That Mason, in October, 1835, subsequent to the purchase, went upon the land again, and expressed himself satisfied with the purchase, and, in April, 1836, paid the notes then falling due to Munroe; and the respondent, relying on the solvency and integrity of the plaintiffs, bought out, in March, 1836, Boynton's interest in the notes then unpaid, and the interest of Crosby; and that the plaintiffs signified to him no dissatisfaction with the purchase, till on the return of Mason from another examination of the land in October, 1836. That Mason then and since has proposed to have the respondents take back a part of the land; but did not pretend the respondents had wronged him, or that he bought except on his own knowledge, as the respondents had no personal acquaintance with the land and timber till the summer of 1837. That Barstow then examined the same, and found some good pine, an "immense quantity of spruce, a good deal of cedar," and "a large quantity of good farming land," and sold to Edward Holyoke, in March, 1838, one half the notes and mortgages at the rate of $3 per acre, and with reference solely to the value of the land and timber. That in July and August, 1838, Mason and Leland proposed to abandon the land to him, if all the notes were obtained and surrendered, but it was not done, as other notes existed than those over which he had control. That afterwards the other notes were obtained, and all placed in his hands to be thus surrendered, and he notified the plaintiffs to make out the release and receive them. But they neglected to do the same, and filed the present bill, without any further negotiations in respect to the subject. That he considered the whole matter to be thus compromised, but if it is not, prays that the other persons interested in the land be made parties.

Barstow filed also an answer to the supplemental bill, which repeats the material denials in his former answer, except admitting that Boynton may have given a bond to Fifield for the land at $6 per acre, but denies any agency conferred on Fifield to sell for the owners. It further denies, that Boynton had the certificates of the Sawyers, to use for the defendants, or that the defendants

authorized the use of them, or knew that Fifield had made misrepresentations, or knew that the timber had been cut from the gore by Todd, or that it was so cut to such an extent, as averred in the supplemental bill; though the respondent does not know, and never pretended to know, the exact quantity of timber on said land. That he knows nothing of Fifield's statements to the plaintiffs, and did nothing to secure $2 per acre to Fifield as agent, over and above the $6 per acre to be paid the owners; and that the bargain was made by him with the plaintiffs at Bangor, and that Fifield was not present, except once coming in on other business, and that he knows nothing of the terms agreed on by Fifield. That he and Crosby knew nothing personally of the land, but believed it to be heavily timbered, and nothing of its being cut off by Todd under a permit from Munroe, or of Fifield's representations about it. That Fifield did introduce the plaintiffs to the owners, as persons who wished to purchase, but left them to conclude a bargain; and, though once present, he took no part in the negotiation, and they knew nothing of his being entitled to the excess over $6, or had made any sale for them, and which they were adopting. That Fifield agreed to pay his expenses to Boston, and that he would see that the purchasers should pay him, when he, Barstow, went to deliver the deed, else the owners would not realize $6 per acre, and that Fifield did pay him. That he said nothing to the respondents or Bullard with a view to deceive, or which he did not then believe to be true, or to induce them to go on and complete the bargain. This respondent denied all fraud in the sale, or any mutual mistakes in regard to the timber, or any attempt to harass the plaintiffs with suits, but supposed all to have been adjusted. He corrects one mistake in his former answer, as to the first time when he heard that Boynton and Porter had given a bond to Fifield, and says it was a few days before the contract of sale with plaintiffs, August, 1835, and not after.

The evidence in the case was voluminous, and so much of it as is material to the facts found by the court, and legally proved and bearing on the questions of law settled, will be referred to in the opinion.

Mr. Bishop and Fessenden & Deblois, for plaintiffs.

W. P. Fessenden and Mr. Kent, for respondents.

WOODBURY, Circuit Justice. It is a matter of regret, that the bills in this case, both the original and supplemental, are not drawn with more precision. Several important matters are alleged only indirectly, and it is unusual that so many others, introduced with directness enough, are not even attempted to be proved. In the answers, also, some things are alleged, which are not responsive to the bill, and much difficulty is caused in settling first what is duly set out in both, and next what is properly proved of that which is duly set out. But from the whole it is undoubted, that the plaintiffs intend to claim relief on account of a fraud in the sale of the land in controversy, and not on account of a gross mistake. Whether, when fraud alone is averred and a mistake alone is proved, a recovery can be had on the latter ground—the allegations of fraud being considered broad enough to include a mistake—need not be here considered. See on this, Smith v. Babcock [Case No. 13,009], Oct. Term, 1846, Mass. Dist. Because, if there is not proved some falsehood or fraud, material in this transaction, it is doubtful whether the plaintiffs could recover for a mistake alone when they had so ample an opportunity to examine the land before the purchase, and undertook to make the examination, and expressed themselves satisfied with the result. On this, the case of Warner v. Daniels [Id. 17,181] may be regarded as decisive; and may be referred to for the precedents in support of that view. It was settled there, that though means of knowledge and explanation will usually defeat a rescinding of a contract for mere mistakes, yet it will not prevent a recovery for fraud, if that was practised in important particulars, relied on by the purchasers.

If the falsehood rendered the examination less perfect and full, or made the statements of the party to be in part confided in, as in respect to details, extending personal inquiry only to general matters and general appearances, the falsehood vitiates the whole. See cases cited in Smith v. Babcock [supra], and Tuthil v. Babcock [Case No. 14,275], (Mass.) Oct. Term, 1846. Thus if a vendor affirm the rent to be more than it is, it is a fraud for which he is liable; as that lies more within his private knowledge, even if the vendee made some further inquiries. Risney v. Selby, 1 Salk. 211; Pasley v. Freeman, 3 Durn. & E. [3 Term. R.] 51; 2 Esp. 572. Otherwise, if it was not so, and the truth could easily be ascertained. Harvey v. Young, Yel. 21; Leakins v. Clissel, 1 Sid. 146.

The next question then is, whether falsehood or fraud were practised in leading the plaintiffs to purchase the land of the respondents at the high price given. If they were, the sale was void, provided they were practised by either of the respondents, or by any person whom they previously employed as an agent to make the sale, or whose acts in negotiating the sale they ratified or adopted afterwards. They would be thus liable, if the plaintiffs relied mainly on the statements thus falsely made to them, though some examination of the premises and timber may have been attempted by them, but carried on slightly, or imperfectly, or erroneously in consequence of such reliance on what was false. See Warner v. Daniels [supra]; Harding v. Randall, 15 Me. 332; 2 Hayw. 240; Lit. Sel.

Cas. 218; 14 Ves. 7, 289; 3 Cow. 537; 2 Ves. Jr. 628.

Nor is it material in this case, whether or not either of the respondents or their agent knew to be false what was stated by any of them, provided he did state what was not true, and it was to a material point and was relied on. A vendor, in cases like this, is not in his own person or by another to throw firebrands, and say he is in sport, or make material statements which are untrue, and excuse himself by his own ignorance.

In relation to the evidence of fraud here, it is not of that plenary character which is found in some of the cases that occurred in the speculating era of 1835. Nor is it brought home so clearly to one of the defendants, Crosby. So far as affecting him, it is rather as a fraud in law and an avoidance of the contract in respect to him in consequence of fraud, committed by others, with whom he was associated in interest, and whose acts in making the sale he adopted, and hence is bound by their misconduct in respect to the sale, rather than from any personal behavior of his own, which is proved to be either dishonest or dishonorable.

What, then, in the first place, are the leading facts proved, from which to infer fraud? The great general fact, which is shown by full testimony, is, that the Munroe Gore, in April, 1835, cost the respondents only $2.25 per acre; and that this was two dollars per acre more than it cost Munroe only five years previous, with timber on it then, which had since been sold by him for a sum equal to all the original cost. The next fact of this character so proved is, that in only four months after their purchase, without making any improvements, the complainants were by some means induced to give $8 per acre for this same land, a price nearly fourfold what it had cost; and the respondents received of it themselves, in money and notes, $6 per acre, being a net gain in those few months of near three hundred per cent. Another of these facts so proved is, that from 1830 to 1835 this tract of land had been cut over by permission of the true owner, and all the timber which the licensee deemed worth cutting removed; and that when this sale was made, which was effected chiefly on account of timber on the land, nothing in fact remained there, except from a half to one and a half thousand feet to the acre. It will at once strike every observer of these general data, that there must have been some extraordinary mistake existing, or some extraordinary deception practised, in order to enable the respondents to sell land thus stripped of timber, to purchasers on account of the timber, and at such an extraordinary advance, within so short a period, on even the high price which the respondents had given. The times, then, were, to be sure, unusual, and almost insane. But, had the whole truth been known to the respondents, madness must have "ruled the hour," or they could not have given $8 per acre for land on account of timber, when only a half to one and a half thousand feet of pine existed to the acre, and that, as will soon be seen, could not then easily be got to market, nor much value be then attached to any spruce or cedar timber thus situated.

The next inquiry would naturally be, who could have any interest in misleading the plaintiffs to give so excessive a price, except the owners, who were to receive, or some agent or trustee in connection with them, who was to receive a portion of the consideration for his services in effecting such a sale? Accordingly, the position taken by the plaintiffs is, that the contract of sale, the price, and all the preliminary negotiations for the sale were made with Nathaniel Fifield, who had a bond for the land from some of the parties in interest. The form of this bond is not very distinctly proved, though its existence is by the evidence and circumstances satisfactorily shown. It is highly probable that the bond on its face either allowed Fifield to have the land on paying $6 per acre, if taken before a specified time, and which in that form was considered on this subject, in 1835, as constituting him an agent to sell at that price, and assumed this form in order that his statements as an apparent owner should have more weight than if he was an apparent agent merely. Or the bond on its face authorized him to sell for the owners at that price, he retaining for his services all he sold it for beyond that price. It is of little consequence which was the form, if it was in either. The evidence in support of its existence and tenor is not so distinct as it might be expected, if Fifield had not been dead, and hence he could not state the facts as a witness, or if made a party, disclose them in his answer to proper interrogatories in the bill. But I see no reason, except perhaps the subordinate interest of Boynton and Porter, who are supposed to have given the bond, why their testimony should not have been taken by the plaintiffs to prove the particulars, or at least been offered by the respondents, to rebut what is set up on that subject, if it could be rebutted. As the evidence now is, however, in respect to the existence and terms of the bond, one of the respondents, Barstow, admits in his answer, that before the sale he heard that two of the owners in interest, viz., Boynton and Porter, had given a bond to Fifield to enable him to sell. He admitted it also to Ware, and again in a letter, April 5th, 1837, he states, "We then told two of our company they had better put the land into the market at $6 per acre." He further states in that letter that a bond was given to Fifield by Boynton and Porter, that Fifield sold the land to the plaintiffs, and then introduced them to him, and a deed was given to them. And Jones understood from Barstow that Fifield said, in behalf of all the owners to Bullard, "that the land had been bonded to

Fifield, to enable him to sell it for Crosby and Barstow."

This evidence looks much like the giving of the bond to Fifield of the character named, and by arrangement of all, and like a subsequent execution of his contract, with full knowledge that Fifield had made it for them. The statements of one of a company so situated bind all. Van Reimsdyk v. Kane [Case No. 16,872]; 18 Wend. 354; 2 Hill, Ch. 109. In their answers, likewise, both of the respondents concede, that they had stated verbally, "any person should have a deed of the land who would give" therefor $6 per acre. Barstow, in his answer, says, he gave Boynton verbally the refusal of all his interest at that price, and supposes Fifield acted under a belief they would sell at that rate, and Fifield receive all he got over $6 per acre. It is to be remembered, in connection with this, that Boynton is the son-in-law of D. Barstow, and that the latter admits further in his answer, that the plaintiffs were introduced to him before the sale was completed by Fifield, as being the persons who wished to purchase the land; that Fifield informed him they had been to Bangor to examine the land, and that he understood from some quarter Fifield was to have any sum he could get per acre beyond the $6 paid over to the respondents. He admits, also, that Fifield paid him for going to Boston, and he said to Bullard, that he came there to close the delivery of the deed and the giving of the notes and payment of the money, or in other words, "for the purpose of completing the bargain for the purchase, as it had been agreed upon by the said Fifield." And it is stated in several of Barstow's own letters, offered in evidence, that the plaintiffs bought the land of Fifield and not of the respondents; and it was on that ground, chiefly, for some time Barstow hesitated to make any compromise with the plaintiffs. So he stated also to Ware. The testimony is explicit from several witnesses, that Fifield in fact made the negotiations for the sale, arranged the terms, fixed the price, and probably received the two dollars per acre over the six, which the plaintiffs agreed to give.

After all this, it is hardly permissible to deny that he acted prominently in the transaction; that his acts, so far as regards the sale at $6 per acre, were adopted or carried into effect by the respondents; that being thus perfected by them and not him, he never having obtained the title himself, nor conveyed it to the plaintiffs, all he did must be regarded in the light of an agent, and not of a principal; that his conduct for the owners was not only thus ratified, but had the previous express assent of two of those interested in the premises, and the subsequent knowledge of his participation, having the refusal and a bond, without disapprobation, by Barstow, one of the respondents and the acting owner, and the general assent of the other, Crosby, to a sale to any body who would give $6 per acre. He left the details of the business to be arranged by the others interested, on account of the pressure of his own individual concerns.

Under these circumstances, it has been settled in the case of Doggett v. Emerson [Case No. 3,960], that the owners cannot take the benefit of acts or negotiations like those of Fifield, without bearing the burthen of them, or any liabilities growing out of them, on account of any falsehoods or frauds of his that accompanied them and were material to the sale. 12 Mod. 490; 1 Bos. & P. 406; Story, Ag. 455; 1 Durn. & E. [1 Term R.] 710; 10 Mass. 327; 1 Bailey, Eq. 343. It has also been settled, in the first named case, that this agency, independent of the circumstances which exist here and did not there of an agency created, or known or recognized by some of the owners themselves as by Barstow, one of these respondents, holding with the other all the legal title, is to be inferred in law, with all its consequences and adjuncts, civiliter, if the owners choose to carry into effect the contract made by and under it. It is a subsequent ratification of it. Clark v. Van Reimsdyk, 9 Cranch [13 U. S.] 153; [Bank of Columbia v. Patterson] 7 Cranch [11 U. S.] 299; Long v. Colburn, 11 Mass. 98; Cushman v. Loker, 2 Mass. 106; Ward v. Evans, 2 Salk. 442; 1 Metc. (Ky.) 650; 1 Dess. 461, 470. See, also, Daniel v. Mitchell [Case No. 3,562]; 15 Wend. 114; 4 Durn. & E. [4 Term R.] 39, 41, 177; Lanborn v. Stetson [Case No. 12,291]; 3 Hill, 552. So it is settled there, that the owners need not have known the falsity or fraud in order to be charged with its civil consequences, if they undertake to receive the benefit of the contract made under it.

This is not a new doctrine, as some seem to suppose. In Doe v. Martin, 4 Durn. & E. [4 Term R.] 66, Lord Kenyon observes: "But it is said, that the transaction, as far as Martin was concerned, was fair and honorable, and that the fraud only consists in the misapplication of the purchase money; but, without imputing any fraud to Martin, and, indeed, it is negatived by the verdict, the maxim, that the principal is civilly responsible for the acts of his agent, universally prevails both in courts of law and equity."

But in addition to that principle for charging the respondents here, it is proved by two witnesses, that one of them, Barstow, and the one who seems to have been the active person in transacting the business, made, before the sale was completed, like representations with Fifield himself as to the certificates about the timber and the quantity of it, and that another equitable owner, Boynton, probably furnished those very certificates, which are charged in the bill to have been so untrue and deceitful. Besides this, three, if not more of the owners, were conusant to Fifield's acting as agent for the whole, and did not forbid him to go on, but rather acquiesced in the bargain he had made, and thus gave

him credit and standing. See on this, Pickard v. Sears, 6 Adol. & E. 469. More in illustration need not be now detailed after the numerous decisions in this court on questions resembling these. No progress can ever be made in disposing of cases of this character, unless we regard the decisions already made in this circuit on similar questions, as binding till reversed by the supreme court, or overturned by this court itself on a clear conviction of their error. Neither of these having yet happened as to what has been adjudged in Doggett v. Emerson [supra]; Warner v. Daniels [Case No. 17,181]; and several others, they are to be regarded as landmarks for the future, and it is considered not necessary on this occasion further to explain or to go behind them.

Next, in what did the falsity consist? In what particulars is the evidence as to falsity or fraud in material parts of this transaction, committed either by Fifield or any of the owners personally? It is sworn to, by two or three witnesses, that Fifield represented the certificates to be true and trustworthy, which stated the pine timber to be six thousand feet per acre, when in fact it did not exceed from a half to one and a half thousand, and that, "small, scattered and rotten."

One of the certifiers further stated, that he had "recently" explored the land to ascertain the quantity, when in fact he had not been on it for several years, and then all which possessed any value was in progress of being cut off, and when in fact the other certifier had not examined at all over half the land. Both the certificates, also, instead of being trustworthy in other respects, had been procured by Darling under a promise from Smith, who held a bond of the land at $1 per acre, that he should have one quarter part of the interest in the bond if he would assist him in selling it. Darling is also one of the certifiers to Sawyer's character, as if disinterested, when in fact he was secretly interested in the sale of the land to the extent of one fourth, and is proved to have been afterwards paid one fourth of all the increased price thus obtained. It further appears that these certificates were sent by Darling to Smith, in April, 1835, and that he, Smith, sent them to Boynton, one of the owners at the time of this sale, and the son-in-law to Barstow. The latter admits he saw them in Boynton's possession, who being part owner by sub-contract, and the one who gave the bond to Fifield, doubtless delivered these certificates to him with the bond. They had been so effective as to help Smith sell the gore at $2.25 per acre, for which he gave only $1, and enabled Boynton, and his associates to sell for $8 in gross or $6 net, what had cost them only about one third of the last sum. It was furthermore shown, that Fifield himself had represented to different witnesses the pine timber to be eight, ten, and twelve thousand feet per acre, being willing to guarantee ten, and the facilities for getting the timber off as good, and so good that it could be run twice a year to market, which would greatly increase its value, and especially impart all the value which the spruce possessed. When in fact it is now proved to have required usually two years then to get the timber to market, and so continued, till some improvements were since made in the stream at a considerable expense. It was next shown specially, that Barstow, one of the respondents, in person confirmed most of these statements, and urged the truth of these certificates on the plaintiffs, as a reason for completing the sale. He told Jones, that the quantity of timber was double what the certificates stated according to his belief; and the stream of water good to run the timber to market twice a year. Bullard testifies to similar statements of Barstow.

What is the result of all this? It is summed up truthfully by Barstow, in October, 1836, in his letter to Mason, in these words: "We all now believe that you have been basely imposed upon in the purchase of the Munroe Gore."

But other objections have been urged to a recovery here; because other persons interested in the land beside the respondents have not been made parties. It is to be remembered, however, that the respondents alone bought the land of Munroe, and that the title was vested in them alone by the deed, and by them alone conveyed to the plaintiffs. Under these circumstances the bill can well be sustained against them alone. West v. Randall [Case No. 17,424]; Wormly v. Wormly, 8 Wheat. [21 U. S.] 421, 451, and note. But how much, under the circumstances here, must be paid back by them on a rescinding of the sale, in consequence of such sub-contracts, is a difficult question, and will be soon considered. See Doggett v. Emerson, May Term, 1846, on the master's report [Case No. 3,962].

In actions on contracts, which form the nearest analogy to the present proceedings, an omission of a person, who ought to be a co-defendant, cannot be taken advantage of except by plea in abatement. Powers v. Spear, 3 N. H. 35; 1 Chit. Pl. 29; 1 Saund. 291b, note 4, and 154, note; Nealley v. Moulton, 12 N. H. 485. Dormant partners, also, are not necessarily parties in a suit, and are not allowed to become so to defeat the action. De Mautort v. Saunders, 1 Barn. & Adol. 398. Nonjoinder of a defendant, can be objected to only in abatement. 5 Coke 119; 1 Saund. 154. Here the plaintiffs might perhaps have made all parties, who got the money and had any kind of interest at the time of the sale in its proceeds, and, on some accounts, that course would have been preferable. But it is very evident, that they were not obliged to prosecute any but those who conveyed to them, who alone contracted with them, and who possessed the legal title to the premises, leaving all subordinate interests and equities to be settled among those who were the parties to

them, or to effect only the amount to be refunded by the respondents, and not their liability.

Another objection is, that one of the plaintiffs has conveyed all his interest in the premises to the other complainants. But it does not follow from this, that he is not entitled to join in bringing the suit for the benefit of his grantees, the original cause of action or complaint having arisen to him, and the remedy being properly in his name. Nor does his conveyance to them prevent them from releasing, or reconveying to the defendants all the title which came from them, it being still all in two of the plaintiffs, if not in the three equally. Such objections going to form rather than substance, should be taken earlier than pleas to the merits, and especially are they untenable if the decree can be so made as to prevent any injustice if there be a misjoinder. 4 Younge & C. Exch. 557; 1 Beav. 277. Again, if one applies for an injunction and relief against a judgment for land, to which he had after the judgment released his interest, it has been held to be no bar, as it is a naked equity, and nothing passed by the release, as he then had no interest and could have none till created by a decree of a court of equity. Dunlap v. Stetson [Case No. 4,164].

The length of time from this transaction, in August, 1835, to the filing of the bill, in August, 1841, is likewise urged against any recovery here. It would operate against the present proceeding, if not bar it, under some circumstances, unless satisfactorily explained, though six years had not quite elapsed before these proceedings were instituted. Because, when a party has taken possession of property purchased, and discovers fraud in the sale, which he thinks vitiates it, he ought, as a general rule, to return, or offer to return, the property speedily, so as not to change in any material respect its condition or the rights of the other party before rescinding, and so as not to deprive him of remedies over, which would have been good if he had been called on earlier. Here, however, the fraud does not appear to have been discovered before the autumn of 1836, and from that time till 1839, there is evidence of negotiations and mutual propositions to compromise the dispute, and an impression that it was or would be compromised till the bill was filed in 1841. Indeed, an actual compromise is set up in the answers of Barstow, as having taken place, and been confided in by him, till these proceedings were instituted. And though no evidence has been offered proving it in such manner as to be binding in law or equity, yet it is admitted by the respondents, and accounts in some degree for the lapse of time without suit after the fraud was discovered.

Another reason, probably, why the plaintiffs need not be so active in reconveying or bringing a bill in this case is, their impression that the respondents had foreclosed their mortgage and taken possession of the premises; and though the foreclosure is denied, it is admitted by Barstow that he had entered on the premises, and sold half of them to Holyoke, or half of the mortgage and notes as early as 1838. See on this, Warner v. Daniels, before cited, and 20 Johns. 585; 2 Schoales & L. 635.

There is one view, however, in which this length of time, though not barring the liability of the respondents, may have an equitable influence on the amount they are to refund, and I will consider this when giving directions concerning that amount. There are, also, several minor questions which have been started in argument, as to the competency of some of the witnesses, and the irresponsive character of some of the answers, which on this view of the evidence it is not necessary to discuss or settle.

On the question, then, of the liability of the respondents, my opinion is, that the sale of the land in question was void on account of the false and fraudulent representations which accompanied it, as they were very material in their character, reaching nearly the whole value of the premises, and were much relied on, notwithstanding the imperfect exploration for only one day or less, which was attempted by the plaintiffs. It must be set aside, therefore, and the consideration paid for it be refunded so far as hereafter pointed out, and the land reconveyed to the respondents. All this can be inquired into and reported on as to particulars, by a master in chancery. But in order to prevent difficulty and delay before him, and after his report is made, it is proper to consider two questions more at this time, in respect to the amount to be refunded.

One is, the influence which the length of time, under all the circumstances of this case, ought to have on the amount which these defendants should in equity refund. It has already been stated, that it is not such as to bar this liability, and I see no reason, therefore, why it should prevent the recovery of the whole amount of money which was received by themselves of the plaintiffs, either at the time of the sale or since, and retained for their own use. But as the money received by them then in equity belonged to others, who by sub-contracts were entitled to portions of it, and those portions were paid over before this bill was instituted, and the plaintiffs knew of the existence of such sub-contracts, and yet did not make the parties to them parties to the bill, nor prosecute the respondents at an early day, so as to enable them, if liable, to have a useful or seasonable remedy over on those sub-contractors, I am inclined to think this injurious neglect in the plaintiffs should prevent them from enforcing a repayment from the respondents beyond the amount of money which they have retained for their own shares. Called upon by this bill to exercise extraordinary powers on the ground alone that it is equitable, we ought to exercise them no further than is clearly equitable; and the parties beyond that, if left as they stand

at law, have no reason to complain. In respect to the notes, received by the respondents from the plaintiffs, and still retained in their possession, or which were under their control when the bill was filed, I think they should be required to surrender all of them, as the lapse of time has not interposed so as to change the character or position of the respondents concerning them. These notes run to them, and were to be kept and collected by them in trust for all the shareholders.

The next question connected with the amount proper to be refunded, grows out of the sum and notes received separately by Fifield, the agent, and which did not pass originally into or through the hands of the respondents. If Fifield was a party to the bill, the proper rule would be usually not looking to the exception here on account of the length of time operating as to sub-contracts, to charge him and the other respondents with such portions as they respectively received of the money and notes, and to require a reconveyance of the premises by the plaintiffs, on being repaid such sums as they had advanced, and on having their notes, which had not yet been paid, returned. There is no agent here, through whose hands all the money and the notes passed, so as to make him responsible in the first instance for all, and to be aided afterwards by the others, who are parties to the bill according to the portion each received, as in Daniel v. Mitchell [Case No. 3,562], and Doggett v. Emerson, before cited. But Fifield not being a party, Crosby and Barstow can alone be charged, and the amount they can be required to pay in respect to him, is a question of some difficulty. Fifield is not a party as Emerson was in Doggett and Emerson, and as Todd was in Daniel and Mitchell. Nor did the money and notes, received by Fifield, pass through the hands of the respondents, or the latter run to the respondents, as they did in the former case, if not in the latter, and which seemed to be considered an essential ingredient to charge them when one of the agents, such as Williams, in Doggett and Emerson, was not a respondent in the bill.. Besides this, there is no admission in either answer, that money or notes were actually given to Fifield, though it is manifest from them and the evidence, and especially the letters in the case, that Fifield acted as an agent in the transaction, and indorsed some of the notes, and the bill states the amount given to him. The answers deny any knowledge that Fifield received $2 per acre, or any other sum, for his services, except by hearsay, or that the respondents in truth agreed to pay or allow any sum whatever for his agency aforesaid. The length of time, then, during which the plaintiffs neglected to prosecute their claims, is a decisive bar to making it equitable for them to account for Fifield's money or notes, by construction, when they never had either, nor can control either. The money and notes to Fifield might have been obtained back, had the respondents been called on and charged for them early. They went into the possession of Fifield at once, and from the plaintiffs, not the respondents; and hence with the knowledge of the plaintiffs, that they were in his possession. The respondents laid by and did not sue till, according to the evidence, Fifield had become insolvent and died, and after that, to charge them for his receipts, when the remedy over would be worthless, and has become so probably by the neglect of the plaintiffs, would be any thing but equitable. The most obvious remedy for them at all would have been against Fifield rather than the defendants. I must hesitate, then, under these peculiar circumstances, to charge the defendants with any money averred to have been paid to Fifield, as their agent, in part consideration for the land, or on account of any notes so given to him.

Some question arises, whether the sum to be refunded by the respondents is to be done jointly or severally. The deeds to and from them seem to have been joint, as were the notes to them. But they were acting for themselves and others, owning, in fact, separate shares; and as their shares are recognised in these proceedings as severed from the rest, in the amount to be refunded, it may be proper that a severance should be made between themselves in the decree. But this point has not been discussed, and before drawing up a decree we will hear the counsel on it for both parties. It will now be entered for the plaintiffs, on the principles here laid down, and the case submitted to a master, to make the computations necessary and the inquiries indicated. There are also some questions of costs for amendments and filing supplemental bills, which the counsel will please to present early, so as to have them settled by the time the case is ready for final judgment on the report.

[NOTE. District Judge Ware delivered an opinion to the same effect in this case. Case No. 9,235.

[Subsequently the master filed his report, to which exceptions were taken. The exceptions were heard and overruled in Case No. 9,236.]

Case No. 9,235.

MASON et al. v. CROSBY et al.

[2 Ware (Dav. 303) 306.] [1]

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

PRINCIPAL AND AGENT — PRE-EMPTION OF LAND TO MAKE SALE—EQUITY—STALE CLAIM—PECUNIARY EMBARRASSMENTS.

1. A contract, by which a right of pre-emption is given to a party for a certain time at a fixed price, on a bona fide expectation that he may become a purchaser, will not constitute him an agent of the vendor, although he sells his interest in the contract at an advanced price before the expiration of the term.

2. But if the right of pre-emption is given not with an expectation that the party will become

[1] [Reported by Edward H. Daveis, Esq.]

a purchaser, but solely for the purpose of enabling him to make sale of the thing, and to get his compensation in the advanced price, this will render him the agent of the owner, and the consequences of agency will follow so as to render the owner responsible for his acts.

3. Generally, poverty is no excuse to a suitor, for delay in commencing a suit. But, when the statute of limitations does not create a bar to the legal remedy, the pecuniary embarrassments of a plaintiff will so far excuse delay, not beyond the period of legal limitation, as to relieve his claim from the imputation of staleness; especially when his embarrassments have been occasioned by the acts of the defendant.

This was a bill in equity, brought to rescind a contract for the sale of 6,000 acres of timber land lying in the county of Washington, on the waters of the Schoodiac, on the ground of fraud or mutual mistake. The land was originally purchased of the commonwealth of Massachusetts, by Munroe, who took of the commonwealth a bond for a deed. He assigned his bond to one Stephen Smith. Smith reassigned the bond and the equitable title to the land to the defendants, at the price of two dollars and a quarter an acre, and they, having paid the balance due to the commonwealth, took a deed to themselves. The legal title was conveyed to the defendants, Crosby and D. Brastow, but five other persons, viz.: Boynton, Wilson, Thurston, B. Brastow, and Porter were interested in the purchase, in different proportions, to the amount of two-thirds of the whole, so that these defendants owned but one-sixth each of the land, and held the other two-thirds in trust for the other purchasers. All the parties being desirous of selling, it was agreed between them to offer the land for sale at the rate of six dollars an acre, or $48,000 for the whole. Thereupon a bond was given by Boynton and Porter, two of the equitable owners, to Nathaniel Fifield, giving him a right of pre-emption of the land at that price, for a limited time. With this bond Fifield went to Massachusetts and agreed to sell the land to the plaintiffs for eight dollars an acre, the difference of two dollars being his own profit. When Smith transferred the bond of the commonwealth of Massachusetts to the defendants he delivered to Boynton two certificates, one of Samuel Sawyer and one of Joseph Sawyer, one of them stating that he had recently explored, and the other that he had worked on the land in getting off timber in 1832, and both certifying that there was then standing on the land 6,000 feet of pine timber to the acre on an average, and from 4,500 to 5,000 feet of spruce; and also, another certificate, signed by five persons of St. Stephens, certifying to the good character of the Sawyers. It was principally on the reliance placed by the plaintiffs upon these certificates, with the strong assurances of Fifield and some of the owners of the land, that they might be entirely depended on, that the purchase was made. Mason, it is true, went from Boston for the purpose of going upon the land and exploring it himself, but by the artifices of Fifield he was prevented from going to it, or, if he actually went on any part of the land, from exploring it. Before the sale of the land by Smith to the defendants, he agreed with one Samuel Darling, Jr., to give him one quarter of the profit he would make on the sale in consideration of Darling's assisting him in making the sale. For this purpose, Darling procured these certificates of the Sawyers, writing them himself, and they signing them. And he was one of the five persons who afterwards signed a certificate that the Sawyers were honest men, and that perfect reliance might be placed on their certificate. These certificates were proved to be grossly false, there not being one-tenth of the amount of timber on the land that was stated in them. Nearly the whole had been taken off in the years 1831–2 and 3. There was no evidence that Boynton and the other purchasers knew the manner in which the certificates had been obtained, or that they were false. Other representations were made, with regard to the expense and facilities of getting the lumber to a market, which were proved to be untrue. The plaintiffs charged in the bill that Fifield acted as the agent of the owners. The defendants denied, in their answers, the agency of Fifield and all knowledge of fraud or falsehood in the certificates; and stated that they had no personal knowledge of the land, and had purchased it on the credit of written reports exhibited to them. Part of the purchase-money was paid when the the deeds were executed, and notes were given for the residue with a mortgage of the land. The defendants have since entered on the land for the non-payment of the notes, and foreclosed the mortgage, and thus regained a complete title to the land. The bill prayed that the defendants may be required to repay the money they have received, and deliver up the outstanding notes, and be perpetually enjoined from suing them at law. These are briefly the material facts.

Mr. Bishop and S. Fessenden, for plaintiffs.

W. P. Fessenden and Mr. Kent, for defendants.

WARE, District Judge. The first question, that arises in this case, is whether there was such a fraud in the making of this contract, as will furnish a just ground, on the principles upon which courts of equity are accustomed to deal with such cases, for rescinding the contract, and replacing the parties, as nearly as may be, in the same situation as they would have been if the contract had not been made. Upon this question, it appears to me that there is no reasonable ground for hesitation. It is clear that the plaintiffs, in making the purchase, relied mainly on the certificates of the two Sawyers, supported by the strong representations of Fifield and some of the owners, that full confidence might be placed in them. The plaintiffs did indeed at first decline to consummate the bargain without examining and

exploring the land themselves, and Mason went for the purpose of making the examination, in company with Fifield, and Fifield set out with him for that purpose. But before arriving at the land, Fifield was, or pretended to be taken sick, and after remaining near the land for two or three days, he informed Mason that his bond would expire in a short time, and that he should lose the opportunity of selling and they of buying, unless he immediately returned to Bangor; and they accordingly returned, without any examination of the land, and completed the bargain. So that the plaintiffs purchased entirely upon their reliance upon the representations made to them by Fifield, corroborated by that of some of the owners, that entire confidence might be placed on the certificates of the Sawyers, who were men of good character. Now it is proved to a demonstration, that these certificates were grossly false. In the years 1831–2 and 3, one William Todd had a general license from Munroe, who was then the owner, to cut timber from the land, paying for his license the gross sum of $1,500 for the three years. During those years, nearly the whole of the valuable lumber was taken off. So that when the plaintiff purchased, according to the testimony in the case, instead of there being 6,000 feet of pine lumber to the acre, there was not more than half a thousand, or about one-twelfth of the amount which the certificate stated.

The manner in which these certificates were obtained throws some light on their character. In the spring of 1835, Smith engaged one Samuel Darling, Jr., to aid him in disposing of the land, and promised him, for his services, one quarter of the profit he should make in the sale. Thereupon Darling obtained these certificates of the Sawyers, writing the certificates himself, and signing another paper to go with them, certifying to the good character of the men. It is immaterial whether Darling and the Sawyers did or did not know they were false. They would be equally fraudulent in one case as in the other. That the object in obtaining them, was to delude and defraud purchasers, cannot be doubted. These certificates were delivered by Smith to Boynton, one of the purchasers, and by them put into the hands of Fifield.

There is no evidence that the present defendants, or those interested with them in the purchase, had any knowledge of the manner in which these certificates were obtained, or that they were so grossly inflamed and false. But it is fully proved that they received them, that they were put into the hands of Fifield, and that he made use of them to induce the plaintiffs to purchase; that Fifield and some of the parties in interest gave the strongest assurances that they might be depended upon. Fifield said that there was a larger amount of lumber on the land than the certificate stated, and that he would guarantee 10,000 feet to the acre. It is said by Lord Eldon to be an old rule of equity, that, if a representation is made to a man going to deal on the faith of it, in a matter of interest, he that makes the representation shall guarantee its truth. Evans v. Bicknell, 6 Ves. 183. And it makes no difference, in law or morals, whether he knew or did not know it to be false. Ainslie v. Medlycott, 9 Ves. 21; 1 Story, Eq. Jur. § 193. It is equally a fraud to aver a fact to exist, the reality of which the party is ignorant of, as it is if it is known to be false. There is no doubt that the representation was made that the certificates were entitled to full confidence, and that there was even more timber than they stated. Nor is there any more doubt that Fifield knew that the plaintiffs relied mainly, if not wholly, on these representations, in making the bargain. Whether he knew them to be fraudulent and false, or not, is not material in this case. He made himself responsible for their fairness and substantial correctness. But I think it may be fairly inferred, that if Fifield did not know that the certificates were false and procured for the purpose of fraud, that he had reason to suspect, and did, in fact, suspect it. If this suit were against Fifield, therefore, no hesitation could be felt in coming to the conclusion that the contract ought to be rescinded, as being deeply tainted with fraud.

This brings us to one of the important questions in the case, whether Fifield, in making the contract, acted as the agent of the defendants, so as to render them responsible for his acts. This is charged in the bill, and is fully denied in the answers. It becomes, then, necessary to consider the terms of the contract entered into with Fifield. The instrument itself is not produced, but it is proved, by the evidence, and admitted to have been a bond, giving him a right of pre-emption of the land for a limited time. Fifield was not, therefore, an avowed agent, nor did he assume to act as such. If he was made an agent, it was rather as a legal result from the facts, than from the avowed intention of the parties, for it is not pretended that the owners, by this bond, intended formally to make him an agent. But an agency may be implied from the circumstances and mode of dealing, and forced by law on the parties, which will, when the rights of third persons have become involved, be equally binding as if it were created by the most formal instrument.

It is certainly true, that an agreement, giving a party a right of pre-emption of a thing, for a fixed price and a limited time, will not per se constitute him an agent of the vendor. Even if the party sells his bond or his interest in the contract before the expiration of the time, this will not render him an agent. Such engagements are of frequent occurrence in commercial transactions, and it was never imagined that they constituted the party, having such a bond or contract, an agent of the owner, so that he became responsible, as principal, for the contracts

which the party made with others. If such a right of pre-emption is given to one, with the bona fide expectation that he may become a purchaser solely, or in company with others whom he may induce to join him in the purchase, this can in no sense make him an agent of the vendor, nor will it render the vendor responsible for any fraud, or misrepresentation, which the party having this right of pre-emption may make in a resale of the thing. The owner has nothing in contemplation but the sale of the thing to the person with whom he has made the engagement. On no principle of law or public policy can he be held, as a principal, for the misconduct of his vendee, in a subsequent sale of the thing to a stranger. Whatever passes between them, is res inter alios acta. If he makes false and fraudulent representations to his vendee, and these are communicated to the second purchaser, who relies upon them, he may in some cases become directly liable to the second purchaser for his fraud. Langridge v. Levy, 2 Mees. & W. 532; on error, 4 Mees. & W. 337; Pilmore v. Hood, 5 Bing. N. C. 97; Crocker v. Lewis [Case No. 3,399]. But this liability does not result, properly, from the principles of the law of agency.

On the contrary, if the vendor gives this right of pre-emption to a party, not with the expectation or understanding that he is to become a purchaser, either solely on his own account or in company with others, but merely to enable him to make sale of the thing to strangers, leaving him to get his commissions or compensation in an advanced price, then, I hold, he becomes in law the vendor's agent, whatever color may be given to the contract. In the interpretation of contracts, the law looks to the substance and effect of the contract, and will not be blinded by the disguise which the parties may throw over the essential characters of the engagement. Such an engagement has all the effects of an agency, and, according to the intention of the parties, it has no other. It is true that the party who has this pre-emptive right may, if he chooses, become a purchaser himself. But this forms no part of the original intention. The sole object is to clothe him with the power to sell, and he may sell under it just as well as he can under the most formal agency. The law will not and ought not to allow a man, under such a disguise, to reap all the advantages of an agency, and escape from all its liabilities. If this can be done, it is easy to see how he may practice frauds to any extent through a simulated vendee on the unsuspecting and unwary, may securely pocket the fruits, and leave the victims of the fraud to seek their remedy from an irresponsible man of straw.

To which of these categories does the engagement with Fifield belong? Was this right of pre-emption given with any expectation that he would become a purchaser, or was it merely to enable him to effect a sale of the land for the benefit of the owners? On the whole evidence there can be no doubt, I think, that it belongs to the latter. This appears in various parts of the record, but perhaps as clearly as anywhere in a letter of Brastow, one of the defendants, to Mrs. Leland, the wife of one of the plaintiffs, under the date of April 5, 1837. In speaking of the sale of the land, he says, "We told two of our company that they had better put the land into the market at six dollars an acre. Wm. F. Boynton" (the son-in-law of Brastow) "and Joseph Porter, according to the usual custom, gave a bond of said land to Nathaniel Fifield." There is not an intimation in this letter, nor in any part of the record, that Fifield was expected to become a purchaser. The bond was given to him to put the land into the market; that is, to enable him to make a sale of it. Can there be any doubt that the sole object of the owners was to enable Fifield to sell the land for their benefit? I think not. My opinion therefore is, that Fifield was substantially made an agent, and that the legal consequences of an agency must follow.

Brastow, in his letter, says: "We told two of our company they had better put the land into the market, and in pursuance of this advice the bond was given to Fifield." Who are included under this plural designation we, does not appear; and it cannot, therefore, be determined who concurred beforehand in this arrangement with Fifield. It is certain that Brastow did, and there can be no difficulty in holding him responsible. But Crosby, in his answer, denies that he took any part in it, and there is no evidence tending to show that he did, or that he knew of its existence until some time after it was completed. He admits, however, that he consented to sell his interest in the land at six dollars an acre. And when the pre-emption contract became known to him, he did not dissent but acquiesced; and, after the sale was made by Fifield, finally ratified it without any inquiry into the circumstances or authority under which the contract with Fifield was made, or the proceedings of Fifield in making the sale. Brastow and the other owners derived no authority to sell the interest of Crosby, from the naked fact that they were jointly interested in the land. Yet when they had all determined to sell for a fixed price, an authority to act for all, in making the preliminary arrangements, might be more easily inferred than it would be under other circumstances. It is a fair and reasonable deduction from the whole evidence, that Crosby passively acquiesced and allowed the acts of Brastow and the other owners, and this silent acquiescence, all the parties living in the same neighborhood, and the subsequent ratification of the sale, under the circumstances, will, in law, be equivalent to a prior mandate. A court of equity would be going a great way in covering up wrong

to allow a part owner to lie by silently and permit his co-owner to practice a fraud in the sale of the joint property, and to take with impunity the fruits of the fraud, merely because he was not actively engaged in perpetrating it. My opinion on the whole case is, that though Crosby had no active participation in constituting Fifield an agent to sell, nor in any of the representations that led to the sale, he must be held as a principal, for the acts of Fifield, at least so far as he has been enriched by the fraud at the expense of the plaintiffs. "Jure naturae aequum est, neminem cum alterius detrimento et injuria fieri locupletiorem." Dig. 17, 50, 206.

This brings us to the last question in the cause, and which was strongly contested at the argument. If the right to rescind the contract ever existed, has it been lost by lapse of time? I have found more difficulty in coming to a conclusion satisfactory to my own mind on this point, than in any other part of the case.

In cases of fraud, time begins to run against the remedy only from the discovery of the fraud. Brooksbank v. Smith, 2 Younge & C. Exch. 58; Blennerhassett v. Day, 2 Ball & B. 129. The contract was, in this case, made in August, 1835, but the deception which had been practiced on the plaintiffs, was not in fact discovered until the fall of 1836. Suspicions had indeed before arisen in their minds, that the representations which had been made to them were highly exaggerated and untrue, but the real state of the facts was not known to them till something more than a year after the contract was made. The bill was filed in August, 1841, so that even the six years' limitation at law had not expired when the suit was commenced. If, then, the plaintiffs are barred, by lapse of time, of equitable relief, it is not by the statute of limitations operating, by analogy, in equity, as it does directly at law. If relief is denied on this ground, it will not be by the application of the legal prescription, but on the mere general ground, that the plaintiffs have slept on their rights for such a length of time that the claim has become stale and antiquated. The ancient brocard, "vigilantibus non dormientibus subvenit lex," is applied in equity, in some cases, with more stringency than at law, and therefore equity will sometimes, under peculiar circumstances, hold a party barred of equitable relief when he is not of his legal right. Then it simply withholds its hand and leaves a party to his remedy at law.

It would have been more satisfactory if legal proceedings had been instituted, in this case, at an earlier period, and while the matter was fresh. But the delay is in part accounted for. In the first place, negotiations were undertaken to effect a compromise. They failed, but some time was consumed in this way. And in the second place, the plaintiffs had been ruined and stripped of their whole property by the fraud, and were destitute of the pecuniary means of prosecuting their rights at law. It is said by Lord Redesdale, that the court cannot take into consideration, as an excuse for delay, the pecuniary embarrassments of suitors, for if this were done, there would be an end of all limitations of actions for distressed parties. Hovenden v. Lord Annesley, 2 Schoales & L. 639. But this was said in a case where the plaintiffs had slept on their rights sixty years, and in which the court held, on a full consideration of the subject that every equitable right must be prosecuted within twenty years, or it would be barred by the statute of limitations operating by analogy on equitable rights, as it does directly at law. But when the delay has been so great as to create a statute bar at law, it is not so clear that the pecuniary embarrassments of a suitor may not excuse some delay, so far as to relieve the plaintiff's claim from the imputation of staleness, especially when his embarrassments have been occasioned by the acts of the defendant. On the contrary, it appears to me entitled to consideration. For when a defendant relies for his protection, in equity, on lapse of time, independent of the statute bar, he addresses himself peculiarly to the conscience and discretion of the court. This is not an exemption which he can claim of strict right; but he puts his defense either on the particular equities of his own case, or on the general policy of discouraging the litigation of stale and antiquated demands. Now when the plaintiff pleads, as an excuse for delay, his inability to meet the necessary expenses of prosecuting his rights, and this inability is occasioned by the very fraud for which he seeks redress, this plea certainly goes far towards overcoming the defendant's objections, whether addressed to the conscience or prudence of the court. Such is the case with the present plaintiffs, and my opinion is, that they have not come into equity too late to be heard, though they may not be entitled to all the relief they might have had if they had come earlier.

The legal title to the land was in the defendants, and the deed was executed by them. But by an agreement between the parties concerned in the speculation, these two defendants were to have but one-sixth each of the interest in the purchase of Smith. Two-thirds was in several other persons, and this was known soon after, if not at the time when the bargain was completed. The money which was paid was distributed among the parties in proportion to the interest they had under this agreement. These persons should properly have been made parties, and if not known when the original bill was filed, should have been brought into the case by a supplemental bill. As this has not been done, the decree cannot affect their rights. Still, as Crosby and Brastow held the whole legal title, and were ostensibly the sole contracting parties, they might, perhaps, if the suit had been commenced as soon as the fraud was

discovered, have been held for the whole and left to seek contributions among the other parties in interest. But since that time some of them have become insolvent, and it is not equally in the power of the defendants now to recall the money, as it would have been had the suit been promptly commenced. The delay has occasioned this inconvenience to them, that if they are now held to refund the whole of that part of the purchase-money received, the decree will operate, as to them, not simply to put them back in the same situation as they would have been in, if no contract had been made, but they will sustain an actual loss. It would be throwing on them a loss occasioned by the act, that is, the delay of the plaintiffs. If the defendants had been actively engaged in concocting the fraud, they might have been held responsible in solido, and left to bear the loss arising from the insolvency of the other parties. But there is no ground for imputing to them fraud, personally, certainly not to Crosby. They had not, and did not pretend to have, any personal knowledge of the land, but bought on the representations of others. It appears to me, therefore, that it would be inequitable to visit upon them the consequences of this delay of the plaintiffs. And a court of equity has authority not only to prescribe the terms on which it will grant relief, but to mold and temper its relief so as to meet all the equities of the case. My opinion, on the whole, is, that the sale should be declared void, as to so much of the land as, by the agreement of the vendors, belonged to Crosby and Brastow: that the outstanding notes in the hands of the defendants be ordered to be given up and cancelled; and that each of the defendants be decreed severally to restore to the plaintiffs so much of the purchase-money as they each severally received to their own use, and that it be referred to a master to examine and report the amount so received and to be repaid, and that the plaintiffs be required to release to the defendants such undivided portion of the land as equitably belonged to them according to the agreement aforesaid, and that all further action be reserved to the coming in of the master's report.

[Circuit Justice Woodbury delivered an opinion to the same effect in this case. See Case No. 9,234. Subsequently the master filed his report, which was excepted to. The exceptions were heard and overruled in Case No. 9,236.]

Case No. 9,236.

MASON et al. v. CROSBY et al.

[3 Woodb. & M. 258.] [1]

Circuit Court, D. Maine. Oct. Term, 1847.

PRACTICE IN EQUITY—MASTER'S REPORT—SIMILARITY TO VERDICT—FOR WHAT SET ASIDE—WHO MAY QUESTION—IMMATERIAL ERROR.

1. The report of a master in chancery, like the verdict of a jury, relates only to facts, and as to them will not be reconsidered and set aside, unless some clear mistake or abuse of power is shown.

[Cited in Celluloid Manuf'g Co. v. Cellonite Manuf'g Co., 40 Fed. 476; Welling v. La Bau, 34 Fed. 42.]

[Cited in Butterfield v. Beardsley, 28 Mich. 423; Hulings v. Hulings Lumber Co., 38 W. Va. 370, 18 S. E. 627.]

2. The burthen of proof is on the party objecting to the report.

3. Third persons, after a contract is executed, cannot question its consideration.

4. If a master err in some respects, which do not appear to have produced results materially different from what would otherwise have happened, it is no ground for setting aside or recommitting his report.

[Cited in Tilghman v. Proctor, 125 U. S. 150, 8 Sup. Ct. 901; Duden v. Maloy, 43 Fed. 408.]

[Cited in Hulings v. Hulings Lumber Co., 38 W. Va. 370, 18 S. E. 627.]

After the decree in this case before given [Cases Nos. 9,234 and 9,235], a master was appointed, who made a report, a copy of which is annexed:

"District of Maine, ss. U. S. Circuit Court.

"Horatio Mason et al., in Equity, v. James Crosby et al.

"Pursuant to a decretal order made in the above cause at the October term, 1846, of said court, by which among other things it was ordered, adjudged and decreed: That the contract, conveyance, mortgage and notes in complainant's bill mentioned, ought to be declared, and thereby were declared null, void and rescinded. That the money received therefor by the respondents and others on their account, being their creditors, at any time before the filing of the bill, and retained and not paid over to other persons interested in the premises at the time of the sale, on their shares, ought to be, and thereby was ordered to be refunded by each in the proportion so received and retained for his interest therein, but on account of the delay of filing the bill, and other circumstances, they are not to be held accountable for other money paid over to other persons then interested. That the notes so received by them, unless paid over, or assigned to others then interested, and for their shares therein, are adjudged to be returned to the complainants by the respondents, as they may be in their joint or several possession or control. That each of the respondents be further ordered to pay interest on all such moneys received and retained from the time of such receipt to the time of final judgment in this case, deducting therefrom their share in the value of any timber taken from said premises by the complainants or their order. That the respondents be decreed severally to pay their share of any taxes on said premises advanced by the complainants, and of any improvements made by them thereon. That on the repayments of the money received and retained, as aforesaid, by each of the respondents, and

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

the surrender of the notes, equal together to the amount of his share or equitable interest in said premises at the time of the conveyance, with the interest, taxes and improvements aforesaid, the complainants are ordered to execute a release to each so doing, of all their title and interest in the share in the premises so equitably belonging to that respondent. That on the surrender, by either of the respondents, of notes which, with the money paid over by him as aforesaid, exceed what was paid for his share in the premises, the plaintiffs be directed to release to such respondents, in trust for other shareholders at the time of the sale, a further interest in the premises, corresponding to the proportion which such excess of notes bears to the whole consideration paid by the complainants. That the respondents were ordered to be thus responsible, and to this extent, notwithstanding the non joinder of others in the bill who had some equitable interest in the premises at the time of the sale. That the complainants are thus entitled to a decree, although one of them, since the sale, has released his interest in the premises to the other. That it be referred to a master to ascertain the amounts of money, interest, taxes and improvements, value of timber, notes, &c., before named, and prepare suitable conveyances to be executed as aforesaid, and have power to examine witnesses, and require disclosures of the parties under oath, and the production of papers pertinent to said inquiries, and do all other things appertaining to a master on the subject. I the subscriber, the master appointed for the purposes hereinbefore recited, submit the following report: I have been attended, agreeably to notice duly served and returned, by J. P. Bishop, Esq., counsel for the complainants, and by the defendant, James Crosby, and his counsel, Edward Kent, Esq., also by Deodat Brastow and William F. Boynton, executors, in Maine, of the defendant Brastow, deceased, and for whom also Mr. Kent acted as counsel. The consideration by the master of so much of said decree as relates to the notes of the complainants in possession of said defendants, or their assigns, and the surrender of the same to said complainants; so much as concerns the value of timber taken from the premises, or stumpage therefor; so much as relates to the payment of taxes and the character and value of permanent improvements on the premises; so much as has regard to the release by the complainants of any part of said premises to said defendants, or either of them, in trust, or otherwise, and the preparation of suitable conveyances for that purpose; and the consideration of all other matters in said decree not hereinbefore recited, except those hereinafter fully and particularly stated, have been waived by the parties respectively, or their counsel.

"The complainants by their counsel claimed to charge the defendant Crosby, upon the pleadings and evidence in the cause, upon that produced to me, and upon the examination of said Crosby for the sum of fourteen thousand three hundred forty-two dollars and thirty-five cents; and the said Brastow's estate in the sum of eleven thousand six hundred and thirty dollars and thirty cents, including interest on the sums received by them respectively: the complainants insisting that said Crosby and said Brastow were responsible and were bound to refund to complainants all moneys received by them from the complainants, although said defendants had paid over certain proportional parts of said moneys to Sam Thurston, Brazier Brastow, Joseph Porter and John D. Wilson, as persons equitably interested in said premises at the time of the sale thereof to the complainants. To maintain this position, said complainants contended that the contracts between said defendants and said Thurston and others, were either parol agreements concerning real-estate, or bonds for the conveyance of certain parts of said premises to them respectively, on certain conditions which were never performed, giving said Thurston and others the mere right of preëmption. But the bill having charged one Fifield to be the agent of the defendants to negotiate a sale thereof, for the benefit and interest of said defendants, as well as said Fifield, and also for the benefit of other persons then unknown to the complainants, and the defendants by their answers having, in substance, admitted that such sale to the complainants was made for the benefit of themselves and of said Thurston, B. Brastow, Porter and Wilson, and the pleadings and proofs in the case and before the master, seeming to recognize said Thurston, B. Brastow, Porter and Wilson, as persons interested with the defendants at the time of the sale to the complainants, I have not felt at liberty to reconsider the evidence on which said decree was founded, or to give a different effect to the evidence adduced by the complainants or defendants at the hearing before me. I have, therefore, considered all moneys paid by the defendants, or either of them, to said Thurston, B. Brastow, Porter and Wilson, as paid to persons interested at the time of the sale to complainants. And for the same reasons, as between the defendant Brastow and William F. Boynton, although with some hesitation, I have treated moneys paid by the former to the latter, as paid to a person interested at the time of the sale to the complainants.

"It appeared that in pursuance of an agreement between the defendants and said Thurston, B. Brastow, Porter and Wilson, that the latter were entitled to receive certain proportions of all moneys which were to be paid by complainants to the defendants; that the complainants gave a mortgage to the defendants, conditioned to pay certain notes to one Munroe, given by the de-

fendants to said Munroe as part consideration for the land in controversy; that the defendants alone having signed said notes, and being legally responsible for the same, they took a bond from said Thurston, B. Brastow, Porter and Wilson, by which they assumed the responsibility of paying one-half of said notes of said defendants to said Munroe, if the same should not be paid by the complainants. It further appeared that some of said notes to Munroe were taken up by said Crosby and Brastow, and not by the complainants; that the defendants commenced an action on said bond, and recovered judgment thereon for one-half of one of said notes, and that said judgment was nearly satisfied by a levy of execution on the estate of said Thurston and others, or of some of them.

"Upon this state of facts, the complainants insisted that the money so recovered of said Thurston, B. Brastow, Porter and Wilson, if they were to be considered as persons equitably interested at the time of the sale, (but which was denied,) must be deemed and taken to be the proper money of the complainants paid to defendants, and that if the same was so distributed by defendants to Thurston and others, said recovery and satisfaction were to be construed as a refunding of the same to the defendants. But I consider it otherwise, and have made no allowance to the complainants for any part of said money. In ascertaining the amount of money paid by the complainants to the defendants, one or both of them, my attention has been called by the complainants to no other evidence than the pleadings and proofs in the cause. No testimony on this point has been offered by either party, and both parties have relied on the case as printed to establish the proper sum. That each party may have the benefit of exception to my report on this point, it may not be improper to state the grounds of it. The bill states the sum paid in cash at the time of the purchase somewhat indefinitely at nearly ten thousand dollars; and the further sum of two thousand five hundred and fifty-one dollars on one of the several notes given in part payment for the consideration of defendants' deed; and also the sum of three thousand three hundred and fourteen dollars on one of the Munroe notes, which they had undertaken to pay, and had secured by mortgage to the defendants, in all, the sum of $15,865. These being material averments and discovery in respect to them being called for in the bill, required a full and careful answer, and both defendants have concurred in their several answers as to the sums paid, and the time and mode of payment, and which are hereafter particularly set forth, the total amount of which payments by the complainants, exclusive of interest, is alleged to be $12,647.06. The complainants, however, insist that it appears from the testimony of Elias Bullard, that they paid an additional sum of $2,200, but it seems to me that the testimony of Bullard on this point fails to establish the fact of any other payments than those particularly set forth in the answers.

"I therefore find the whole sum paid by complainants on account of the contract rescinded by the decree, to have been twelve thousand six hundred forty-seven dollars and six cents. I further find that said Crosby received or had the benefit of one-sixth part of the amount of the first payment by complainants to the defendants, and of the sum paid by complainants to Munroe; and that said Brastow received, retained and had the benefit of one-sixth part of said first payment, two-sixth part of the payment to Munroe, (Brastow at the time of said payment having become the owner of Boynton's share,) and for one-half the payment to said Brastow on Aug. 28, 1836, (said Brastow at that time having purchased Crosby's interest in addition to Boynton's, in the complainant's notes and mortgage,) and that each is chargeable with interest on those sums or proportions respectively, and which I have cast to May 1, 1847, and to be computed on the principal sums from said day to final judgment.

"Upon the foregoing principles, I find there is due from James Crosby to the complainants the sum of two thousand eight hundred fifty-seven dollars and eighteen cents, and no more, as per Schedule A; that there is due from the estate of the defendant, Deodat Brastow, deceased, the sum of five thousand nine hundred and fifty-eight dollars and twenty-two cents, and no more, as per Schedule B hereto annexed.

"All of which is respectfully submitted.

"Bangor, May 1, 1847.

"Fred. Hobbs, Master in Chancery."

Schedule A, referred to in this report, contains a statement of the moneys paid by the complainants to and for the use of James Crosby, one of said defendants, or received by him and not paid to others interested in the premises at the time of the sale to the complainants, viz.:

This sum paid Sept. 21, 1835, to wit, one-sixth of $6,275.40, or.....	$1,045 90
Interest on the same from Sept. 21, 1835, to May 1, 1847.....	728 54
This sum paid Munroe April 24, 1836, whole am't $3,910.80, one-sixth is.....	651 80
Interest on the same from April 24, 1836, to May 1, 1847.....	430 94
	$2,857 18

May 1, 1847.

Fred. Hobbs, Master.

Schedule B, referred to in this report, contains a statement of the moneys paid by the complainants to Deodat Brastow and for his benefit; or received and retained by him, and not paid to others interested in the premises at the time of the sale to the complainants, viz.:

This sum paid Sept. 21, 1835, to wit, one-sixth of $6,275.40, or.....	$1,045 90
Interest on the same from Sept. 21, 1835, to May 1, 1847.....	728 54
This sum paid Munroe April 24, 1836, $3,910.80, two-sixths is.....	1,303 60
Interest on the same from April 24, 1836, to May 1, 1847.....	861 88
This sum paid Brastow, Aug. 28, 1836, $2,460.86, one-half is.....	1,230 43
Interest on the same from Aug. 28, 1836, to May 1, 1847.....	787 87
	$5,958 22

May 1, 1847.

Fred. Hobbs, Master.

To this report the respondents filed several exceptions, with a written argument attached to each. A copy of the exceptions, without the arguments, is annexed:

"Maine, ss. Circuit Court U. S. in Equity.

"Horatio Mason et al. v. James Crosby et al.

"Exceptions taken by the complainants to the report of Frederick Hobbs, Esq., one of the masters in this honorable court, bearing date the first day of May, A. D., 1847, and filed in court the —— day of the same May, made in this cause, to whom the same stood referred by the decretal order bearing date the —— day of October, A. D., 1847:

"First—Because said master, in and by his report, certified 'that the defendants received of the complainants, in payment for said land, the sum of $12,647.06, and no more.'

"Second—Because said master, by his said report, has certified $3,537.77 as interest due up to the 1st of said May upon said money paid by complainants.

"Third—Because said master has, by his report, certified that defendant Crosby was bound to refund to the complainants the sum of $2,857.18, and no more.

To wit, the principal sum received by him.....	$1,697 70
Interest upon the same.....	1,150 48
	$2,857 18

"Fourth—Because said master, as appears by his report, 'did not feel at liberty to give effect to evidence adduced by the complainants,' upon a supposition that the court, by said decree, had conclusively settled, as a fact, that said Porter, Thurston, Brazier Brastow, Wilson and Boynton were equitably interested in lands at the time of said sale, and that he had no right to enquire whether such were the case or not.

"Fifth—Because said master, in his said report, makes no distinction between transactions between the defendants themselves, and between defendants and others prior to and after said sale, and treats the said Porter, Thurston, Brazier Brastow, Wilson and Boynton as though all the obligations between them and the defendants existed prior to and at the time of the sale."

These exceptions and the report were also accompanied by a statement of the new evidence laid before the master; and an exhibit of the claims and offers made before him by each party as to all the matters in dispute. These, when important, will be explained in the opinion of the court. The original complainants moved also for leave, on this hearing, to submit further evidence in support of these exceptions, which leave was not granted.

Mr. Bishop, in support of them.

W. P. Fessenden and Mr. Kent, against them.

WOODBURY, Circuit Justice. At the hearing of the exceptions in this case, a motion to introduce further evidence in their support was made by the complainants, and overruled. But if that disposition of it had, on maturer consideration, been found to be improper, we would still admit the evidence before deciding on the exceptions. But we think the ruling was right under all the circumstances. Because the further evidence was offered without any previous notice to the opposite party of a wish to offer more proof, or of a willingness that more might be adduced by them. The court, therefore, decided that the evidence could not be admitted without granting a like privilege to the other side, and allowing time to improve the privilege thus granted, and that, on such terms of mutuality and time allowed, it might be admitted. The plaintiffs objected to this indulgence to the other side, and hence we still think they were rightfully precluded from doing what they did not consent their antagonists should be allowed time to do.

In respect to the exceptions themselves, most of them seem chiefly to rest on an impression that the court, when a master's report is returned, should retry and reëxamine and decide on all the questions of fact, as well as law, raised before the master. But we regard the office of a master in chancery somewhat like that of a jury in the courts of common law. Originally there were twelve masters in number, and their duties were not only limited, in the progress of time, to matters of fact, but chiefly to those of mere debt and credit, and computation of interest. 1 Spence, Eq. Jur. When they have once decided on these facts, and no legal question is involved in them, their report should stand probably without amendment here, or without recommitment, unless reasons exist for either, as strong as will justify setting aside a verdict. If there has been a clear mistake, or a palpable abuse of power, either of them ought to be corrected. But if the court should enquire or act beyond that, as to matters of fact, the office of master would prove but little aid in the administration of justice—the court being compelled to go over all the facts again, and thus their labors be greatly and unnecessarily increased. When a party has enjoyed one full hearing as to the facts involved in his claims of debt, credit, interest and kindred topics, there seems little justification for going into another, unless the master has clearly fallen into a mistake, or clear-

ly abused the power confided to him. Without such a limitation, no prospect would exist of putting an end to litigation.

Proceeding to the examination of the different exceptions, with these views, our conclusions are, that judgment must be rendered in conformity to the report.

The first exception is, in substance, that the whole sum received by the defendants of the plaintiffs in money, was larger than that found by the master. But this was a fact involving no principle of law, and concerning which the testimony on the points in doubt was contradictory. The evidence, in one view of the subject, showed more, and in another view, near the amount found by the master. The probability seems to be, that if the plaintiffs paid more than $6,275, the sum allowed by the master, it was in the course of the business paid to Fifield, and not retained by the respondents; and that the notes to Fifield, and endorsed by him, were substituted for any money beyond that sum. After the lapse of eleven or twelve years, the truth is not likely to be attainable with much exactness, and this delay is so much more the fault of the plaintiffs in this case, than of the respondents, as to have formerly caused a decree, in some respects less favorable to them than it otherwise would have been. Not taking a receipt or some written evidences of the amount of money paid by them at the time of the sale, whether to the respondents or Fifield, (which is the chief cause of the difficulty on this point,) is another neglect on their part, the consequences of which must fall, rather on them than the defendants. It is the business of the former, rather than the latter, to remove doubts and uncertainties as to the larger amount claimed. Not doing this, and there being evidence to justify either view, the master has allowed the smaller sum; and we do not see enough in the case to warrant a belief that it has been done through any clear mistake, or abuse of power.

The second exception is merely a branch of the first, being that the interest allowed is not sufficient for the whole principal paid. It falls with the first exception, as the interest is enough in amount, if the principal allowed was probably enough, and we have already decided that it was, in respect to this item.

The third exception raises a question of law, rather than fact, since it contends that the defendant Crosby is not charged with enough in other respects, as he is allowed payments made before the bill was filed to other persons claiming to possess an interest in the land at the time of the sale in 1835 to the plaintiffs, when, in truth, the plaintiffs argued that those other persons then possessed neither an equitable nor legal interest in the premises, sufficient, in law, to justify such payments. But the fact is undoubted that they claimed some interest there; that the claim was then admitted by the respondents; that even the complainants alleged in their bill the existence of such interests, but without knowing the names of the parties; that the respondents gave their names and proportions of interests in their answers, and that the only question made in this matter at the hearing, was whether an interest like theirs, not by deed, but by bond in most of the cases, made it imperative on the plaintiffs to join them all as defendants in the bill.

Now, although several of the matters in the answers as to this may be not precisely responsive to the bill,—8 Cow. 387; 1 Johns. Ch. 580; 2 Johns. Ch. 88; 3 Blackf. 18; 8 Pick. 113; 4 Paige, 22; 15 Me. 125; Randall v. Phillips [Case No. 11,555],—and a bill with no formal interrogatories renders it more difficult to decide, with exactness, what is and what is not responsive, yet there is other evidence than these answers that these persons were interested. That was the, first step to be proved, before considering its effect. That was amply shown, without the answer, by the bond from the respondents to Smith, which had been assigned to most of those persons claiming an interest; next, by the bond of most of them given to pay their proportions of the original consideration for the land to Munroe; next, by the active part some of them took in getting certificates and an agent to make this new sale; next, by the testimony of most of them, on the stand, in support of their interest; and finally, by the allegations in the bill, and the grounds taken at the hearing and in the decree. It cannot be set up by any persons, that such a bond did not, in law, give an equitable interest, for want of consideration, when it is a sealed instrument. Or, in the case of Boynton, (one of them not included in the assignment of the bond,) that his interest was by parol, and without consideration, or was not mutual, when he procured one of the defendants to make the advances for him, and when the contract has already been executed, and this objection comes afterwards from a third person, and not a party to the agreement. See Tufts v. Tufts [Case No. 14,233], Mass. Dist., Oct. term, 1847.

An executed contract, though without consideration, mutuality or writing, to take it out of the statute of frauds, cannot afterwards be objected to by third persons, if it can be by the parties, however the latter may object while it is executing. And where one has stipulated to allow another an interest in certain premises, and admits, in his answer, that the interest was a just one, and this interest has since been recognized and executed, it is too late for other persons to object to the legal or equitable propriety of it, and on that account to attempt to avoid it. See cases in Tufts v. Tufts [supra]. It will not do in chancery to consider it unconscientious or unjust to treat such an interest as valid, when the parties to it have not chosen to make any objection, either on technical or substantial grounds. Nor would this decision, exonerat-

ing the defendants from what they had paid to others interested with them at the sale, and done many years before the present suit, and some time before any offer to rescind the sale by the plaintiffs, be at all injurious to the plaintiffs, if they exercised proper vigilance and diligence. These third persons could have been separately prosecuted early, and the due shares of money received from them, rather than the respondents. Or even in this bill, after their names and respective amounts of interests and money received, had been disclosed by the respondents, they could, as was requested, have been made co-defendants, and their proportions recovered back.

Considering the interests of all these other persons beside the defendants, to whom parts of the consideration were paid at the time as proved by testimony and circumstances, even without the aid of the answers of the defendants, it becomes of little importance what in them is or is not responsive on this point, and the only remaining objection under this exception is to the want of proper evidence to show actual payments made to these subclaimants to the extent of their interests. The evidence, as to that, consists, also, in part, of matter in the answers. Those are very clear to prove the payment and were not contested at the hearing of the original cause, but are now objected to as incompetent to prove them. Even now, they can separately be proceeded against, and made liable, unless the neglect of the plaintiffs has been such as to exonerate them, or they have some other valid defence. So if the defendants had been sued earlier, and the contract rescinded earlier, less harm or injustice would have happened in making them chargeable for all which went into their hands at first, as their resort over to others receiving it from them, might have thus been more early and successful, while by such delay their remedy over would probably now, in most instances, be worthless. It is probable that some of the answers in respect to this last fact, also, may not be exactly responsive to the bill, and might not alone suffice. Looking, however, to the other testimony, there seems little doubt from that. The oaths of Boynton, himself, Thurston, Porter and others, before the master, and the bond given by most of them to pay their portions of the original consideration, and the fact already and otherwise established, that they were interested in the land in certain proportions, are strong to show that they have been paid all to which they were entitled. The very lapse of time which was before referred to, being so long, and no existing claim being made of a failure to pay any of them, coupled with the continued ability of, at least, one of the defendants, to comply with their obligations, is quite decisive that the payments have been adjusted in conformity with the promises and right which really existed.

There is a further exception taken by the plaintiffs, that the defendants are not charged with the whole of $3,910, which the plaintiffs paid for them to Munroe. They were charged with only such portions of it as their interests required them in the end to pay. This, we think, was sufficient. They held the whole legal title to the land by deed, and gave their notes for the whole consideration. When they sold it for all interested, and paid over to others the proportions of the money received, it was proper, as the original consideration was not yet due, to take from the others' obligations to pay their ratio of it. They thus stood in the capacity of trustees, both for buying and selling, and all they did, in these respects, was not for themselves alone, owning but portions, or for themselves as joint obligors. It was rather for all possessing an interest in the premises. And when they received the $3,910, and paid it over to Munroe, as that was the substance of the transaction, it being paid by the plaintiffs for them, they received as well as paid it for all in their due proportions, and are liable individually for only the shares they themselves owned, or were bound to pay. Only that was to go to their real and final benefit, and that they are required to restore. As to the residue, when they collected money of the others to help pay for that, (which was owing to Munroe, and which they alone were bound to him to advance,) they collected only the portions which remained due from the others after applying their share of the $3,910. They hence cannot be considered as recovering back anything of this $3,910, but receiving the balance due from the others interested, after allowing to them their share in that sum paid by the plaintiffs.

The fourth exception is founded on the idea, that the master took for granted, as if already settled by the decree, what he ought to have decided on evidence offered before him, i. e. the interest of these particular claimants under the defendants. Now, although the fact of an interest in third persons had been alleged in the bill itself, and admitted in the answer, and proved by various testimony, yet I am not aware that the names of those possessing such an interest, or their exact proportions, were shown with precision, except in answers. And as those answers may not, in these respects, have been responsive to the bill, it would have been proper for the master to have resorted to other evidence for these particulars. The decree did not decide who in fact were the particular claimants, and their proportions, as it was not necessary, in order to decide on the merits. Again, it did not seem to be controverted, that these persons named by the master were the persons, and had the proportions in the sub-claim under the defendants, which both sides conceded to exist.

Has this view of the master, then, if to some extent erroneous, led to any error or mistake in the results? That is not pretended. All the evidence and circumstances concurred in support of that interest, and it is well settled, as to errors in ruling on evidence

by courts, that if it do not appear to have changed the verdict from what it would otherwise be, a new trial will not be awarded. Allen v. Blunt [Case No. 217]; Taylor v. Carpenter [Id. 13,785]; and cases cited in them.

The fifth and last objection is, that the master does not distinguish between rights and obligations of the defendants or transactions of theirs with others after the sale of the land, and those before. But this, I apprehend, is misunderstood. The master does not appear to have taken the interests or duties of the parties for a guide, as they stood at any other time than the sale, though he may, and properly has, looked to their transactions afterwards, as in pursuance and in affirmance of those previous interests and duties. And at times they may be some evidence of what the prior contracts and interests had been, and therefore deserve attention in that view. But we see no instance of the master's making any new arrangement after the sale, a test or standard of any old obligations. The new bond, given by the sub-claimants after the sale, to pay their proportion of the original consideration to Munroe, if not paid by the plaintiffs, is the new contract or transaction which is probably meant to be referred to. But that was only a new form of securing what was their duty before to accomplish, i. e. the payment of that portion of the consideration to be paid for the land, which their share in the land rendered proper. The duty to pay that existed from the time their interest existed, and the new bond was only a new evidence or new security concerning it.

Judgment according to the report on the decree.

Case No. 9,237.

MASON v. CUTTS.

[5 Cranch, C. C. 465.] [1]

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

EQUITABLE LIEN—FRENCH AWARD—ADVANCES TO SHIP—BILLS OF EXCHANGE TAKEN.

1. Advances to a master of a ship seized and carried into France, in 1810, and liberated after eighteen months' detention, made after her release to enable her to prosecute her homeward voyage, are not a lien upon the compensation awarded to the administrator of the owner, by the commissioners under the French convention.

2. The plaintiff must resort to the administrator of the owner for payment in the ordinary course of administration; especially if the person making the advances takes bills of exchange for the amount advanced.

Bill in equity by [Gilbeck Mason,] the administrator of James Leveaux, against [Hiram Cutts] the administrator of Thomas Brown, to which the defendant filed a general demurrer. The bill stated that in 1810, the ship General Eaton, J. S. Place, master, owned by Thomas Brown, a citizen of the United States, was captured by a French privateer, and carried into Calais. That in 1812 she was liberated, but before she could proceed on her homeward voyage, it was necessary that she should undergo considerable repairs, and be fitted for the voyage; that Captain Place not having the funds for that purpose, applied to the deceased, (Leveaux,) who made the necessary advances therefor to the amount of 20,463 francs, including costs of protest and damages on certain bills of exchange drawn by Captain Place, on his correspondents in London, for the reimbursement of said advances; that the ship was afterwards seized and detained at an English port; that the advances have never been repaid, and that the owner, Thomas Brown, died insolvent; that the commissioner under the French treaty, allowed the claim of Hiram Cutts, administrator of the owner, Thomas Brown, for detention of the ship and expenses, to the amount of $4,687; a certificate of which is about to be issued from the treasury of the United States, which will be paid to the said Hiram Cutts, unless prevented by an order of this court. That the plaintiff has a just claim on the amount so awarded to the said Cutts, for the amount of his said advances, "and is entirely without remedy at law to obtain the benefit of his lien on said fund, and can only obtain the same by the equitable interference of this honorable court."

The plaintiff contends, in his bill, "that he is not bound to resort to the estate of said Brown, or to those funds thus awarded, as a general creditor of said Brown's estate, but that he has an equitable claim on the fund itself, for the amount of his advances as aforesaid, and the interest due thereon, which he believes will amount to as much as the sum to be received on said award," and prays a decree therefor, and for general relief.

Mr. Key, for plaintiff, cited Sheppard v. Taylor, 5 Pet. [30 U. S.] 692, 710; The General Smith, 4 Wheat. [17 U. S.] 438; Forster v. Hale, 3 Ves. 696; Duke of Bolton v. Williams; 4 Brown, Ch. 430.

R. S. Coxe, contrà. The plaintiff's intestate never had any lien on the ship for his advances; and if he had, he has none upon the money awarded, which does not represent the ship, but merely demurrage, and expenses of prosecuting the claim before the French tribunals. But whatever lien he might have had, he abandoned by taking bills of exchange for the amount of his advances, and by suffering the ship to depart. He can now claim only as a general creditor, and must look to the administrator in the regular course of administration. This case is very different from that of Sheppard v. Taylor [supra], where the award was for the loss of the ship, and stood in the place of the ship, and liable to all liens by which the ship was bound.

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

THE COURT (THRUSTON, Circuit Judge, absent) decided, that the plaintiff's intestate had not a specific lien on the ship; and if he had, he abandoned it when he received bills of exchange for the amount of his claim, and therefore he can only come in as a general creditor of Brown, and receive his dividend in the due course of administration.

MASON (DUNNELL v.). See Case No. 4,179.

MASON (GAMBLE v.). See Case No. 5,209.

MASON (GRAHAM v.). See Cases Nos. 5,671 and 5,672.

MASON (GRANT v.). See Cases Nos. 5,698 and 5,701.

Case No. 9,238.

MASON v. INGRAHAM.

[5 Ben. 81.] [1]

District Court, E. D. New York. March, 1871.

PILOTS—TENDER OF SERVICE—HALF PILOTAGE—AGENT OF VESSEL.

The pilotage law of New York provided, that in case of a tender of service by a pilot to a vessel, and a refusal of such service, half pilotage should be due and recoverable of the agent of the vessel. A pilot filed a libel on such a cause of action against a person, who was not at the time of the tender the consignee of the vessel, who did not act for her under a general employment, and who did not collect her freight. *Held*, that, in order to charge a person with liability as agent, under the act, it is necessary to show that he had some connection with the vessel at the time, and that the defendant was not liable.

[Libel by Edward R. Mason against John S. Ingraham for the recovery of pilotage.]

BENEDICT, District Judge. This is an action by a pilot to recover half pilotage of the defendant, as the agent of the bark R. B. Walker. It involves the same question of jurisdiction decided in the case of Banta v. McNeil [Case No. 966], to which reference is made for my opinion thereon. There is, however, another question in this case, which has not arisen in former half pilotage cases decided in this court. Here the right to recover is rested upon the state statute, which, it is claimed, creates a liability for half pilotage on behalf of the agent of the ship to which the tender is made; and it is only as agent that the defendant is sought to be held, as he was not master or part owner. Upon this point, it is sufficient to say that, in my opinion, it is at least necessary, in order to charge a person, in the capacity of agent, with a liability of this description, to show that he had some connection with the vessel. At the time of the pilot's tender, the defendant was not the consignee of the vessel, nor did he act for her under any general employment. Her freight was not collected by him, nor does it appear that he was in any way connected with the vessel at the time the libellant's cause of action arose.

The libel must, therefore, be dismissed.

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

MASON (JOHNSON v.). See Case No. 7,396.

Case No. 9,239.

MASON v. JONES.

[1 Hayw. & H. 323.] [1]

Circuit Court, District of Columbia. Nov. 27, 1847.

PRACTICE IN EQUITY—MOTION TO FILE ANSWER—DEFENDANT IN CONTEMPT.

1. It is of right and not favor for the defendant to file his answer before the decree nisi is made absolute.

2. A defendant in contempt in a cause against himself and others may file his answer in another cause against himself individually, though both suits relate to the same matter.

An injunction was granted in the case of Barnes vs. Jones and others, which was entered served on all the defendants [Thomas P. Jones, and Alexander Hunter, marshal of the District of Columbia]. The defendants did not appear to this suit nor answer the bill. On February 10, 1841, a writ was issued in the name of Jones against the complainant [John] Mason, Jr., on a note dated April 15, 1839, made by said Barnes to said Mason or order, endorsed by him and M. Clark, payable October 15 following. Mason was arrested, and special bail was put in. Mr. Marbury found his appearance entered; but having received no instructions, and never having seen Mason, he entered judgment at March term, 1842. A ca. sa. was issued, and Mason was taken in custody.

In January 13, 1843, Mason filed his bill. The bill and injunction of Barnes vs. Jones et al. was referred to as part of this bill. The prayer of the bill was that the judgment of March term might be opened, or relief granted here by perpetual injunction and cancellation of the said note. The injunction was returned served on Jones. He did not appear or answer. On June 24, 1845, a perpetual injunction was decreed nisi, which was served on July 1, and on October 24, 1845, before the decree became absolute, the defendant Jones' answer to the bill was brought into court and offered to be filed.

Objection being made by the complainant, the matter stood over and was heard at this term.

Henry May, for complainant.

Jos. H. Bradley, for defendants.

[1] [Reported by John A. Hayward, Esq., and George C. Hazleton, Esq.]

May, for the complainant, objected to the reception of the answer, because Jones was in contempt by having violated the injunction granted in the Barnes Case against him and others by suing upon one of the notes. Har. Ch. 222, 263; Williamson v. Carnan, 1 Gill & J. 211, 213.

Bradley, contra, contended that it was the defendant's right to file his answer before decree nisi becomes absolute, and that the contempt, if there was any, was in another cause. 1 Smith, Ch. Prac. 61, note a; Alkroyd v. King, 8 Paige[2] [Akroyd v. Klug, 1 Ch. Sent. 39].

CRANCH, Chief Judge. The bill states that, in 1838, certain persons, among whom was the defendant, Thos. P. Jones, associated for the purpose, among other things, of procuring and getting cuttings of the morus multicaulis, and authorized John F. Callan to sell them, and he did, as their agent, sell Abraham Barnes a large number of cuttings, which cuttings the said J. F. Callan, for the said persons, warranted to vegetate and grow, if certain instructions were followed. That the said Barnes, relying on the said warranty, was induced to purchase of the said Callan, 125,000 cuttings, for which he gave his several promissory notes with the complainants and M. St. Clair Clarke as endorsers thereon, and that all the said proceedings were with the knowledge and assent of the said Thos. P. Jones and others. That the complainant does not recollect the amount of each note or the aggregate amount of them all, but will show the same to the court. That the complainant charges that there "was the most manifest fraud in the sale of the said cuttings, and that the same did not vegetate or grow, and there was a total failure of the consideration of the notes, notwithstanding the said Barnes did follow the instructions given, and did everything in his power to make the same vegetate and grow." "That the same was known to the said Callan and the said Thos. P. Jones and others." "And that the said sale was made fraudulently, and that the said notes were given without any consideration whatsoever, the one for which they were given having totally failed, as the complainant is informed and believes, and so charges." That the notes were given and taken for the benefit of said Thos. P. Jones and others. That, on the 19th June, 1839, the said Barnes obtained an injunction from this court to prevent the said Callan and the said Thos. P. Jones and others from passing the said notes or from suing upon the same, as will appear by reference to the proceedings in the case of the said Barnes against the said T. P. Jones and others in this court, which injunction was regularly served upon the said T. P. Jones. But the complainant charges that the said T. P. Jones, in defiance of the injunction, which was then and still is in force, has sued the complainants upon one of the notes so enjoined.

The complainant then charges that payment of the note had never been legally demanded—whereby the plaintiff was discharged. That, on the 10th of February, 1841, while the injunction in Barnes' Case, was in force, the said defendant Jones brought suit against this complainant (Mason) on one of the notes so enjoined in Barnes' Case. That, not being able to attend to the case in person, he applied to a friend to enter special bail for him and to employ counsel; and his special bail, through mistake, entered the appearance of Mr. Marbury, attorney-at-law, instead of Brent & Brent, who alone were acquainted with the facts of the case and of the defence, and to whom the complainant had spoken. That the complainant was ignorant that the appearance of Mr. Marbury had been entered as his counsel, until after he (Mr. Marbury) had confessed a judgment in the case at March term, 1842, and until the ca. sa. was served against him, this complainant. That the note upon which this judgment was founded was dated 15th of April, 1839, signed by Barnes, payable to the order of the complainant, on the 15th of October, 1839, and endorsed by the complainant. That the injunction in Barnes' Case was granted June 19th, 1839. That T. P. Jones, at the time of receiving the note, knew that the note was given for the cuttings, and that the consideration had totally failed. Upon this bill an injunction was issued on the 14th of January, 1843 (after the complainant, Mason, had been arrested on the ca. sa., but before his commitment in execution), to restrain the defendant "from proceeding further upon the judgment" at law, which had been rendered on the 4th of April, 1842. That on the 24th of June, 1845, the defendant T. P. Jones, having failed to appear and answer the bill within three months after the day of appearance and after the filing of the bill, it was taken pro confesso and a perpetual injunction decreed nisi, i. e., to be absolute unless cause to the contrary be shown at the term next succeeding "that to which the decree shall be returned executed." Before the decree became absolute, on the 24th of October, 1845, the defendant, T. P. Jones, by his counsel, moved for leave to file an answer.

This motion was resisted on the ground that the defendant was in contempt by having violated the injunction granted in Barnes' Case, June 19th, 1839, against this defendant and others, by bringing this action at law upon one of the notes included in that injunction, and that his answer in this case of Mason against Jones cannot be received while he is in contempt in the case of Barnes against Jones and others.

In support of the objection to the motion to file the defendant's answer, the counsel for the complainant cited Har. Ch. 222, but that

[2] [See note 3 on page 1038.]

authority only shows what acts will authorize an injunction and what will be a violation of the injunction, not that a party who is in contempt in one cause may not file his answer in another. The authority in Har. Ch. 263, only shows that, although the answer denies the whole equity of the bill, the injunction will not be dissolved until the defendant's contempts are cleared, meaning, no doubt, contempts committed in that cause.

The complainant's counsel also cited Williamson v. Carman, 1 Gill & J. 211, 213. But in that case the contempt was committed in that cause, and has no relation to the filing of the answer, which was filed May 13th, 1826. The only point in that case applicable to this is that the chancellor will not hear a motion to dissolve the injunction while the defendant is in arrest under an attachment for a contempt in violating the same injunction. But there are many cases in which a party who has committed a contempt even in the same cause may sustain a motion. Thus a plaintiff in contempt for non-payment of costs for an irregular motion can enforce an answer from the defendant (1 Smith, Ch. Prac. see note a); and it is only where a party in contempt applies for a favor that such an objection is available (Akroyd v. Klug, 2 Paige [3] [1 Ch. Sent. 39]).

Can a party be said to be in contempt unless he be attached for the contempt? for until attached or otherwise brought before the court non constat that he is guilty of the contempt, so as to prevent him from proceeding in his cause. In the present case the defendant did not apply to the court for a favor in offering to file his answer, for he had a right to file it at any time before the decree became absolute, and therefore the rule that a party in contempt cannot make a motion until he has cleared his contempt, is not applicable to this case. But the injunction which the defendant is charged with violating was not granted in the present cause, but in that of Barnes vs. Jones and others, and the defendant is not guilty of a contempt in this cause by being guilty of a contempt in another cause.

For these reasons I think the defendant has a right to file his answer, which was produced and offered to be filed before the decree nisi became absolute.

[For a hearing on motion to dissolve injunction, see Case No. 9,240.]

[3] These citations are incorrect. There is no case in any of Paige's Chancery Reports under the name of Alkroyd v. King or Akroyd v. Klug. In Johnson v. Pinney, 1 Paige, 646, the defendant applied for a commission to take testimony of a witness. The plaintiffs resisted the application, on the ground that the defendant was in contempt for not paying a bill of costs. The chancellor held that where a party is in contempt, the court will not grant an application in his favor which is not a matter of right. If he applies to the court for a favor, it will be granted, on condition that he purge his contempt by complying with the former order of the court.

Case No. 9,240.

MASON v. JONES et al.

[1 Hayw. & H. 329.] [1]

Circuit Court, District of Columbia. March Term, 1848.

FRAUD—NOTES—DEFENSE—HOLDER WITHOUT NOTICE—FRAUD OF AGENT — EQUITABLE RELIEF—CONFESSION OF JUDGMENT—INJUNCTIONS—VIOLATION OF—PRINCIPAL.

1. The proper order, where the defence set up to a promissory note is fraud, is to restrain its negotiation and permit the parties to proceed at law.

2. An injunction against negotiating a promissory note is not violated by suing thereon, and proceeding to judgment and execution.

3. By praying that a bill in another cause may be made a part of the present bill, all its statements are considered as repeated, and must be answered.

4. All the facts stated in the bill, not denied by the answer, are taken as true on a motion to dissolve on final hearing. Facts not admitted must be proved.

5. Denial of fraud charged to have been committed by an agent is not sufficient on the information of the agent and the belief of the principal.

6. Fraud in the origin of a negotiable note is no defence against a bona fide holder without notice.

7. But a member of a company who discounted individually a note belonging to the company, without knowledge of any fraud in its origin, is affected by the fraud of the agent of the company.

8. Where a judgment has been confessed by an attorney through the negligence of the defendant, equity will not relieve.

9. Where B. filed his bill against I. and others, alleging fraud in a contract, which was not answered, and M. afterwards filed his bill against I. for relief against a judgment at law in relation to the same matter, though the fraud can not be tried in M.'s suit, the injunction obtained by him will be continued until B.'s suit shall be tried or disposed of.

10. It seems that after judgment an endorser is considered in equity a principal and not a surety.

11. Courts of law and equity have concurrent jurisdiction in cases where fraud is the ground of relief, and the court which first obtains possession of the case must settle the matter conclusively.

[In equity. Heard on motion to dissolve an injunction.]

In the spring of 1839 Abraham Barnes purchased 125,000 cuttings of the morus multicaulis of J. F. Callan, agent of the Washington City Silk Co., and gave his negotiable notes with M. Clarke and Mason as sureties for the price of the same. The aggregate of the notes was $5,000, payable, it was believed by Barnes, in two payments of $2,500 each on the 15th of Oct. and Nov., 1839. Callan was represented, when the purchase was made, to have warranted that the cuttings would vegetate and grow if certain instructions were followed. Barnes did not examine them until they were delivered,

[1] [Reported by John A. Hayward, Esq., and Geo. C. Hazleton, Esq.]

when he was struck with the dry appearance of the cuttings; notwithstanding, he set them out, following the instructions; but all of them, except about 2,700, did not vegetate, and at the time of the sale were dead and worthless. Upon discovering this Barnes, on June 19, 1839, filed his bill, stating as above and charging that the contract was made by Callan as the agent and with the knowledge of the members of the company, and that he knew the worthless condition of said cuttings, and fraudulently misrepresented the quality and condition thereof; and his said notes being negotiable, he sought an injunction against the same being negotiated or sued on, and an abatement to the extent of the partial failure of the consideration. The members of the company were Dr. Jones, Pierce Hall, Callan and a number of other persons, who were made defendants. It was charged that the notes were then held by said Callan, or some member of the company, and by no one who had paid a valuable consideration therefor without notice. An injunction was granted "against negotiating or passing away said notes," which was returned served on all the defendants. The defendants did not appear to this suit nor answer said bill. On February 10, 1841, a writ was issued in the name of said [Thomas P.] Jones against the complainant, [John] Mason, [Jr.], on a note dated April 15, 1839, made by said Barnes to said Mason or order, endorsed by him and M. Clarke, payable on October 15th, following, for $1,250. Mason was arrested, and special bail was put in. Mr. Marbury found his appearance entered; but having received no instructions, and never having seen Mason, he entered judgment at March term, 1842. A ca. sa. was issued, and Mason was taken into custody.

On January 13, 1843, Mason filed his bill, setting out the purchase of the cuttings by Barnes of Callan, as the agent of the company, and of one Kinsman, of Philadelphia, the warranty, and worthlessness of the cuttings as above stated; the giving of notes for the price, and the injunction granted at the instance of Barnes as aforesaid; the suit by Jones upon "one of said notes," given for said cuttings; that he had been sued by Kinsman upon "three of said notes," and had employed Brent & Brent, who were his attorneys, and to whom he had explained the transaction, and requested them to attend to any suits on said notes; that he attended to Kinsman's in person, and employed those gentlemen; but being unable to do so when sued by Jones, he requested a friend to enter bail and to employ counsel, who, by mistake, entered Mr. Marbury's name, instead of Brent & Brent; that he often spoke to them afterwards of his cases, but without naming this of Jones', as the defence was the same as Kinsman's, who became non-suit; that his friend did not inform him of the entry of Mr. Marbury's name; and the first he knew of it, and of said judgment, was upon examining the docket after being taken in execution; that the said note for $1,250 was one of those given for said cuttings and enjoined as assigned, which, and the total failure of the consideration, were known to said Jones at the time the note was delivered to him, if he did not then hold the same for himself and the other members of said company; all of whom were charged to be parties to said fraud. The bill further stated that Barnes resided in Washington county, Maryland, and that the demand of the said note was made in the city of Washington. The note was dated, but not made payable there. The bill and injunction of Barnes was referred to as a part of this bill. Jones was required, among other things, to answer what office he held in said company, and what sum he gave for said note, in what paid, and to whom. The prayer was that the judgment might be opened, or relief granted here by perpetual injunction and cancellation of the said note. The injunction was returned served on Jones. He did not appear or answer. On June 24, 1845, a perpetual injunction was decreed nisi, which was served on July 1st; and on October 24, 1845, before the decree became absolute, Dr. Jones' answer to Mason's bill was brought into court and offered to be filed. Objection being made, the matter stood over, and was heard and leave granted at the October term. [Case No. 9,239.]

Redin and Bradley in support of the motion to dissolve.

The counsel in support contended that this was not a case for the interference of a court of equity.

I. Jones was not in contempt. He obtained the note bona fide before Barnes' injunction, and had a right to proceed to judgment. That injunction was against the company collectively, and was not meant to reach him individually. Barnes' injunction bond was to the parties, and would be no security to Jones as the individual holder of the note. The notes mentioned in Barnes' bill are not the same as those in Mason's. The order for the injunction was not against suing, but negotiating merely. It was settled on the presentation of the answer that the contempt, if one, was in another cause, and could not be urged in this. The remedy for contempt in violating an injunction is attachment. The judgment cannot, for that reason, be set aside.

II. But the defences set up are defences at law. 1. As to the fraud and warranty, they are denied; if upon the information of Callan only, the charge is merely upon the information of Barnes. Mason's bill does not aver that the company knew the cuttings were bad at the time of the sale, nor that the statements in Barnes' bill are true. What was given for the note, and what office Jones held, are immaterial inquiries, and cannot serve the complainant in his defences of fraud and failure of consideration. The de-

nial of the defendant meets fully every material allegation in both bills. But, if not sufficiently denied, fraud and warranty are no defence against Jones, a bona fide holder of the note without notice; gaming and usury are the only defences against an innocent third party (Chit. Bills); fraud is not, except between the original parties, (Thornton v. Winn, 12 Wheat. [25 U. S.] 183,) and on warranty the remedy was at law; no circumstances of fraud are stated, and if they had been, the defence was at law. 2. The failure of consideration is denied, but it is averred to be total, and that is also a full defence at law. 3. No advantage can be taken in equity of any illegality in the demand and notice after judgment. There is no averment that the residence of Barnes was known to Jones. If unknown, the note was properly demanded at the place of its date.

III. The judgment was properly obtained and cannot be stricken out. A party is bound by a judgment confessed by his attorney of record, unless fraud or collusion with the adverse party can be shown. He will not be relieved where it is produced by his own negligence. In this case the complainant did not inform his bail that Brent & Brent were his attorneys, and requests him to have their appearance entered; nor did he give any attention to the suit afterwards. There is no relief under such circumstances. 36 Law Lib. 259; 2 Story, Eq. Jur. §§ 885, 887, 889, 896; Prather v. Prather, 11 Gill & J. 110; Fowler v. Lee, 10 Gill & J. 358. The understanding at the bar, as to the confessions of judgments, is that the defence must be made known at the same time, and an opportunity afforded for a trial, before the jury are discharged; else a defendant might wait till the witnesses were dead and limitations would be a bar.

Mr. May, contra:

I. It is a case of partial failure of consideration, made so by reference to Barnes' bill. The fraud charged is denied on the information of Callan only, which is not sufficient. Alex. Ch. Prac. 86. The defendant was one of the company, and is charged to have known of the fraud, but, if no personal knowledge, he was answerable for the misrepresentations of Callan, the agent of the company. He is not a bona fide holder of the note. He received it as the property of the company, of which he was one. He, therefore, knew the consideration, or had reason to know, and was bound to inquire. His answer is not full; he does not state what office he held in the company, nor what he gave for the note. A case of fraud is made out in Barnes' bill, which the defendant and other members of the company were bound to answer.

II. The judgment was entered by mistake. The complainant was lulled into security by the former injunction. He had no knowledge of the appearance of Mr. Marbury. He had a defence which he had instructed his counsel, Brent & Brent, to make to all these notes. Equity can interfere. 2 Story, Eq. Jur. §§ 885, 887, 889, 896; Gott v. Carr, 6 Gill & J. 309; Offutt's Adm'r v. Offutt, 2 Har. & G. 179; Smith v. McIver, 9 Wheat. [22 U. S.] 532; Brown v. Swann, 10 Pet. [35 U. S.] 497; Truly v. Wanzer, 5 How. [46 U. S.] 141; Marine Ins. Co. v. Hodgson, 7 Cranch [11 U. S.] 332; Creath's Adm'r v. Sims, 5 How. [46 U. S.] 204. 36 Law Lib. 61.

III. Jones was under disability to sue. The injunction in Barnes' Case was not to sue. The suit brought against Mason was on the same note, and was a violation of that injunction. The defendant was in contempt, and shall take no benefit from his illegal act. There will be a restoration of the rights of the parties as they stood before the suit was brought. The remedy for breach of an injunction is not merely attachment, but the acts done will be treated as nullities. Partington v. Booth, 3 Mer. 148; Marquis of Downshire v. Sandys, 6 Ves. 109 (2d Ed.) 108; 1 Smith, Ch. Prac. 623; Hearn v. Tennant, 14 Ves. 136, a case of possession restored; West v. Belches, 5 Munf. 187; 2 Har. Ch. Prac. 222; Alex. Ch. Prac. 86, 88, 92; Bullen v. Ovey, 16 Ves. 144; Leonard v. Attwell, 17 Ves. 385; Gadd v. Worrall, 2 Anstr. 555; Anon., 3 Atk. 567; Earnshaw v. Thornhill, 18 Ves. 487; Marsack v. Bailey, 2 Sim. & S. 577; Woodward v. Earl Lincoln, 3 Swanst. 626; Woodley v. Boddington, 9 Sim. 214; Robinson v. Byron, 2 Dickens, 703; 3 New. 294; Williamson v. Carnan, 1 Gill & J. 212; Hood v. Aston, 1 Russ. 412; Clark v. Dew, 4 Cond. Eng. Ch. Cas. 344; Hawley v. Bennett, 4 Paige, 163; Lynch v. Colegate, 2 Har. & J. 34; Gibson v. Tilton, 1 Bland, 353.

Before CRANCH, Chief Judge, and MORSELL, Circuit Judge.

MORSELL, Circuit Judge. The first question to be considered is whether defendant has violated the injunction in the case of Barnes v. Jones and others. Both subpoenas and injunction, by the return of the marshal, were served on all the defendants. The order for the injunction was obtained on 19th June, 1839, as: "Let the injunction issue to restrain the defendants from negotiating or passing away the promissory notes in the bill mentioned until the further order of the court." It is erroneously stated in Mason's bill that the injunction was to prevent Jones and others from "suing upon the same." This is not included in the order of the judge, though it appears to be interlined in the precept of injunction issued by the clerk. That order is in the words above stated, and I think it was entirely correct not to enjoin the bringing of suit by the original party, as the bill charges that the notes were obtained by fraud, the defence would have been available at law, and the party might have suffered great evil from being prevented from suing. He might have lost the security for the pay-

ment of his debt, which he might have had by a judgment. There might also be other evils occasioned which do not now occur to me. I find it sanctioned by authority (3 Bac. Abr. "Injunction," 651): "Injunction will be granted to restrain the negotiation of bills of exchange or promissory notes obtained by fraud, and in this case if the plaintiff support his motion by an affidavit of the truth of the facts stated in his bill, the injunction will be allowed immediately upon the bill being filed; but the defendant should, upon intimation of the suit by negotiating the security, defeat its object (in note), "where a motion was made to restrain a defendant either from bringing an action on a promissory note, suggested to have been given for undertaking to bring about a marriage, or to prevent him from assigning it over, the court made an order upon the defendant to keep the note in his possession, and not assign or endorse it, but would not extend the injunction so far as to inhibit the payee himself from proceeding at law."

Smith v. Aykwell, 3 Atk. 566, Amb. 61: In the case in 3 Atk. the chancellor says: "Here it is not only charged by the bill to be a marriage brokerage agreement, but the fact supported by an affidavit, and therefore I will make an order on the defendant to keep the note in his own possession and not assign or endorse it over to any person whatever, but shall not extend the injunction so far as to prevent him from proceeding at law. There being then for the reason, as well as the reasons already given in the opinion of the chancery judge in this case on the subject of allowing the answer to be filed, no violation of the injunction, the objections on that ground cannot avail."

The reason offered in support of the motion to dissolve will next be considered:

First, as to the jurisdiction. That the circumstances of the fraud ought to be stated in the charge of fraud in the bill, and not in terms only, and that none such are so stated. Second, that the defence might have been made at law, and that it is now too late, there being no clear evidence of fraud or accident, or the act of the opposite party unmixed with any negligence or fault on the part of the complainant. Third, the answer denies the fraud as to himself or Callan. The bill in this case prays that the facts and things stated in Barnes' bill against this defendant and Callan, and sundry others, may be made a part of this bill, and I supposed it must be so considered. It is objected that the complainant cannot have the advantage of the facts stated in that bill, because they are stated as of the knowledge of others, and complainant does not state in his bill "that he believes them to be true," but I suppose it must be understood that they become a part of the bill into which they are invoked according to the usual and common form, which is invariably with those words, and of course that this objection must be answered.

Barnes' bill, after stating particularly the attending circumstances and the contract and consideration made with Callan, the agent of the company of which the defendant in this case was a member, according to which the cuttings were affirmed and warranted to vegetate and grow, that he had no opportunity of examining and inspecting said cuttings unless they were delivered after the contract of sale. He charges that the whole lot of cuttings so purchased by him of said Callan, as agent aforesaid, was, at the time of sale, dead and utterly worthless except about 2,700 cuttings; proceeds to charge that, at the time of delivering said cuttings, they had not (with the exception just stated) been in the ground or any soil for some time, and were utterly valueless, and that said Callan well knew the same, and did fraudulently misrepresent the condition and quality of said cuttings, of which he also charges the other defendants in the suit had knowledge. And it seems to me that the bill filed in this case reiterates the same circumstances in substance, and charges a fraudulent knowledge of the same by the various parties to the contract, and the fulfillment of Barnes on his part. It appears then that the facts and circumstances of the fraud, and the fraud itself, are positively charged to have been practiced on the part of the defendants. What effect ought to be given to the answer? Admit that at the time stated in the bill, 1838, sundry persons, the names of some of whom are correctly given in said bill, and among whom were the defendants, united themselves into an association or company for the purpose, among other things, of procuring and selling cuttings and trees of the morus multicaulis, and that they offered the same for sale, and authorized John F. Callan to sell for them, who acted for them in the city of Washington as their agent; it admits the contract made with Barnes, but denies that Callan warranted as the agent of the company as stated. Admits also that Barnes, for the cuttings, gave to Callan his four several promissory notes, made payable to complainant, and endorsed by him and Matthew St. Clair Clarke, but declares and avers that he was personally and wholly ignorant of the said transaction, and was not advised with or consulted in any part of them; nor did he ever know of them until long afterwards and after he had become the sole bona fide holder of the notes hereinafter mentioned (the one mentioned in the bill). But this defendant, on the information he has received from the said John F. Callan, positively, particularly and circumstantially denied that there was any fraud done, or attempted or designed, in the sale of the said cuttings by the said John F. Callan; that he is informed and believes that some part of the cuttings did vegetate and grow; that Barnes, as he is informed and believes, did not follow the instructions; denies that the

consideration of the notes entirely failed; admits that the notes were given for the benefit of the said company as a company; admits that an injunction was obtained by Barnes as stated, but that long before the granting of the injunction the said defendant, without any knowledge of any facts, and without having heard anything to cast suspicion upon the said notes, and without any knowledge or information about the consideration for which they had been given, bona fide and in the regular course of dealing and business, received one of the said notes, being the one mentioned in said bill, and gave full value therefor; this was within a few days after its date; that he had received the same from the said Callan as the property of the said company, but that he, this defendant, received it as any other person would have done, relying on the credit of the endorsers thereon more than that of the drawer; excuses himself for a disobedience to the injunction; does not recollect that it was served on him. He did bring the suit, &c., utterly ignorant of the facts with respect to Mr. Marbury, &c., except that he did confess the judgment, &c. That if the facts therein stated are true (which he does not admit, &c.), they are insufficient to give jurisdiction to this court to go behind the said judgment at law, and he prays to have the same advantage as if he had pleaded the same; denies all fraud and combination, &c., and declares and averring that on the 18th April, 1839, he received the said notes bona fide and gave full value therefor in the regular course of business; excuses himself for not having put in his answer earlier, &c. It is objected that this answer does not fully respond to the charges contained in the bill, and that those which are not answered are to be taken as true.

The rule laid down in Young v. Grundy, 6 Cranch [10 U. S.] 51, is: "If the answer neither admits nor denies the allegations of the bill, they must be proved on the final hearing, but upon a question of a dissolution of an injunction they are to be taken to be true." As to the objection that he does not state what office he held in the company, and what he paid for said note, and whether the proceeds of the said note were for the use of himself and the other persons named in the bill of complaint, &c., and what sum of money did he give for said note, he has answered that he was a member of the company; admits that he received the note; states that without any knowledge or information of or about the consideration for which they had been given bona fide and in the regular course of dealing and business, he received one of the notes, being the one mentioned in said bill, and gave full value therefor; that this was within a few days after its date; that he received the same from the said John F. Callan as the property of said company, but that he received it as any other person would have done, &c. This seems to me sufficient to answer all the material part of those interrogatories.

The next and last objection is, "that a case of fraud has been charged in the bill, and the answer does not meet it to the extent of it." The answer, besides the general denial of all fraud and evil practice and all combination, &c., says: "But this defendant, on the information he has received from the said John F. Callan, positively, particularly and circumstantially denies that there was any fraud done, attempted or designed in the sale of the said cuttings of the said John F. Callan, and he sufficiently denies it as to himself by showing his entire ignorance of all the circumstances," &c. The question is, what weight is due to the denial merely upon information of Callan and his belief, without any knowing? The charge is, that Callan as agent of the company was guilty of the fraud. Is the charge fully met?

The bills are injunction bills, and filed on oath. It is true the answer of the defendant is on oath, but it is not of facts from his own knowledge. He declares he was altogether ignorant of them. His answer is, therefore, nothing more than his belief of what another has informed him. I do not think such an answer ought to have the weight of a full and positive denial of the facts respecting the fraud as stated in the bill. The principle will be found established in the cases of Clark's Ex'rs v. Van Riemsdyk, 9 Cranch [13 U. S.] 153; Union Bank of Georgetown v. Geary, 5 Pet. [30 U. S.] 111. In the last case the judge, in delivering the opinion of the court, says: "It is to be borne in mind that the bill does not charge the agreement to have been made with the bank, but with their attorney. The denial by the bank is not, therefore, of any matter charged to have been within their own knowledge. They could, therefore, only speak of their belief, or from information received from their attorney, and not from their own knowledge of the transaction." This was also the case of an injunction bill. It has been contended, however, that the defendant in this case, being the holder of an endorsed negotiable promissory note, before the same became due for a bona fide and valuable consideration, and without notice, cannot be affected by the fraud. This, as a general proposition, is unquestionably true. Do not the circumstances, however, of this case show the principle inapplicable? It is admitted that at the time of the transaction the defendant was a member of the company; that Callan was the authorized agent to make the sale and contract of sale, and that he acted for them in the contract with Barnes for the 125,000 cuttings; who gave his several promissory notes drawn by said Barnes and endorsed by Mason and Clarke to Callan as such agent, for the benefit of the company, as such company; one of which notes some few days after the date was delivered by said Callan to him, the defendant, as the

property of said company. Was he not, therefore, fully affected by the actings and doings of Callan in the transactions as much as any other member of the company, and as much so as if he had in fact known and been cognizant of all the facts and circumstances charged as fraudulent, and although he received it under the circumstances stated by him? If so, the principle relied on by him, above stated, is not applicable.

The next part of the case presents a question of more difficulty. It is in relation to the equity jurisdiction of this court in a case which has already been before it as a court of law between these same parties, and where the complainant could have availed himself of the matter set up in this case and had full and ample justice done to him, yet did not even attempt it, but, on the contrary, confessed a judgment to the defendant for the amount of the claim. The rule is that when a party has a good defence at law and omits to make it, he cannot afterwards upon the same ground have relief in equity. Gott v. Carr, 6 Gill & J. 312. In the court of appeals, the judge in stating the opinion of the court says: "The well settled general rule being that a court of equity will not relieve against a recovery in a trial at law, unless the justice of the verdict can be impeached by facts or on grounds of which the party seeking the aid of chancery could not have availed himself at law, or was prevented from doing it by fraud or accident or the act of the opposite party, unmixed with any negligence or fault on his own part," and the principle is the same where at law there is a confession of judgment. Many other cases might be here stated establishing the same rule, but I really do not think it necessary. The question then is, has there been any such circumstances of fraud or accident or the act of the opposite party, unmixed with any negligence or fault on his (complainant's) own part? To show this it has been said that the injunction granted by the court in the case of Barnes had the effect to lull him into security, &c., and, secondly, that Mr. Marbury, instead of Messrs. Brent & Brent, by mistake and accident was employed as the attorney in the case, and, not knowing there was a defence, confessed the judgment. With respect to the judgment, it was granted in a case in which the complainant was no legal party, and, as I have before said, the judge made no order inhibiting the defendant in that case to sue on the note, and the service of the writ in the case was amply enough to warn the complainant that the defendant did not consider himself thereby restrained from suing on the note, and the additional circumstances, which he states, of his having sometime before sued Kinsman on three of the notes given for the same contract, and feeling it necessary to attend to them in person, fully proves this excuse not to be sound. As to the mistake in employing Mr. Marbury, let the circumstances be considered proved as stated by the complainant himself. The suit was brought against him on the 10th of February, 1841, and in the usual course progressed until March, 1842, when the judgment was confessed, being the regular trial court; that, not being able to attend to the case in person, he applied to a friend to enter special bail for him and to employ counsel, and that his special bail through mistake entered the appearance of Mr. Marbury, attorney at law, instead of Brent & Brent, who alone were acquainted with the facts of the case and of the defence, and to whom the complainant had spoken; that if sued as an endorser on said notes, &c., he wished the said Brent & Brent to attend to the cases for him, of which he (the complainant) would inform them; that he was never informed by his said special bail that he had directed Mr. Marbury to appear for him, nor did he know the same until after judgment had been rendered against him, and not then did he know that any judgment was obtained until after a ca. sa. had been served upon him.

It appears, then, that Mr. Mason gave no directions to his bail, who he employed as counsel for him, or that he (the bail) knew that the Messrs. Brent were, nor does it appear that he ever inquired of his bail who he had employed, or that he ever informed the Messrs. Brent and requested them to appear. The suit was depending the usual time of twelve months, without any attention on the part of the complainant in the preparation for the trial; no order to summon witnesses; no reasonable and proper endeavor to procure evidence, but a total indifference. He must have known when, by the rules of the court, the trial court would be. Suppose Brent & Brent had been employed, could he think that it would not be necessary to have his proofs of the fraud ready to enable them to make the defence? instead of which he does not make any inquiry of them about it. Can it be said that this is the case of accident unmixed with any negligence or fault on his part? On the contrary, does there not appear to have been gross negligence?

But although the court has no jurisdiction to try and determine the question of fraud, for the reasons already stated, has it not the power and would it not be proper to continue this injunction to await the final decision of the case of Barnes against the defendant, with a number of other defendants hereinbefore mentioned? There is enough to show that that suit is to try the validity of the same contract with which the note in the case is connected, notwithstanding the erroneous description of the notes mentioned in that bill. It is true that after the liability of the endorser becomes fixed by judgment, as in this case, he is to be considered as a principal, so decided in the case of Creath's Adm'r v. Sims, 5 How. [46 U. S.] 206, and Prout v. Lennox, 3 Wheat. [16 U. S.] 520:

"That the endorser of a note who has been charged by due notice of the maker's default is not entitled to the aid of a court of equity as a surety." But can we shut our eyes to the most unjustly oppressive and iniquitous effect which the complainant in this case would be made to suffer if he is not permitted to have the benefit of the rescission of the contract, if such should be the event upon the trial of that case?

That suit was brought on the 19th June, 1839, and, according to the return of the marshal, the defendants were all served with subpoenas. But no answers, I believe, have yet been filed. The delay in bringing it to issue has been certainly very great, but the case is still depending and undisposed of. It may be added that the defendants in this case cannot be said to be free from blame in occasioning the delay.

Fraud being the ground upon which relief was sought from the obligation of the contract, this might be availed of either in a court of chancery or of common law. In such case the rule is, "The court which first has possession of the subject must determine it conclusively, and has a right to retain it exclusively of the other." Smith v. M'Iver, 9 Wheat. [22 U. S.] 535. Chief Justice Marshall, in delivering the opinion of the court, says: "In all cases of concurrent jurisdiction, the court which first has possession of the subject must decide it." Again, at 536: "Admitting, then, the concurrent jurisdiction of the courts of equity and law in matters of fraud, we think the cause must be decided by the tribunal which first obtains possession of it, and thus each court must respect the judgment or decree of the other."

The court of chancery had first possession of the contract in connection with this note, and had an exclusive right to retain it until the case was disposed of. Is that not a sufficient reason for this court to hold up the injunction until the other case has been disposed of, or at least until this defendant has done everything in his power to bring it to a final action?

Case No. 9,241.

MASON et al. v. KANE.

[Taney, 173; 24 Hunt, Mer. Mag. 717.] [1]

Circuit Court, D. Maryland. May 2, 1851.

CUSTOMS DUTIES—RECOVERY OF DUTIES PAID—PROTEST—IN WHOSE NAME SUIT BROUGHT.

1. The tariff acts of 1799 [1 Stat. 627] and 1845 [5 Stat. 727] do not prevent the actual owner of goods imported, from suing for the recovery of duties paid under protest by the consignee, and do not require such suits to be brought in the name of the consignee.

[Cited in Gray v. Lawrence, Case No. 5,722.]

2. The tariff act of 26th February, 1845, provides that no action to recover duties paid under protest, shall be maintained against a collector, "unless the said protest was made in writing, and signed by the claimant, at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof." A protest under this act, objecting in general terms to the additional duty exacted, but assigning no reason for the objection, will not warrant the institution of a suit to recover back the duties objected to, even though such duties were illegally exacted.

[Cited in Thomson v. Maxwell, Case No. 13,983; Pierson v. Lawrence, Id. 11,158; Davies v. Arthur, 96 U. S. 151; Chung Yune v. Kelly, 14 Fed. 641.]

This action was instituted on the 22d of October, 1850 [by David Mason and John E. Tullis], against [George P. Kane] the collector of the port of Baltimore, for the recovery of duties paid under protest. The facts sufficiently appear from the following statement of facts, agreed on by the counsel in the cause, and the opinion of the court.

Statement of facts: (1) It is admitted, that the plaintiffs are residents of Savannah la Mer, Jamaica, and aliens, and owners of the pimento, mentioned in the above case; and that Spence & Reid, merchants of Baltimore, were the consignees of said pimento, and entered the same, and paid the duties exacted upon them by the defendant, under protest in writing, signed by them. (2) It is further admitted, that on or about the 21st of September, 1849, the plaintiffs consigned, from Savannah la Mer, the said pimento, as per invoice and bill of lading, to said Spence & Reid, and that the invoice upon which it was entered, sets forth correctly the price paid by plaintiffs, at the time the same was purchased. (3) It is also agreed, that the custom-house papers relating to this case, or proper copies of the same, shall be read in evidence by either party, and that oral evidence may likewise be given at the trial of this cause.

Upon the foregoing statement of facts, and such other evidence as may be produced by either party at the trial of the case, it is agreed, that the following questions shall be raised and submitted to the court for its opinion: (1) Whether the plaintiffs in this case can maintain the action, by reason of the act of 26 February, 1845, or any other acts of congress. (2) Whether the appointment of the merchant appraisers, is not such an award as is final and conclusive on the plaintiffs, as to the value whereon the duty should have been estimated. (3) Whether the return of the government weighers of the gross weight of the pimento, being 87,139 pounds is conclusive; and the deduction therefrom for tare, or the weight of the bags, should be the weight shown by the invoice; or should be the tare returned by the said weighers, 2617 pounds, which is three per cent. on the gross weight. (4) Whether the additional duty or penalty of $899, exacted in this case, or any part thereof, may be recovered by the plaintiffs, inasmuch as a portion of the pimento, to wit, four hundred and

[1] [Reported by James Mason Campbell, Esq., and here reprinted by permission. 24 Hunt, Mer. Mag. 717, contains only a partial report.]

twenty-three bags, has been exported, as will appear from the export entry thereof.

If, upon the foregoing questions, the opinion of the court should be in favor of the plaintiffs, then a verdict and judgment shall be entered for the plaintiffs, for the damages claimed in the narr. with costs; but if in favor of the defendant, then for the defendant with costs. And it is further agreed, that if the judgment should be in favor of the plaintiffs, the amount including interest for which the verdict and judgment shall stand, shall be hereafter calculated in conformity with the principles which the court shall decide to govern the case, and the said verdict and judgment corrected accordingly.

Brown & Brune, for plaintiffs.

Z. Collins Lee, Dist. Atty., and Hon. Reverdy Johnson, for defendant.

TANEY, Circuit Justice. This suit is brought against the collector of the port of Baltimore, to recover certain duties, which the plaintiffs allege were overcharged upon a cargo of pimento, imported from Savannah la Mer, in Jamaica. The official appraisers, acting under positive directions from the secretary of the treasury, estimated the value of this pimento much higher than that in the invoice; and upon a reference to merchant appraisers, although they valued it lower than the officers of the government had previously done; yet, the price at which they assessed it, exceeded the invoice price more than ten per cent., estimating the value by the pound, without regard to the difference in the dutiable quantity, arising from the difference in the tare allowed in the invoice, and that allowed by the official weighers; and upon this appraisement by the merchant appraisers, the penal duty of twenty per cent. was exacted by the collector, upon the whole cargo, and paid under protest by the consignees. The pimento was warehoused upon its arrival, and a part of it remained in the warehouse when the penal duty was demanded; and a large portion of it was re-exported and never withdrawn for consumption or sale in this country.

The suit is brought by the owners of the cargo, who reside in Jamaica, and not by the consignees, who paid the money and signed the protest; and it is objected by the defendant, that this suit cannot be maintained by a foreign owner, but must be brought by the consignee; that under the acts of 1799 and 1845, the consignees, for all purposes connected with the payment of duties, were to be regarded as owners; and that the principles and doctrines in relation to principal and agent in the ordinary concerns of life, do not apply to a case of this kind.

This is certainly a question of some difficulty. But we do not think that the language of the act of 1845 requires this construction; and the motives of policy which evidently introduced the provision upon this subject in the act of 1799, can hardly have influenced the provisions of the act of 1845, under which this suit is brought. We see no inconvenience that can arise to the collector, or the public, by permitting the owner to maintain the suit in his own name, instead of suing in the name of his agent or consignee; the payment by the consignee, is the payment by the principal; and the protest of the consignee, the protest of the principal, if he thinks proper to adopt it. We think the practice in some of the circuits has sanctioned suits by the foreign owner, in cases of this description; and as this practice is consistent with a fair construction of the act of 1845, and no injustice or inconvenience can arise from it, the court are of opinion, that this objection must be overruled.

But the objection to the sufficiency of the protest, is a much more serious one. Some question has been made as to the charges to which it objects; but it is very clear that it applies altogether to the additional and penal duty, which appears to have been demanded and paid on the day of the protest; it objects to this demand in general terms, without specifying any particular grounds of objection. But it is now insisted, in support of the action, that the demand was illegal: (1) Because the merchant appraisers assessed the value at the time of the shipment, and not at the time of the purchase. (2) Because they did not actually inspect the pimento. (3) That if their valuation was lawfully made, it does not exceed the value in the invoice ten per cent., taking into consideration the whole cargo, and the difference in the dutiable weight, arising from difference between the tare claimed in the invoice, and that allowed by the official weighers; and (4) That if a penal duty was incurred upon the part of the cargo withdrawn for sale and consumption, it was not incurred upon the portion of it which remained in the warehouse and was re-exported to a foreign country.

But none of these objections are set forth in the protest; it objects, as we have already said, in general terms, to the additional duty exacted on that day; that is, the whole penal duty, but assigns no reason for the objection. Now, the act of 26 February 1845, in express terms, provides that no action of this kind shall be maintained against a collector, "unless the said protest was made in writing and signed by the claimant, at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof." It is not, therefore, sufficient to object to the payment of any particular duty or amount of duty, and protest in writing against it; the claimant must do more; he must set forth, in his protest, the grounds upon which he objects, distinctly and specifically; and these latter words are too emphatic to be regarded as

mere surplusage, or to be overlooked in the construction of this law. The object of this provision is obvious; in the multitude of collection offices in the United States, and the changes which so frequently take place in the officers, mistakes and oversights will sometimes take place, and irregularities in the assessment of duties; and the object of this provision is, to prevent a party from taking advantage of such objections, when it is too late to correct them, and to compel him to disclose the grounds of his objection, at the time when he makes his protest.

The case before the court strikingly exemplifies the policy of this provision. One of the objections is, that the merchant appraisers did not actually inspect the pimento. It was not actually looked at and inspected by these appraisers, because there was no controversy about its quality. The consignees had notice, and appeared before the merchant appraisers, and did not suggest that there was any defect in the quality, which would lower the value, nor express a wish to have it inspected; they offered to prove that it was bought at the price at which it was invoiced, and that such was then the market-price at the place where it was purchased. The appraisers were satisfied that it was bought at the price stated, but were of opinion that the price was lower than its market value in the principal markets of the island, and appraised its dutiable value accordingly. There is not the slightest reason to suppose that their appraisement would have been, in any degree, influenced or changed by their actual inspection of the article; and if this objection had been stated in the protest, the error could have been immediately corrected, before the duties were exacted; but it is now too late. If this oversight be fatal to the appraisement, and renders it invalid, then the public lose not only the enhanced duties to which the pimento was liable, but also the additional or penal duty which was the consequence of the merchant appraisal. The same may be said of the other grounds of objection above mentioned, if they had been set forth in the protest as the grounds of objection, and had been deemed tenable by the administrative department of the government, the errors could have been corrected without the expense of litigation, and the duties which the law imposes secured to the public.

It is for this purpose that the act of 1845 requires the grounds of objection to be distinctly and specifically set forth in the protest; for this suit, although in form against the collector for doing an unlawful act, is, in truth and substantially, a suit against the United States; the money is in the treasury, and must be paid from the treasury, if the plaintiffs recover. As the United States cannot be sued and made defendants in a court of justice without their consent, they have an undoubted right to annex to the privilege of suing them any conditions which they deem proper. In the exercise of this power, they have granted this privilege, in the form of a suit against the collector, where duties are supposed to be overcharged, upon condition that the claimant, when he pays the money, shall give a written notice that he regards the demand as illegal, and means to contest the right of the United States in a court of justice; stating also at the same time, distinctly, the specific grounds upon which he objects. This is the condition upon which he is permitted to sue the collector, and thus to appeal from the administrative to the judicial department of the government. It is a condition precedent; and as it was not performed in this instance, the present action cannot be maintained, even if the duty exacted were not legally due.

It is unnecessary, therefore, to inquire whether the objections now made would have been valid if set forth in the protest. If improperly charged, it is, no doubt, yet in the power of the administrative department to do justice to the claimant; but no action can be maintained under the act of 1845. The verdict must, therefore, be for the defendant.

Verdict for defendant.

Case No. 9,242.

MASON v. LAWRASON et al.

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

Circuit Court, District of Columbia. Nov. Term, 1804.

PLEADING AT LAW—ACTION BY ADMINISTRATOR—OYER OF LETTERS—PROFERT—COURT RECORDS—AUTHENTICATION.

1. Although the plaintiffs name themselves administrators, yet if they have not made profert of their letters of administration they are not bound to give oyer of them.

2. The act of congress respecting the authentication of the records of state courts does not apply to records of the courts of the United States.

[Cited in Turnbull v. Payson, 95 U. S. 424.]

Action on a contract made with the administrators and not with the intestate, but the plaintiffs named themselves administrators, and did not make a profert of their letters of administration. A rule had been laid upon the defendants [Lawrason & Smoot] to plead. They prayed oyer of the letters of administration, and cited Theobald v. Long, Carth. 453, and Adams v. Savage, 6 Mod. 134. The plaintiffs refused to give oyer.

Mr. Taylor, for plaintiffs.

Mr. Swann, for defendant.

THE COURT decided that they were not bound to give oyer, because there was no profert; because oyer is not demandable after the first term; and because the plaintiffs did not sue in the right of their intestate, but in their own right. So that the letters of administration constituted no part of their title.

A certificate of discharge of McPherson, as

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

a bankrupt, was offered in evidence, with a seal, said by counsel to be the seal of the United States district court in Richmond, but not stated by the clerk to be such, but barely signed by him.

THE COURT (CRANCH, Circuit Judge, absent,) permitted verbal evidence to be given that this was the seal, and also that the clerk of that court, W. Marshall, had usually attested records in that manner, and did not insist on its being authenticated agreeably to the requisites of the act of congress, as it was not the act of a state court, but one of the United States. (Judge Fitzhugh's Notes.)

[See 3 Cranch (7 U. S.) 492.]

Case No. 9,243.

MASON v. MANSFIELD.

[4 Cranch, C. C. 580.] [1]

Circuit Court, District of Columbia. Oct. Term, 1835.

DAMAGES—ANCHORING WITHIN LIMITS OF FISHERY—REASONABLE CAUSE—MALICE.

1. If a master of a vessel navigating the Potomac, in the usual course of navigation, anchors in the plaintiff's fishing ground, without malice, for the purpose of taking in the residue of the cargo; and when required to depart, his not doing so immediately be not attributable to malice, but to a reasonable cause, and he removed his vessel as soon as the circumstances of wind, weather, and tide would permit, he is not liable for damages.

2. But if the defendant, knowingly and without necessity or reasonable commercial purpose, anchor his vessel within the limits of the plaintiff's fishery so as to interrupt the same; or if the defendant, having so anchored his vessel within the said limits, knowingly, and without necessity, or any reasonable commercial purpose, remained within the same, so as to interrupt the plaintiff's fishery, the plaintiff is entitled to recover.

This was an action on the case [by Richard B. Mason against Charles Mansfield], for "that the defendant, not ignorant of the premises, (that is, of the plaintiff's right of fishing,) but maliciously intending to injure the plaintiff in this behalf, and to deprive him of the use of his said fishery, did, on the —— day of —— and continually thereafter, for and during the space of —— days then next following, wrongfully and injuriously stop and anchor a certain vessel, then under the command of the defendant, in the berth and range of the said fishery, so that he entirely obstructed and hindered said fishery," &c.

Upon the trial of the general issue, Mr. Neale, for defendant, prayed the court to instruct the jury, that if they should believe, from the evidence, that the defendant pursued the usual course of navigation when he entered the berth of the plaintiff's fishery, and that he anchored his vessel in the channel for the purpose of taking in the residue of his cargo, and not with the malicious intent to injure the plaintiff's right of fishery; and that when required to depart thereout, his not doing so immediately was not attributable to any malice on his part towards the plaintiff, but for the reasons stated in the deposition of the mate, and that he removed his vessel as soon as wind, weather, and tide would permit; then they will find for the defendant.

Mr. Taylor, for plaintiff, contended that it was not necessary for the plaintiff to prove malice, although it is averred in the declaration.

But THE COURT gave the instruction as prayed.

MORSELL, Circuit Judge, contra, being of opinion that malice was not the gist of the action, and therefore need not be proved.

Mr. Neale cited Harman v. Tappenden, 1 East, 562; 1 Chit. 146; Reynolds v. Kennedy, 1 Wils. 233; Goslin v. Wilcock, 2 Wils. 305.

Mr. Taylor, contra, cited 1 Chit. 129, 130, 376; 4 Starkie, 418; Williamson v. Allison, 2 East, 446; Peppin v. Solomons, 5 Term R. 496; Bristow v. Wright, 2 Doug. 665; Barrett v. Wills, 4 Leigh, 114.

THE COURT, (nem. con.) at the prayer of Mr. Taylor and Mr. Mason, for plaintiff, instructed the jury, that if they should be satisfied by the evidence, that the defendant knowingly and without necessity, or any reasonable commercial purpose, anchored his vessel within the limits of the plaintiff's fishery, so as to interrupt the same; or that the defendant, after he had anchored within the limits of the plaintiff's fishery as aforesaid, knowingly and without necessity, or any reasonable commercial purpose, remained within the same, so as to interrupt the fishery, then the plaintiff is entitled to recover.

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

Case No. 9,244.

MASON v. MASI.

[5 Cranch, C. C. 397.] [1]

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

WITNESS—COMPETENCY—INDORSER.

An indorser of a promissory note is a competent witness for the defendant in an action by the indorsee against the maker.

[See Bank of Alexandria v. Clarke, Case No. 844.]

[This was an action at law by Milo Mason's administrator against Seraphim Masi.]

Assumpsit, upon the defendant's promissory note to Nicholas Harper, and by him indorsed to the plaintiff's intestate.

Mr. Morfit, for defendant, offered the indorser, Nicholas Harper, as a witness to prove payment by the defendant; and cited White v. Kibling, 11 Johns. 128; Cooper v. Davies, 1 Esp. 463; Charrington v. Milner, Peake, 8, and Starkie, Ev. pt. 4, p. 300.

THE COURT (THRUSTON, Circuit Judge, contra, and the other judges doubting) per-

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

mitted him to be sworn and examined, to prove payment by the defendant; and said they would hear a motion for a new trial if the verdict should be for the defendant.

Verdict for the plaintiff, $50, with interest from the 25th of March, 1835.

Judgment for the plaintiff.

Case No. 9,245.

MASON v. MASON.

[3 Cranch. C. C. 648.] [1]

Circuit Court, District of Columbia. Nov. Term, 1829.

BILLS AND NOTES—INDORSER—SUIT AGAINST PRIOR INDORSER.

The plaintiff indorsed a note (as town indorser,) already indorsed by two others, for the accommodation of the maker, and at maturity was obliged to take it up. *Held*, that he may recover of the first indorser the whole amount paid to take up the note.

Assumpsit by the last indorser against the first indorser of a promissory note made by Thompson F. Mason, payable to and indorsed by the defendant, Richard B. Mason, and by H. Ashton. The note was offered for discount, but the bank required a town indorser, and the plaintiff, who resided in Alexandria, indorsed it. It was then discounted for the benefit of the maker, and, at maturity, paid by the plaintiff.

The defendant contended, that as he and Mr. Ashton indorsed it for the accommodation of the maker, he was only liable for one half; but

THE COURT (nem. con.), at the prayer of the plaintiff, instructed the jury that the defendant was liable for the whole amount paid by the plaintiff to take up the note.

THRUSTON and MORSELL, Circuit Judges, were of opinion that this case differs from that of McDonald and Magruder at Washington, in this particular, that here the plaintiff was not originally one of the indorsers before the note was offered for discount.

CRANCH, Chief Judge, did not think that that circumstance was material, because he was of opinion that the prior indorser was liable to the subsequent, for the whole, unless there be an agreement to the contrary.

[See Case No. 9,246.]

Case No. 9,246.

MASON v. MASON.

[4 Cranch, C. C. 401.] [1]

Circuit Court, District of Columbia. Nov. Term, 1833.

NOTES—INDORSER—SUIT AGAINST PRIOR INDORSER.

An indorser, who has been obliged to take up a note indorsed by two previous indorsers, for the accommodation of the maker, may recover the whole amount from either of the two accommodation indorsers.

[Action by Thompson F. Mason against Richard B. Mason.]

The plaintiff indorsed a note, (as town indorser,) already indorsed by two others, for the accommodation of the maker; and at maturity was obliged to take it up.

THE COURT held, that the plaintiff may recover of the first indorser the whole amount paid to take up the note.

[See Case No. 9,245.]

MASON (MATILDA v.). See Case No. 9,280.

MASON (MAURY v.). See Case No. 9,314.

Case No. 9,247.

MASON v. MUNCASTER et al.

[2 Cranch, C. C. 274.] [1]

Circuit Court, District of Columbia. Nov. Term, 1821.[2]

RELIGIOUS SOCIETIES—VESTRY AND CHURCH WARDENS—SALE UNDER DECREE—ESTOPPEL.

1. The vestry and wardens of "the Protestant Episcopal Church of Alexandria," were the vestry of the Protestant Episcopal Church in the parish of Fairfax, in the ecclesiastical meaning of those terms as modified by the laws and constitution of Virginia, and the canons of the church.

2. By the sale made under the decree in the case of Taylor v. Terrett [9 Cranch (13 U. S.) 43] the purchasers became privies to the church, and may avail themselves of the estoppel resulting from the warranty of Daniel Jennings, the original grantor.

This was a bill in equity [by John Mason against John Muncaster and others,] praying for an injunction to stay the proceedings at law upon judgments rendered upon two promissory notes given for part of the purchase-money of the glebe, belonging to the parish of Fairfax, which had been purchased by the complainant and Mr. Jones, at the sale made under the decree of this court, affirmed by the supreme court of the United States, in the case of Taylor v. Terrett, 9 Cranch [13 U. S.] 43, and praying, also, that the sale may be set aside for defect of title; that the notes may be given up to be cancelled, and that the part of the purchase money which had been paid, may be decreed to be refunded, &c.

The complainant in his bill states, that he purchased upon the faith of the decree of the supreme court, which he supposed to be binding upon all the world. That the opinion of that court was not printed till 1817, and that it is but very recently that his attention was directed to the reasonings in detail, upon which the decree was founded, and which he now perceives was founded upon the assumption of two facts which do not exist, viz.: (1) that the congregation of the Episcopal church of

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

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

[2] [Affirmed in 9 Wheat. (22 U. S.) 445.]

Alexandria is identical with the original parish of Fairfax, as it existed prior to the assumption of jurisdiction over the District of Columbia by congress; and that the vestry and church-wardens elected by and acting under the authority of that congregation, come in by legal and regular succession to the vestry and church-wardens of the parish of Fairfax; and (2) that there was no other Episcopal church in the parish of Fairfax, than that of Alexandria; and that the property belonged to the church of Alexandria, which in this respect represented the whole parish. The complainant further states, that there are two parties, who were not concluded by the decree, and who have a manifest interest and outstanding title, viz.: 1. The parish of Fairfax, in Virginia, which has a right to the whole glebe; and that many of the members of the Episcopal Church in that parish have threatened that the rights of that parish are to be prosecuted. 2. The heirs of Daniel Jennings, to whom the legal title will revert in consequence of the defeat of the capacities of perpetual and legal succession in the church-wardens, Dade and Wren, and the want of limitation by the deed, to their heirs in their natural capacity; so that the only protection of the complainant would be by setting up the estoppel in Jenning's deed, which he could not do, because there is no legal succession from the church-wardens Dade and Wren, to the church-wardens, Deneale and Muncaster, and so no privity between the complainant and the parish of Fairfax. By a supplemental bill, the complainant asserts that there is now a regular and duly elected vestry and wardens of the Falls Church, in the parish of Fairfax, as competent to assert the rights of the church of that parish as the defendants.

The answer of the defendants, (the vestry and church-wardens appointed by the church in Alexandria,) asserts that they are the vestry and wardens of the whole parish, and are the regular successors of the vestry from the year 1765, and that there never has been but one vestry for both churches in the parish. It contends that the complainant had full knowledge of the state of the title at the time he purchased, and that the question of the outstanding title in Jennings was settled by the supreme court in the case of Taylor v. Terrett [supra].

There were many exhibits, and much testimony, and the cause which came on to be heard on a motion to dissolve the injunction, which had been granted, was fully and ably argued upon the whole merits, by Mr. Key and Mr. Wirt, (the attorney-general,) for complainant.

Mr. Taylor, Mr. E. J. Lee, and Mr. Swann, for defendants.

After the argument, it was agreed that the cause should be considered as having been set for final hearing, and that the opinion of the court should be given at the next term.

CRANCH, Chief Judge. After the decision of the case of Taylor v. Terrett in the supreme court of the United States, the only question left open to the complainant in this case seems to be, whether the complainants in that case were the representatives of the cestuis que trust of the glebe; or in other words, whether they, with George Deneale and John Muncaster, two of the defendants in that case, were, at the time of filing the bill, (22d November, 1811,) the vestry of the Protestant Episcopal Church, in the parish of Fairfax, in the ecclesiastical meaning of those terms as modified by the laws and constitution of the state of Virginia, and the canons of the church. For, if they were, the supreme court having decided that that church was the cestui que trust, and that the vestry, as incident to their office as general guardians of the church, were entitled to assert its rights and interests, and with the assent of the minister, had a right to require a sale of the land; a sale so made by them, would constitute the purchasers privies to the church; and would enable them to avail themselves of the estoppel resulting from the warranty of D. Jennings, the original grantor; and they would be in no danger from the outstanding title in the heirs of that grantor, nor from the claims of that portion of the parishioners, (if any such there be,) who reside in the county of Fairfax.

After the Revolution, when the Protestant Episcopal Church ceased to be the established church in Virginia, and the vestries ceased to have the power to tax their respective parishes, a Protestant Episcopal parish in the ecclesiastical meaning of those terms, consisted only of those inhabitants of a territorial parish, who were members of the Protestant Episcopal Church. The word parish, therefore, in its ecclesiastical sense in regard to the Protestant Episcopal Church of Virginia, was synonymous with the phrase, "Protestant Episcopal Church in the same parish;" or, in other words, a parish, in its ecclesiastical sense, in Virginia, after the Revolution, meant the Protestant Episcopal Church in a parish. And the Protestant Episcopal Church in a parish consisted of the members of that church who resided within the territorial parish.

The right to the glebe in question, is decided by the supreme court to be in the Protestant Episcopal Church, in the parish of Fairfax. No individual member of the church has any interest therein, but in right of his church. It is a social, not an individual right. The Protestant Episcopal Church in the parish of Fairfax is recognized by the act of Virginia of 1786, as a religious society capable of having property, and belonging to a sect which could make, or had made rules for regulating the appointment of trustees. In May, 1787, the convention of the Protestant Episcopal Church of Virginia, ordained rules for that purpose, which rules are recognized by the act of 1788, which declares that the trustees

of the Protestant Episcopal Church, (appointed according to their rules,) and their successors shall be considered successors of the former vestries, and have the same powers.

The repeal of the acts of 1786 and 1788, did not affect the right of the sect (that is, the convention,) to make such rules, because the right was not given by those acts. They are only evidences of a preëxistent right. The vestrymen, who were complainants in the bill of Taylor v. Terrett were duly appointed according to the rules of their sect, (that is, the canons of their church.) There is no evidence of the particular manner in which they were chosen, but it is certified by the church-wardens, that they were duly elected to serve the parish as vestrymen for the next three years; and the fact must be admitted, unless the contrary be proved. The only remaining question then, is, what parish were they to serve? The complainant's counsel say, not the parish of Fairfax, but the Alexandria congregation, or as they call themselves in the vestry-book, "The Protestant Episcopal Church of Alexandria," which had abandoned the parish of Fairfax, and set itself up in 1803, as a separate religious society. And they give this answer to the question, because they say there are no entries in the vestry-book from the 19th of April, 1799, to the 2d of April, 1804; because on the 15th of June, 1803, there was a new agreement entered into by certain subscribers to the church; because the vestry which was elected in 1804, and all the subsequent vestries, styled themselves the vestry of the Protestant Episcopal Church at, or in, or of, Alexandria, and never called themselves the vestry of the parish of Fairfax, as all the former vestries did; because in two or three instances, in the minutes of the proceedings of the vestry, they speak of the parish of Alexandria; and because the vestry suffered the Falls Church to go to ruin.

The court, however, is of a different opinion. We think the parish, mentioned in the minutes of the election of the vestry in 1810, was the parish of Fairfax: 1. Because the entry is made in the vestry-book of the parish of Fairfax.

2. Because there was no other parish which they could serve as vestrymen.

3. Because all the vestries chosen since 1803, have uniformly held, and claimed to hold the glebe, and the church, and all the church-property belonging to the Protestant Episcopal Church in the parish of Fairfax, in the right of that church, and as representing the whole Protestant Episcopal Church in that parish, and have exercised all the rights of property over the same, which a vestry could exercise.

4. Because when the congregation at the Falls Church ceased to exist, the Alexandria congregation became the only Protestant Episcopal congregation in the parish, and constituted the whole Protestant Episcopal Church in the parish. All the Protestant Episcopal inhabitants in the parish, who had a right to vote at all for a vestry, had a right to attend the election held in April, 1810, and to vote for vestrymen; and if they did not, it was their own fault.

5. Because there is no evidence to satisfy us that the Alexandria congregation abandoned the parish of Fairfax, or any of their parochial rights, or ever formed themselves into a separate religious society. The omission of entries in the vestry-book, is accountable for without supposing any such abandonment. There are twelve blank pages left between the minutes of 1796 and 1804, from which circumstance, a strong inference may be drawn that the person who left those blank pages supposed there were minutes of proceedings which had not been entered in that book; and, in fact, a rough minute-book has been produced in evidence, containing the minutes of several meetings of the vestry in 1796, 1798, and 1799, which ought to have been entered in those blank pages. It also appears in evidence that the minutes of the proceedings of the vestry were sometimes taken upon loose sheets; and that there was no time between 1796 and 1804, when there was not a regular vestry. There was a meeting of the vestry on the 16th of April, 1799, at which Mr. William Fitzhugh was elected a vestry-man, in the place of Mr. Hunter, who had resigned. As this meeting was after Easter Monday of that year, (which happened on the 25th of March,) and that being the day and year when a vestry ought to have been chosen, a strong presumption arises that a vestry was chosen in March, 1799, although no minute of such an election is preserved. It is true that the election of the vestry in 1804 (of which there is an entry in the book) raises a strong presumption that no vestry was chosen in 1802, when, regularly, it ought to have been chosen; for, the elections being triennial, if a vestry had been elected in 1802, it would not have been necessary to choose one in 1804; the old vestry, however, had a right, under the canons of the church, to act until a new vestry should be chosen. Under such circumstances, a single omission to choose a vestry, at the regular day, cannot justify an inference that the congregation of Alexandria had abandoned their parochial rights. The agreement of the 15th of June, 1803, which is fastened into the vestry-book with wafers, (evidently for its preservation,) instead of proving an abandonment of parochial rights, and the formation of a new and separate religious society, justifies a strong contrary inference. Its sole object is to raise a fund (by renting the pews of the church) for the support of the Rev. Thomas Davis, who was regularly inducted as rector of Fairfax parish in the year 1792, and continued to be the rector of that parish until October, 1806; during all which time the right of the church to the glebe was vested in him as persona ecclesiae. The subscribers to that paper agreed to hire certain pews at certain

prices, and pay $1,000 per annum to Mr. Davis, the residue to be applied to the use of the church. The resolutions of the 18th of November, 1803, which are written on the page next after the agreement of the 15th of June, 1803, have no other object than the agreement; and afford no evidence either of the intention to abandon the parish, or to form a new religious society; but do, with the agreement, show the strongest evidence of a determination to adhere to the parish, and to support its rector and its church.

The counsel for the complainant seems to rely much upon the circumstance that the vestry of 1804, and all the subsequent vestries style themselves the vestry of the Protestant Episcopal Church at, or in, or of Alexandria, and never call themselves the vestry of the parish of Fairfax, as all the former vestries did. This circumstance is, at most, only evidence that they did not think themselves entitled, or did not choose to call themselves by that name. There is no evidence of the reason why they did not think themselves so entitled, or why they did not choose so to call themselves. One thing, however, is certain, namely: that it was not because they had abandoned their parochial rights. And if it was not evidence of an abandonment of those rights, it does not seem to be material to the complainant what were the motives of the vestry. The omission to call themselves by their right name did not work a forfeiture of the rights of their constituents; nor did they lose their rights by their ignorance of them. Their constituents were all those who had a right to vote at that election; and consisted of all the members of the Protestant Episcopal Church in the parish of Fairfax who had a right to vote at all elections of vestrymen. If the vestry was the real representative of the Protestant Episcopal Church in the parish of Fairfax, it is immaterial by what name they called themselves.

Although it may not be necessary in this case to ascertain what was the reason which induced the vestry of 1804, and the succeeding vestries to call themselves the Protestant Church of Alexandria, and to omit to call themselves the vestry of the parish of Fairfax, as their predecessors had done, yet it may be satisfactory if we can account for that circumstance without the necessity of an inference that they had abandoned their parochial rights. They might have supposed that the Protestant Episcopal Church of Virginia had been broken down by the acts of 1799 and 1802, and therefore felt a reluctance to take a name which should imply a connexion with the church. They might have erroneously supposed that the best way of preserving the rights of the Protestant Episcopal Church in Fairfax parish, was to have as little apparent connexion with it as possible. They knew that the Alexandria congregation was the only remaining Protestant Episcopal congregation in the parish, and really constituted the whole of the Protestant Episcopal Church in that parish; and as almost all the members of that congregation, and the whole glebe were in that part of the parish of Fairfax which had been ceded to the United States, they might have erroneously supposed that there would be an impropriety in calling themselves the vestry of the parish of Fairfax. There was also an ambiguity in the words church, and parish, which might tend to confuse and perplex their ideas on the subject. They might have supposed that as the only remaining Protestant Episcopal congregation in the parish worshipped in Alexandria, they might with more propriety be called the Protestant Episcopal Church of Alexandria than the Protestant Episcopal Church of Fairfax parish; and as the civil jurisdiction of part of the territorial parish of Fairfax had been ceded to the United States, they might not have been aware that the ecclesiastical parish still remained entire. Supposing it to be divided, they might have thought it would be improper in them to take the name of the entire parish. The circumstance, also, that the county, as well as the parish, bore the name of "Fairfax," tended to increase the confusion of ideas on the subject. The circumstances, in which they found themselves, were new. Their ideas, at first, must have been confused and unsettled as to the whole extent of their rights; but it seems clear, that from the first, they claimed the exclusive right to all the church property, upon the ground that they constituted the whole of the Protestant Episcopal Church in Fairfax parish. It is immaterial by what name they called themselves. All their acts showed that they claimed and exercised all the ecclesiastical rights of that parish. This view of the subject explains, and gives consistency to all their acts. In three instances, namely, on the 20th of October, 1809, and the 18th and 24th of February, 1810, the minutes of the vestry speak of obtaining a rector for the parish of Alexandria. This was, no doubt, an inaccurate expression, and arose from the same confusion of ideas which has been already mentioned.

It was strongly urged by the complainant's solicitor, that the complainants in the case of Taylor v. Terrett could not avow themselves to be the vestry of the whole parish of Fairfax without confessing themselves to be guilty of sacrilege in suffering the building commonly called the Falls Church to go to ruin. But surely it cannot be called sacrilege to suffer a useless building to go to decay. When the vestry ceased to have the power to tax the parish, its obligation, to keep the churches in repair, ceased also. They could only be kept in repair by voluntary contributions. The Falls Church was erected solely for those members of the church who lived in its vicinity. It was for them to keep it in repair; and if they did not, the vestry was not responsible. But the hy-

pothesis of the complainant's counsel would charge the vestry with a much heavier sin than that of repairing a useless church. It would charge them with knowingly seizing upon, and converting to their own use, or the use of their constituents, property to which they had no right. The weight of this argument, therefore, turns against the complainant.

6. We are of opinion that the Alexandria congregation did not separate themselves from the parish of Fairfax, and establish a distinct separate religious society, because they could not do so consistently with the canons of the church then in force.

Upon the whole, then, we are of opinion that the complainants in the bill of Taylor v. Terrett, together with George Deneale and John Muncaster, two of the defendants in that case, were the vestry of the Protestant Episcopal Church in the parish of Fairfax, in the ecclesiastical meaning of those terms, as modified by the laws and constitution of Virginia and the canons of the church, and may avail themselves of the estoppel resulting from the warranty of Daniel Jennings, the original grantor; and therefore the complainant has failed to support his bill; which must be dismissed with costs.

The complainant appealed to the supreme court of the United States, where the decree of this court was affirmed. See 9 Wheat. [22 U. S.] 445.

[NOTE. Subsequently this cause was heard on a motion to show cause why four executions, in favor of Muncaster against Mason and Jones, should not be quashed, because issued more than a year and a day after judgment. The court refused to quash the executions. Case No. 9,920.

[The case again came before this court upon a motion to quash two writs of fieri facias in favor of Muncaster against Mason and Jones which had been issued upon the mandate of the supreme court, affirming the decree in this case. The motion was denied. Id. 9,248.]

Case No. 9,248.

MASON v. MUNCASTER.

[3 Cranch, C. C. 403.] [1]

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

DAMAGES—ON DISSOLUTION OF INJUNCTION — CAPIAS—POUNDAGE FEES—LEVY—GOODS SOLD.

1. Upon the dissolution of an injunction to stay proceedings on a judgment of the circuit court of the District of Columbia, damages at the rate of ten per cent. per annum must be awarded, unless it be a bill to obtain a discovery, or some part of the judgment remain enjoined.

2. The plaintiff in a ca. sa. is liable to the marshal for his poundage as soon as he has taken the body of the defendant in execution on that writ.

3. The plaintiff in a fi. fa. is also liable to the marshal for his whole poundage on the debt, if he levy goods to the value of the debt, whether they be sold or not. If sold, and they produce less than the debt, he can claim poundage only on the amount made.

4. The original defendant is not liable in any form of action to the marshal; nor to the original plaintiff for the poundage; nor is he or his property liable for poundage, unless the judgment be for a sum larger than the debt due from the defendant, to be released on payment of the amount really due, with costs; for the marshal cannot, on a fi. fa. make more than the amount of the judgment; nor can he detain the debtor upon a ca. sa. for more than that amount.

5. If the marshal has not returned the fi. fa. he may proceed to execute it for his poundage.

The injunction heretofore granted in this case to stay proceedings upon two judgments at law, obtained in this court by Muncaster against Mason, having been dissolved, two writs of fieri facias were issued and levied upon the land of Mr. Mason, in the county of Alexandria, returnable to December term, 1824, but not returned, the sale of the land having been postponed by consent of the parties.

Mr. Key, for defendant Mason, moved the court to quash these writs, because they included damages, at the rate of ten per cent. per annum from the time of granting to the time of dissolving the injunction according to the act of congress of the 24th of June, 1812, § 7 [2 Stat. 756], and contended that the bill was for discovery, and therefore the damages should be at the rate of six per cent. per annum only.

Another question was also submitted to the court, namely, whether Mr. Mason was liable to the marshal for his poundage fee for levying the executions on the land.

Mr. Key also contended, that the levy was invalid for want of a sufficiently certain description of the lands levied upon.

E. J. Lee, contrà. The bill was not to "obtain a discovery," but was an ordinary bill for an injunction grounded upon facts which it averred the plaintiff could prove.

CRANCH, Chief Judge (nem. con.). This case comes now before this court upon a motion to quash two writs of fi. fa. in favor of John Muncaster against John Mason and Mr. Jones, which were issued from this court on the 17th of May, 1824, returnable to December term, 1824, and which the marshal had levied on certain real estate of the defendant Mason, in the county of Alexandria, but which executions have not been returned; the sale of the land having been postponed at the request of Mr. Mason, and with the consent of the plaintiffs at law. These executions were issued upon the mandate of the supreme court of the United States, affirming the decree of this court, which dissolved the injunction and dismissed the bill of Mason v. Muncaster [Case No. 9,247]. One of these executions was for $4,000 damages and costs; and by the clerk's indorsement thereon, the damages were to be released on payment of $2,000 with interest from the 4th of January, 1819, to April 6, 1821, at the rate of six per

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

cent. per annum, and from that date to May 12, 1824, at the rate of ten per cent. per annum, and from that time at the rate of six per cent. per annum, till paid, and costs. The other was for $360 damages and like interest. It was agreed by the parties in these cases, "that the court, upon a case stated shall say whether the plaintiff, John Muncaster, was, on the dissolution of the injunction of John Mason against him and others, entitled to the ten per cent. claimed for the delay occasioned by the said injunction; and so too, whether the marshal has a legal claim on the said John Muncaster for poundage fees on levying the said executions on the land of the said John Mason."

The first question is, whether the plaintiff at law is entitled to the ten per cent. for delay occasioned by the injunction? By the 7th section of the act of congress of the 24th of June, 1812, it is enacted, "That when any injunction shall hereafter be obtained to stay proceedings on any judgment rendered for money in the circuit court of the said district, and such injunction shall be dissolved wholly or in part, damages, at the rate of ten per cent. per annum from the time the injunction shall be awarded, until dissolution, shall be paid by the party on whose behalf such injunction was obtained, on such sum as appears to be due, including costs; and execution on the judgment enjoined, shall be issued for the same;" "provided that when the injunction shall be granted to obtain a discovery, or any part of the judgment shall remain enjoined, the court may, if it appear just, direct that such damages shall not be paid, or only such certain portion thereof as they may deem expedient." The statute is peremptory, that the ten per cent. "shall be" paid, unless the case be within the proviso. As no part of the judgment remained enjoined, the only question is, whether the "injunction" was "granted to obtain a discovery." That it was not technically a bill of discovery, is evident. It does not suggest the want of evidence of any kind, nor does it aver any material fact to be in the knowledge, much less in the exclusive knowledge, of the defendant. The object of the injunction was to stay the execution until the court should hear and decide upon the new facts which the defendant had discovered since giving his notes for the purchase-money. These facts were: 1st. That there is still remaining in that part of the parish of Fairfax, which continues in the county of Fairfax, a church belonging to the parish, and a worshipping congregation of Episcopalians, who claim all the rights of the parish, and consequently, a title to the land. 2d. That the legal title is still outstanding in the heirs of Daniel Jennings, who are not estopped by the deed of their ancestor, "inasmuch as the fact may be made clear and notorious, that there was no regular and legal succession, no right of representation, no identity of character and capacities between the said complainants and the original parish of Fairfax." 3d. That those heirs reside in distant states, so that they are not, and cannot be barred by the statute of limitations.

In the complainant's amended bill, filed after the injunction was awarded, he says he "hath discovered other matters and considerations, proper, as he is advised, to be suggested in support of his said original complaint." The new facts, alleged in this amended bill, are: 1. "That there is a regularly elected vestry and wardens of the said Falls Church, having all the powers that the said Alexandria Church can pretend to; and that D. D., W. B. R., &c. &c. are the vestry: and that B. G. T. and D. F. D., are the churchwardens thereof, duly elected by the said vestry; so that your orator is fully enabled to show to your honors, not only that such outstanding title might exist," "but that such title now actually resides in competent parties, in esse who have never relinquished, but on the contrary do assert the same." 2. "That your orator, upon inquiring into the nature and occupancy of the said glebe, has been most credibly informed, and does verily believe, that it was always considered and used as the common property, and to the common benefit of both churches in the said parish. That until the mansion house on the said glebe was destroyed, the rector of the whole parish, having charge of both the churches, resided therein, and cultivated the glebe, and that after his removal to Alexandria, the rents of the said glebe were applied equally to the use and benefit of both the said churches." 3. "That the grantor, D. Jennings, is dead, and has left as his representatives, two sons, Daniel Jennings, and Owen Jennings, residing, as your orator is informed and believes, one in the state of Kentucky, and the other in Louisiana." There is no averment that the complainant is unable to prove any of these facts, nor that they were known to the defendant. There is a general prayer, that the defendant may answer the allegations of the bill, but there are no particular interrogatories. If this be an injunction granted "to obtain a discovery," it would be very difficult to conceive of one which is not. It seems to us to be only the ordinary and common case of an injunction to stay execution. The rule adopted by the act of congress in such cases is, that the ten per cent. must be paid; the exception applies only to extraordinary cases.

The second question is, whether the marshal has a legal claim for poundage on levying the executions on the land of the complainant? It is understood that the land has not been sold, but was liable to be sold, and had been advertised; but that the sale has been postponed by the agreement of the parties, without prejudice to the rights of the marshal. One objection to the claim of poundage is, that there was no valid levy, because the land is not sufficiently described. The executions are not yet returned, and are still in the hands of the marshal;

but they are exhibited with the schedule and appraisement; by which it appears that the beginning of the tract is at the end of the lower line of Patterson's land, where it touches the river Potomac. There is nothing to show that the other boundaries are not all correct. Apparently they are sufficiently certain. We cannot say that the levy is invalid for want of certainty. The question then is, whether the marshal is entitled to his poundage fee for levying on land which is not sold? By the act of congress of the 27th of February, 1801, § 9 (2 Stat. 103), the marshal was entitled to receive the same fees, perquisites, and emoluments which were by law allowed to the marshal of the United States for the district of Maryland. By the act of March 3, 1807 (2 Stat. 430), the marshal, for services not enumerated in that or some other act of congress, is entitled, if performed in the county of Washington, to such fees as were, on the first Monday of December, 1800, allowed by the laws of Maryland to a sheriff for like services; if performed in the county of Alexandria, to such fees as were then, by the laws of Virginia, allowed to a sheriff of a county in Virginia.

The poundage fee is not expressly given, or regulated by any act of congress. By the statute of Westm. I, c. 26, no officer shall take any reward to do his office, but of the king; and by 29 Eliz. c. 4, no sheriff shall "receive or take of any person for serving an execution on the body, lands, goods, or chattels of any person, more or other consideration or recompense, than twelve pence of and for every twenty shillings that he shall levy or extend and deliver in execution, or take the body in execution for, by virtue and force of any such extent or execution." That act does not contain the word poundage. The 3 Geo. I. c. 15, § 14, uses the word "poundage," and calls it "poundage, allowance, or reward." By the 16th section of the same act, it is enacted, "That it shall not be lawful for any sheriff, by reason or color of office, or by reason or color of executing any writ or writs of habere facias possessionem aut seisinam, to ask, demand, or receive any other or greater consideration, fee, gratuity, or reward, than twelve pence of every twenty shillings of the yearly value." And by the 17th section, it is enacted, "that poundage shall in no case be demanded or taken upon executing any writ of ca. sa., or upon charging any person in execution by virtue of such writ, for any greater sum than the real debt bona fide due and claimed by the plaintiff," under the penalty of treble damages to the party aggrieved; but the statute does not say whether the party aggrieved be the plaintiff or the defendant, nor which of them is bound to pay the poundage. By the statute of 8 Geo. I. c. 25, § 3, it appears that the halfpenny in the pound upon recognizances was to be paid by the prosecutor; and by the 5th section, the sheriff upon such recognizances is to take only the same fees as are appointed by the statute of 3 Geo. I. By the act of Maryland of 12th of October, 1753, c. 22, it is enacted, "that no officer, by reason or color of his office, shall have, receive, or take of any person any other or greater fees than by this act are allowed;" "to a sheriff serving an attachment or execution, 7 lbs. of tobacco," &c. The Maryland act of 1779 (chapter 25) gives "to the sheriff the same fees on a fieri facias, or replevin, as upon attachments;" and "for all goods and chattels which he shall attach and take into his possession, or wherewith he shall be chargeable, the same fees as on an execution." And by section 5, "on the service of any execution for money or tobacco, the sheriff, for the service of the same, shall charge and receive on the same at the rate of 10 per centum on the first £5, &c. and 5 per centum for the residue; and no sheriff shall be chargeable in any action of escape for more than the sum of money really due, or indorsed to be received on the execution in discharge thereof." It does not clearly appear by any of these statutes who is in the first place liable to the marshal for his poundage, if the defendant be taken on a ca. sa.—the plaintiff or the defendant.

The case of Les Viscounts De London v. Michell (Anno 1616) 1 Rolle, 404, was an action of debt by the sheriff against the plaintiff in the execution, for his poundage fees upon a ca. sa. Lord Coke said: "If he has not an action of debt he has no remedy; and, therefore, forasmuch as the words are that he shall have, receive, and take, this makes it a duty in him, and so the action lies; quod fuit concessum per curiam." The case of Welden v. Vesey, Poph. 173, was debt by the sheriff against the creditor for £7 0s. 6d. for poundage on £181, for which the debtor was taken on a ca. sa. It was decided that the sheriff should have 5 per centum on the first £100, and 2½ on the residue; and Whitlock, J., was of opinion that the sheriff may refuse to do execution until the levying money be paid to him; but that point was not decided. In the following cases the sheriff recovered his poundage against the plaintiff: Brockwell v. Lock, 1 Salk. 331; Peacock v. Harris, Id. 331; Jayson v. Rash, Id. 209; Lyster v. Bromley, Cro. Car. 286; Earl v. Plummer, 12 Mod. 124; Tyson v. Paske, 1 Salk. 333; Pope v. Hayman, Holt, 317; Suliard v. Stamp, Moore, 468; Gurney and Some's Case, Cro. Eliz. 335. In all these cases the action was against the plaintiff in the execution; and there is no case in which the marshal or the sheriff brought his action for poundage against the original debtor in the execution. In Earl v. Plummer, the action was brought by the sheriff for his poundage on executing an erroneous writ, and the court said "that if the party himself will take out such an erroneous writ, he shall not, under pretence thereof, cheat the sheriff of his fees." Woodgate v. Knatchbull, 2 Term R. 148, was an action upon the case under the 29 Eliz. c. 4, by the

defendant in a fi. fa. against the sheriff for damages, for taking more than his poundage, for levying the fi. fa. Verdict for the plaintiff, £54 14s. A rule was granted to show cause why the verdict should not be set aside. The counsel, in arguing in support of the rule, said: "The mischief intended to be remedied by the act of Elizabeth, was the negligence of the sheriffs in executing process; persons who had recovered judgments being obliged to pay money to sheriffs to induce them to do their duty properly in levying the sums recovered. This was to be remedied by allowing the sheriff so much in the pound for the sum levied, as a stimulus to him: but to prevent him from charging the plaintiffs in the original suits with more than was allowed, the act gave the two remedies therein specified. They, therefore, were the only persons intended to be benefited by such pecuniary compensations, and not the defendants." Buller, J., says: "If the plaintiff choose to have an auction, he must pay the expenses out of his own debt to be levied; for there is no color to charge the defendant with it. The sheriff can only levy on the defendant that sum which is given by the judgment of the court." The judgment was for £200; but the fi. fa. was indorsed to levy £116, besides the costs of levying and the sheriff's fees. Buller, J., further said: "Then the only remaining question is, 'whether,' in this case, it appears that the plaintiff is the party grieved. The first execution was what struck me as a ground for this doubt. The judgment there was for £200. The sheriff was at liberty by the judgment of this court to raise £200, but no more; and the expenses of levying must have been paid out of the debt. For in actions on simple contract, and judgment for a debt certain, the expenses of levying must be paid by the plaintiff, and not by the defendant; so that if the sheriff overcharge, the plaintiff is the sufferer. But if the judgment be for a penalty, the plaintiff has a right to receive the whole of his debt, independent of the expenses of the execution; and in those cases the defendant is the party injured by the sheriff's taking more than he ought." Grose, J., said: "At common law, no fee whatever was allowed to the sheriff; then if he be entitled to receive any, it must be by act of parliament. Now by looking into the act it appears clearly to have been the intention of the legislature that the sheriff should be paid in proportion to the sum levied, and that the sheriff should only levy what was really due." In Bonafous v. Walker, 2 Term R. 126, which was debt against the sheriff for an escape, the court decided that the plaintiff was entitled to recover against the sheriff all that he had a right to receive from the debtor who had escaped, including the poundage; and Buller, J., said: "For poundage is part of the debt, and the prisoner could not have been discharged out of execution without paying the poundage, and therefore if the plaintiff was entitled to recover at all, he was entitled to recover the poundage as well as the debt." The case of Lake v. Turner, 4 Burrows, 1981, was debt by the sheriff for poundage on a ca. sa. in favor of the defendant, against Gibbs, who was arrested by the plaintiff. The only ground of defence was, that the ca. sa. was prosecuted at the instance and for the benefit of the king, who, not being named in the statute 29 Eliz. c. 4, is not bound by it, and therefore not liable for poundage. But this defence was, upon demurrer, adjudged bad, and the plaintiff had judgment. In Alchin v. Wells, 5 Term R. 470, it was held that if a sheriff levy under a fi. fa. he is entitled to poundage, though the parties compromise before he sells any of the defendant's goods; and if the sheriff, notwithstanding the compromise, satisfy himself for the poundage on the debt, the court will not rule him to return the writ. The case of Fisher v. Beatty, 3 Har. & McH. 148, was an action of replevin for goods taken by the defendant, as sheriff, to satisfy his poundage and other fees due on a writ of fi. fa. and a venditioni exponas, which last writ was countermanded before execution, and so returned by the sheriff before he took the goods in execution for his poundage. The general court decided that the sheriff could not execute, in that case, for his poundage, and that the defendant in an execution is not liable to the sheriff for his poundage. In the case of Maddox v. Cranch, 4 Har. & McH. 343, the general court decided that the plaintiff in an attachment was liable for poundage. In Stewart v. Dorsey, 3 Har. & McH. 401, the defendant had been taken in execution by the plaintiff (the sheriff) at the suit of the state, who agreed to release the defendant, on his paying all legal costs, and the defendant promised to pay the poundage to the sheriff, who thereupon discharged him. The court gave judgment for the sheriff in an action against the defendant on that promise. A manuscript report of Howard v. Justices of Levy Court of Ann Arundel, in 1805, was cited in this court in April, 1821, in the case of Ringgold v. Nicholls [Case No. 11,848], in which the general court, after full argument, decided that the defendant, and not the plaintiff, is liable to the sheriff for poundage; and upon that decision this court (Morsell, J., absent, and the other judges doubting,) decided the case of Ringgold v. Nicholls. Letters were read by the counsel in that cause, from Mr. Harris and Mr. Taney, stating that the question was still open in Maryland, and from Mr. Williams, that the court of appeals had decided that the plaintiff is not liable to the sheriff for poundage when the defendant is discharged under the insolvent law.

By the consideration of all these cases we are led to the conclusion: 1. That the plaintiff in a ca. sa. is liable to the marshal for his poundage as soon as he has taken the body of the defendant in execution upon that writ. 2. That the plaintiff in a fieri facias is

also liable to the marshal for his whole poundage on the debt, if he levy goods to the value of the debt, whether they be sold or not. If sold, and they produce less than the debt, he can claim poundage only on the amount made. 3. That the original defendant is not liable in any form of action, to the marshal, nor to the original plaintiff, for the poundage; nor is he or his property liable for poundage, unless the judgment be for a sum larger than the debt due from the original defendant, to be released on payment of the amount really due, with costs; for the marshal cannot, on a fi. fa., make more than the amount of the judgment, nor can he detain the debtor upon a ca. sa. for more than that amount. 4. That in the present case the marshal, not having returned the fi. fa., may proceed to execute it for his poundage; and in this way only has the marshal a legal claim on the defendant in this cause for the poundage, unless he shall have promised to pay it, upon good consideration.

See 2 Tidd (Phila. Ed. 1828) 1035, upon St. 43 Geo. III. c. 6, § 5.

Case No. 9,249.

MASON et al. v. NEWELL et al.

[2 Chi. Leg. News, 1.]

Circuit Court, W. D. Michigan. 1869.

CONTRACTS — INTERPRETATION — DEPENDENT AND INDEPENDENT STIPULATIONS—PLEADING.

[1. N. & Co., lumber dealers, entered into a contract with M. & Co., owners of a sawmill, by which N. & Co. agreed to furnish certain quantities of logs at M. & Co.'s mills, to pay M. & Co. five dollars per thousand for sawing, and to transport the lumber from M. & Co.'s dock. M. & Co. agreed to saw the logs, furnished by N. & Co., in sizes and styles as directed; to handle and pile the lumber in certain ways; to furnish boom-room for the logs; and to provide certain facilities for shipping the lumber, together with other stipulations. *Held*, that N. & Co.'s promise to pay for sawing the logs was dependent on M. & Co.'s performance of the various stipulations on their part, as to the manner of doing the work, etc., and that M. & Co. could not recover for sawing, without averring, specifically, performance of all such conditions.]

[2. *Held*, further, that N. & Co.'s agreement to furnish the logs was independent of all that M. & Co. were to do, except to furnish boom-room to receive the logs, and that M. & Co. might recover for a failure to deliver logs, without averring performance of any other stipulations of the contract on their part.]

Assumpsit (Lyman G. Mason and others against Theodore Newell and others) to recover damages for breach of contract. Demurrer to declaration.

Mr. Van Arman and Storrs & Wilson, for plaintiffs.

Judge Higgins and G. V. N. Lothrop, for defendants.

WITHEY, District Judge. So far as it becomes necessary to know the terms of the contract for the purpose of the demurrer, I give the substance of the respective agreements in their natural order, rather than the order written in the instrument.

Newell, Beaumont & Co.'s Agreements.

1. Newell, Beaumont & Co. are lumber dealers in Chicago, and agree to furnish in the Muskegon river, in time for the spring drive in each year, and deliver to Mason & Co. at their mills in Muskegon, good merchantable pine saw logs, running not more than 4½ to the thousand feet, during the four years succeeding Sept. 13, 1866, sixty-one million feet, board measure; the first year, sixteen million feet, and each of the three subsequent years fifteen million feet.

2. Pay all expenses of running, driving, booming, and delivering said logs at Mason & Co.'s mills, and assort the logs at their own expense, if they require it done, in storage places, which Mason & Co. are to provide.

3. Provide transportation for the lumber from the mill docks as fast as made; and,

4. At no time allow over five hundred thousand feet to accumulate on Mason & Co.'s dock without a further agreement, except near the close of navigation.

5. Pay Mason & Co. for every thousand feet of lumber sawed according to contract five dollars.

6. The price of sawing to be due and payable in the city of Chicago to the order of Mason & Co., on presentation of the certificates of tally and shipping bills of each cargo that may be delivered from Mason & Co.'s dock.

Mason & Co.'s Agreements.

1. Mason & Co. are owners of mill property in Muskegon, and they agree to run their saw mill to its full capacity during the usual sawing season, running day hours each year for four years, commencing with the season of 1867.

2. Manufacture for Newell, Beaumont & Co., from their said logs, in each said year, fifteen million or more feet of lumber.

3. To manufacture all lumber in a good and workmanlike manner. Such lumber to be sawed by the same gauge as used in 1866. And furnish proper gauge for all styles and kinds of lumber in common use in the Chicago market. Lumber to be cut as directed by N., B. & Co. from time to time, so far as the logs furnished will admit.

4. To handle the upper qualities of lumber with care, and pile separate, as far as practicable. All said lumber to be carefully piled on their docks, separate lengths by themselves, studding, joists, etc., with other dimension stuff, by itself, so that it may be conveniently shipped separate.

5. Furnish all boom-room and attend to receiving the logs in their mill boom, and receipt for the logs as delivered by the Muskegon Booming Co. in their mill boom.

6. Provide suitable pockets or places for storing and assorting logs at their mill.

7. For the convenience of shipping the lumber, they are to extend their dock 150 feet out

into deep water, and furnish a scow, if required to facilitate the shipment of lumber, which scow, when required to be used, is to be loaded by Mason & Co.

8. Take the logs furnished by Newell, Beaumont & Co. at the scale as purchased by them, and guarantee the scale by delivering on their docks the same quantity of lumber, in feet, board measure, as the logs delivered scale.

9. To take duplicate shipping receipts and duplicate certificates of tally for each cargo. Upon presentation of either duplicate or original shipping receipts and certificates of tally, Newell, Beaumont & Co. to pay for sawing at five dollars per thousand feet.

Mutual Agreements.

The lumber to be tallied at the mutual expense of the parties, at Muskegon, as it goes on board vessels per order of Newell, Beaumont & Co. Culls to be rejected.

There are agreements in the contract not noticed in the above abstract, because not affecting the questions raised by the pleadings. Mason & Co., plaintiffs, have brought suit upon this contract against Newell, Beaumont & Co., defendants, to recover damages for a breach of the contract. The declaration contains six special counts and the common counts. The first count sets out the agreement of the parties in haec verba, avers that the parties entered upon performance of the contract; the defendants delivered logs during the sawing season of 1867 until the 10th of September, and plaintiffs received the logs at their saw mill, and manufactured them into lumber, according to the requirements of the contract, until such time, when the defendants wholly neglected and refused to deliver logs, and still do neglect and refuse. Plaintiffs claim damages for such neglect and refusal of one hundred and fifty thousand dollars. All the other five special counts set out the contract by reference to the first count. The first three counts are quite similar; the last three cover the same ground as the first three, but are more full in their averments and statements of breaches on the part of defendants, claiming to recover for the price of sawing done, as well as damages for not delivering logs. I do not propose, nor do I deem it necessary, to state more fully the substance of the different counts. Performance by plaintiffs, as well as readiness and willingness to perform, are averred generally.

Defendants have filed a demurrer to all the special counts. The first and fourth grounds present objections of most importance, and in reference to which the arguments of counsel were almost exclusively confined. To these I shall first and mainly direct my attention.

The first objection is that there is not sufficient averment that plaintiffs have kept and performed the contract on their part; and, fourth, that what are defendants' agreements are set out to be independent, when in fact they are dependent; that plaintiffs' promises and undertakings are alleged to be the sole and only consideration for the promises and undertakings of defendants, whereas performance of plaintiffs' promises is the real consideration for defendants' promises. It is quite clear to my mind, that the promise of defendants to pay five dollars per thousand feet for sawing depends upon performance by plaintiffs of their agreement to saw the logs of defendants, handle and pile the lumber, furnish dockage for the convenience of shipping, and a scow to facilitate loading vessels, when needed, according to the terms of the contract, etc. The doing of these things by plaintiffs was the consideration for the defendants' promise to pay; hence, if any of the counts of plaintiffs' declaration are for the recovery of the contract price for sawing, such counts should aver such performance, and also that tally sheets and bills of lading of the cargoes of lumber shipped from plaintiffs' dock were presented to the defendants, etc. Without these averments, plaintiffs could not make the proof upon trial necessary to recover the price of sawing. I am satisfied that there are no sufficient averments of performance in these particulars, and therefore that there can be no recovery in this suit for the price of sawing. But I am equally clear that the first three counts do not state as any part of the cause of action the price of sawing. On the contrary, they go for damages consequent upon the failure to furnish logs to be sawed. These three counts are quite inartificially framed, but are, I think, in the substance sufficient.

The last three counts of the declaration are for the price of sawing and damages for failure to furnish and deliver logs by defendants, and for abandonment of the contract by them without cause or excuse. There can be no recovery under any of these counts for the price of sawing, because of the want of sufficient averments of performance on the part of plaintiffs. There are averments showing the sawing to have been done, but omission to aver performance of other things which are conditions precedent to payment by defendants. It is true that there is the general averment that plaintiffs have done and performed all things by them to be done and performed, according to the requirements of the contract; and, while a general averment of performance is sometimes held to be sufficient, depending upon the nature of the act or thing to be done, I think the rulings are not broad enough to sanction the general averment in a case like the present. It might have been sufficient to have averred that the logs were manufactured into lumber, in all respects as required by the contract, that the lumber thus sawed was handled and piled as required by the contract; that the dock was built within a reasonable

time, or was being built, and that reasonable time had not elapsed for its completion; that a scow was furnished, and that tally sheets and bills of lading of each cargo shipped from plaintiffs' dock were presented to defendants, etc., etc., without specifying as particularly and fully as are the agreements in the contract; but clearly there should have been, what is lacking, to enable plaintiffs to recover for the price of sawing, viz. sufficient averments to inform the court that plaintiffs have fully performed the several things upon which payment depended. Inasmuch, however, as these counts also go for damages occasioned by failure of defendants to deliver the logs which they contracted to deliver, it becomes necessary to consider the fourth ground of objection presented by the demurrer as well to these as to the first three counts. The question presented by the fourth objection is really this: Are the agreements dependent or independent? Or, to put it in another form, are the promises by one party the consideration for the promises of the other party? Or, as defendants insist, was performance by plaintiffs the consideration for the promises and agreements of defendants? These are but different forms of the same question, so far as regards the objection I am now considering, and to be answered from the evident sense and meaning of the contract; not from anything which has transpired since the agreements were entered into by the parties, but from the provisions of the instrument as it was when it came from the hands of the parties.

Now, I have already said that defendants' agreement to pay for manufacturing the lumber could not be enforced against them, without first averring and proving performance by plaintiffs of their agreement in reference to several things by them to be done and performed, which were covered by, and entered into, the price to be paid by defendants; and hence defendants' agreement to pay was dependent and not an independent agreement. The consideration of that agreement of defendants was performance by, and not the promise of plaintiffs to perform on their part. Promise for promise was not the consideration here. But, if this suit has been brought solely to recover, not for the price of manufacturing the logs into lumber, but for not furnishing logs to be manufactured, the question would present an entirely different aspect, and its solution would turn upon other stipulations of the contract than those I have so frequently referred to, and this is the feature of the case to which we now call attention.

Now, Newell, Beaumont & Co. agree to furnish, in the Muskegon river, in time for the spring drive each year, beginning with the lumber season of 1867, and deliver to Mason & Co., at their mill in Muskegon, good merchantable pine saw logs, etc., during the four years succeeding September 13, 1866; the first year, sixteen millions, the second, third, and fourth years, each fifteen millions feet. Mason & Co. were to provide pocket or storage places, for these logs, from time to time, at their mill, and manufacture them into lumber. When as the logs came down the Muskegon river, with the logs of other lumbermen, occupying, as the whole quantity would, miles of the stream, they were stopped in their progress by the booms of the booming company. Here the logs are mixed indiscriminately. There are many owners of the logs, and many millions of feet, perhaps, owned by each. The booming company, or other party, as soon as logs come down, and the mills are ready to begin sawing, commence to deliver for the respective log-owners logs at the various mills, and this goes on the entire season, till all the logs are sawed into lumber, or until the mills stop sawing. Each mill has pockets or storage places for receiving from day to day the logs which are delivered from the booming company's booms. But a small portion of what are to be sawed during the season are at any one time at any mill; and the pockets or storage at the mills are required to be no larger than to contain such quantity of logs as prudence would dictate to ensure a supply in view of their constant or almost daily delivery in small rafts. Now, it is evident that the first thing to be done under this contract by anybody was furnishing and delivering logs by Newell, Beaumont & Co. to plaintiffs, unless possibly that the pockets or storage places were to be provided by Mason & Co. preparatory to the logs being delivered at their mill. The next thing to be done was the sawing of these logs into lumber by Mason & Co., and it is perfectly plain that there could be no sawing by the latter until the logs were in part delivered. How can it be claimed, then, that sawing on the logs was a condition precedent to delivering them? How can it be maintained that the delivery of logs depended on the sawing being done? How does it appear that performance by plaintiffs of their agreement to saw and do the several other things, dependent upon getting pay for sawing, was the consideration for the defendants' promise to deliver logs?

I have asked myself these questions, and I have turned to the contract for answers, and looking to the intention of the parties, by what they have said in that instrument, cannot escape the conclusion that no such claim can be maintained. On the contrary, Newell, Beaumont & Co. agreed to deliver logs, and the performance of that promise depended upon nothing to be done by Mason & Co. except providing, at their mill, storage. And this undertaking to deliver logs runs through the entire period of the contract.

Let us test this particular agreement. Suppose Newell, Beaumont & Co. had never delivered any logs under the contract,—had done nothing,—and for this failure Mason & Co. bring suits, claiming damages for the non-delivery of logs. Would it be necessary

that Mason & Co. should aver that they had sawed the logs, or had done any other act or performance of their agreement beyond having provided storage, boom-room, and being ready and willing to receive the logs, and manufacture them into lumber, and to do and perform the contract on their part to be done? Clearly not. If Newell & Co. delivered logs to the mill, and no storage was provided, that fact would excuse them from further delivery, no doubt; but that aspect of the case is not presented, nor is the question, what failures would justify an abandonment? What had Mason & Co. to do, which must necessarily precede the delivery of the logs? Nothing, unless providing storage and boom-room. Hence performance by Mason & Co. of their agreement to saw, etc., cannot be regarded as the consideration for Newell & Co.'s promises. Now, if such is the contract at the outset, nothing subsequent is to be allowed to change the construction of it, except the agreement of the parties. And there has been no change by agreement. I have no doubt as to the character of this particular agreement by Newell, Beaumont & Co. to deliver logs. It is independent of any and everything which Mason & Co. are to do, except possibly providing storage and boom-room at their mill.

If Newell, Beaumont & Co. had incorporated into their agreement to deliver logs that such delivery from time to time was to depend upon Mason & Co., at all times during the life of the contract, manufacturing such logs into good merchantable lumber, piling and assorting the lumber, building a dock and furnishing a scow to facilitate shipment of such lumber, then there would be no doubt but after commencing to deliver logs, a default by Mason & Co. would release Newell, Beaumont & Co. for further obligations. And Mason & Co. would be obliged, in an action for not delivering logs, to both aver and prove performance of all those conditions.

I need not discuss this topic further, nor need I refer to and review the many authorities cited by counsel for defendants. I have examined them as far as I have had access to the volumes referred to, and find nothing which in the slightest affects the views expressed. The first and every other count, among other things, avers general performance by plaintiffs of all things on their part to be done and performed according to the terms and stipulations of the contract, and that they have been and still are ready to receive the logs of defendants, and manufacture the same into lumber, according to the conditions of the contract. Some of the counts aver that "they were ready, able and willing, and fully prepared to receive from defendants, and to manufacture into lumber, in a skillful and workmanlike manner, the entire amount of logs." These averments I regard as sufficient allegation that storage places were provided at plaintiffs' mill, if we are to regard their agreement in that respect a condition precedent to the delivery of logs. When plaintiffs say they were at all times ready to receive defendants' logs, or ready, willing, and fully prepared to receive them, it is equivalent to saying that pockets of storage places were provided, although it would be better to state specifically that pockets of storage were provided, and also boom-room. At the same time I am quite satisfied that the general averment of performance by plaintiffs is not sufficient to permit a recovery for the price of sawing, because, as before indicated, when several things are to be performed, which are conditions precedent to the right to exact payment, the averment must be sufficiently full and particular to advise the court that each and every of such acts have been performed, and yet I regard the court advised in reference to storage places at the mill having been prepared.

The first and fourth grounds of demurrer are, nevertheless, regarded as well taken to the last three or amended counts; the fourth ground, because these counts state that the promise of the plaintiffs to perform, on their part, constituted the consideration for defendants' promises, and that the promises of defendants constitute and were the sole and only consideration for the promises of plaintiffs. I regard nearly all the agreements of the contract dependent. The only serious doubt I have in reference to any of the agreements which I have particularly called attention to is that of defendants to deliver logs. And the doubt has been whether Mason & Co.'s agreement to provide pockets, storage, and boom-room is a condition precedent. I am inclined to allow that it is such, and, this being so, there is no doubt as Newell & Co.'s other agreements, to which I have referred, being dependent on performance by Mason & Co.; and so Mason & Co.'s agreement to saw, etc., being dependent on Newell, Beaumont & Co.'s furnishing logs to saw; hence the fourth ground of demurrer is sustained in reference to the three amended counts. The first ground of demurrer is well taken, because the counts present, as one of the causes of action, the price for sawing manufactured lumber, without averring performances, sufficiently of the various acts and things by them to be done and performed, as I have already indicated the rule to require. The second ground of demurrer, which is for inconsistent and repugnant averments in the different counts, is not sustained. The third ground is general, and need not be noticed.

The result is that the first three counts, though inartificially drafted, are regarded as not open to the objections of the demurrer. Whether they will serve the plaintiffs' purpose upon a trial is for them to determine. The last three amended counts are open to the objections presented by the first and fourth grounds of demurrer. What I allude to as the fourth ground of demurrer is the amendment made to the original cause of demurrer.

The plaintiffs have leave to further amend

their declaration at any time within thirty days. The demurrant is allowed costs of the motion, including $50 attorney fee.

MASON (MUNCASTER v.). See Case No. 9,920.

MASON (MURRAY v.). See Case No. 9,966.

Case No. 9,250.

MASON et al. v. PEABODY.

[13 Int. Rev. Rec. 142.]

Circuit Court, M. D. Tennessee. 1871.

INTERNAL REVENUE — DISTILLER — CAPACITY OF STILL—PRODUCTION—SURVEY—NOTICE —WHEN TAX DUE.

1. The true meaning of section 20 of the act of July 20, 1868, is that the distiller is required to pay the tax upon eighty per cent. of the capacity of his distillery ascertained according to the provisions of section 10 of said act, whether he actually produces so much or not, and is required to pay the tax upon the whole product if exceeding eighty per cent. of said capacity.

2. But in order that the distiller may be bound by the survey of his capacity, under section 10 of said act, the provisions of said section must be strictly complied with, and a certified copy of the survey, signed by the assessor and the surveyor, must be left with the distiller. It will not suffice that he has actual notice of the results of the survey, if not furnished with such certified copy.

3. The tax upon distilled spirits is due the moment it is produced, and must be paid even if the spirits are destroyed by leakage or fire.

[This was an action at law by M. O. Mason & Co. against D. W. Peabody, collector of internal revenue at Nashville, to recover certain taxes exacted under protest.]

TRIGG, District Judge. The case was an action of assumpsit against the collection of internal revenue at Nashville, to recover the amount of taxes paid and a protest upon an assessment for the deficiency in the spirits reported by the plaintiffs, who were distillers, below eighty per cent. of the surveyed capacity of the distillery. It was contended that the survey was not binding upon the distillers because a certified copy was not left with them according to the requirements of section 10, Act July 20, 1868 [15 Stat. 129]. A certified copy of the survey was sent to the commissioner of internal revenue, and a correct copy of this, but not signed by either the assessor or surveyor, was retained in the assessor's office, but no copy was left with the distillers. It was shown, however, that the distillers were present while the surveyor was making his measurements, and there was evidence that they had actual knowledge of the results of the survey. It was proved that the distillers had regularly reported their production and paid the tax upon the amount of spirits actually made. Several months afterwards the distillery was burned, and shortly after this they were assessed for the tax upon the difference between the amount of their aggregate reports and eighty per cent. of their surveyed capacity, which they paid under protest; and appealed to the commissioner of internal revenue and afterwards instituted this suit in the circuit court of Davidson county, whence it was removed into the United States circuit court at Nashville. It was proved that four hundred gallons of spirits had been lost by leakage and the burning of the distillery which were not included in the reports of the distillers. It was contended by the U. S. district attorney, R. McP. Smith, that the requirement of section 10, Act July 20, 1868, to furnish to the distiller a certified copy of the survey of the capacity of the distillery was merely directory, and that, while it should be carefully complied with, yet, if this was not done and the distiller had actual notice of the results of the survey, he would be bound by it; that the analogies were numerous where things required by statute to be done in a particular way were held to have been validly done, although the precise mode prescribed had been disregarded, of which cases were cited. Stress was laid upon the fact that section 11, Act July 20, 1868, in connection with section 96, of said act, inflicted a heavy penalty on the distiller, who should have proceeded with his business before the survey had been made under section 10. Upon the other hand it was contended that the true construction of section 20, of said act, in regard to the eighty per cent., was as decided by Judge Drummond, in U. S. v. Singer [Case No. 16,292].

Judge TRIGG charged the jury that the language of section 20, Act July 20, 1868, "in no case shall the quantity of spirits returned by the distiller, together with the quantity so assessed, be for a less quantity of spirits than eighty per centum of the producing capacity of the distillery as estimated under the provisions of this act," was clear and imperative; that it was the intent of this section to impose a tax upon 80-100ths of the assessed capacity of every distillery, which must be paid irrespective of its actual product; that if more than 80-100ths of the assessed capacity was produced, the tax must be paid upon the excess also; that the entire product was meant to be taxed, but the tax upon 80-100ths of the capacity must be paid at all events, whether so much was produced or not.

But the judge charged the jury that the survey was not binding upon the distillers unless a certified copy had been left with them as required by section 10 of the act, and that, even if they had actual knowledge of the results of the survey, this would not supply the omission to furnish them with the certified copy required by this section.

In regard to the spirits lost by leakage and the burning of the still, it was held that, under section 4 of the act, the tax upon the spirits was due the moment of the production of the spirits, and must be paid even if the

spirits were destroyed before being drawn from the receiving cistern, and before the distiller had received any benefit from them, and that the amount of tax upon the 400 gallons lost by leakage and burning here must be deducted from any recovery by the plaintiffs.

The jury returned a verdict for the plaintiffs.

Case No. 9,251.

MASON v. RHINELANDER.

[8 Ben. 163.] [1]

District Court, S. D. New York. June, 1875.

TORTS — INJURY TO A VESSEL BY FAULTY CONSTRUCTION OF A BULKHEAD—LEASE—DAMAGES.

1. A canal boat, lying at a bulkhead, was so injured by a projecting timber, on which she struck when the tide fell, that she sank. The land in front of which the bulkhead had been built formed part of an estate, and had been leased by the executor to other parties, reserving, however, the right to build the bulkhead, which was afterwards constructed by the executor: *Held*, that the executor was liable for the damage occasioned to the boat by the faulty construction of the bulkhead.

2. The owner of the boat was bound to raise her after she had sunk, using due care in raising her, and if, in so raising her, she received further injury, the executor was also liable for such injury.

This was a libel by [John C. Mason] the owner of the canal boat J. Stackpole, to recover the damages sustained by her while lying at a bulkhead at the foot of Ninety-Third street, in the city of New York, by reason of her striking on an obstruction caused by the logs or crib-work extending out from the bulkhead, the same not having been properly constructed. It was alleged that the respondent [William C. Rhinelander] had the control, direction and management of the bulkhead, which was a part of the estate of William Rhinelander, deceased.

The respondent denied that he had any control, direction or management of the bulkhead, and alleged that it had been leased to, and was in the possession and control of, Thomas J. Crombie and others. He also alleged that the bulkhead at the foot of Ninety-Third street, between the lines of the street, did not belong to the estate, but to the corporation of the city of New York.

Beebe, Wilcox & Hobbs, for libellant.

H. H. Anderson, for respondent.

BLATCHFORD, District Judge. (1.) I deem it satisfactorily established by the evidence, that the sinking of the libellant's boat was caused by its striking a projecting timber in that part of the bulkhead which was not embraced within the lines of any street.

(2.) Having caused the bulkhead to be constructed with such projecting timber under water and out of sight, the respondent was responsible for all damage caused by it to vessels lying at it and using reasonable care.

(3.) When the boat, with her cargo, sank, as the result of her striking such timber, the loss was total, unless she was raised. It was incumbent on the libellant to raise her, if possible, and to use due care and caution in raising her. If, in the proper use of proper means to raise her, further damage was caused to her, the loss therefrom must fall on the respondent. There is nothing to show that adequate skill was not exercised in the measures taken to raise her.

(4.) It is not shown that the libellant did not use reasonable precautions, while his boat was lying at the bulkhead, in protecting her by fenders, or that he had reasonable ground for supposing that the fenders he had in use were not adequate.

(5.) There is nothing in the leases put in evidence to absolve the respondent from liability. By the reservation in each of them the respondent had the right to construct this very bulkhead, and it was constructed during the term of the leases, and by the respondent. The lessees were not responsible in any manner to third parties for any defect in the construction of the bulkhead. Indeed, if this boat had belonged to the lessees, there is nothing in the leases which could prevent them from recovering against the respondent.

There must be a decree for the libellant, with costs, with a reference to a commissioner to ascertain the damages.

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

Case No. 9,252.

MASON v. ROLLINS.

[2 Biss. 99.] [1]

Circuit Court, N. D. Illinois. Jan., 1869.

CONSTITUTIONAL LAW—DISTILLERIES — POWER OF CONGRESS—REGULATING DISTILLERY — DISTRESS WARRANT — RESTRAINING GOVERNMENT OFFICERS.

1. The act of July 20, 1868 [15 Stat. 125], regarding distilleries, is constitutional.

2. The power vested in congress by the constitution to levy and collect taxes, duties, imposts and excise, with the authority to make all laws necessary and proper to carry that power into effect, is absolute, with the single restriction that no rights secured by other provisions of the constitution shall be violated.

3. Congress having the power to impose a tax, and to render its collection effectual, if the character of the business is such that the giving of a bond as a condition precedent to commencing business is a proper means of insuring its collection, such a bond may be required.

4. The prohibition of a distillery within 600 feet of a rectifying establishment is not an unwarrantable interference with the use and disposition of property. If a business affords unusual facilities for evading the government tax, then congress may prescribe the modes, conditions, and limitations under which that business can be transacted.

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

5. A distress warrant issued by a government officer is due process of law, and seizure of property under it is within the taxing power of the government.

6. Although it might be the duty of a court to interfere with the execution of a law imposing unreasonable conditions to the pursuit of a lawful business, yet it will not restrain the officers of the government from carrying out a law, on the application of a party who simply fears that he may be injured in a business which he proposes to undertake. He must first be pursuing his lawful business and some unauthorized act be done or threatened.

This was an application by Mason for an injunction against E. A. Rollins, the commissioner of internal revenue, and others, officers acting under the internal revenue laws.

The bill alleged that the complainant leased a lot of land, near Clintonville, Kane county, in this state, for the term of three years from the first day of September, 1868, together with the alcohol works, etc., thereon. That by the act of congress of July 20, 1868 [15 Stat. 125], grievous and illegal burdens were imposed upon distillers and rectifiers, particularly in requiring a bond, in a large penalty, to be executed before they may proceed with the business; also, in prohibiting the use of any distillery or rectifying establishment within six hundred feet of any licensed distillery. The bill further states that the fifth and seventh sections of the act of March 31, 1868 [Id. 60], were unconstitutional and void, and that, in consequence of the threatened interference of the officers of the government, the complainant is afraid to commence the prosecution of his business, and is unable to find any one to assist him in carrying it on.

Edward Roby, for complainant.
Jesse O. Norton, for defendants.

DRUMMOND, District Judge It will be seen that the object of the bill is to restrain the defendants from carrying out various provisions of the laws referred to, and which are claimed to be an unauthorized interference with the plaintiff in the pursuit of a lawful business. It is not alleged that the plaintiff has done anything except to take the lease, nor that he has been stopped in anything which he has begun.

Under the constitution, congress has power to levy and collect taxes, duties, imposts and excise, and also the authority to make all laws necessary and proper to carry that power into effect. It may be admitted that in doing this congress cannot violate any rights secured by other provisions of the constitution, but, excepting this restriction, the power is absolute. There is, as will be seen, power to collect the taxes, and that implies the use of all proper and necessary means to make the collection effectual. Property cannot be subject to unreasonable seizures, nor the house or person of a citizen subject to unreasonable searches; nor can he be deprived of his property without due process of law.

As to the first special ground of complaint, requiring a bond as a condition precedent to the commencement of the business of rectifying or distilling: The right of congress to collect the tax being undoubted, everything that is produced by a distiller or rectifier may be subject by law to the tax. Congress has the right to render the collection of the tax due upon that business or product effectual, and if it is seen that the character of the business is such that irresponsible parties may engage in it, under the direction of capitalists who are in the background, and who thus seek to avoid the proper responsibility which belongs to them, and in this way to render it uncertain that the tax due upon the product shall be made available to the government, there can be no doubt, I think, that as a means of accomplishing that result, congress may require a bond of the person who proposes to engage in that kind of business. The question must always be, whether, under the circumstances of the case, it is a reasonable condition, and I cannot say that it is not in this case.

As to the second objection that is made, the existence of a distillery within 600 feet of a rectifying establishment: It is claimed that this is an unwarrantable interference with the use and disposition of property, that the owner has a right to appropriate it in any way to the performance of a lawful business. But, if the kind of business to which the owner wishes to appropriate his property is such as to afford great and unusual facilities for secreting what may be the actual product of a business, and thus to evade the tax which is due to the government, then the congress of the United States, within the authority which it has to collect the tax which may be imposed, can prescribe the modes, conditions and limitations under which that business can be transacted; and, if it has appeared by observation and experience that the construction and use of a distillery within a certain number of feet of a rectifying establishment enables those who use the one and the other in the prosecution of their business easily to evade the payment of the tax which is due, congress may prohibit this mode of doing the business, which affords these great facilities for avoiding the tax.

Experience has shown, I think, that there has been no one thing used in carrying on the distilling and rectifying business which has been so thoroughly calculated to evade the payment of taxes as the construction of these two establishments so near to each other; the ease with which connections could be made between them was such as to enable the owner to conceal from the officers of the government the amount of the product, and thus escape the payment of the tax. Therefore, as it seems to me, this was a particular mode which congress had a right to prescribe, in order to make the collection of the tax effectual.

It may be conceded that the question whether a seizure or a search is unreasona-

ble, in the language of the constitution, is a judicial and not a legislative question; but, still in determining whether a seizure is or is not unreasonable, we have to look at all of the circumstances under which it is made. For example, at first blush, nothing appears more oppressive than for an accounting officer of the government to strike a balance against a public debtor, and to issue a warrant of distress against his property for the recovery of that balance. It is not a judicial determination; it is not a judicial process by which the property of the debtor, under such circumstances, can be taken for the satisfaction of the debt; but it is an executive process and has been expressly decided to be due process of law within the meaning of the constitution. Murray v. Hoboken Land, etc., Co., 18 How. [59 U. S.] 272. It is the taxing power of the government that interposes, the right to seize and take property for the payment of taxes that is exercised; and this is a potential right. All property of the citizen is subject to the imposition of taxes for the support of the government and the payment of its debts. The only security the citizen has is under the safeguards that are thrown around the subject by the provisions of the constitution itself—one of which is that they must be uniform, and they cannot be imposed without a vote of the representatives of the people in pursuance of law. That is the principal security that we have in relation to this tremendous power which the government has over our property in the right to tax.

I am inclined to think that if congress should impose an unreasonable condition as a prerequisite to the pursuit of a lawful business, it might be the duty of the courts to interfere with the execution of such a law by the officers of the government; but where a party comes into a court and asks that the officers of the government should be prohibited from carrying out various provisions of law which concern the details of a business he proposes to undertake, I think that he cannot ask its interference by injunction, for fear that, in the execution of some of those provisions, a right guaranteed him by the constitution may be violated. There must be some unauthorized act done in the first place, or threatened. He must be pursuing his lawful business and that business be interfered with, or the prosecution of it threatened with some act of the government, before the court can interpose.

I do not say—it is not necessary that I should say in this case—that every provision in these various laws is in strict accordance with the constitution; but I think that before the plaintiff can call upon the court to enjoin the officers of the government in relation to all, or any of them which it is claimed are unconstitutional, he must first establish that he is pursuing his business, and that some right in the pursuit of that business has been interfered with. In this case, with the exceptions that have been mentioned, nothing of the kind is shown. For this reason, in addition to the others which have been mentioned, the court cannot grant the injunction which has been asked in this case.

[See 13 Wall. (80 U. S.) 602.]

Case No. 9,253.

MASON et al. v. SARGENT.

[23 Int. Rev. Rec. 155.]

Circuit Court, D. Massachusetts. Oct. Term, 1876.[1]

TAXATION—INTERNAL REVENUE—TAX ON SUCCESSIONS—REPEAL—ACCRUED RIGHT.

[A testator who died in 1867 bequeathed certion personalty in trust for his widow for life and at her death to be divided between his two adult children. The act of July 14, 1870 (16 Stat. 261), repealing the internal revenue tax on legacies and successions, exempted from repeal any case when the tax had become "an accrued right." *Held*, that the tax against the bequest accrued immediately upon the death of the testator, though not due and payable until after the death of the widow.]

[Cited in U. S. v. New York Life Ins. & Trust Co., Case No. 15,873. Followed in Hellman v. U. S., Id. 6,341. Cited in U. S. v. Rankin, 8 Fed. 875.]

[This was an action by William P. Mason and others against John Sargent, collector of internal revenue, to recover taxes, alleged to have been illegally exacted.]

George Putnam, for plaintiffs.

George P. Sanger, U. S. Atty., for defendant.

SHEPLEY, Circuit Judge. This action is brought to recover back a legacy tax paid under protest by plaintiffs to the defendant as collector of internal revenue for the Fourth Massachusetts district.

William P. Mason, the plaintiffs' testator, died December 4, 1867. By his will the personal property upon which the tax in question was levied was bequeathed to the plaintiffs in trust for his widow during her life, and upon her death one-half to his son William P. Mason, and one-half to his daughter Elizabeth R. Cabot, both being of full age at the time of his decease. The widow died June 17, 1872.

In April, 1873, the tax in question was assessed by the assessor of internal revenue for said district upon the ground that the 17th section of chapter 255, Act July 14, 1870 [16 Stat. 261], exempted this tax as "an accrued right" from the operation of the 3d section of the same act which repealed "the special tax on legacies and successions from and after the first day of October, eighteen hundred and seventy." Plaintiffs, to avoid distraint, paid the tax under protest that the property did not vest in the plaintiffs' cestui que trust in possession until the death of testator's widow which oc-

[1] [Reversed in 104 U. S. 689.]

curred after October 1, 1870, the date at which the repeal of the legacy tax took effect, and that the tax had not accrued October 1, 1870, so as to be within the saving clause of the 17th section of the act of repeal. Plaintiffs duly claimed of the commissioner of internal revenue the refunding of the tax for the reasons above stated. The commissioner rejected the appeal upon the ground that the tax accrued under the act of June 30, 1864 [13 Stat. 223], and was saved by section 17 of the act of July 14, 1870. Plaintiffs thereupon commenced this action for the sum of two thousand two hundred and forty dollars with interest from May 13, 1873, and the case is submitted to the court upon the foregoing facts which are agreed by the parties.

By the provisions of the 124th section of chapter 173, Act June 30, 1864, "any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property where the whole amount of such personal property, as aforesaid, shall exceed the sum of one thousand dollars in actual value, passing after the passage of this act, from any person possessed of such property, either by will or the intestate laws of any state or territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale, or gift, made, or intended to take effect in possession or enjoyment after the death of the grantor or bargainor, to any person or persons, or to any body or bodies politic or corporate, in trust or otherwise, shall be and hereby are made subject to a duty or tax to be paid to the United States as follows," etc.

The 125th section provided that the tax or duty should be a lien on the property of every person who should die as aforesaid for twenty years, or until the same within that period, be paid to the United States. The act of July 13, 1866, c. 184, § 9 (14 Stat. 140), while retaining the lien given by the 125th section of the act of June 30, 1864, provided that "the tax or duty aforesaid shall be due and payable whenever the party interested in such legacy or distributive share of property or interest aforesaid, shall become entitled to the possession or enjoyment thereof, or to the beneficial interest of the profits accruing therefrom." It also made it the duty of the executor, administrator, or trustee, having in charge or trust any such legacy or distributive share of an estate, to give notice thereof to the assessor or assistant assessor of the district within thirty days after he shall have taken charge of the trust.

The third section of chapter 255, Act July 14, 1870, repealed the tax on legacies and successions from and after the 1st day of October, 1870. The 17th section of the same act continued the former acts in force "for levying and collecting all taxes properly assessed or liable to be assessed or accruing under the provisions of former acts," and "for maintaining and continuing liens, etc., incurred under and by virtue thereof," and further provided that the act of repeal "should not be construed to affect any act done, right accrued, or penalty incurred under former acts," but every such right was expressly saved.

The tax upon a pecuniary legacy under the provisions of these statutes must be taken to have accrued immediately upon the death of the testator, though not due and payable until the party interested in the legacy becomes entitled to the possession or enjoyment thereof, or the beneficial interest in the profits accruing therefrom. The lien of the United States for the tax attached to the fund in the hands of the executors and trustees as soon as they entered upon the trust. This lien was maintained and continued by the provisions of the 17th section until the tax, the right to which accrued at the death of the testator, became due and payable after the death of the widow, when the children became entitled to the possession and enjoyment of the fund. It was determined in May v. Slack [Case No. 9,336], that the tax is to be taken to accrue upon a pecuniary legacy immediately upon the death of the testator though not payable until the legacy is payable. If the tax accrued before October 1, 1870, it was within the exceptions of the 17th section, and was properly collected, and cannot be recovered back.

Plaintiffs nonsuit. Judgment for defendant, with costs.

[The case was taken on writ of error to the supreme court, where the judgment of the circuit court was reversed. 104 U. S. 689.]

MASON (SAUNDERS v.). See Case No. 12,376.

MASON (SHORTRIDGE v.). See Case No. 12,812.

MASON (SINGER MANUF'G CO. v.). See Case No. 12,903.

MASON (STONE v.). See Case No. 13,485.

Case No. 9,254.

MASON v. TALLMAN.

[Cited in Gibson v. Gifford, Case No. 5,395; Bloomer v. McQuenan, 14 How. (55 U. S.) 542. Nowhere reported; opinion not now accessible.]

MASON (UNITED STATES v.). See Cases Nos. 15,734–15,738.

Case No. 9,255.

MASON v. WALLACE.

[3 McLean, 148.] [1]

Circuit Court, D. Indiana. May Term, 1843.

VENDOR AND PURCHASER—IMPROVEMENTS—SANCTION—SPECIFIC PERFORMANCE—DELAY IN PAYMENT—WHEN TIME ESSENTIAL.

1. Where possession has been taken of property purchased, and valuable improvements made, the acquiescence of the vendor may be presumed.

[Cited in Story v. Black, 5 Mont. 26, 1 Pac. 1.]

2. A delay of payment for two years, under such circumstances, where the vendor sustains no damage which interest will not compensate, will not bar a bill for a specific execution of the contract.

[Cited in Ewins v. Gordon, 49 N. H. 461.]

3. Where time is made an essential part of the contract, the rule is different.

In equity.

Mr. Stevens, for plaintiff.
O. H. Smith, for defendant.

OPINION OF THE COURT. This is a bill for the specific execution of a contract. On the 1st of January, 1835, Mason purchased from the defendant, Wallace, lots 112 and 113, in Jeffersonville, in this state, for six hundred dollars, payable in three annual payments, of two hundred dollars each. Wallace executed a title bond for a deed when the purchase money should be paid. Shortly after the purchase, Mason took possession, and has remained in possession. He has made large and valuable improvements upon the lots, and in the streets, &c., amounting to a sum exceeding 4,000 dollars. On the 1st of September, 1838, Mason tendered to Wallace 732 dollars, the amount due, including interest, on the contract of purchase, which Wallace refused, and declined making a deed. This refusal was founded on the negligence of Mason, in not paying the purchase money; and a specific execution of the contract is resisted on the same ground. Time may be made a material part of the contract, and, when that is done, chancery will not decree a specific execution in favor of a party who has failed to perform his part of the agreement. But in most cases time is not essential, and a mere delay of payment, unless it has been unreasonable, will be no bar to a specific execution of the contract. Where the default is connected with a material change in the circumstances of the parties, or in the value of the property, chancery will not decree a performance.

In the present case, the purchaser has not only been in possession of the premises since the purchase, but he has expended, in improving the property, more than seven times the amount of the purchase money. The defendant alleges that this was done by complainant in his own wrong, and without authority. But, from the possession of the complainant, and the progress of his improvements, the defendant must have had full notice, and, as it does not appear that he took any step to arrest the progress of the complainant, the acquiescence of the defendant may be fairly presumed. The delay was less than two years of the first payment, and less than one of the second. The doctrine which governs this case is found in Longworth v. Taylor [Case No. 8,490]; s. c. 14 Pet. [39 U. S.] 174; and in Piatt v. Oliver [Case No. 11,115].

We think, taking all the facts and circumstances into consideration, the plaintiff is entitled to the relief prayed for in his bill, on his paying the purchase money, and interest up to this decree. There was an informality in the tender, and this, connected with the general features of the case, induces the court to require the payment of the interest, as stated. Decree, &c.

[See Case No. 9,256.]

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

Case No. 9,256.

MASON v. WALLACE.

[4 McLean, 77.] [1]

Circuit Court, D. Indiana. May Term, 1846.

SPECIFIC PERFORMANCE — DELAY IN PAYMENT — PROPERTY ENHANCED IN VALUE—IMPROVEMENTS—INTEREST.

1. To entitle a purchaser to a specific execution of his contract, he should make payment either within his contract, or at least within a reasonable time afterwards. If there be great negligence and delay in the payment, and the property is greatly enhanced in value, the court will refuse to give effect to the contract.

2. But where the purchaser has entered into the possession of the property, and made improvements on the ground of four or five times the value of the land, the court will presume an acquiescence by the vendor, and will decree a conveyance, on the payment of the money, notwithstanding the delay.

3. But the court required the purchaser to pay interest up to the time the money was paid.

In equity.

Stevens & Thornton, for complainant.
Mr. Smith, for defendant.

OPINION OF THE COURT. This is a bill for the specific execution of a contract, and the defense is, that the complainant has been negligent in making his payments, and, therefore, not entitled to a decree.

The contract was a purchase of certain lots in New Albany, and several years have elapsed since the purchase, and the complainant took no effectual steps to perform

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

his contract, until a tender of the money was made a short time before this bill was filed. But the complainant, shortly after the purchase, entered into the possession of the property, and made permanent and lasting improvements upon it. The improvements have cost more than four times the value of the lots, and they were made with the knowledge of the defendant, and with his presumed acquiescence. The complainant averred a readiness to pay, which the answer denied.

If this case stood upon the contract alone, we should have no hesitancy in dismissing the bill. Where time is not made the essence of the contract, the purchaser is bound to pay the consideration in a reasonable time. That time may vary according to circumstances, and not unfrequently an excuse may be deemed sufficient for the delay. But where change in the value of the property occurs, and there has been unnecessary delay, chancery will not aid the purchaser. Some of the courts, in late decisions, have shown a disposition to require more promptness in the purchaser, than has, heretofore, been required. Where the relative positions of the parties, in regard to the property, remain unchanged, and there are no circumstances of hardship, the interest on the money is often deemed a compensation for the delay of payment. And this is especially the case where the purchaser is in possession of the property, and has expended large sums in improving it.

In the case under consideration, the improvements made by the complainant are permanent, and of great value; and the fact of delay is the only objection made to a specific execution of the contract. The improvements could not have been made without the knowledge of the defendant. The complainant was not formally put into possession by the defendant, but there was an acquiescence in his possession, and in the expenditures on the property. Under the circumstances, we feel bound to give effect to the contract, but in doing so, we will require the complainant to pay interest on the sum due, up to the time of making the payments, and the court will require this to be done in sixty days.

[See Case No. 9,255.]

Case No. 9,257.

MASON v. WILSON.

[Cited in Smith v. Bank of Columbia, Case No. 13,011. Nowhere reported; opinion not now accessible.]

MASON & HAMMOND ORGAN CO. (HAMMOND v.). See Case No. 6,004.

MASON LUMBER CO. (BUCHTEL v.). See Case No. 2,077.

Case No. 9,258.

The MASSACHUSETTS.

[10 Ben. 177.] [1]

District Court, E. D. New York. Nov., 1878.

DAMAGE—EXCESSIVE SPEED IN NARROW CHANNEL—COSTS.

1. The M., a large passenger steamboat, passed through the channel between Blackwell's Island and New York City with excessive speed, being behind time. A canal-boat loaded with coal was lying then at a well-known and frequented place for discharging such vessels. The swell thrown by the M. rolled upon the canal-boat and sank her at once, the captain and his wife jumping into the river to save their lives. Thirty days afterwards the owner of the cargo of coal gave notice to the owners of the M. of a claim for damages and thereafter filed a libel to recover against the steamer: *Held*, That the canal-boat was properly laden and made fast, and that, though such boats as the M. pass the place daily, no other such accident was shown to have occurred and that the case was not therefore one of inevitable accident.

2. The M. was not in fault in going through that channel, or in going too near the canal-boat, but was in fault in running with excessive speed and the loss was due to such fault and the steamboat was liable therefor.

[Cited in The Rhode Island, 24 Fed. 295.]

3. The court, to mark its disapprobation of the delay in giving notice of the claim to the M., refused to give costs to the libellant.

In admiralty.

Treadwell Cleveland, for libellant.
Wm. P. Dixon, for claimants.

BENEDICT, District Judge. This action is brought by the owner of a cargo of coal laden on board the canal-boat Dr. J. N. Huntley, to recover the damages arising from the sinking of that canal-boat and her cargo on the morning of the 9th of June, 1877.

It appears that this coal was laden on board the canal-boat at Port Johnson, and safely transported therein to the bulk-head at the foot of East 61st St., New York. The boat arrived at the bulk-head on the evening of June 8th, and was made fast outside of a schooner then lying alongside the bulk-head. At about 9 o'clock the next morning the steam-boat Massachusetts, one of the large passenger boats, engaged in making daily trips through the Sound, passed between the place where the canal-boat lay and Blackwell's Island, and in so doing raised a swell that broke over the canal-boat and sank her, causing the damage sued for.

The libel charges among other faults that the accident arose from the negligence of those navigating the Massachusetts in passing the canal-boat at an improper and unlawful rate of speed. The answer denies the negligence charged and avers that the accident arose from negligence on the part of those in charge of the canal-boat in that she was not properly secured at the bulk-head,

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

and in that she was too deeply laden, and in that proper exertion was not put forth to avoid damage from the swell. The proofs show that the place where the canal-boat was moored was a well-known and much frequented discharging place for vessels of this class, and that so far as is known the present is the only instance of damage caused to any vessel lying there by the swells of passing steamboats, although the boat here proceeded against and others of her class pass the locality daily. The evidence also shows that this canal-boat was properly laden and that the accident cannot be attributed either to an excess of cargo or to the manner in which it was laden or to the manner in which the canal-boat was made fast or to any want of care or skill on the part of those in charge of the boat. The case is therefore one either of inevitable accident or of negligence on the part of the steamboat. There is no room for doubt that there was negligence on the part of the steamboat in regard to her speed.

At the place of the accident the river is narrow but not so narrow as in some other parts of that channel, and although it is not very clearly shown that there was any necessity to pass so near the bulk-head as the Massachusetts did on this occasion, I do not hold her liable by reason of passing nearer to the canal-boat than she was entitled to do. Nor do I find her guilty of fault in passing Blackwell's Island by the channel on the New York side. She had an undoubted right to go down that channel, there being no question as to her ability to pass without endangering the safety of boats made fast where this boat was. It is constantly done by boats of large dimension with safety to all. But negligence is proved against the Massachusetts in regard to her speed. While boats of the large size of the Massachusetts have the right to navigate as well as boats of a smaller class, circumstances often arise when it becomes the duty of such boats to slack their speed because of the great swell they produce when moving rapidly. This is a known duty and its performance has been frequently observed. It has been enjoined by the courts in well-considered cases. The C. H. Northam [Case No. 2,690]; The Morrisania [Id. 9,838], and cases there cited. It is a duty that attaches as well in the case of passing a vessel at anchor or made fast at the pier as when passing a vessel in motion. The degree of care required of course varies with the circumstances.

In this instance the proof is clear that the Massachusetts was going at more than her ordinary rate of speed. Her unusual speed was the subject of remark to bystanders on the shore before the accident happened, and it is proved by several witnesses. This evidence receives confirmation from the fact that the steamboat was behind time. This unusual speed caused an unusual swell, so that the waves broke over the canal-boat and sank her at once, the captain and his wife jumping into the river for the safety of their lives.

Against such a swell as the evidence shows to have been thus caused the canal-boat was unable to protect herself by any reasonable care, and for the damage thus caused to the libellant's coal the steamboat must be responsible, because she had no right to proceed at extraordinary speed in a narrow channel like this, where vessels were moored as this canal-boat was. "Her undoubted right to the navigation of the river is subject to the restriction that it must be exercised in a reasonable and careful manner and do no injury to others that care and prudence may avoid." Hunt, J., The Morrisania [supra].

The libellant is therefore entitled to a decree, but I give no costs for this reason: It does not appear that any notice of this claim was given to the steamboat until some thirty days after the damage was known to have occurred. The ease with which fictitious cases of damage done at the piers can be got up and the difficulty in being able to meet any such claim unless promptly informed of its existence, coupled with the fact that it is seldom if ever possible for those on board the steamboat to know when damage is done at the piers, seem to require some rule that shall insure notice being at once given to the steamboat when it is intended to charge her with liability for damage done at the piers by her swell.

As tending to secure this result I have on former occasions declared my intention to refuse costs in a case of this character, when prompt notice of the claim has not been given. To that I adhere, and no injustice can arise from throwing the burden of showing such notice upon the libellant. In this case no prompt notice is proved.

Let a decree be entered in favor of the libellant without costs and let it be referred to a commissioner to take proof of the amount of the loss.

MASSACHUSETTS, The (JONES v.). See Case No. 7,480.

MASSACHUSETTS ARMS CO. (COLT v.). See Case No. 3,030.

Case No. 9,259.

In re MASSACHUSETTS BRICK CO.

[2 Lowell, 58; [1] 5 N. B. R. 408; 4 Am. Law T. 220.]

District Court, D. Massachusetts. Aug., 1871.

BANKRUPTCY—SUSPENSION OF COMMERCIAL PAPER—INSOLVENCY—ADVANCES—MORTGAGE—ESTOPPEL.

1. The stockholders of a trading corporation agreed to lend money to the company in proportion to their several shares. One of them

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

made the loan by giving his note, which the company indorsed, and agreed with him to provide for at maturity. They failed to take up the note when it became due, and the promisor paid it within fourteen days after its maturity. *Held*, that there had been no suspension of the commercial paper of the company for fourteen days.

2. Where stockholders were to advance money to the company in proportion to their interests, and did so advance it on a credit of four months, and all but one of them afterwards extended their loans for one year, in accordance with what the treasurer testified was an understanding at the time the loans were made, and the company paid all its trade debts as they matured, and was in good credit, whether it could be properly considered insolvent, quaere.

3. At a meeting of the stockholders, who were also the principal creditors of the company, it was voted unanimously to give a mortgage to one of the stockholders to secure him for advances made beyond his proportion. The petitioner, who was a stockholder and creditor, was present, and made no objection. *Held*, he was estopped to set up the mortgage as an act of bankruptcy by the corporation.

[Cited in Re Hapgood, Case No. 6,044; Re Williams, Id. 17,706; Re Sawyer, Id. 12,394; Re Kraft, 3 Fed. 893.]

The Massachusetts Brick Company was incorporated in May, 1869, for the purpose of manufacturing bricks in Somerville and Medford, with a right to have a capital stock not exceeding $500,000, of which $300,000 might be in real estate. The evidence tended to show that the capital stock had been fixed at $400,000, of which about $350,000 had been paid in, and that in July, 1870, it was found that so much of this had been invested in land and machinery, that the operations of the company were embarrassed for the want of active capital. Thereupon certain of the shareholders, of whom the petitioner was one, signed this agreement: "The undersigned, stockholders in the Massachusetts Brick Company, hereby agree to furnish the treasurer, in proportion to the amount of stock held by them, whatever money may be required to pay the present indebtedness, at ten per cent interest per annum, provided that not over $75 per share shall be required on the amount subscribed to raise $150,000 in full."

The petitioner accordingly lent the treasurer of the corporation $5,000, and took the note of the company at four months, as did others. Some of the stockholders lent their notes on four months, and took a receipt from the treasurer that the company was to pay them at maturity. When the note held by the petitioner came due in December, 1870, he agreed to extend the loan, and lent the treasurer his note at four months, taking from him a receipt that the company were to provide payment for it at maturity, it being given for their accommodation. The petitioner offered evidence tending to show that he informed the treasurer that he should not renew the loan again, but should expect the company to pay the note at maturity, which would be the 4th of April, 1871.

The stockholders advanced different sums, not regulated precisely by the number of their shares, and Oliver Ames, the largest holder, advanced $90,000, which was $30,000 more than his proportion.

The treasurer testified that there was an understanding among the contributors that the money should not be called for until the company should be able to pay it, and that they should all share alike.

Early in 1871, at an adjournment of the annual meeting of the stockholders of the company, at which the petitioner was present, Mr. Ames presented a proposition: That if a mortgage were given him for the excess which he had advanced above his share, he would "carry" $60,000 for one year, if the other stockholders would do likewise. This proposition was accepted unanimously.

All the stockholders, excepting the petitioner, afterwards signed an agreement to extend their several debts, but he refused to sign it. When his note became due, it was not paid by the company, nor were funds furnished him by them, and he took it up within fourteen days after its maturity. He has sued the company at law, and in this petition sets up the non-payment of this note and the mortgage to Ames as acts of bankruptcy.

The treasurer testified that the company owed very few debts, excepting to its shareholders, and met all its ordinary obligations promptly, and was in good credit; that it could pay this debt, but considered that the petitioner was bound to wait.

E. Avery, for petitioners.
D. W. Gooch, for respondents.

LOWELL, District Judge. This case has all the appearance of an attempt to coerce the payment of a disputed debt, by an attack on the commercial standing of a trading corporation. Nevertheless, if that corporation has suspended payment of its commercial paper, and there is no real dispute of its validity, or if it is bankrupt for any other reason, the powers of the court are rightly invoked. I am of opinion that there is no commercial paper of the company overdue. The debt to the petitioner is for money paid to take up his own note, which he had lent to the company; that debt does not depend upon the company's indorsement of the note, but upon the fact that money has been paid in their behalf. If there had been no indorsement, the right of action would be the same in fact and in form. When the petitioner took up his own note, it was paid, and he neither need to nor can declare upon it as still outstanding. He lent it to the company for the very purpose of having it discounted as his note, and not as theirs, and his obligation was always that of a promisor, and intended to be so, and their obligation to the holder was merely that of an indorser. Their obligation to this petitioner was truly represented by the receipt, which agreed to save him harmless; and, as soon as he was damni-

fied, he had a good cause of action for money paid, but not upon a promissory note; and as the note was taken up within fourteen days after it was due, there never was any suspension for that period.

A more difficult question is, whether in March, 1871, when the mortgage to Ames was given, the company were insolvent, and intended the mortgage to be a preference. There is evidence that they needed money to carry on their business; and, if we leave out of view the fact that the great body of their creditors were their own stockholders, and hold the debts of this class to be ordinary trade debts, there is certainly much ground to say that they were insolvent. The petitioner maintains that these are ordinary debts; but it is quite apparent that the whole object and purpose of these loans was to enable the company to carry on its business, and that it would frustrate this purpose to require them to be repaid on demand, or even in four months, and, therefore, it may be presumed that most of the lenders had not the slightest intention of treating their loans in that way. I do not mean to say that they had not a legal right to demand payment, but they had no intention of pressing their demands at the risk of the insolvency of the company, which was precisely what they were seeking to avoid. When, therefore, all, excepting the petitioner, agreed to extend their loans for one year, the question of insolvency was perhaps adjourned for that time. This was the way it struck me at the hearing, as I then intimated. Here was a company in good credit, meeting all its trade debts, but having what the treasurer swears to have been, and the other members, excepting the petitioner, appear to have considered, a sort of permanent loan. I fear it might be straining a point to say that this company was insolvent, so that whatever payments it made or security it gave must be taken to be acts of bankruptcy, if attacked within four months. It is the result, undoubtedly, when traders are wholly insolvent, and generally known to be so, that all dealings with them, excepting for present considerations, are liable to be avoided, if they are objected to within the prescribed time.

But another ground exists in this case for saying that the petitioner cannot rely on this act of bankruptcy. The corporation, at a meeting at which he was present, voted to give this security; and he did not dissent, and, indeed, so far as appears, assented. It has been held that the vote cannot affect the private rights of stockholders, in their dealings with the corporation, if they were not present and did not assent, and had no notice of the vote until it was too late to affect action under it, though the meeting was a legal meeting: American Bank v. Baker, 4 Metc. [Mass.] 164.

But here the petitioner was present, and did assent, or did not dissent, and had full notice of the vote. It may be said that it would be useless for him to dissent, when he found that a majority was in favor of giving the mortgage; but I think, if he understood that the corporation was about to commit an act of bankruptcy, as he says it was, it was his duty to protest and see if the stockholders deliberately intended to put themselves in that position. He is proceeding against the corporation for an act which he helped them to commit, and this is a breach of faith towards his fellow-stockholders. There can be no clearer or more decisive act of bankruptcy than for a trader to assign all his property to trustees for the benefit of his creditors. Such an act is not even capable of explanation; because, however honest it may be, it is a technical fraud on the statute. But it has been uniformly held that a creditor who assents at a meeting of creditors, is estopped to set up the deed as an act of bankruptcy. Hicks v. Burfitt, 4 Camp. 235, note; Ex parte Kilner, Buck, 104, and the decisions of Lord Eldon, cited in that case in the argument; Bamford v. Baron, 2 Term R. 594, note; Ex parte Cawkwell, 19 Ves. 233; Back v. Gooch, Holt, N. P. 13; Oliver v. King, 8 De Gex, M. & G. 110. Two of these decisions go to the mere silence of a creditor. Indeed, in one of them the creditor advised against the course of action adopted. Applying them to this case, it would seem that the petitioner's failure to protest, at a time and place where he, as a creditor, had a right to be heard, would bind him, and this whichever way he voted on the question. My doubt was, whether at a meeting of stockholders, not called as a meeting of creditors, it might be presumed that any thing but the affairs of the corporation were to be regarded, and whether a creditor, who happened to be a stockholder, ought to be expected to interfere. But, upon reflection, I find it impossible to divide the rights and interests of the parties in this way; for every meeting of stockholders was, in fact, a meeting of the chief creditors, and, besides, it rather strengthens the argument for an estoppel, that the creditor was not only suffering the debtor to commit an act of bankruptcy, but himself held such relations to the debtor that he was bound to notify him of the consequences of his proceedings.

The evidence tends to show not merely a constructive breach of good faith, but an actual one. The petitioner left Boston before the mortgage was delivered, and left written instructions that the defendants should be made bankrupts, and the mortgage be broken up if his note was not provided for at maturity. And, on the other hand, there was no evidence that any other party interested had any thought of bankruptcy, or understood that an act of bankruptcy was about to be committed. The consent of creditors that was asked for and obtained was not to the mortgage, but to the extension; that is, Ames would extend his proportion if the others would extend theirs. As to the

mortgage, no one is estopped if this petitioner is not; because all that any of them formally and in writing agreed to was the extension. I think, upon the whole, it was the duty of the petitioner to warn the corporation that they were committing an act of bankruptcy of which he or some other creditor might take advantage; and, as he has not done so, he is estopped to set up the mortgage as such an act.

Petition dismissed.

MASSACHUSETTS FIRE & MARINE INS. CO. (BAYARD v.). See Case No. 1,133.

MASSACHUSETTS HOSPITAL LIFE INS. CO., Ex parte. See Case No. 9,327.

MASSACHUSETTS HOSPITAL LIFE INS. CO. (DURANT v.). See Case No. 4,188.

MASSACHUSETTS MUT. LIFE INS. CO. (CONOVER v.). See Case No. 3,121.

MASSACHUSETTS MUT. LIFE INS. CO. (DAVIS v.). See Case No. 3,642.

MASSACHUSETTS NAT. BANK (FISKE v.). See Case No. 9,857.

MASSACHUSETTS NAT. BANK (MATTHEWS v.). See Case No. 9,286.

MASSACHUSETTS NAT. BANK (MORSE v.). See Case No. 9,857.

Case No. 9,260.

The MASSASOIT.

[1 Spr. 97; 7 Law Rep. 522; 12 Hunt, Mer. Mag. 367.] [1]

District Court, D. Massachusetts. Dec., 1844.

SEAMEN — WAGES — SHIPWRECK — REMNANTS OF VESSEL SAVED—OFFICERS AND SEAMEN SUPERSEDED BY OWNER IN SALVAGE.

1. In case of shipwreck, seamen are entitled to wages, as such, if by their exertions remnants of the vessel to the amount of the wages are saved, although no freight be earned.

[Cited in The Holder Borden, Case No. 6,600; Drew v. Pope, Id. 4,080.]

2. If, after a vessel is cast on shore, the owner appears with a competent force, supersedes the officers, and takes the business of salvage out of the hands of the seamen, and neither affords them subsistence, nor desires their aid, they being willing to render it, they may recover wages in a suit in rem against the remnants of the vessel.

This was a libel for wages in a voyage from Calcutta to Boston.

Richard H. Dana, Jr., for libellants.

Sidney Bartlett, for respondents.

SPRAGUE, District Judge. If no freight was earned, the first question is, whether in case of shipwreck and total loss of freight, parts of the vessel being saved by the exertions of the crew, the seamen are entitled to wages. When the early editions of Abbott on Shipping were published, there had been no decision on this point in England. Abb. Shipp. (3d Ed.) p. 435.

In the American courts it has been settled, by a series of decisions commencing at an early date, that in such case the seamen are entitled to compensation. Should that compensation be wages under the contract? This was opposed to the maxim, that "freight is the mother of wages," which the courts were not prepared directly to encounter. Should the compensation be salvage? Salvors are mere volunteers, and very liberal compensation is awarded to them, in order to invite their exertions and secure their fidelity, in the laborious and oftentimes perilous service of rescuing and preserving wrecked property. Shall then seamen be absolved from the obligations of their contract, and from all duty of obedience to their officers, at the moment when their services may be most needed, for the protection of the property of the owners? Shall they be at liberty, at such a time, to divest themselves at once of their allegiance to the ship, and of the character of covenanted seamen, and assume, at their option, the character of salvors, claiming its large rewards, and subject to no control? This would not only be inconsistent with the contract of hiring, but a startling violation of that principle of maritime policy, which sedulously endeavors to bind up the interest of the mariner with that of the owner. It would be not only an inducement to relax his efforts in time of difficulty and danger, but a direct temptation to cause shipwreck and disaster, that he might successfully claim the large rewards of salvage service.

There may, indeed, be cases in which seamen may become salvors of their own vessel, as stated by Lord Stowell in The Neptune, 1 Hagg. Adm. 227, 237; and by Mr. Justice Story more liberally, in The Two Catherines [Case No. 14,288]; and as in Mason v. The Blaireau, 2 Cranch [6 U. S.] 240, 269, 270; although that was against the judgment of that able jurist, Mr. Justice Washington, as appears in The Cato [Case No. 13,786]. But seamen can properly become salvors only in very extraordinary cases, where the services rendered are without the range of their contract, and therefore voluntary. Of such we are not now speaking.

The objections to seamen becoming salvors, in ordinary cases of shipwreck, are so formidable, that the idea could not be entertained; and it was decided that they were still held by their contract, and bound to continued exertions to save their ship, her tackle, apparel, and fragments. That for such laborious and hazardous service, when successfully performed, they should receive some reward, no one was bold enough to deny. It could not be salvage, for the insurmountable objections already stated. Should it be a quantum meruit? That was incompatible with the idea, that the serv-

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission. 12 Hunt, Mer. Mag. 367, gives only a partial report.]

ice was rendered under a contract prescribing the rate of compensation, and was obnoxious, in a great degree, to the objections which excluded salvage.

Holding, as the courts generally did, and upon the strongest reasons, that the seaman was still serving under the obligation of his contract, the plain principle would seem to be that his compensation should be that which the contract prescribed. And this was the practical result to which they in fact generally came, although they did not see fit to give it the name of wages. They have called it sometimes salvage measured by the stipulated wages, sometimes quasi salvage, or wages in the nature of salvage. But the compensation actually given was the contract wages, neither more nor less; and this, too, whether the voyage had been long or short, the amount large or small, or the service, at the time of the shipwreck, great or trifling. It had not one quality of salvage, excepting that something must be saved. It was not for voluntary, but for covenanted service. It was not enhanced by peril and gallantry, nor diminished by the object being easily and safely accomplished. It was not affected by the value of the property saved, provided it was not less than the amount of the wages. It might exhaust the whole remnants, where there had been little either of peril or labor; or it might not take a hundredth part, where both had been great. Decisions of Judge Winchester, reported in a note in Relf v. The Maria [Case No. 11,692]; Frothingham v. Prince, 3 Mass. 563, more fully reported in 2 Dane, Abr. 462; Weeks v. The Catharina Maria [Case No. 17,351], which states what was the ultimate decree in The Cato [supra]; Giles v. The Cynthia [Case No. 5,424]; Clayton v. The Harmony [Id. 2,871], a remark arguendo; Coffin v. Storer, 5 Mass. 253, 254, a dictum; The Two Catherines [supra]; Adams v. The Sophia [Case No. 65]; Brackett v. The Hercules [Id. 1,762]. In Dunnett v. Tomhagen, 3 Johns. 156, the court, by Kent, C. J., considers the compensation that should be awarded, to be salvage; and the same opinion is expressed in 3 Kent, Comm. 195.

It will be seen by these cases, that while judges and jurists were really carving out a new exception from the general rule, that makes the earning of freight a pre-requisite to the recovery of wages, they had the fear of the maxim that "freight is the mother of wages," before their eyes, and sought to propitiate it by a misnomer. That maxim is probably indebted to the concise figure of speech in which it is conveyed, for something of its force and acceptance; for, as observed by Lord Stowell, in The Neptune [1 Hagg. Adm. 227], it is not strictly accurate. Wages are the legitimate offspring of the mariner's contract united with its performance,—cut off, indeed, sometimes by the stern decrees of maritime policy, seeking to unite the interest of the mariner with that of the owner.

Chancellor Kent, in Dunnett v. Tomhagen, and in his Commentaries above cited, expressed dissatisfaction with this equivocal state of judicial opinion, in which the language of the courts vibrated between wages and salvage; and to escape from it, he adopted the greater evil of considering that the reward should be strictly and merely salvage. Mr. Justice Story, in The Two Catherines [supra], says, "If the question were entirely new, it might, perhaps, be more consistent with the principle of the rule, that the earning of wages shall depend on the earning of freight, to hold that the case of shipwreck constituted an exception from the rule; and that the claim to wages was fully supported by the maritime policy, on which the rule itself rests."

What was thus clearly indicated in 1821, as the most proper course, and the course which Judge Story would evidently have pursued, but for the influence of previous opinions pronounced by others, was fully adopted by Lord Stowell, in The Neptune, 1 Hagg. Adm. 227. The case was this: A British vessel was wrecked on the coast of France, and the freight totally lost, but by the exertions of the crew, parts of the vessel were saved, which were sold by the captain, who was also the owner. After their return to England, the seamen instituted a suit in personam, in the admiralty, against the owner, for wages. The libel or petition contained no claim for salvage, or quasi salvage, services. Lord Stowell, after full investigation, in an elaborate judgment, sustained the naked claim for wages as such, distinctly announcing it as an exception to the rule, which makes wages to depend on freight. This is evidently approved by the American editor of Abbott on Shipping (4th Am. Ed., p. 452); and again by the same high authority, in Pitman v. Hooper [Case No. 11,185]; and we may now, with that directness which should characterize courts of justice, give to the established practice in this country its true designation, and say that in such cases wages, as such, are recoverable.

The result of the authorities, and the true doctrine, are well stated in Curt. Merch. Seam. pp. 285–290, where the learning on this subject is collected.

But it is contended that, in the case now before the court, the seamen did not save the remnants of the vessel; that they were preserved by other agency, and that this distinguishes the present case from all cases in which compensation has been allowed, and ranges it with that of The Elizabeth and Jane [Case No. 4,356].

What are the facts? The ship Massasoit, on a voyage from Calcutta to Boston, went ashore in a storm on the night of Wednesday, the 11th of December last, on Point Alderton, at the mouth of Boston harbor. The crew remained on the wreck, performing all their duties, until they were taken off by a life-boat, barely escaping with their lives, about three o'clock

in the afternoon of Thursday. Previously to this, the owners had received information of the disaster, and at the time when the seamen were landed, the agent of the owners arrived with a steamboat from Boston, for the purpose of saving the remnants of the vessel and cargo. From that time, the captain gave up all control to the agent. The crew were in a suffering condition, and physically unable to perform any labor, during the residue of Thursday. On Friday, some of them were still too feeble to do anything; the others went upon the beach, near the wreck, and rendered some trifling service, by throwing out of the reach of the sea a few sheets of copper, that had been torn by the waves from the bottom of the ship. The agent continued to labor in saving the wreck, until Tuesday following, and then contracted with certain persons to take up the cables and anchors, when the sea should become smoother; which was done in the succeeding week. Neither the agent of the owners, nor the officers of the ship, furnished the seamen with any means of subsistence, or called on them for any service, or indicated in any manner, that their aid was desired.

The seamen never formally tendered their services, but no disinclination was manifested, on their part, to perform whatever services might be required of them. They remained, supported by charity, near the wreck; their presence and condition being known to the agent and officers, until Saturday, when they went to Boston.

The admiralty requires no vain or nugatory acts, and a formal and express offer of service was not necessary. Had the agent desired their aid, he would doubtless have made it known, and furnished them the means of subsistence, which might easily have been done. Instead of this, he came with a steamer, and as great a force of efficient men as he chose to take with him, and it was in his power, before Friday morning, to have increased that force to any desired extent. I must presume, therefore, that he had all the assistance that he wished, and the seamen being thus superseded, and the saving of the remnants taken out of their hands, might well consider themselves discharged, and, after remaining near the wreck about forty hours on charity, seek the means of subsistence elsewhere.

Why should they not have wages? Such performance would, upon the principles applicable to other contracts of hiring, entitle them to the stipulated reward. That policy which makes the compensation of the seaman depend on his saving property, entrusted to his care, for the owner, was intended to secure his fidelity, and stimulate his exertions in case of disasters, which usually occur at sea, or in remote countries, where the owners cannot be present; and oftentimes where none but the crew can know how far their duty has been fully performed. Here the owner appeared; all control over the property was delivered up to him, he assumed the entire management, superseded the seamen, took the business of the salvage out of their hands, and in effect, discharged them. Surely the stern rule of maritime policy, which has been adopted to stimulate continued exertions for the benefit of the owner, has no application to a case like this; and the just principles which usually govern contracts for labor need not be intercepted.

This differs from the case of The Elizabeth and Jane [supra]. There the vessel had been entirely abandoned,—left derelict by the crew. It had not been delivered up to the owner. He had never appeared. In such cases it is often difficult, sometimes impossible, to ascertain whether more could have been done or not; and the policy of making it for the interest of the crew to persevere, by saying to them, when you abandon the vessel, you abandon all hope of compensation, is manifest; and the accidental circumstance that the derelict is afterwards found by others and brought to the owners, burdened with heavy salvage, does not affect the justice or policy of the case, nor resuscitate the claim to wages.

Decree for wages and costs.

NOTE. Since the decision of The Massasoit the point there adjudicated has been considered, incidentally, in several cases reported in the United States. Davis v. Leslie [Case No. 3,639]; The John Perkins [Id. 7,360]; Bruce v. The America [Id. 2,046]. And some decisions prior in date to The Massasoit have since been reported: Cartwell v. The John Taylor [Id. 2,482]; Reed v. Hussey [Id. 11,646]; The Wave [Id. 17,300]; The Dawn [Id. 3,666]. In this last case, (previously reported in the American Jurist,) Ware, J., after a very careful examination of the authorities, expressed the opinion, "that the seamen, in these cases, have two distinct claims, one for wages, and another for salvage. Their wages are to be paid exclusively from the materials of the ship, they being pledged for that purpose, and the full amount due is to be paid without deduction. But they have no claim for wages against the cargo, except for the freight due upon it. Their claim for salvage is against the general mass of the property saved; and, as in all cases of salvage, the amount is uncertain, depending upon the particular circumstances of the case." The learned judge goes on to say, that "the crew are bound to remain by the vessel, and contribute their utmost exertions to save as much as possible from the wreck." Their service, therefore, wants one essential element of salvage service,—that of being voluntary. And the conclusion finally arrived at is, that they are not to be rewarded as general salvors, but are to be allowed, in addition to wages, "a reasonable compensation, pro operâ et labore."

It has been said by eminent authorities, that "it matters not whether the recompense be made in the name of wages, or as salvage." Reed v. Hussey [supra]; 3 Kent, Comm. 196, note; but there are cases where the compensation wholly depends on this distinction, as for example, where the ship perishes, and cargo alone is saved, with no freight due upon it.

In England, the exception contended for in The Massasoit, has been established both by the courts and by legislation. The next case to The Neptune, before the high court of admiralty, was The Reliance, 2 W. Rob. Adm. 119. There was a total loss of cargo and freight; the ship perished, and the crew in her, but portions of the ship were saved by strangers, and came into the owner's hands. The widow and administratrix of one of the crew, promoted a suit for his wages against the owners. The learned

judge, (Dr. Lushington,) decreed wages to the time of the seaman's death. In the next year after this decision, (Sept. 5, 1844,) was passed 7 & 8 Vict. c. 112, § 17: that "in all cases of wreck or loss of the ship, every surviving seaman shall be entitled to his wages up to the period of the wreck, or loss of the ship, whether such ship shall, or shall not, have previously earned freight; provided the seaman shall produce a certificate from the master or chief surviving officer of the ship, to the effect that he had exerted himself to the utmost to save the ship, cargo and stores." And in 1854, was passed the 17 & 18 Vict. c. 183: that "no right to wages shall be dependent on the earning of freight;" with the proviso that in all cases of wreck, or loss of the ship, proof that the seaman has not exerted himself to the utmost to save the ship, cargo and stores, shall bar his claim. "A most wise and salutary substitute," says Judge Betts, Davis v. Leslie [supra], of the first statute, "for that old figment of law, which had, in many cases, been most oppressively enforced against seamen, that freight is the mother of wages."

In the year 1849, the gentleman who had acted as proctor for the libellants, in The Massasoit, filed a libel in the district court for Massachusetts, on behalf of certain seamen belonging to the ship Niphon, against the owners, for wages. The libellants were on monthly wages, when the ship was abandoned at sea, on account of a dangerous leak, and set fire to, by the master's orders. They claim wages to the time of the abandonment, on the ground that the seaman's contract is a simple contract of hiring, and that his title to wages depends only on his faithful performance of the service for which he is engaged. Sprague, J., dismissed the libel in a judgment not reported: and upon appeal to the circuit court, the decree was affirmed. See The Niphon's Crew [Case No. 10,277].

In The Florence (May 14, 1852) 20 Eng. Law & Eq. 607, where the seamen, by the master's order, abandoned a leaky ship, at sea, saving nothing of ship, or cargo, Dr. Lushington said, "Their right to wages was gone, and would have been, if a year's wages had been due them." In an action for salvage, brought by certain of the crew, who subsequently returned and saved the ship, he allowed the claim; on the ground that by the peculiar circumstances of the case, their contract, as seamen, had been terminated; and they might well be salvors. See, also, The Riby Grove, 2 W. Rob. Adm. 52; The Robert and Ann, Holt, Rule of Road, 55; The Isabella, 3 Hagg. Adm. 427; Hawkins v. Twizell, 34 Eng. Law & Eq. 195; Worth v. Mumford [1 Hilt. 1]; Hobart v. Drogan, 10 Pet. [35 U. S.] 122; Collins v. Hathaway [Case No. 3,014].

Case No. 9,261.

MASSETT v. MAXWELL.

[Cited in Crookes v. Maxwell, Case No. 3,415. Nowhere reported; opinion not now accessible.]

MASSEY (ALLEN v.). See Case No. 231.

Case No. 9,262.

MASSEY v. SCHOTT et al.

[1 Pet. C. C. 132.] [1]

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

DEBT—BOND—DOUBLE PAYMENT—VOLUNTARY PAYMENT.

1. In an action of debt on a bond, with a collateral condition, nothing can be recovered, but what the obligee is entitled to, upon a breach of the condition.

[See Bank of Mount Pleasant v. Sprigg, Case No. 891.]

2. One of the partners of a mercantile house, in Liverpool, having been arrested for a debt due by them, in the city of Philadelphia, paid the same; and took from the defendants a bond, in the condition to which, it was stipulated, that the obligors had agreed to indemnify him, against a double payment of the sum paid, should the house be obliged, by compulsion of law to make the same. The plaintiff's house in Liverpool having been called upon by two persons claiming the same money and suits having been instituted in England for the same; not having notice of the payment made by the partner here, and desirous to avoid the expenses of litigation; filed a bill of interpleader in the court of chancery, praying to be allowed to pay the amount claimed from them, in the two suits, into court; which was done, by permission of the lord chancellor. This was a voluntary payment, and the condition of the bond does not protect the plaintiffs from the loss sustained thereby.

The parties having entered into a written agreement, to waive all manner of form in the pleadings, and to try the cause on the merits, the case appeared to be as follows, viz:

In the year 1808 or 1809, the house of Pearson, Hodgson and Massey of Liverpool, of which the plaintiff was a member, became indebted to Nathan Davidson of Philadelphia, in the sum of about six thousand four hundred dollars; for the balance of the proceeds of a cargo of cotton, which had been shipped to them. In July, 1809, Davidson became insolvent, and assigned over his estate, to the defendants, for the benefit of his creditors. On the 16th November, 1809, Davidson, and on the 17th of the same month, the defendants, wrote to the house of Pearson, Hodgson and Massey, and directed them to pay over the balance of the funds in their hands, to William and John Bell and Co. of London. Soon after these orders were given, the defendants, as assignees of Davidson, empowered S. Potter of London, to collect the said balance for their use. The Bells, in consequence of the first orders in their favour, instituted a suit in the high court of chancery, in England, against Pearson, Hodgson and Massey, to recover the said balance. Pending that suit, Massey, one of the partners, came to Philadelphia, and was arrested at the suit of the defendants, in order to recover the aforesaid balance; and he, Massey, "in order to release himself from the arrest, and at the same time, to secure himself against a double payment of the said claim, which might take place, if his said house in England should have been compelled by course of law, to pay the demand, made on them by said William and John Bell and Co.; or by having paid or secured to the said Potter, or to any other person, on behalf of the said Davidson, or his assignees, in any manner whatsoever, prior to the date of the bond, hereafter mentioned; or before any countermand, to be given by the said assignees of such payment, shall have reached

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

the said Pearson, Hodgson and Massey, in England;" paid to the defendants, the sum of seven thousand nine hundred and sixty-seven dollars and seventy-six cents; the balance supposed to be due; and the defendants entered into a bond, in which all the above circumstances are fully recited, and the parts marked as a quotation, are literally copied from the recital. Then follows the condition; which obliges the defendants to discontinue their suit against Massey; to use their best endeavours to procure a discontinuance of any suits, that have been, or might be brought against Pearson, Hodgson and Massey, in consequence of any orders of the said Davidson, before his assignment, or of the defendants afterwards, by the said W. and J. Bell and Co., or any other person, for the recovery of the said balance; and also, to save harmless, and indemnify the said Pearson, Hodgson and Massey, or either of them, against any loss, injury, or damage, they may, by compulsion of the law, have sustained, or may sustain; by reason of any payment, in consequence of any suit brought in England, or elsewhere, against them or either of them, by virtue of any order given by said Davidson, previous to his said assignment, or by the defendants, since the said assignment, or in consequence of any foreign attachment, levied in their hands, by any creditor of Davidson, for the recovery of the said balance; and also save harmless, and indemnify the said Pearson, Hodgson and Massey, and every of them, against all charges, injuries, losses and damages they may sustain, by reason of a double payment, of the said balance as aforesaid, or any part thereof. There is then a proviso; that the defendants should not, in any event, be liable, by virtue of this obligation, to pay any larger sum, than was received by them from Massey; and that all costs heretofore incurred in England, by reason of Pearson, Hodgson and Massey's non-compliance with the order of Davidson, and of the defendants as aforesaid, should be paid by Pearson, Hodgson and Massey; not extending, however, to more than the costs of one suit, if they should have been prosecuted on two contending claims; and that all legal costs, that should be incurred after the date of the said bond, should be borne by the defendants.

This bond was dated the 27th July, 1810; the bill in equity, against Pearson, Hodgson and Massey, by the Bells, was filed in November, 1809. On the 10th August, 1810, Pearson, Hodgson and Massey, filed in the same court, a bill of interpleader against the Bells; against Little and Wotherspoon, who also demanded the balance, but who, in their answer to this demand disclaimed; against Potter, Davidson, and his assignees; and prayed an order, to enable them to pay into the Bank of England, the balance acknowledged by them to be due to Davidson. On the same day the order was made; and on the 17th of the same month, Pearson, Hodgson and Massey, paid into the bank, to the credit of the accountant of the court, fourteen hundred and forty-three pounds, seven shillings, equal to six thousand four hundred dollars.

The questions were: First, whether the plaintiff, having paid to the defendants, about fifteen hundred dollars more than the house of Pearson, Hodgson and Massey acknowledge to have been due; should be at liberty, in this suit, to establish that fact, and to recover it back. Secondly, whether the plaintiff is entitled to recover any money in this action. The first question arose in the progress of the cause, upon the plaintiff offering to prove the overpayment; the second, upon a motion to nonsuit the plaintiff.

M. Levy and R. Peters, Jr., for plaintiff.
Sergeant & Todd, for defendants.

WASHINGTON, Circuit Justice (charging jury). This is an action of debt, brought upon a bond, with a collateral condition; and therefore the plaintiff cannot recover any thing, but what he is entitled to, upon a breach of that condition. The condition is; that the defendants should discontinue their suit against the plaintiff; should endeavour to obtain a discontinuance of any suits in England, against Pearson, Hodgson and Massey, in consequence of any orders of Davidson, or of the defendants; to indemnify said Pearson, Hodgson and Massey, and every of them, against any damages they might sustain by legal compulsion, in consequence of any suit brought in England, or elsewhere, against them, by virtue of any order given by Davidson, or by the defendants, or in consequence of any foreign attachment, levied in their hands, by any creditor of Davidson; and to indemnify them against all damages they might sustain, by reason of a double payment of the balance. It is admitted, that there has been no breach of the two first parts of the condition; nor has any attachment been levied; neither was the over payment made on the 27th July, 1810, by compulsion of law, in consequence of any suit brought against Pearson, Hodgson and Massey, or by virtue of any order, given by Davidson, or the defendants; nor was such over payment a double payment, that being the first payment, and the payment into the banks doubled it, so far as it went. But, as to the difference between the sum paid on the 27th July, 1810, and that paid on the 17th August, into the bank; there has never been any double payment of that sum, and of course, it cannot come under the last clause of the condition. The plaintiff, if he inadvertently paid to the defendants more than his house owed, may recover it back, in an action for money had and received, but not in this action.

As to the second question, it is the opinion of the court, that the action cannot be maintained. The recitals in the condition of the

bond, express in most intelligible language, the intention of the parties. The defendants, having arrested the plaintiff in this country, for the balance due to them, by his house, and held him to bail, had obtained a security, which they were only induced to relinquish, upon receiving payment of what was supposed to be due. But, as it was possible, the house of Pearson, Hodgson and Massey, might be compelled, by legal process, to pay the same money again, to the Bells, or to some other person; or, that they might have paid, or before they could have notice of the settlement in Philadelphia, might pay, voluntarily, that balance, upon orders drawn by Davidson, or by the assignees; it was but just, that the defendants should indemnify those persons against a double payment, made under any of those circumstances. That this was the design of the parties, is clear, from the recitals; and the condition is precisely accommodated to that intention. The recital, as to the compulsory payment, states that the defendants had agreed to secure Pearson, Hodgson and Massey, against the event of a double payment of the said claim; which might take place, if they should have been compelled, by course of law, to pay the demand made on them by the Bells. In execution of this agreement, the defendants oblige themselves, to indemnify the said Pearson, Hodgson and Massey, against any damage they may, by compulsion of law, sustain, by reason of any payment, in consequence of any suit brought against them; by virtue of any order given by Davidson, or by the defendants. But the payment made into the bank, was not made by compulsion, or in consequence of any suit brought against Pearson, Hodgson and Massey; but it was made, under an order, obtained upon the prayer of Pearson, Hodgson and Massey, and in a suit in which they were complainants, not defendants. This proceeding was a violation, not only of the words, but of the intention of the parties. The defendants did not admit the claim of the Bells, but on the contrary, obliged themselves, to endeavour to have it discontinued; and that the cause might be defended, they bound themselves from the date of the bond, to pay the costs. Had Massey himself filed the bill of interpleader, and prayed to be permitted to pay the money into the bank, it would have been a gross fraud; in as much, as he would have attempted to deprive the defendants of the security they had obtained by his arrest, and then, by a voluntary abandonment of the cause of the defendants, and a payment of the money, to compel the defendants to restore the security, which they had taken, in lieu of the person of Massey. But although this case is clear of fraud, the payment in England having taken place, in about twenty days after the compromise was made in Philadelphia; still, it cannot for a moment be contended, that a payment made upon the prayer of Pearson, Hodgson and Massey, and in a suit brought by them, was a payment made by compulsion of law, in a suit brought against them.

As to any voluntary payment, which Pearson, Hodgson and Massey might have made, before the date of the bond; or might make, before any countermand, to be given by the defendants, of such payment, should reach Pearson, Hodgson and Massey in England; the recital states an agreement by the defendants, to indemnify Pearson, Hodgson and Massey, against any payment made to Potter, or to any other person, on behalf of Davidson, or his assignees, in any manner, before those periods. Then comes the condition intended to fulfil the agreement, and it stipulates, to indemnify the said Pearson, Hodgson and Massey from all damages, which they might sustain, by reason of a double payment of said balance as aforesaid. These words, "as aforesaid," clearly refer to the double payment, mentioned in the recital; that is, a payment made to Potter, or to any other person, on behalf of the said Davidson, or his assignees. But the payment in England, for which this suit is brought, was not made to Potter, or to any other person, on behalf of Davidson or the assignees. Persons claiming on behalf of Davidson or the assignees, could never be persons claiming adversely to them; but it is most obvious, that persons claiming for their benefit were intended. It is impossible, that the Bells, the only defendants to the bill of interpleader, who claimed adversely to Davidson, or to his assignees, could be intended; because, in the same sentence, but a line or two preceding these expressions, payment by compulsion of law, is expressly referred to the Bells by name. It would then have been absurd, immediately afterwards to permit a voluntary payment to them. It is of no consequence indeed, whether the words "as aforesaid," refer to the payments mentioned in the recital, or the words "said balance;" because, if they were omitted altogether, the meaning of this part of the condition, is ascertained by the obvious meaning of the recital; both of which refer to voluntary payments. That the words "his assignees," in the condition, mean the defendants, and not the Bells, or any other, to whom Davidson had given an order to receive the money, is obvious; not only from the preceding words, which in reference to the Bells, speak of a compulsory payment, and consequently, the order of Davidson in their favour, could not be on his behalf; but, because the defendants are immediately afterwards described in the same words, viz. "the said assignees."

For these reasons, it seems clear that the plaintiff cannot recover in this action.

The plaintiff suffered a nonsuit.

MASSEY (WEBSTER v.). See Case No. 17,336.

Case No. 9,263.

MASSIE v. GRAHAM.

[3 McLean, 41.] [1]

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

PRACTICE IN EQUITY—BILL OF REVIEW—NEW MATTER—HOW BILL FILED—WHEN FILED—MISTAKE IN DECREE—COMPLIANCE WITH DECREE—DELAY.

1. The ordinances of Lord Bacon still govern bills of review. They may be filed for errors of law, for new matter or proof material in the case, of which the party, at the hearing, had no knowledge.

[Cited in Irwin v. Meyrose, 7 Fed. 536.]

[Cited in Ketchum v. Breed, 66 Wis. 97, 26 N. W. 277.]

2. If the new matter would have changed the decree, though foreign to the issue, it is ground for a review.

[Cited in Irwin v. Meyrose, 7 Fed. 536.]

[Cited in Traphagen v. Voorhees, 45 N. J. Eq. 45, 49, 16 Atl. 200.]

3. The mode of filing a bill of review is, by petition setting forth the grounds, and asking leave to file the bill. As the practice is new in this court, the bill being filed in the present case, considered as a petition for leave, &c.

4. In England, before the enrolment of a decree, a bill of review will not lie.

5. To authorise a review, the evidence must not only be newly discovered, but it must appear that by the use of reasonable diligence it could not have been discovered.

[Cited in U. S. v. Rico, Case No. 16,160.]

[Cited in Ketchum v. Breed, 66 Wis 97, 26 N. W. 277.]

[See Baker v. Whiting, Case No. 786.]

6. A miscalculation in the amount of the decree, by which the defendant is charged with a larger sum than he should be, may be corrected, and the ground of review obviated by entering a credit for the amount, on the unsatisfied decree.

[Cited in Tappan v. Wilson, 7 Ohio, 190.]

7. It is not necessary in all cases to comply with a decree before it can be reviewed. As for instance the execution of a conveyance.

[Cited in Phillips v. Mariner, Case No. 11,105.]

8. Application for leave must present a prima facie case for a review. On the hearing, the same grounds may be considered.

9. Lapse of time will bar a review. Especially where the death of persons interested in the transactions, leaves no probability of explanation.

10. The granting of a bill of review is not a matter of right.

In equity.

Scott & Massie, for complainants.

Leonard & Stansbury, for defendant.

OPINION OF THE COURT. This case was argued at the last term, and continued under advisement. It is a bill of review to set aside a decree entered against the complainants, at September term, 1815, on the ground of new matter and proof discovered since the entry of the decree.

The ordinances of Lord Bacon still govern bills of review. They may be filed for error in law appearing in the decree, or for new matter or proof material in the case, of which the party had no knowledge at the hearing. There is some contrariety in the decisions, whether the newly discovered matter must not be such as would have been pertinent to the issue at the hearing. But the better opinion seems to be, that this is not necessary. If the matter be of a nature to have changed the decree, though foreign to the issue, it affords ground for a review. Story, Eq. Pl. § 416; Partridge v. Usborne, 5 Russ. 195; 3 Atk. 33; 2 Freem. 31.

There is also some want of concurrence in the authorities whether the new proof must not relate to facts which, at the hearing, were not attempted to be proved. And whether merely cumulative evidence of facts controverted at the hearing is admissible. If the new proof be of such a character as to have caused a different decree, it is not perceived why it should not be ground for a bill of review, whether it relate to new facts, or facts contested at the hearing. But whether the ground be newly discovered matter or proof, it must clearly appear that the party, at the hearing, had no knowledge of it, and could have had none by using reasonable diligence. Young v. Keighly, 16 Ves. 348; Ord v. Noel, 6 Madd. 127; Bingham v. Dawson, 1 Jac. 243.

A bill of review for newly discovered matter or proof, must be filed by leave of the court; for errors in law, it may be filed without leave. This is the English practice, and we have adopted it. The mode of application for leave to file such bill, is, by petition setting out substantially the original proceeding, and the new matter or proof on which a reversal of the decree is prayed. No such petition has been filed in the present case. Indeed, from the frame of the bill first filed, it was difficult to say whether it was an original bill for relief, a bill in the nature of a bill of review, or a bill of review. It partook more of the nature of an original bill than of any other. But amendments have been made, so as to give the bill now before us, the form of a bill of review. And the first question is, whether this bill, on a motion for leave to file it, shall be considered as a regular petition for such leave. Forms may sometimes appear tedious, if not unnecessary; but in judicial proceedings, they should never be lightly regarded. They are the result of experience and practical knowledge; and are often the best evidences of the law. They contain in themselves certainty, and when sustained by proof, lead to certain results. So far as regards the present proceeding, the formality of a petition is supposed to have been dispensed with. At a previous term, with a view to bring this case to a hearing, and meet the wishes of the counsel, an order was entered that the cause should stand for argument as on an application for leave to

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

file the bill, and also on the merits. This departure from form, induced by the peculiar circumstances of the case, is not to be drawn into precedent.

Before the enrolment of a decree, in England, a bill of review to set it aside does not lie, but a supplemental bill, or a bill in the nature of a bill of review. All decrees in that country, until their enrolment, are considered interlocutory; and this is the reason of the above rule. Coop. Eq. Pl. 88, 89; Mitf. Eq. Pl. (by Jeremy) 90. But in this country, generally, decrees are matters of record; and in the courts of the United States, they are uniformly so considered. Dexter v. Arnold [Case No. 3,856]. As the decree was entered in 1815, and this bill was not filed until 1835, the statute of limitations is relied on to bar the right of complainants. As a bill of review for errors apparent in the decree, is in the nature of a writ of error, the same limitation applies to it. Story, Eq. Pl. § 410; Smith v. Clay, Amb. 645; 3 Brown, Ch. 639. But it would seem the statute should not operate against a bill of review for newly discovered matter, only from the time of such discovery. Five years, by the statute, bars a writ of error; but five years from the discovery, in this bill, did not elapse before it was filed.

A reversal of this decree is asked, on two grounds. 1. A mistake in the calculation of interest. 2. Payments made by the conveyance of land, and otherwise, and not credited.

From the original bill, it appears that Nathaniel Massie, the ancestor of the complainants, acted, for many years, as the agent of Graham, of Virginia, in the sale of Ohio lands. That on the 7th of August, 1805, a settlement between the parties took place, in which Massie was found indebted to Graham in the sum of $12,674 96; for the payment of which, the 10th of September following, a bond was executed. Massie continued to act as agent until the 23rd of February, 1807, when his agency was revoked in a power of attorney given by Graham to Robert Means. Another settlement was had between Massie and Graham, by his attorney, Means, the 30th June, 1807, in which the debt of Massie was increased to $16,512 96. To secure this certain lands were mortgaged. A bond was also executed for $3,834 67, the 1st of August, 1807, payable 1st July, 1809. In November, 1813, Massie died, and in 1814 the bill was filed against his administrators and heirs, to foreclose the above mortgage. The court decreed a payment of the sum of $16,512 96, with interest on $12,674 96 from the 10th of September, 1805, the time the first bond became due; on the sum of $3,834 67, from the 1st July, 1807, the amount of the second bond, and the mortgaged premises were ordered to be sold, &c. It is insisted, that the bond for the sum of $3,834 67 included up to its date the interest on the first bond; and that the decree should only have required the payment of interest on the gross sum from the date of the last bond. This would make a difference between the sum decreed and the sum due of $1,373 12.

That the above mistake occurred, is not seriously controverted by the defendant's counsel. But they contend: (1) That this mistake is no ground for a bill of review; (2) that it was the result of negligence; (3) that there is a larger sum still due and unpaid under the decree, and they are willing to enter a credit for the amount claimed.

It is said, in Seton on Decrees, 399, that in case of miscasting and miscounting, where the matter appears from the decree itself to be mistaken, it may be corrected by an order. The court will at any time correct a mere clerical error in a judgment, where the error is apparent; and so in a decree where the error appears from the decree itself, it may be corrected in a summary mode by the court. But is such the error complained of?

In the first place, the error does not appear from the decree itself. It can only be made to appear by evidence showing the consideration of the second bond. Had that bond been given, as might well be presumed, for moneys received, or other ground of indebtment discovered with the first bond, the decree was correct. And its incorrectness can only be shown by proof that the second bond included the interest up to its date, on the first bond. The error, therefore, cannot be considered as merely formal, nor one which the court, on motion, may order to be corrected.

Are the complainants chargeable with negligence, in not discovering this evidence, and using it at the hearing? It is not enough that the evidence was not within the knowledge of the party at the hearing, but it must appear that it could not have been known, by using reasonable diligence.

In the cases of Bingham v. Dawson, 1 Jac. 244, and Harvey v. Murrell, Harp. Eq. 257, it was held that the absence of an inventory which might have been procured at the proper office by a search, could not be a ground for a bill of review. Young v. Keighly, 16 Ves. 348; Dexter v. Arnold [Case No. 3,856]; Livingston v. Hubbs, 3 Johns. Ch. 124. If there be any laches or negligence, the party is not entitled to relief. And the question here arises, whether there was negligence, in this case, chargeable to the complainants. The present complainants being infants at the hearing in 1815, they were represented by a guardian ad litem, appointed by the court. Still, if this guardian were guilty of gross negligence, it might conclude the rights of the complainants. But, in this respect, there is no proof of such negligence. It is hardly to be expected that the guardian should have searched for the memoranda of the second settlement. There was nothing on the face of the second bond to show that it included the interest on the first bond; and such a presumption could not arise. It was ascertained from the notes of the settlement; and these, under the circumstances, we do not

think the guardian was required to search for. Of this error in the calculation of interest the complainants may, therefore, take advantage by a bill of review; unless the remittitur proposed by the counsel for the defendants shall change their right in this respect.

By the calculation of the complainant's counsel, there remains unpaid on the decree only the sum of $1,042 73, exclusive of costs, a sum less, by $333, than the amount erroneously charged for interest. This calculation adds the interest up to the time of the sale of the mortgaged premises. But the defendant's counsel produce a very different result, by adding the interest up to the time the money was paid. And this is in conformity with the decree. It avoids compound interest, by ordering the payment of the two bonds, with interest from their dates until paid. This mode of calculation leaves a balance due on the decree including costs, after deducting the interest erroneously computed. A remittitur of this interest will correct the error complained of; and of course, in that particular, remove all ground for a bill of review.

An objection is made to the filing of this bill, on the ground that the decree, sought to be reversed, has not been performed. This is generally a good objection. But there are cases where a review of a decree is allowed, though it has not been performed. By one of the ordinances of Lord Bacon, the decree must be performed before a bill of review can be brought. If the decree be for land, the possession of it must be surrendered; if it be for money, the money must be paid. But if any act be decreed which extinguishes the party's right at common law, as making of an assurance or release, acknowledging satisfaction, or canceling of bonds, it may be dispensed with, on the special order of the court. So, where the party is unable to pay the money decreed. Story, Eq. Pl. § 406; Partridge v. Usborne, 5 Russ. 195, 244, 253; 2 Johns. Ch. 488; Mitf. Eq. Pl. (by Jeremy) 88; 1 How. Eq. Exch. side p. 329. The proposed remittitur being entered, this objection does not lie to the present bill, for the balance of the decree which remains unsatisfied is very small, and it may be a matter of doubt whether such balance will amount to more than the costs.

Before the other grounds for leave to file this bill are considered, it may be proper to inquire how far, on a petition for leave, matters of explanation or defence may be examined. In the case of Hodges v. Mullikin, 1 Bland, 506, the chancellor said, "on application for leave to file a bill of review, on the ground of newly-discovered matter, I consider more correct that the propriety of granting the leave should be at once fully investigated; that proofs should be admitted in relation to it; and that the question should be then finally determined." But this seems not to be the course of the court. If leave be given to file the bill, the defendant in his answer may contest the materiality of the evidence, and the fact of its having been newly discovered. On the petition a strong prima facie case should be made out, and, to prevent abuse in such proceeding, counter affidavits may be received, and other evidence against the facts stated in the petition. Dexter v. Arnold [supra]. But this being only a preliminary proceeding, the defendant ought not to be concluded from contesting the facts on the hearing of the bill of review.

The second ground for leave to file this bill is, a receipt by Robert Means, agent for Graham, dated 31st July, 1807. This paper acknowledges the receipt of two notes; one given by Jozabad Lodge for two hundred and forty-six dollars; the other by John Timberlake, for three hundred and twenty-seven dollars and eighty-nine cents, due the 1st of October ensuing, "which said notes, when collected, to be paid John Graham on account of said Massie;" also, "received said Massie's relinquishment unto his portion of bonds and debts now due in the hands of Nathaniel Pope, the whole amount thereof being eleven hundred and fifty-two dollars and seventy cents, the one-third thereof being said Massie's proporition; and also bonds and debts not due for land sold by said Pope for five hundred and nine dollars and sixty-five cents; the one-third thereof being said Massie's proportion; that when all or part thereof is received, to be likewise applied to said Massie's credit with said Graham." Pope, in the sale of lands, was the agent of Graham, and also of Massie. No part of these sums were credited in the decree, and it is insisted that all of them should have been so credited. Nearly thirty-four years have elapsed since this receipt was given. Massie, Graham and Dunn, and perhaps Means, are dead. No explanation can now be given of the transaction, except what appears on the face of the receipt, and some memoranda in regard to subsequent dealings between Massie and Graham. To allow a review of a decree after so great a lapse of time, and under such circumstances, would require strong evidence. Evidence not clear, or which is susceptible of a different application, must be held insufficient.

This receipt, it must be observed, is dated the day before the last mortgage bond bears date. And as this bond was given on a settlement of accounts, subsequently to the other bond in the decree, which had been given on a prior settlement, the inference is at least plausible that the sums named in the receipt were to be credited on the bonds. And this inference, if weakened, is not overthrown by the words in the receipt that, "the notes (or money) when collected were to be paid to Graham on account of said Massie." To be paid, on account, in common parlance, may not always refer to an open account, but may mean to the credit of the party. The language of the receipt, therefore, does not necessarily lead to the conclusion that these payments were not to be made on the bonds. Other facts in the case, though not connected

with this receipt, may shed some light upon it.

Now if it shall appear that the settlement on which the second bond was given was not final, but that open accounts of monied and other transactions remained between the parties, the inference would be that the sums named in the receipt when paid were to be applied on such accounts. On the 18th December, 1809, Nathaniel Massie, in writing, acknowledged to Walter Dunn, to have received of Joseph West two hundred and twenty-one dollars, the 6th December, 1806, for John Graham, "which he would settle and account for at any time." And again, on the 23d of the same month and year, he acknowledged that he had received one hundred and twenty-six dollars and fifty cents, "on account of Graham, which he promised to pay to Dunn at any time." And it seems, by a paper signed by Massie, dated 10th May, 1810, that he was authorised to sell the land mortgaged to Graham, at a fixed price. And this paper shows that the bonds were unpaid at its date. It also appears, though not perhaps in an unexceptionable form, that certain sums specified in the receipt of Means, which were paid to Graham, he credited to Massie. The facts in the case fully establish, that, subsequently to the mortgage, Massie received moneys of Graham on land sales; that at the settlement on which the mortgage was given, all the moneys thus received were not embraced, and consequently the settlement was not a final one. This also appears from the correspondence of the parties and certain contracts respecting lands. So that if Massie ceased to be the general agent of Graham after the power was given to Means, he still continued to act as agent to some extent, not only in regard to past, but future transactions.

Taking into view the facts and circumstances which bear upon the receipt of Means, instead of showing that the sums named in the receipt were intended to be applied, when received, to the payment of the mortgage bonds, they rather lead to a different conclusion. And this, connected with the great lapse of time, must be held conclusive against the sufficiency of this ground for leave to file the bill.

The third ground relied on is, that payments on the mortgage debt were made by the conveyance of certain lands to Graham, and the payment of certain moneys to Dunn as agent for Graham. On the 22d June, 1810, Walter Dunn writes to Massie from Richmond, Virginia, that he had received one hundred sixteen dollars and sixty-nine cents, which he had entered to his credit with his uncle Graham. And the 8th May, 1811, Dunn received thirty-three dollars and thirty-three cents, being at Richmond, which were placed to Massie's credit with Graham. And also the 15th August, 1811, Dunn received one hundred and twenty-one dollars from Massie. These sums it is insisted should have been credited on the mortgage bonds, and that not having been so credited, nor in the decree, it is ground for a review of the decree. There is no evidence that these payments were made on the mortgage. And can such payment be inferred, when the evidence shows an open account of money and land transactions, between the parties, at the time of the payments? To authorize the leave prayed, it is not enough that the evidence should bring the mind to balance probabilities. The fact of payment, and of its having been newly discovered, must be clear. Such is not the proof in regard to the above items.

The complainants rely on two deeds for certain tracts of land executed by Massie to Graham, and a deed executed by Abijah Oneal to Graham, for three hundred and forty acres, for the consideration expressed of two thousand nine hundred and thirty two dollars, as showing a payment of that amount on the mortgage. There is no evidence of the consideration for these conveyances, nor how it was paid, except what the deeds contain. And there is nothing on the face of the deeds which show how the consideration was paid, or was intended to be applied. The facts in the case authorise a presumption that the lands were not conveyed in payment on the mortgage. It seems that in February, 1810, Massie owed Graham on account of warrants located, five tracts of land, amounting to four thousand five hundred and thirty-five acres. And that by an agreement executed the 19th November, following, Massie binds himself to convey to said Graham nine hundred and fifteen acres in addition. Without adverting to other and similar transactions between these parties, it may be assumed as highly probable, that the three tracts conveyed to Graham, as above, were conveyed to him on other considerations than payment on the mortgage.

The granting of a bill of review is not a matter of right. This is the import of Lord Bacon's ordinance. In the exercise of its sound discretion the court may refuse leave to file a bill for new discovered evidence, although the facts, if admitted, would change the decree. Story, Eq. Pl. § 417; Bennet v. Lee, 2 Atk. 528; Wilson v. Wall, 6 Wall. 83; Young v. Keighly, 16 Ves. 348; Partridge v. Usborne, 5 Russ. 245; Dexter v. Arnold [supra]; Thomas v. Harvie's Heirs, 10 Wheat. [23 U. S.] 146.

The grounds on which this application rests have been examined with some minuteness; and with the exception of the first one, which is obviated by a remittitur, there is no clear and satisfactory evidence of payment to any amount, having been made on the mortgage. Indeed, in every instance the presumption is rather against such payment. If, on such evidence, after the lapse of more than thirty years, the parties all being dead, a decree should be reviewed, great mischief would result. The application for leave to file the bill is overruled.

Case No. 9,264.

MASSOLETTI v. MILLER.

[2 Cranch, C. C. 313.] [1]

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

WITNESS—INTEREST—JOINT OWNER OF VESSEL—PASSAGE MONEY—INDEMNITY GIVEN.

One of two joint owners of a vessel is a competent witness to prove a joint claim against a passenger in the vessel, for the passage-money, if the other joint owner has given credit in account for his share of the passage-money, and a release of a claim to recover it back in case he should not get it from the passenger.

This was an action for money had and received by the defendant, for goods of the plaintiff sold by the defendant on commission. The defendant claimed to set off the amount of passage-money due by the plaintiff to the defendant, and one Howland, who were joint owners of the brig Benefactor, for the plaintiff's passage from Marseilles; and to prove this set-off, the defendant offered the other joint owner, Howland, as a witness, the defendant having credited him in account with his share of the passage-money, and given him a release from all claims which he might have to recover it back from Howland, in case the defendant should fail to get it from the plaintiff.

THE COURT (THRUSTON, Circuit Judge, contra) decided that the witness was competent.

MAST (INGELS v.). See Cases Nos. 7,033 and 7,034.

Case No. 9,265.

In re MASTBAUM.

[2 Wkly. Notes Cas. 479.]

District Court, E. D. Pennsylvania. June 23, 1875.

BANKRUPTCY—LAST EXAMINATION—EXEMPTION—14TH SECTION OF ACT.

The exemption under 14th section of bankrupt act [of 1867 (14 Stat. 522)], not allowable until after bankrupt has passed his last examination.

This was an issue certified to the court upon an exception to the ruling of the register (Davis).

The bankrupt applied to the assignee for the exemption provided for in the 14th section of the bankrupt act. The assignee refused to allow the exemption on the ground that the bankrupt had not yet made a satisfactory surrender of his property.

The question having been submitted to the register, he reported the fact to the court, together with his opinion thereon, to which the bankrupt excepted.

Mr. Cutler for exceptant, argued that the bankrupt had been very fully and extensively examined, although he had not yet passed his last examination.

Mr. Huey, contra.

THE COURT (CADWALADER, District Judge), dismissed the exception, holding that the bankrupt was not entitled to the exemption allowed in the 14th section of the bankrupt act until after he had passed his last examination, where a doubt existed as to whether he had made full disclosures of all his property in his schedules.

Case No. 9,266.

The MASTEN.

[1 Brown's Adm. 436.] [1]

District Court, E. D. Michigan. June, 1872.

COLLISION—WEIGHT OF EVIDENCE—SPEED IN ENTERING A HARBOR.

1. Evidence of verbal statements made in time of excitement and peril should be received with great caution, and when opposed to the direct and concurring testimony of many witnesses, is entitled to but little weight.

2. A sailing vessel entering a crowded harbor at the rate of six miles an hour, in addition to a favorable current of four miles, condemned for too great speed.

Libel for collision by Frederick H. Blood, owner of the schooner Maid of the Mist.

The collision occurred at about 2 o'clock in the morning of the 10th day of September, 1871, in the St. Clair river, a short distance below Port Huron, and opposite the Port Huron Middle Ground, so called. The schooner was lying at anchor, in about mid-channel, and the bark was coming down the river, bound on a voyage from Chicago to Buffalo, laden with wheat. The starboard bow of the bark struck the schooner on the starboard side, carrying away her jibboom and head gear, and her foremast head, breaking her starboard stanchions, and driving her anchor into her, and inflicted such injuries that she sunk in about an hour and a half. The night was dark, although it was a good night to see lights. There was a large number of vessels at anchor in the river, variously estimated by the witnesses at from thirty to seventy or eighty. The channel was somewhat narrow, although there was ample room for vessels exercising ordinary care and skill to pass. The wind was blowing a stiff breeze down the river, and was consequently free to the bark. The current at that point was about four miles an hour. The bark had up her mainsail, mainstaysail, topsail, and three jibs, and was running at the rate of about six miles an hour through the water, and about ten miles by the land. Her mainsail was being taken in at the time of the collision.' Thus far the facts were undisputed.

H. B. Brown, for libellant. The master was clearly in fault for running at too great speed. The following facts are not disputed:

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

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

First. That the wind was blowing almost a gale from the northerly, and was a fair wind for the Masten as she came down the river. Second. That she was passing through the water at six miles an hour. Third. That, with the addition of the current, she was actually approaching the schooner at ten miles an hour. Fourth. That no sails had been furled from the time she entered the river, and only a reef taken in her topsails. Fifth. That there were from fifty to eighty sail in the river, that had taken refuge there from a storm in the lake. These vessels were lying upon both sides and in the center of the river. It was the duty of the bark to furl all her canvas, except what was absolutely necessary to preserve her steerage way, or to come to anchor before she reached the schooner. The Morning Light, 2 Wall. [69 U. S.] 550, 558; The Virgil, 2 W. Rob. Adm. 202.

W. A. Moore, for claimant.

Mr. Moore's brief discusses simply the question of fact.

LONGYEAR, District Judge. The main and only disputed essential fact in the case is, whether the schooner had up her proper anchor light; and it is conceded that if she had, then the bark is in fault, and must respond in damages. Too great speed is also charged as a fault against the bark; but this can be of importance only in case it shall be found that the schooner had not up her proper light, and then only on a question of division of damages. The question as to the schooner's light will, therefore, be first considered.

The testimony on the part of the libellant shows that from the force of the wind and current the schooner dragged her anchor a considerable distance before she came to, and that she came to only a few minutes—fifteen or twenty—before the collision. John Jones, master of the schooner, testifies that immediately upon coming to anchor, he took in the colored lights, and hung a bright light in the fore-rigging on the port side. He then describes the lamp or lantern, and its height from the deck, &c., but as no question is made in these respects, it is unnecessary to repeat his testimony. Hannah Dell, the cook, testifies that she trimmed the bright light, and handed it to Capt. Jones, in the cabin, when he brought in the colored lights. James M. Jones, son of Capt. Jones, and who was on the lookout on the schooner, testifies that he saw his father hang up the light, and that it burned brightly. Oscar Hill testifies that he was on deck several minutes after the schoner came to anchor, and that he distinctly saw the light; that he went below before the collision, but on hearing the alarm, came on deck, and at the time of the collision was standing near the fore-rigging; that when the foremast head was carried away, the fore-rigging came down with a run and the lamp with it, that the lamp hit him on his back, and that it was then still burning. Henry Sageman testifies that he was also on deck when the schooner came to anchor, and saw the light hung in the rigging, and that it was burning good.

Now these five witnesses testify with a particularity of detail which precludes the possibility of their being mistaken. One of two things must be true, either that the schooner had a proper and sufficient anchor light, or that each of these five witnesses has sworn falsely, willfully and deliberately.

In answer to this array of testimony, respondent produces the following: James Kendrick, master of the bark, testified that he was standing forward near the lookout, when the latter reported to him that he saw a vessel ahead; that by the aid of his glass he distinctly saw a vessel, which proved to be the Maid of the Mist, a little over his starboard bow, and only about 100 feet off, and that he saw no light on her; that he immediately ordered his wheel hard a-starboard, and the collision occurred almost immediately after. He also testifies to a conversation with Capt. Jones, master of the schooner, in which he said to the latter, that it would not have happened, if he, Capt. Jones, had had a light out, and that Capt. Jones replied that he ordered the boys to put one out. Two others of the crew of the bark testify to having heard Capt. Jones make the same statement. George Johnson, the lookout on the bark, testified to seeing the schooner, and reporting her to Capt. Kendrick, and that he saw no light on her. The wheelsman on duty, and several others of the crew of the bark, on deck at the time, also testify that they saw no light on the schooner before the collision, but it does not appear that any of them saw the schooner, and I am satisfied they were not in a position to have seen her, or any light there may have been upon her at any time before the collision occurred. All the witnesses on the part of the bark testify that the first light they saw on the schooner was a light coming out of her cabin soon after the collision.

Besides the above testimony on the part of respondents, a statement made by Hannah Dell, the cook on the schooner, in her testimony, to the effect that when the lamp was brought into the cabin after the collision, it was burning dimly and the glass was smoky, is alluded to as evidence that even if a light was out, as testified by the witnesses on the part of the schooner, it was not a sufficient one.

I shall take up and consider the points involved in respondents' testimony in the inverse order in which they are above stated. The condition of the light when it was brought into the cabin after the collision, as stated by the cook, is easily attributable to what happened to it by the collision, and

therefore does not necessarily conflict with the statements of the witnesses on the part of the schooner, that it was burning brightly before the collision. The only thing that appears strange to me is that it was not extinguished entirely. The fact that those on board the bark did not see the light immediately after the collision is, in my opinion, to be attributed to the fact that it came down with the rigging, and was thereby hidden from their view.

The statement sworn to by Capt. Kendrick and two other witnesses on the part of respondents, as having been made by Capt. Jones, that he told the boys to hang out a light on the schooner, is attempted to be explained by Capt. Jones. He says that after the collision he did tell the boys to hang out the light again, and that although he has no recollection of making the statement testified to by Capt. Kendrick and the others, yet if he did make it, it must have been made in reference to that circumstance. Besides this, testimony of verbal statements made and heard in time of excitement and peril must be received with much caution, and when opposed to the direct and positive concurring testimony of many witnesses can have but little weight. If the fact of light or no light rested on Capt. Jones' uncorroborated testimony, then the statement might have considerable force; and perhaps in the light of the testimony of Capt. Kendrick and the lookout on the bark, that they saw no light on the schooner, it would outweigh Capt. Jones' testimony entirely. But Capt. Jones is fully corroborated by the testimony of three eye-witnesses as to the fact of the light being there in its proper position in the rigging, and these witnesses stand perfectly fair before the court. Capt. Jones' testimony may be thrown entirely out of the case, and still there is ample proof that the light was there, by whomsoever it may have been placed there.

There is more force, however, in the statements of Capt. Kendrick, of the bark, and his lookout, that they saw no light on the schooner. It was their business to look for lights, and it is a fair and even strong presumption that there was no light where they saw none. After all, it is a presumption merely, and cannot have the effect in this case, of outweighing satisfactory positive proof of the existence of the fact itself, viz., that there was a light. Capt. Kendrick and the lookout, in making their statement that they saw no light, do not stand in the same position of Capt. Jones and his men in their statement that there was a light. The latter could not be mistaken, while the former might be. The alternative presented in the case of the witnesses for libellant is not presented here. There may have been a light on the schooner, as testified by libellant's witnesses, and still it may be true that Capt. Kendrick and his lookout did not see it, as testified by them. Why they did not see it is not necessary for us to inquire. It is sufficient for our present inquiry that there is a strong preponderance of proof that the schooner had a proper and sufficient anchor light.

That it was the legal duty of the bark to avoid the schooner under the circumstances found to exist is, of course, conceded. Not having done so the bark was in fault, and must respond for the schooner's damages.

Having arrived at the above conclusion, it is unnecessary to consider the question of speed. But I deem it a duty, as a caution to navigators, to express the disapprobation of the court of the almost reckless speed of the bark under the circumstances. Capt. Kendrick testified that the bark was quick to mind her helm, and it is preposterous to say that a speed of six miles an hour through the water was necessary for steerage way, when beyond all question one-half that speed, or even less, was amply sufficient for the purpose. Here was a large vessel, heavily laden, coming down the current and before a strong wind, in a comparatively narrow channel in which were numerous vessels at anchor, carrying canvas sufficient for the open water in such a breeze, and rushing along at a speed entirely unnecessary for her management, and which, under the circumstances, seemed entirely regardless of danger to herself or to other vessels. It was clearly her duty, on coming into the river, to have taken in her canvas until her speed had been slackened down to just what was absolutely necessary for steerage-way. The excessive speed of the bark was a gross fault, and one for which she must have been held responsible in any event. Decree for libellant.

MASTERS (UNITED STATES v.). See Case No. 15,739.

Case No. 9,267.

The MASTERS.

The RAYNOR.

[Brown's Adm. 342.] [1]

District Court, E. D. Michigan. July, 1871.

COLLISION — VESSEL AT ANCHOR — PROPER ANCHORAGE — ANCHOR WATCH.

In the absence of a law or custom prohibiting vessels from lying in a channel, anchorage there is not necessarily improper because the channel is narrow at that point, and vessels are constantly passing and repassing, if room be left for vessels and tows to pass in safety. In such an anchorage, however, a vigilant anchor watch is imperatively necessary.

[Cited in The Worthington and Davis, 19 Fed. 837; The Ogemaw, 32 Fed. 921.]

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

Libel for a collision between the bark Fame and the schooner Wm. Raynor.

On the 8th day of October, 1868, about seven o'clock in the evening, the bark Fame lay at anchor in the St. Clair river, a little below Port Huron, and just opposite the foot of the middle ground (so called), which is on the American side of the river. As she so lay at anchor, the tug I. U. Masters came down the river with a tow of four vessels, the fourth vessel in the tow being the schooner Wm. Raynor. The tug undertook to pass the bark on the American or port side of her, and between her and the said middle ground, and in doing so the schooner sagged off to port and came in collision with the bark's jibboom, carrying it away, and doing other damage. The current at this point is about four and a half miles an hour, and the wind was blowing quite strong, nearly down the river, but varying a little across the current from the American side. The bark was lying with her bows up stream, but the wind had swung her stern a little—not to exceed one point, and probably less—toward the Canadian side of the river. The course of the tug, in attempting to pass the bark as she did, was a little across the wind and the current, and the immediate cause of the collision was the tail of the tow being carried down against the bark by the wind and current.

W. A. Moore, for libellant, claimed: (1) That the bark lay bow up stream, with sails furled, light properly placed and burning, steady at anchor, and occupying not over 35 feet in width. (2) That the channel was from one-quarter to one-third of a mile wide, and not difficult of navigation. (3) That it is usual for vessels driven in by stress of weather to anchor in a channel of that width. (4) That two-thirds of the navigable channel lay on the starboard side of the bark. (5) That if she lay nearer the middle of the river, the tug had sufficient room to pass on the American side. (6) That, so far as the schooner was concerned, the accident was unavoidable, and the tug is responsible.

H. B. Brown, for the tug. A vessel colliding with another at anchor in a proper place is prima facie in fault, but if she be anchored in an improper place she cannot recover, unless the other vessel has grossly neglected her duty in passing her. Strout v. Foster, 1 How. [42 U. S.] 89; Knowlton v. Sanford, 32 Me. 148; The Marcia Tribon [Case No. 9,062]; O'Neil v. Sears [Id. 10,530]. The bark ought not to have anchored in the narrowest part of the channel, without some good reason, when there was plenty of room above and below. The bark was also in fault for not having a proper anchor watch. Buzzard v. The Petrel [Id. 2,261].

LONGYEAR, District Judge. There was no satisfactory proof before me as to the exact width of the river at the point in question, but it is near enough for the purposes of this case to assume, and such, I think, the proofs tend to show, that it is from one-fourth to one-half a mile wide. The proofs are contradictory as to the precise point where the bark lay in the river, varying from one-third of the distance from the American channel bank (the middle ground before spoken of) to the middle of the channel; but there is no dispute but that there was room on both sides of her for vessels and tows to pass, and that is sufficient for the purposes of this case.

The proofs show that the schooner was in no manner in fault for the collision, and the case against her was in effect abandoned at the hearing. The libel must therefore be dismissed as to her, and the case will be considered as against the tug alone.

Where a vessel at anchor is collided with by a vessel in motion, the latter is always prima facie in fault, provided the former is anchored in a proper place, and herself observes the law. In order to exonerate the tug from this prima facie liability, it is contended that the bark was anchored in an improper place —that the channel is narrow, and vessels and tows are constantly passing and repassing, and owing to a curve or bend in the river just above, and the strength of the current, the whole channel is needed for safe navigation, unobstructed by vessels lying at anchor. Many witnesses were sworn on both sides as to the safety and propriety of a vessel lying at anchor at the point in question, but I think their testimony may all be summed up in this: that there are safer places for vessels to lie at anchor, and where they would be a less obstruction to navigation, both above and below the place in question, and which the bark might have reached if she had chosen to do so. No law or custom was shown, however, prohibiting vessels from anchoring there, but, on the contrary, it appeared that others had anchored there, and the legal right to do so was conceded. It also appeared from the proofs that there was room on both sides the bark for vessels and tows to pass in safety, by the exercise of due care and diligence. I must hold therefore that the bark had a legal right to lie at anchor where she did. While so holding, however, I must also hold that, having selected a comparatively insecure and inconvenient place to lie at anchor, no matter whether from necessity or from choice, she was bound to exercise the greatest degree of care and diligence in keeping watch and ward for her own safety and the safety of passing vessels. A viligant anchor watch was essential under the circumstances, and the want of it would constitute a fault which could not be overlooked. Had the bark such a watch?

The only man on deck was Druillard, the pilot, and he was not there in the capacity of or on duty as a watch at all. In fact, the purpose for which he was there, as stated

by himself, shows that there was not only no watch as such, but that there was no pretense of any. He says, in substance, that he was there for the purpose of keeping himself warm by walking. It is true, when he accidentally, or otherwise, noticed the close proximity of the tow, he called the mate to put the wheel to port, but even this was not done in time to effect anything. If there had been a vigilant watch on board the bark, such as the circumstances in which she had voluntarily placed herself imperatively demanded, the danger would have been seen and the helm put to port, and thus by the force of the current the stern of the vessel would have been worked over against the wind, and the jibboom turned off to starboard in time, in all probability, to have cleared the schooner entirely, or, at all events, so nearly as to have much lessened the damages. If, in addition to this, the cable had been allowed to run out and the vessel to drop down the stream with the current, the collision would have been avoided with almost absolute certainty. Because the bark had not such a watch, and did not take any effective measures to avoid the collision, she must be held in fault. See 1 Pars. Shipp. & Adm. 576, 577, and cases cited in note upon p. 577.

But this does not exonerate the tug from inquiry into her conduct, or from responsibility, if she was also in fault. It is contended, on behalf of libellant, that the tug ought to have taken the Canadian side of the river, where there was more room, and where the wind and current would have carried the tow away from the bark, instead of bringing it directly down upon her. The excuse made on behalf of the tug for not taking the Canadian side is that there were other vessels within that space at the time, making it dangerous to take that side. I do not think that it appears by the proofs that the position of those other vessels was such as to make it any more dangerous to pass on that side than on the other. But, as we have seen, there was room to pass on either side, and the tug, no doubt, had the right to pass on either side which in the best judgment of her master was the most feasible under the circumstances as they appeared to him at the time. Having made his choice, however, and that choice involving, as it did, the necessity of crossing the wind and current, the inevitable effect of which was as apparent then as it was afterwards, it became the duty of the master of the tug to make due allowance for that effect. This, of course, he did not do, or the collision would not have occurred. See The New Philadelphia, 1 Black [66 U. S.] 76.

The tug is therefore held also in fault.

Both vessels being in fault, it follows that each must bear a moiety of the damages. A decree must be entered in favor of libellant against the tug for a moiety of his damages and costs, referring it to a commissioner to ascertain and report the damages, and dismissing the libel as against the schooner.

Case No. 9,268.

In re MASTERSON.

[4 N. B. R. 553 (Quarto, 180).] [1]

District Court, D. Rhode Island. Feb. 15, 1870.

BANKRUPTCY—DEPOSIT IN COURT—RIGHTS OF ASSIGNEE—OF MORTGAGEE—PETITION FOR DISTRIBUTION.

1. Where money was deposited in court to the credit of a person against whom a warrant for adjudication of bankruptcy had been issued, and the funds had thereby been lodged in court without prejudice to the rights of creditors or of a mortgagee, the legal intendment of such deposit would be that the rights of the assignee on the one side, and of the mortgagee on the other, should be adjudicated according to the law and the usage of the court.

[Cited in Ferguson v. Peckham, Case No. 4,741.]

2. A petition to a court to order a distribution of a fund lodged in its registry, is not regarded as an action or suit within the meaning of the 2d section of the bankrupt law [of 1867 (14 Stat. 518)].

3. Ordered, that the petition must stand for a hearing on its merits.

In bankruptcy.

KNOWLES, District Judge. On the 19th of June, 1868, a warrant in bankruptcy was issued against one John Masterson, on the application of Sheldon, Kelly & Hale, creditors, and on the same day an auxiliary injunction was granted against said Masterson, and one John P. Cooney, and Doyle & Joslon, auctioneers, forbidding a sale by them, or either of them, of certain personal property, then advertised to be sold at auction on the 20th of June, in virtue of a mortgage conveyance from said Masterson to said Cooney, bearing date March 7th, 1868.

Service of the injunction was made on the 20th, and the proposed sale postponed or abandoned, the property remaining, so far as appears, in the custody and charge of the mortgagee Cooney, the alleged bankrupt, Masterson, having absconded. On the return day of the warrant, the 27th of June, Masterson was adjudged a bankrupt on default; and on the same day it was agreed in writing between the petitioning creditors and the same Cooney, that the marshal or messenger should make sale of the said property at auction, at as early a day as he should see fit, the net "proceeds of sale to be brought into court, and held in lieu of the property." Under an order of court, pursuant to this agreement, the property was sold on the 2d of July by the marshal, who, on the 18th of July made return of his proceedings, paying into the registry as said net proceeds, three hundred and sixty-eight dollars and four cents. On the 28th of July said Cooney filed a petition to the court, representing that the mortgage aforesaid was a valid and unimpeachable lien upon the property described, and praying an order from the court that the aforesaid should be paid over to him out of

[1] [Reprinted by permission.]

the registry. So far as is shown by the record, this petition was not brought to the notice of the court until the 3d of February, 1869, when a hearing was indefinitely deferred at the instance of the petitioning creditors on account of the absence of a witness. Nor does it appear that action was afterwards invoked until the 1st of February, 1871, when a motion of the creditors, filed November 2d, 1870, that the said petition of Cooney be dismissed for want of jurisdiction, was called up for determination.

In support of the motion, the learned counsel cited as a binding and conclusive precedent, the opinion of this court, delivered in October last in Boutour v. Peckham [Case No. 1,707], dismissing a petition for want of jurisdiction, the court holding that by a suit in equity or by an action at law, and not by a petition merely, should the petitioner have sought redress or relief; electing to follow, as to this point, the rulings of Justice Nelson, Chief Justice Chase, and (as understood) of Justice Clifford, rather than that of Justice Swayne. And as this court has as yet seen no reason to retract or qualify its opinion in the case cited, it is manifest that the judgment in this case should be the same as was the judgment in that, if, as contended, the two cases are in contemplation of law the counterparts each of the other, of the same species as well as of the same genus.

Herein, however, I am constrained to differ with the learned counsel of the creditors. In the case of Boutour v. Peckham [supra], the property in question was in the hands of the assignee, Boutour being simply an outside creditor, claiming to have a valid lien upon the property, by virtue of unrecorded mortgages, for a demand against the bankrupt firm, the which demand he had not presented for registration. This petition was against both the assignee and a secured mortgagee, claiming the property as his under the mortgage, and praying a judgment of the court, establishing his claim, and an order to the assignee to surrender to him the property. This controversy between him and the respondents the court held was one of that species which the bankrupt act contemplates shall be settled by a suit in equity or action at law in either the district or the circuit court, with a right in either party to test the rulings of the district judge or of the circuit judge by an appeal or writ of error. Bankrupt Law, §§ 2, 8, 9. It was not, the court held, one of that other species which the law contemplated should be submitted by a simple petition to the court, to be passed upon summarily as it were by a district judge at chambers or in open court, subject only to the revisory action of a circuit judge "in term time or vacation," under the provisions of the 2d section of the bankrupt law, in relation to which Justice Clifford and Judge Shipley, in Littlefield v. Canal Co. [Case No. 8,400], thus spake:

"Appeals in equity suits and in causes of admiralty and maritime jurisdiction, vacate the respective decrees in the subordinate courts, and remove the whole record into the court of paramount jurisdiction; but nothing of the kind is done in a proceeding by petition under the 2d section of the bankrupt act. * * * Nor is the allegation by a petitioner that he is aggrieved, sufficient, unless it be also alleged in what the error consists, whether of law or fact, and the nature of the error should be distinctly stated for the information of the appellate court, and as a matter of notice to the opposite party. Appellate courts, even in appeals, proceed upon the ground that the decree in the subordinate court was correct, and the burden to show error is upon the appellant. The Baltimore, 8 Wall [75 U. S.] 378. Matters of fact as well as matters of law, may doubtless be revised in the circuit court; but it was not the intention of congress, in this form of proceeding, to give a party a second trial merely as such, but to secure to him an appellate tribunal for the re-examination and revision of the rulings, orders, and decrees of the district courts, and for the reversal of the same in case they are found to be erroneous."

In the case at bar, as is already shown, the property in question was, by agreement of the creditors and the mortgagee, sold by the messenger before the 21st of July, when an assignee was appointed and the proceeds deposited in the registry of the court, and in the registry has the money remained, unclaimed by any one save by the petitioner. Not only has the money never yet passed into the hands of the assignee as assets of the bankrupt, but no claim to it has he ever asserted in any manner cognizable by the court, its legal and only custodian. The agreement, it will be noted, was not that the proceeds be paid over to the assignee as monies to which his title was conceded to be prima facie paramount, but were to be brought into court—i. e. paid into the registry, whence it could not be removed, as the parties must be presumed to have known, save upon an order of the court authorizing a check therefor, to be signed by the clerk as clerk, and countersigned by the district judge, as judge. The results of the proceedings were, in my judgment, simply to lodge the funds in the court, without prejudice to the rights of creditors or of the mortgagee, an essential part of the agreement between the parties being, in legal intendment, that the claim of the assignee on the one side and of the mortgagee on the other, should be adjudicated by the court according to the law and usage of the court in cases of deposits in its registry. The money, it appears, was deposited to the credit of John Masterson, and on the appointment of an assignee, that officer was of course vested with all the rights of Masterson and of his creditors in the fund, as it then was in the registry, subject to the claim of the mort-

gagee, Cooney. Either party could at any time, by petition or motion, prefer his claim to it, whereupon it would become the court's duty, after causing proper notice to be given to whomsoever it might deem proper, to pass upon such petition or motion. The dismissal of it would not necessarily establish the title of any contesting party. The court might well adjudge that the petitioner, A, had failed to establish his right, and dismiss his petition, retaining custody of the fund until some other petitioner, maybe a second, maybe a fiftieth, should establish his right satisfactorily to the court.

Accordingly, I must hold that, by this agreement, sanctioned as it was by an order of the court, the parties submitted their matters in dispute to the decision of the court, upon petition to be filed, waiving their respective rights to institute proceedings in equity or at law, either in the district or the circuit court. Such, obviously, was the intent of the parties. At the date of that agreement, the rulings of Justice Swayne (Bill v. Beckwith [Case No. 1,406]), were recognized as authoritative by the bar in this district, and redress or relief in nearly all cases arising under the bankrupt law was sought by petition, that being, evidently, as held by that learned judge, "a cheaper, speedier, and more simple mode" than proceedings at law or in equity, according to established usages and existing laws. And in harmony with this hypothesis has been the conduct of the parties. Within a week after the deposit of the money, and the appointment of an assignee, the mortgagee, Cooney, files his petition to the court, and on the 3d of February, 1869, the creditors, without objection to the form of proceedings, ask delay of trial, that they may procure the evidence of one of the petitioning creditors; and thereafter, until the 2d of November, 1870, nearly two years, they permit the case to stand upon a docket, which was actually or constructively called for trial on the first Wednesday of every month, without motion to the court, or suggestion of error of process, or of misapprehension of rights, to the petitioner. These are not insignificant facts, regarded as bearing upon the intent of the parties to the agreement of June 27, 1868; nor is it an insignificant fact, that at this late day it may be questioned if either the assignee or petitioner can bring any action or suit. The bankrupt law (second section) expressly bars all actions or suits by or against any assignee, unless brought within two years from the time the cause of action accrued.

The motion or petition of the creditors, Sheldon, Kelly & Hale, that the petition of Cooney, mortgagee, be dismissed for want of jurisdiction, is overruled or denied, and the petition last named must stand for hearing upon its merits. When the assignee of the bankrupt, Masterson, shall see fit to file his petition that the money in the registry be paid over to him, it will become the court's duty to pass upon his claims, as against Cooney, as well as all other contestants. A petition to a court to order a distribution of a fund lodged in its registry, I do not, as at present advised, regard as an action or suit within the meaning of the clause above quoted from the 2d section of the bankrupt law.

Case No. 9,269.

MASTERSON v. KIDWELL.

[2 Cranch, C. C. 669.] [1]

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

ARBITRATION AND AWARD—NOTICE TO PARTIES—REVOCATION—MOTION TO SET ASIDE—WHEN MADE.

1. Upon the submission of a cause to arbitration by consent of parties and rule of court, the arbitrators are not bound to give notice to the parties of the time and place of making their award.

2. After submitting a cause to arbitration by rule of court, neither party can revoke his submission without consent of the other.

3. Notice of the filing of the award may be given to the attorney-at-law of the opposite party.

4. Want of notice is no ground of exception, but of a motion to set aside the award.

5. Quaere, whether a motion to set aside an award must not be made within four days after notice of the filing of the award.

This cause was, by consent of the parties and a rule of court submitted to arbitrators, who made their award, which was filed, and notice of the filing was given to Mr. Swann, the attorney-at-law of the defendant, who filed exceptions to the award: (1) Because the arbitrators made the award at a time and place of which the defendant had no notice. (2) That before the award the defendant had revoked his submission. (3) That notice of the award was served only upon the defendant's attorney-at-law.

1st. The parties must have notice of every meeting of the arbitrators. Rigden v. Martin, 6 Har. & J. 406; Kyd, Awards, 29, 31, 34, 96. No time was given to the defendant to produce his evidence. 2d. Before the award was made, viz. on the 15th of December, the defendant revoked his submission and gave notice thereof to the arbitrators; notwithstanding which, without any notice to the defendant of their intention to proceed, they made an award on the 20th. Kyd, Awards, 112, 113. The submission is only an authority, not a contract. If the submission be by bond, it may be revoked, and the arbitrators cannot proceed; but the party revoking will be liable upon his bond. If the submission be by rule of court, and he revokes, he may be attached, but the arbitrators have no authority to make an award. Kyd, Awards, 29, 33.

Mr. Marbury, contra. The want of notice is not the ground of exception, although it may

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

be of a motion to set aside the award; but then it must be supported by affidavit. Exceptions must be for matter apparent on the face of the award. But a motion to set aside the award is now too late. It should be made within four days after notice of the award. Rigden v. Martin, 6 Har. & J. 403; Kyd, Awards, 29, 34; Oxley v. Oldden, 1 Dall. [1 U. S.] 430. Neither party has a right to revoke a submission made under a rule of court. It would be a contempt of the court. Under the act of assembly of Maryland (1785) c. 80, § 11, notice to the attorney-at-law is sufficient. The parties are not entitled to notice of the time and place of making up their award.

Mr. Swann, produced the defendant's affidavit stating the facts, which he considered as evidence of malpractice of the arbitrators, and moved to amend his exceptions by stating their improper conduct.

But THE COURT overruled all the exceptions and ordered the judgment to be entered upon the award. CRANCH, Circuit Judge, wishing for time to look at, and consider the papers, gave no opinion.

[The defendant filed a bill in equity to stay the judgment at law. A preliminary injunction was granted. Upon final hearing the court decided that the bill lacked equity, in that the complainant had a complete and adequate remedy at law. Injunction dissolved. Case No. 7,758.]

MASTERSON (KIDWELL v.). See Case No. 7,758.

MASTICK (MORGAN v.). See Case No. 9,803.

MASTIN BANK (ROSENTHAL v.). See Case No. 12,063.

Case No. 9,270.

MASURY v. ANDERSON et al.

[11 Blatchf. 162; 6 Fish. Pat. Cas. 457; 4 O. G. 55; Merw. Pat. Inv. 114.] [1]

Circuit Court, S. D. New York. May 8, 1873.

PATENTS—PAINT CAN—INFRINGEMENT—EQUIVALENT—CLAIM OF PATENT.

1. The letters patent granted to John W. Masury, July 12th, 1859, for "an improvement in paint cans, &c.," the claim of which is, "the construction of a metallic can for hermetically sealing paints and other substances, having attached thereto a rim or ring of thin brass or other soft metal, in such a manner that the top or cover may be removed by severing the said rim or ring of brass or other soft metal with a penknife or other sharp instrument, in the manner and for the purposes herein described and represented, or its equivalent," are valid.

2. The invention covered by such claim consists in placing in one end of a can, and adjacent to the edge of the wall or side of the can, a rim or ring of thin brass or other soft metal, thus forming part of the end of the can, and designed to be cut through, to open the can, and is not anticipated by a can of tin with a band of sheet lead in the outer wall or side of the can, and encircling the circumference of the can, with each of its two edges soldered to the adjacent tin.

3. It is an infringement of such claim to make a can with one end wholly of thin tin, which can be easily cut at the outer edge of such end.

4. The rights of a patentee depend on the claim of his patent, properly construed, and not on what he may erroneously suppose it covers.

[Cited in McClain v. Ortmayer, 141 U. S. 419, 12 Sup. Ct. 78.]

[This was a bill in equity by John W. Masury against William Anderson and Frederick O. Pierce, brought upon letters patent No. 24,748, granted to complainant.]

W. Howard Wait, for plaintiff.
George Harding, for defendants.

BLATCHFORD, District Judge. This suit is founded upon the same letters patent upon which the suit of the same plaintiff against Daniel F. Tiemann and others was brought [Case No. 9,271]. The opinion in that case describes the invention, and sets out the specification and claim. It also states at length the value and use of the patented can.

In this suit, the infringement charged in the bill is the same as in that suit, namely, "that the defendants have made, and caused to be made, for their use, cans embodying the patented invention, and have vended paints and colors put up in cans so constructed." The defendants are shown to have sold cans containing paints made liquid with oil, put up by them in such cans.

The answer in this suit sets up the defence of want of novelty in the invention, as did the answer in the former suit, but adduces, to support such defence, matters not set up in that suit. It avers, among other things, that the plaintiff's invention is described in letters patent No. 11,892, granted in England to Jules Jean Baptiste Martin de Lignac, and dated October 7th, 1847. In the specification of the Lignac patent, which was enrolled April 3d, 1848, the following language is all that is material to this case: "The concentrated milk is then, as quickly as possible, to be filled into vessels made of plate tin, or other suitable material, which will allow of being closed hermetically, and also allow of being treated by heat, as hereinafter explained. The vessels I prefer for this purpose are cylinders, such as are shown at figure 5, and, in order that the upper end or cover may be readily removed by the simple act of cutting, I prefer that lead should be used all around, i. e., as is shown by the drawing. These vessels, being filled quite full with concentrated milk, are allowed to stand for twenty-four hours, when the vessels are soldered all around so as to hermetically close them." An exhibit introduced in evidence by the defendants, as being constructed in accordance with such description, is a cylindrical can made of ordinary sheet tin, some five inches in depth and four inches in diameter, one end of which is composed of a circular

[1] [Reported by Hon. Samuel Blatchford, District Judge, reprinted in 6 Fish. Pat. Cas. 457, and here republished by permission.]

shaped piece of tin, formed with a flange something less than a quarter of an inch deep, turned down at the outer circumference of such end. The lower end of such flange is connected with the outer wall or side of the can by a band of sheet lead, a little over one-half of an inch wide, encircling the circumference of the can, the lower part of the band being soldered to the top of the wall or side of the can, and the upper part of the band being soldered to the lower edge of such flange, so as to leave a width of lead of about one-quarter of an inch, between the upper edge of the wall or side of the can and the lower edge of the flange, and to allow the lead to be penetrated and cut in such width around the circumference of the can, and thus the top or end of the can to be separated from the body of the can. This arrangement differs from the plaintiff's invention. The latter consists in placing in one end of the can, and adjacent to the edge of the side or wall of the can, a rim or ring of thin brass or other soft metal, such rim or ring thus forming part of the end of the can. It is shown, by the evidence, that lead is a much more difficult metal to solder than thin brass, owing to the fact that especial preparation is required in order to enable the solder to adhere to the lead, and that the lead is liable to melt when the soldering iron is brought in contact with it, in the process of soldering; and that, for these reasons, it would take a workman a much longer time to manufacture a given number of cans constructed according to the Lignac specification, with a lead band, than it would to make the same number of cans constructed in the same form, but with a brass band in the place of one of lead. It is also shown, that the use of thin brass instead of lead, in such form of can, admits of a neater and more perfect finish. Independently of this, the testimony shows that the plaintiff's can presents several advantages over the Lignac can: (1.) The plaintiff's can, in the size and number of pieces of which it is composed, and in the labor of preparing them and putting them into the form of, and securing them together as, a can, does not differ materially from the simplest form of can used; while, in the Lignac can, the band of lead constitutes a separate and additional piece, requiring additional labor in preparing it and inserting it in the can, and the seams cannot be soldered by machinery, as in the plaintiff's can. (2.) In the plaintiff's can, the force necessary to cut the metal in the end of the can, can be applied in an oblique or vertical direction, and is not required to be applied laterally, as in the Lignac can. The former mode of cutting affords a freer passage to the knife, for the reason that it causes the lips of the opening to spread in different directions; while, in cutting the lead band in the Lignac can, by lateral pressure, both lips of the opening are forced inwards, and they, in turn, bind upon and obstruct the passage of the knife-blade, so as to render the process of cutting more difficult. (3.) Cutting one end with the can standing on the other end, permits the can to be filled to its entire capacity; while, in the case of the Lignac can, if it be filled above the centre line of the inserted band, the contents will run out in the process of cutting through the band. If the Lignac can be an improvement on the ordinary hermetically sealed can, these advantages made the plaintiff's can a material improvement on the Lignac can, and the advantages thus shown to result from changing the position of the soft or thin metal from the side to the end are sufficient, in my opinion, to sustain the patent, as against the Lignac can.

The defendants prove that the plaintiff has made cans in the form of the Lignac can, but having, in place of the band of lead, a band of brass, and that he placed on such cans labels claiming them to be within his patent. It is urged, that, by reason of this, the plaintiff is estopped from denying that the Lignac can is the equivalent of his invention. But this view is not tenable. The rights of the plaintiff depend upon the claim in his patent, according to its proper construction, and not upon what he may erroneously suppose it covers. If at one time he insists on too much, and at another on too little, he does not thereby work any prejudice to the rights actually secured to him.

The evidence shows that a can constructed according to the Lignac patent does not accomplish the end sought by it, and is not a can which can be easily opened; and that, even when the plaintiff substituted in it a brass band for one of lead, his customers who used it found it more convenient to open the can by cutting out the hard top by the use of a hammer and a knife, than to do so by cutting through the brass band. Although the inventor of the Lignac can had the general idea of enabling a can to be opened by cutting more easily through a softer or a thinner metal, he did not embody his idea in a form which was practically of any substantial utility, and the means he adopted were substantially different from those adopted by the plaintiff.

The defendants also introduce in evidence, on the question of novelty, a can made wholly of tagger's iron, that is, sheet iron rolled so thin as to be easily cut by a pocket knife, and claim that similar cans had been used by the Pennsylvania Salt Manufacturing Company, for putting up caustic alkali, for some years prior to the date of the plaintiff's patent. These cans were filled by pouring in the alkali in a molten state, and it solidified on becoming cold. The only reason given for using tagger's iron by the witnesses who testify to the use of cans are, that, when tin was used, the heat the cans were subjected to caused the tin to melt, and that iron was less expensive than tin. It also appears, that, previously to July, 1857, while tagger's iron was used for the sides, sheet tin was used

for the bottom and top, showing that the original use of tagger's iron was with no purpose to facilitate the opening of the cans. One witness testifies that the company put up the alkali in broken pieces, in cans made wholly of tagger's iron, but he does not state that they did so previously to the date of the plaintiff's patent, or that he knew of its being put up in that condition, in such cans, prior to such date.

The defendants, at the hearing, asked leave to put in further proof on the question whether the tagger's iron was used with a design to facilitate the opening of the cans, and on the question whether it was practicable to open the cans, when filled with the alkali, by cutting out the top. Leave was given to both parties to put in further proofs on those points. The defendants, however, failed to avail themselves of the leave so granted; but the plaintiff has furnished evidence which conclusively puts to rest all pretensions in favor of such can. He has produced in evidence sheet iron cans containing caustic alkali, of the manufacture of said company, the same being put up by said company in such cans and sold by it, together with the circulars in which the cans were enveloped when sold. These cans are made of sheet iron, not capable of being easily cut with a knife; and their contents consist of a solid mass of alkali, apparently conforming in shape to the capacity of the can. But the circular furnishes conclusive evidence against the claim set up in behalf of this can, in the directions it gives for opening the can, which directions are in these words: "Break up one box of the saponifier into fragments. by striking upon the sides of the box;" and again: "Knock off either end of a pound box of concentrated lye." Moreover, on the whole testimony, it is doubtful whether the tagger's iron actually used by the company before the date of the plaintiff's invention was so thin as to be capable of being cut to facilitate the opening of the can. It is, therefore, not shown that the use of tagger's iron in the manufacture of such cans by said company was a prior use of the plaintiff's invention.

The defendants admit, by stipulation, that they have made and used, for putting up paints and colors, and vending paints and colors put up therein, "cans with one end made wholly of thin tin, which can be easily cut at the outer edge of such end." The plaintiff claims such can to be an infringement of his patent. In the view I take of the patent, if one end of the can is made wholly of thin tin, and thereby the location of the thin or soft metal in such end is secured at the only part of the end where, by the patent, it is required to be, or where it is essential it should be, namely, at the part of the end nearest its outer edge, it is not material whether the metal in the other parts of the end be thick or thin, so far as the plaintiff's invention is concerned. The use of a plain end of thin metal secures what the patent is designed to accomplish, and in the mode specified in it, by enabling the end to be removed by cutting it out near its outer edge with a knife, while the body of the can may be made of thicker metal, and thus strong, and the thinness of the metal left thin, to be cut, does not interfere with the safe handling and transportation of the can.

There must be a decree for the plaintiff, for a perpetual injunction, and an account of profits, with costs.

[For another case involving this patent see Masury v. Tiemann, case No. 9,271.]

Case No. 9,271.

MASURY v. TIEMANN et al.

[8 Blatchf. 426; 4 Fish. Pat. Cas. 524; Merw. Pat. Inv. 113]. [1]

Circuit Court, S. D. New York. May 6, 1871.

PATENTS—PAINT CANS—RING OF THIN BRASS—METAL CAP.

1. The letters patent granted to John W. Masury, July 12th, 1859, for an "improvement in paint cans, &c.," are valid.

2. The claim of the patent is, "the construction of a metallic can, for hermetically sealing paints and other substances, having attached thereto a rim or ring of thin brass or other soft metal, in such a manner that the top or cover may be removed by severing the said rim or ring of brass or other soft metal with a penknife or other sharp instrument, in the manner and for the purposes herein described and represented, or its equivalent." The value of the patented can, as a can for holding paints liquid with oil, is, not only that it can be easily opened, but that, by severing the thin metal near the exterior wall of the can, the entire contents of the can can be removed without difficulty and without waste, while the can is as strong to resist injury as if there were no thin metal in it.

3. Such patented can is not anticipated by a can having a hole in the middle of its top covered by a thin metal cap, removable by being pried up or severed, the rim or ring between the cap and the edge of the can not being of thin metal.

[This was a bill in equity by John W. Masury against Daniel F. Tiemann and others, to restrain the defendant from infringing letters patent No. 24,748, granted to complainant.]

W. Howard Wait, for plaintiff.

Orlando L. Stewart, for defendants.

BLATCHFORD, District Judge. This suit is founded on letters patent of the United States, granted to the plaintiff, July 12th, 1859, for an "improvement in paint cans, &c." The specification describes the invention as "a new and improved can for putting up and hermetically sealing paints and other substances." It says: "The nature of my invention consists in the construction of a tinned or galvanized iron can, of any known form, with a rim or ring of thin soft metal

[1] [Reported by Hon. Samuel Blatchford, District Judge, reprinted in 4 Fish. Pat. Cas. 524, and here republished by permission.]

attached to the top edge of the same. * * The principal objection to the use of fruits and other edibles put up in soldered tin cans, is the difficulty of opening the same without much labor and the convenience of proper tools. In the use of paints put up in hermetically sealed cans, this objection is most formidable. To remove the top from a small can of paint without injury to the contents thereof, is a task very difficult to accomplish. My invention obviates these difficulties, and presents a can possessing all the advantages of the ordinary can, and, in addition thereto, the extraordinary advantage of being readily openable by the most inexperienced person. To that end, I construct the body of the can, and attach the bottom thereto in the ordinary way; but, for the top of the can, in the place of using material of the same weight and thickness as for the other parts, I take thin brass or other soft metal, and attach a rim or ring thereof to the top of the can, and secure the same by soldering, as in the ordinary mode. For sealing the can after it shall have received its contents, I take a disk of tin, and solder it to the rim or ring, leaving between the said disk and the edge of the can sufficient space to admit the passage of a penknife blade. The can is then, in all respects, like the ordinary tin can hermetically sealed, except that the cover of my newly invented can may be removed by severing the thin brass rim or ring with a penknife or other sharp instrument." The claim is: "The construction of a metallic can, for hermetically sealing paints and other substances, having attached thereto a rim or ring of thin brass or other soft metal, in such a manner that the top or cover may be removed by severing the said rim or ring of brass or other soft metal with a penknife or other sharp instrument, in the manner and for the purposes herein described and represented, or its equivalent."

The infringement charged in the bill is, that the defendants have made and caused to be made, for their use, cans embodying the patented invention, and have vended paints and colors put up in cans so constructed.

The answer contains a general averment of want of novelty in the invention, without any specification as to prior use or knowledge, and denies the infringement. A mass of testimony has been taken, without objection, to prove prior use and knowledge of the invention. The only question in litigation is that of novelty. The utility of the invention is shown to be very considerable, especially for the purpose of putting up in the patented cans liquid or semi-fluid articles, such as paints liquid with oil. The claim on the part of the defendants on the question of novelty is, that they themselves used cans embodying the invention prior to the date of the plaintiff's discovery, such cans having been made by one Charles S. Hine. The value of the patented can in respect to semi-fluid paints is, that, while it is perfectly tight, after it is sealed by soldering, and can be easily opened, it can also be so opened, by severing the thin metal top near the exterior wall of the can, that the entire contents of the can can be removed without difficulty and without waste, because the opening left when the top is taken off is substantially of the same dimensions as the area of a horizontal section of the can. Moreover, the use of the rim or ring of thin metal does not detract from the strength of the can, or from its capacity to resist injury, the salient parts of it exposed to contact in handling and transportation being of the thicker metal which composes the body of the can, and the disk in the middle of the top, and between which and the edge of the can such rim or ring is interposed, not being made of the thin metal which forms the rim or ring.

The plaintiff made his invention about two months before the date of his patent. The defendants claim to have shown by testimony, that, in 1852, they substituted in use for a can with a loose or slip cover, a can having a hole in the middle of its top, covered by a thin brass cap, on which were shown, in relief, by being struck through from the other side by a die, the name of the defendants' firm and other words; and that this brass cap could be easily removed by inserting a knife under its edge and prying it up, or by severing it. But this can was not the equivalent of the plaintiff's, and did not embody the invention. The rim or ring between the brass cap and the edge of the can was not of thin metal, capable of being severed, but was of the same thick metal as the body and bottom of the can; and, when the cap was removed, the difficulty existed of getting at so much of the contents of the can as lay in the recess formed inside between the thick ring and the body of the can—a difficulty which the plaintiff's invention obviates.

The defendants also claim to have shown that, about 1853, they adopted a form of can like the one of 1852, in all respects, except that the cap, instead of being of brass, was, in order to make it cheaper, made of thinner tin than the rest of the can, such cap having on it, in relief, the same words, and being capable of being removed in the same manner, as the brass cap. But this can was no nearer to the plaintiff's invention than its predecessor of 1852.

The defendants also claim to have shown that, in the winter of 1856–7, they adopted a form of can, having a rim or ring of thin tin, and a centre cap of thick tin, the rim and cap being, each, a horizontal plane, and the cap not being marked with any words in relief; and that, after about a year, they modified the form slightly, by turning down, all around the inner edge of the thin rim or ring, or making a shoulder on such edge. This can was the same thing as the plaintiff's. That they adopted such a can, and

at some time, is certain. The point is as to the time. On a careful review of the whole evidence, especially that derived from the defendants' books of account, and their circular to the trade, in January, 1860, I am satisfied that they had no such can, and that no such can was made by Mr. Hine, or for them, until some time in 1859, after the date of the plaintiff's invention. It would be enough to say, that, as the burden of proof is on the defendants, they have not satisfactorily shown that they preceded the plaintiff with their can. But it is shown, I think, affirmatively, that he preceded them. The controlling circumstance in the case, which outweighs the unreliable and unsupported evidence of mere memory, and is sustained by every piece of evidence in the case, derived from contemporaneous records in books, is the annual circular or catalogue, which the defendants issued on the 1st of January, 1860, for the use of their customers, being a pamphlet of thirty pages, giving a list of paints and prices. That pamphlet says: "Oil colors. To afford greater facilities in opening the cans, we have had a quality of tin imported expressly for us, from which the tops of all cans (of and under 6 lbs.) are made. This tin, while it in no way lessens the strength of the cans, is easily and rapidly cut with a stout penknife. The tin should be cut between the caps and the edge. Note. Customers wishing this style of can at the present time (January) must be particular in mentioning it in their orders, as all our stock on hand is not put up in this manner." This was the first time any notice of such a can had appeared in any of the defendants' catalogues, and it is impossible to resist the conclusion, that such a can was, at the time of this catalogue, a new style of can, that so useful a thing was announced as early as possible after its adoption, and that it is not true that it had been in use by the defendants since 1857, as claimed.

There must be a decree for the plaintiff, for a perpetual injunction, and an account of profits, with costs.

[For another case involving this patent, see Masury v. Anderson, Case No. 9,270.]

Case No. 9,272.

MATCALM v. SMITH.

[6 McLean, 416.] [1]

Circuit Court, D. Michigan. June Term, 1855.

MORTGAGES — FORECLOSURE — PARTIES — CHARGEABLE WITH BALANCE.

1. All persons interested, should be made parties to a bill to foreclose a mortgage.

2. This is indispensable where a party may be chargeable with any balance, which the sale of the mortgaged premises may not satisfy.

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

[This was a suit by William H. Matcalm against Osmond Smith. Heard on demurrer to the bill.]

Mr. Howard, for plaintiff.
Mr. Clark, for defendant.

OPINION OF THE COURT. This is a bill in chancery to foreclose a mortgage. Charles D. Parkhurst executed three several promissory notes to plaintiff, each for five hundred and forty-four dollars, and to receive the payment of these notes, Smith and wife executed a mortgage for sixteen hundred and thirty-three dollars on the premises stated in the mortgage, dated 7th December, 1851, given by the said Parkhurst as collateral security. But if the money should not be paid, the party of the second part to sell the mortgaged premises. There was a failure to pay the sum due, $1280 70, on 1st July, 1853, and this bill is brought to have the mortgaged premises sold.

And the bill states that Eben Sherwood, who is also made a defendant, claims to have some interest or estate in the mortgaged premises, mortgaged to him by Parkhurst, dated 3d June, 1850, which required Parkhurst to pay to Sherwood $687 41, in three equal annual payments to be paid in sawing, and the said Sherwood to deliver the logs at the mill ponds. And the bill requires Sherwood to answer whether he has not received from Parkhurst the notes, &c., and whether the mortgage has not been fully paid; and whether the said mortgage ought not to be discharged of record. What amount, if any is due, on the mortgage. Whether he has delivered the logs, &c., at the mill pond. How many feet of lumber had been sawed by Parkhurst. Whether the said Parkhurst did not make the notes, and the said Smith and wife did not execute the mortgage; and whether the amount stated to be due on said notes is not due.

To the bill the defendants demur, and for cause of demurrer state, that Charles D. Parkhurst, alleged to be a citizen of Michigan, is not made a party, when the object of the bill is to foreclose a mortgage to pay his debt.

It is clear that Parkhurst should be made a party. The mortgage was executed by Smith and wife, to pay his debt. The debt was incurred by Parkhurst for the purchase of the premises mortgaged. He sold to Smith, and Smith and wife agreed to pay to the mortgagee the original consideration, for which the premises were sold, and himself and wife executed a mortgage to secure such payment. It seems Parkhurst had mortgaged the premises, while he owned them to Sherwood, for six hundred and eighty-seven dollars and forty-one cents, to be paid in three equal annual payments in sawing lumber, &c., Sherwood to deliver logs to be sawed at the mill pond. Parkhurst is a necessary party to show in his answer how much

of the original consideration was paid, and especially is it necessary that he should answer how much he paid, on Sherwood's mortgage, if the whole of it were not discharged. Sherwood is called on to answer as to what payments were made, but Parkhurst has a direct interest in showing the payments to Sherwood, as he would be answerable to him for any remaining balance, or to the plaintiff, should Sherwood's mortgage be first satisfied, it being prior in date. The demurrer to the bill is sustained. Leave given to amend the bill.

Case No. 9,273.

MATERN v. GIBBS et al.

[1 Spr. 158; [1] 17 Hunt, Mer. Mag. 287.]

District Court, D. Massachusetts. Dec., 1847.

SEAMEN—WHALING VOYAGE—LAY OF SEAMAN—JOINT SUIT—DISRATING—SPECIAL NOTICE.

1. The master and owners of a whaling ship, are not liable to be sued jointly by a seaman, for his lay or share.

2. A clause in the shipping articles, authorizing the master to disrate any seaman, whom he should judge indisposed, or incompetent, to his duty, which had been in use only three years, and was not brought specially to the notice of the seaman, at the time he shipped, was *held* not to be binding on him.

3. Whether any length of use, or special notice of such an article, would make the judgment of the master conclusive, quaere.

This was a libel in admiralty, for a cooper's lay on a whaling voyage, (one sixty-fifth of the net catchings, being more than $1300,) brought against the master and owners. An exception, that these parties could not be proceeded against jointly (see 13th admiralty rule), being sustained by the court, there was a discontinuance as to the master. Two other exceptions: 1st. That a master in a whaling voyage is not liable for the lays of the men; and 2dly. That all the owners must be joined; were argued at length in April last, but it became unnecessary to decide them. After a hearing, at a subsequent day, upon the merits.

E. T. Dana, for libellant.

J. H. Clifford and L. F. Brigham, for respondents.

SPRAGUE, District Judge. The defence was, 1st. That the libellant being judged incompetent by the master, and displaced, this was conclusive against his claim, under the following clause in the shipping articles:—"It is further agreed that if any officer or seaman, after a fair trial of his abilities or disposition, shall be judged incompetent, or indisposed, to the proper discharge of the duties of his station, the master shall have a right to displace him, and substitute another in his stead,—a corresponding reduction of the lay of such officer, or seaman, with reference to the duty which he may afterwards perform, thenceforth to take effect." See Curt. Merch. Seam. p. 393.

It was alleged by the libellant, in his supplemental libel, and was uncontradicted, that he had no actual knowledge of this stipulation in the articles, and that they were neither read by, nor to, him, and that he received no additional compensation on account of it. It is the well settled rule of admiralty law, that a seaman is not bound by any new or unusual stipulation introduced into the articles, and which is in derogation of his general rights, without full knowledge thereof, and adequate compensation therefor. Brown v. Lull [Case No. 2,018]. Now, the object of this clause is, not merely to enable the master to disrate a seaman, which he might always do, but to make the master's judgment, on that point, conclusive upon the seaman and his wages, so that no court may afterwards inquire into its correctness. Such being the character of this article, and the libellant denying any knowledge of it in fact, the court is to inquire whether general usage and length of time, has so far established it, as a part of the common shipping articles, in the whaling business, that the libellant was, in legal contemplation, affected with knowledge of it. On this point, the facts as reported, under agreement, by a commissioner of this court are, that the introduction of this stipulation is peculiar to New Bedford, and its immediate vicinity; that a form of articles, with this clause, was first printed in 1839; that it began to be used in 1840, and from that time forward, has been growing into general use. This vessel sailed from New Bedford in 1843. Thus the average length of a single whaling voyage, measures the whole interval from its first introduction, to its use in the articles now in question. The duration of these voyages makes the shipping and the settling with crews, of much less frequent recurrence than in the freighting business. Upon these facts, I think it would be venturing too far, to say that this libellant must be presumed to have known of the introduction of this clause. He should have been specially informed of it, at the time he shipped.

In deciding this point, upon the special circumstances of the case, I do not mean to intimate an opinion that this clause in the shipping articles would, by any length of time, or by being brought specially to the notice of the seaman, make the judgment of the master absolutely conclusive, so that the court could not inquire into its justness, or reasonableness. I leave that question to be decided, when it shall become necessary to do so.

The judgment of the master being held not conclusive upon the libellant, I must pass upon the question of his competency. It was proved to have been perfectly well understood by all parties, that he shipped as for his first voyage, and not at the full lay of a cooper. Upon a careful examination of all the evi-

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

dence, I am of opinion that the libellant was not incompetent to fulfil this engagement. Decree for the libellant for the lay claimed.

Case No. 9,274.

In re MATHERS et al.

[17 N. B. R. (1878) 225.] [1]

District Court, D. Indiana.

BANKRUPTCY — COMPOSITION — RIGHT TO VOTE — DEBTS NOT PROVEN.

Creditors are not entitled to vote upon proposals for composition without having first proved their debts.

[Cited in Re Keller, Case No. 7,654.]

By the Register:

I, Noble C. Butler, one of the registers of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me the following question arose pertinent thereto and was stated and agreed to by the parties: At a meeting called and held at the time and place aforesaid, for the purpose of considering a proposal submitted by the bankrupt for composition with his creditors, William Blakely offered to vote thereon without first having proved his debt, as required by section 5077, Rev. St. U. S. The undersigned register, presiding at said meeting, ruled that Blakely was not entitled to vote on such proposal until he has made proof of his debt in the mode prescribed by said section 5077; to which ruling the said William Blakely, by his counsel, Louden & Miers, excepted, and the question thus arising is, at the request of the parties, certified into court for decision by the judge, with the following reasons of the register for his ruling:

The bankrupt law provides (section 5077, Rev. St. U. S.) that, "to entitle a claimant against the estate of a bankrupt to have his demand allowed, it must be verified by a deposition in writing, under oath, and signed by the deponent, setting forth the demand, the consideration thereof, etc., etc., etc." And again, "no claim shall be allowed unless all the statements set forth in such deposition appear to be true." Elsewhere the officers are named before whom these proofs may be made, viz.: registers, U. S. commissioners, and notaries public. The forms in which they shall be made are prescribed by the justices of the supreme court, viz.: forms Nos. 21, 22, 23, 24, and 25. Creditors cannot vote for assignee or receive dividends; are not entitled to notice of application for discharge, and cannot oppose a discharge or contest its validity when granted, and, in short, they have no standing in court unless they have proved their debts. And in the proceedings under section 43 of the act (Rev. St. U. S. § 5103), which in old copies of it is entitled "superseding bankruptcy proceedings by arrangement," there is no exception made to this general rule. In these proceedings the estate of the bankrupt is administered by trustees under the supervision of a committee of creditors; but it is nevertheless a proceeding in court, and proofs of debt in the usual form are required of all creditors who participate therein. It is, moreover, to this section that the provisions for composition with creditors are added by the amendment of June 22, 1874 [18 Stat. 178]. The language of the amendment is, "Be it enacted, etc., etc., that the following provisions be added to section 43 of said act." Now there is nothing in this portion of the law authorizing compositions which indicates that a different practice is to be observed as to proofs of debt from that already established. The character of the proceeding thus instituted is not such as to make any change necessary. It is merely another form of bankruptcy proceeding and the formalities of such proceedings are not inappropriate to it. It resembles in some particulars the proceeding by "arrangement," wherein the resolution to adopt this mode of settlement is first adopted by three-quarters in value of the creditors who have proved their debts, and afterwards confirmed by the court.

The statute concerning compositions requires the resolution in acceptance of the proposed composition to be first passed by a certain proportion of "the creditors" assembled at the meeting called to consider it. The language here does not, as in the case of an "arrangement," explicitly designate "creditors whose claims have been proved," but, in the opinion of the register, the word "creditors" is used in this instance, as in others throughout the law, to denote such creditors only. It would be a tiresome repetition to insert this qualification wherever the word occurs in the law, and it is frequently omitted without leaving the meaning in anywise obscure.

It was urged by counsel for Blakely that the schedules required of the bankrupts in composition cases dispenses with the necessity of proof; that the specification of the creditors therein is sufficient for their identification. But this objection, if valid, would obviate the need of proof in all bankruptcy proceedings, for in all of them the bankrupts are required to submit sworn statements of the names, residences, and occupations of their creditors, the amounts due them, the particulars of the indebtedness, etc., and these creditors are, notwithstanding this, compelled to prove their debts. The bankrupt's statement in neither case is accepted as conclusive. There is the same opportunity and the same inducement for collusion in each class of cases. The bankrupt might in composition cases procure a favorable compromise with his real creditors by listing enough fictitious ones to outvote them, if his statement is conclusive. He might wilfully, or ignorantly exclude genuine cred-

[1] [Reprinted by permission.]

itors from the terms of a composition, or at any rate from a participation in it to the full amount of their claims, for nothing is more common than discrepancies between the statements of debtors and creditors as to the precise amount of the indebtedness, which can be rectified only by the production in due form of law of the evidences thereof. These creditors would have but a very tardy remedy for this violation of their rights if they are denied the authority to prove their own debts, and referred to the statements of the bankrupt as the only and indisputable evidence of their existence. True, the composition is binding on the creditors whose names, etc., are included in the statement of the bankrupt, and does not affect or prejudice the "rights of any other creditors," but the same may be said of creditors in any bankruptcy proceeding, whose names are wilfully omitted from the schedules of the bankrupt.

There are no reported cases accessible to me in which this question is decided. In the matter of Holmes [Case No. 6,632], Southern district of New York, Blatchford, J., in enumerating the duties of registers presiding at composition meetings, said, "he (the register) must necessarily decide who are entitled to vote, and in respect to what amount of debts, and pass upon the regularity and propriety, in form, of the proofs of debt and of letters of attorney." It thus appears that the practice in composition cases in that district is to require such debts to be proved. There is also a dictum of Lowell, J., in Ex parte Jewett [Id. 7,303], district of Massachusetts, to the effect that "no oath is required of them (creditors) in ordinary cases."

For the foregoing reasons it is my opinion that composition cases are not excepted from the operation of section 5077, Rev. St. U. S., requiring proof of debts in bankruptcy proceedings, and this opinion and the reasons therefor are respectfully submitted.

GRESHAM, District Judge. The practice in this district has uniformly been as held by Mr. Register Butler. It is the only safe practice, and, indeed, the only practice recognized by law. The finding is approved.

Case No. 9,275.

MATHEWS v. ABBOTT.

[2 Hask. 289.] [1]

District Court, D. Maine. Dec., 1878.

BANKRUPTCY—MAKER OF NOTE—SECURITY GIVEN TO INDORSER — SUBROGATION — NATIONAL BANKS—REAL ESTATE SECURITY.

1. By subrogation, the security, given by the maker of a note to the indorser or surety, when both have become insolvent and the liability of the indorser has become fixed, in equity, may be recovered by the holder of the note and applied to its payment.

[Cited in National Shoe & Leather Bank of Auburn v. Small, 7 Fed. 843.]

2. National banks may hold, under section 5137 of the Revised Statutes, real estate security so acquired, as acquired subsequent to the loan.

Bill by the assignee in bankruptcy of Henry R. Butterfield, the maker of sundry notes, indorsed by respondent Abbott, and held by sundry national banks, the other respondents, to determine whether such banks are entitled to be subrogated to the rights of Abbott as indorser, under a mortgage of real estate to him from the bankrupt to secure his liability for indorsing the notes, his liability having become fixed, and he being insolvent.

Edmund F. Webb and William L. Putnam, for orator.

Gardiner H. Vose, for respondents.

FOX, District Judge. On the sixteenth of November, 1877, the bankrupt mortgaged to H. G. Abbott, certain real estate in Waterville, on condition "that if the said Butterfield shall save harmless the said Abbott from all liability incurred by said Abbott on certain promissory notes signed by said Abbott as indorser, guarantee and surety, for the accommodation of said Butterfield to an amount not exceeding $8000, and from all liability which may hereafter be incurred by said Abbott on any notes given in renewal of said notes now outstanding, and from any and all liability which may hereafter be incurred by said Abbott on any and all promissory notes and bills of exchange as indorser or surety, or for the accommodation of said Butterfield, then this deed shall be void."

Abbott indorsed sundry notes for Butterfield's accommodation, which were afterwards discounted by certain national banks, who are now the holders of these notes, and are made parties to this bill. Abbott is insolvent, and has never paid either of the notes so indorsed by him; but his liability upon all of them has become absolute.

This bill is brought by Butterfield's assignee in bankruptcy against Abbott and the holders of these notes, that the rights of all parties interested in this mortgage may be ascertained and determined by this court; and it would seem that there could not be much occasion for controversy in the matter after the learned and ample discussion of the law in Re Jaycox [Case No. 7,242], by the late Judge Hall, and by Judge Lowell in Re Pierce [Id. 11,140], and subsequently by him in Ex parte Morris [Id. 9,823].

In these opinions both the English and the American authorities are referred to, and they fully sustain the principle as stated by Lowell, J., in Ex parte Morris [supra]. It is well settled, that if a mortgage, pledge, or lien is given by a principal debtor to secure his indorser or other surety, and both become insolvent, the holders of the notes or other debts, for which the surety is bound, have an eq-

[1] [Reported by Thomas Hawes Haskell, Esq., and here reprinted by permission.]

uity to require the property to be applied to the discharge of their debts specifically."

A distinction has been sometimes taken between a security for the indemnity of the surety, and one conditioned for the absolute payment of the debt; but as is stated by Chapman, J., in New Bedford Institution for Savings v. Fair Haven Bank, 9 Allen, 178, "It is well settled by the authorities that the creditor has an equitable claim to the security as well when the mortgage is given for mere indemnity, as when the condition is added that the principal shall pay the debt."

It is quite immaterial whether the surety has or not actually paid the debt. If he has become absolutely bound for its payment, as was said by Lord Eldon in Ex parte Waring, 19 Ves. 345, as quoted by Lord Hatherly, 5 Ch. App. 776, "It was true these bills were not paid, but, inasmuch as the estate of the debtor could not be withdrawn until the debts were paid, * * * and inasmuch as the estate of the creditor holding the security was in such a condition that he was not able to make payment of the bills in money's worth, the only way was to dispose of the security and pay the bills. * * * The bill holder comes in, not on account of any special lien he has upon the property, but because the person from whom he holds has a security, which security can not be taken away until all liability upon the bills is at an end."

The surety is to be indemnified from his liability by means of the security he has received for that purpose from his principal; and to use the language of Parker, J., in Hopewell v. Cumberland Bank, 10 Leigh, 225, "If a surety is bound for the debt and is indemnified by the principal debtor, the creditor may pursue the indemnity in exoneration of the liability of the surety, not from any notion of mutual contract between the parties, that in providing for the surety, the creditor shall be equally provided for, but from a principle of mutual equity, independent of contract, namely, that to prevent the surety from being first harassed for the debt or liability, and then turning him round to seek redress from the collateral security given by the principal, a court of equity will authorize and even encourage the creditor to claim through the medium of the surety all the rights he has thus acquired, to be exercised for his benefit and in discharge of his obligations."

The security was given and received, not for the benefit of the general creditors of Abbott, but, it was for the special object of indemnifying him from the payment of these particular liabilities; and if, by a court of equity, it is so applied, the purpose contemplated by the parties to the conveyance is accomplished; the general creditors of the principal can have no cause for complaint, because, as against them, it was in all respects a valid transaction; and, as to the general creditors of Abbott, they are in the same condition they would be, if Abbott had never assumed this liability; they can have full recourse to all of his estate which should be applied in payment of debts for which he is primarily liable; and they certainly have no right to insist that Butterfield's property should thus be disposed of.

By adopting the course proposed, equal and exact justice is obtained, as the property of the bankrupt, which, he had agreed with his surety he should have as security for his liability, goes in discharge of these very liabilities, and a court of equity thus affords its aid to the surety, by applying the property of the principal to the payment of the debts for which it is pledged, which the surety might not be able to do for want of ready money, if he is unable to resort to the security before actual payment by him of the claims of his principal, for which he had thus become responsible.

The holders of the notes of Butterfield are various national banks; and, as they are prohibited from making loans on real estate, it is urged that they cannot avail themselves of this security. This objection is wholly without merit. It does not appear that either of the banks knew of the mortgage, or gave credit on account thereof. All the security which they took at the making of the loan was the personal obligation of the parties, and it is only when they have become insolvent, that the banks ask that the property of the principal may be applied to the relief of the surety; not by force of any agreement to which they were parties; but wholly through the application of certain equitable principles, which, under such circumstances, control such security. This is rather in the nature of security subsequent to the loan, which by section 5137, Rev. St., national banks may hold for debts previously contracted.

Decree in conformity with this opinion.

Case No. 9,276.

MATHEWS v. DOUGLASS.

[1 Brunner, Col. Cas. 196; [1] 1 Cooke, 136.]

Circuit Court, Tennessee.[2] 1812.

PRACTICE IN EQUITY—INJUNCTION—WHEN GRANTED.

An injunction will not be granted during the pendency of an action unless the parties asking relief in equity will confess judgment at law.

Douglass brought an action at law against Mathews, and filed his declaration, to which Mathews demurred. During the pendency or the action at law, and indeed before the demurrer had been determined, Whiteside, on behalf of Mathews, and upon a bill filed for that purpose, moved the court for an injunction.

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

[2] [District not given.]

Dickinson, on behalf of the plaintiff at law, objected to an injunction being granted unless the complainant would confess a judgment.

BY THE COURT. An injunction generally operates as a release of errors; but if it be granted as this case now stands it will not so operate here. Suppose the injunction is granted to stay the proceedings at law, and ultimately there would be a decree against the complainant. He may still go on, and if the declaration is defective prevent the recovery of the claim, or at least delay it, without any pretence founded in justice. And besides, should the demurrer be decided against him, he might prosecute a writ of error. We, therefore, will not grant the injunction unless the complainant will confess a judgment at law.

And it was done accordingly.

Case No. 9,277.

MATHEWS v. SPRINGER.

[2 Abb. U. S. 283.] [1]

Circuit Court, S. D. Mississippi. Jan. Term, 1871.

SLAVERY—EMANCIPATION—DEVISE TO FREED SLAVES.

1. By the laws of Mississippi and Ohio, as they existed in 1858–59, where an owner of slaves, residing in Mississippi, voluntarily carried them to Ohio with the intent that they should thereby become free, such slaves became free. And they could not lose that status by returning, with their former master, to Mississippi for temporary purposes.

2. A devise of proceeds of real property, in favor of negroes formerly held as slaves, but who have been emancipated, is valid. So *held*, under the law of Mississippi, in reference to a case where the emancipation was by the act of the owner.

3. One who is entitled, by the terms of a will, to a share of the proceeds of land sold, as legatee, cannot be barred of his rights in respect thereto, by an adjudication made in proceedings to which he is not a party.

Hearing upon pleadings and proofs in equity.

The suit was brought by Isaiah J. Mathews and Caroline J. Mathews against Benjamin Springer, executor of the will of Robert L. Mathews, and others.

W. P. Harris and Upton Young, for complainants.

T. A. Marshall and J. B. Chrisman, for defendants.

HILL, District Judge. This cause is now submitted upon bill, answer, exhibits, and proof, from which the following facts appear, and upon which the questions to be determined arise:

Robert L. Mathews, a resident of Warren county, in this state, a man possessed of a considerable estate within this state, both personal and real, was in the year 1858, the owner of a slave named Harriet, the mother of complainants, who were then his slaves, and whom he also claimed as his natural children, and whom he was anxious to emancipate and set free, Isaiah being then about seven, and Caroline about five years of age.

Not being permitted by the laws of this state to emancipate them here, and have them continue their residence here, he took them with him to the state of Ohio; and in the court of common pleas at the May term, 1858, of Hamilton county, in said state, executed a writing by which he declared them free and no longer slaves, and procured a decree of said court declaring them free persons of color, and remained with them in Ohio for some weeks, when he returned with them to Carroll county, in this state, where they remained until shortly after the death of said Mathews, which took place early in 1859; when, by the directions of Springer, one of the executors named in the will of said Mathews, they returned to the state of Ohio, where they have since remained. Said Mathews on February 20, 1859, made and published his last will and testament, and on March 26, 1859, died in said county of Carroll, in this state; and on April 25, 1859, said last will and testament was duly proved and admitted of record in the probate court of Warren county, the place of residence of said testator at the time of his death.

The testator, leaving no widow or legitimate children as the natural objects of his bounty, after providing in his will for a number of specific legacies to his collateral relatives and friends, directed that his executors should sell and convert the residue of his estate, real and personal, into cash, and deposit the same in the State Bank of Louisiana; that complainants should be maintained and educated out of said funds until they were twenty-one years of age, when the remainder should be divided between them, the said Isaiah Jefferson receiving two-thirds, and Caroline Josephine one-third; with the further provision that if anything should happen by death or otherwise that his said children should not receive said bequest, that the same should go to said bank for the use of the stockholders.

In June, 1860, the heirs at law and next of kin to said testator filed in the probate court of Warren county their petition against said Springer, who had qualified as such executor, and had proceeded to the execution of the trusts under the will, and also against Downs and Johnson, the other two persons nominated in the will as co-executors with said Springer, and against the said bank, and naming the complainants as defendants thereto, but taking no other steps against them. The petition alleged that complainants were slaves, and could not take the bequests provided for them in said will, and that the bequest to the bank was void, because there was no such corporation in ex-

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

istence, and that the pretended devise and bequest to the bank was intended, not for the benefit of the bank, but for the benefit of complainants, and that this provision in the will, as well as the pretended emancipation of complainants, were both attempted frauds on the laws of the state of Mississippi, and against its policy, and void.

To this petition the said Springer and the Louisiana State Bank, which claimed to be the bank intended in the said will, answered the allegations in the same. The court dismissed the petition as to complainants, for the alleged reason that they were slaves, and could not take under the will; and dismissed the same as to said Downs and Johnson, because they had not qualified as executors; and as to said bank, for the reasons charged; and proceeded, according to the prayer of the petition, to declare said bequests to complainants and to the bank void, and ordered distribution of the estate, after the payment of the specific legacies, among the petitioners.

From this decree said Springer and the bank appealed to the high court of errors and appeals of the state, where the decree rendered by the probate court was affirmed; and proceedings were had to distribute the personal estate according to said decree. Subsequently, Springer made a final settlement, so far as he had executed the trusts under the will; and the defendant, Diggins, was appointed administrator de bonis non, with said will annexed. No notice of complainants or their interest was taken in the proceedings in said probate court, nor were they in any way brought before it.

Complainants, by their next friend, filed this bill at December term of this court, 1868, for the purpose of setting up and enforcing the provisions made for them in said will, notwithstanding the proceedings so had in the said probate court, and so affirmed by the high court of errors and appeals, alleging that their father, the said R. L. Mathews, took them to the state of Ohio with the purpose of emancipating them, and that he did so emancipate them, and with the purpose that they should remain citizens of that state, and receive an education, and the advantages of free persons. That afterwards he returned with them to Mississippi, to remain a short time only; and in a short time they were to be returned to the state of Ohio as their permanent home. During their stay in Mississippi, after their emancipation, they occupied the position of citizens and residents of Ohio, as far as they were capable of doing so, and were only in Mississippi temporarily. That not having been parties to the proceedings in the probate court and high court of errors and appeals, they were not affected by any of the proceedings therein; and that they are now entitled to all the provisions in their behalf made in said will, so far as said estate can be collected.

To this bill, said Springer, Diggins, T. A. Marshal, and H. H. Miller, R. S. Buck, Reason Wooley and wife Elizabeth, and Hampton H. Griffith and wife Susan, have filed their answers, admitting the execution of the will, its probate, and the proceedings had under it, as first above stated, but denying that said Robert L. Mathews took complainants to Ohio with the intention of their remaining there; alleging that his proceedings were intended as a fraud and evasion of the laws of this state; and that complainants were, at the time of said Mathews' death, his slaves in this state, and a part of his estate, and incapable to take anything under his said will; that any pretended rights they may claim under said will are concluded against them by said proceedings had in the probate court, and affirmed by the high court of errors and appeals of this state.

The questions to be determined by the court are: (1) Did the complainants become free persons of color in the state of Ohio; and if so, was their condition changed to a state of slavery when they were brought back to the state of Mississippi, and at the death of the testator? (2) If they were free persons of color at the death of the testator, were they capable of taking under the provisions in their favor in the will? (3) If free persons of color, and capable of taking under the will, are they now precluded from the provision made in their behalf, by reason of the proceedings and decree of the courts above referred to?

These questions, if raised in this court before the attempted severance of this and other states from the Union, would have been regarded as of peculiar interest. For many long years a heated sectional controversy had been carried on between the people of the states where African slavery was maintained, and of those where it was forbidden. This controversy existed before the formation of the Federal Union; and as a compromise, and to avoid more serious results, provision was made in the constitution for the reclamation of persons held to servitude in one state, who might, without the consent of those entitled to their service, flee to those states where such service was forbidden.

But the result of the late bloody war has been to emancipate all of the race, so long the bone of contention between the slaveholding and the non-slaveholding states; all are now free, and, under the constitution and laws, enjoy equal rights as citizens of the United States, and of the several states, as did the white race before this change in the condition of the other race; so that we approach the consideration of the questions presented as we would any other question involving only pecuniary rights and remedies.

The changed condition of the race to which the complainants belong, has nothing to do with the questions to be determined. Their rights, if any they have, are to be determined under the law as it existed at the time of the death of Colonel Mathews, the testator. If they were incapable from their condition on

account of race, color, or condition of slavery, then or before that time existing, to take under the provisions made for them in the will, they are now incapable to do so; so that we must, in considering all the questions presented, place ourselves back at the time of the death of the testator, and the time his estate should have been administered and the trusts in the will executed, had no change taken place.

The first question for determination is, did the complainants become free persons of color in the state of Ohio in consequence of their having been taken there by the testator, who was then their owner, and the proceedings there had by him as stated?

In the non-slaveholding states I believe it has always been held that when a slave was removed to their territory, or was permitted to go there with the intention upon the part of the owner that he should remain, he at once became free; and I am not aware of any contrary ruling by the courts of any of the Southern or slaveholding states; so that if the proof establishes the fact that it was the intention of Colonel Mathews that they should remain there when he took them into that state, they at once, without more, became free, and no change of purpose on his part, or any other act of his could change their condition. In the case of Rankin v. Lydia, 2 A. K. Marsh. 813, it is held that no law, at least in that state, could bring into slavery one over whom it has ceased to exist. As stated by the judge who delivered the opinion of the court: "It would be a construction without language to be construed, implication without a scrap of law, written or unwritten, statutory, or common, from which the inference could be drawn, to revive the right to a slave when that right had passed over to himself." But we are left in no doubt as to their then condition according to the law of Ohio, as expounded and settled by the supreme court of that state in the case of Anderson v. Poindexter, 6 Ohio, 622, in which it is held that a slave being permitted by the owner to go into Ohio, no matter for what purpose, thereby became free as soon as he entered that state. This, it is true, is contrary to the holding of the courts of most of the Southern states; with perhaps the single exception of Louisiana, the Southern states claimed and their courts, with the exception mentioned, held that the taking of a slave to a non-slaveholding state, with the intention of only a temporary sojourn or a mere transit through the state, did not communicate freedom to the slave. But conceding that the complainants were taken to Ohio by the testator with the intention that they should be free, there can be no doubt but that they became free, and there is no doubt but such was his intention and purpose. And it may as well be said now as again, that the preponderance of the testimony is that he intended that they should become residents of the state of Ohio, and enjoy all the rights of free persons of color resident within that state, although he would have greatly preferred that during their minority they should have remained with him in Mississippi, if they could have enjoyed the same advantages here. The testimony all goes to show that he was a man of intelligence, and understood the laws of Mississippi upon the subject, and knew that they could not be permitted to remain in Mississippi after the notice given them to depart from the state; he further knew that they could not be permitted to enjoy the benefits of an education in this state.

At the time he brought them back to Mississippi, they were too young to be at school; they were also too young to produce any of the evils which free persons of color residing in the state were supposed to exert as an evil influence on the slave population of the state. I am, therefore, satisfied that the complainants did become and were free persons, from and after they were so taken to the state of Ohio, even upon the view entertained by the people of the slaveholding states, and that expressed by their highest tribunals, and were then entitled to all the rights appertaining to free persons of color in the state of Ohio.

The next branch of the first inquiry is, did complainants lose the rights so conferred upon them, by being brought back to Mississippi? It is contended by defendants' counsel that they did, and the case of Hinds v. Brazealle [3 Miss. (2 How.) 837] is referred to as authority to maintain this position. That was a case in which the owner had carried a slave to the state of Ohio and executed a deed of emancipation with an intention of immediately returning with the slave to the state of Mississippi, and had done so to avoid the laws of the state of Mississippi, and to give to the slave so intended to be emancipated, the rights and privileges of a free person of color here, as though the emancipation had taken place here; it was held to be a fraud upon the laws of this state, and, therefore, void in this state, notwithstanding the act might have been held valid in the state of Ohio; and that to allow the emancipation of slaves to remain in this state was contrary to the declared policy of the state, as shown by the general course of legislation on the subject. The case reported in 1 Rand. (Va.) 15, was referred to in that case, and is relied upon in this. These cases would be applicable in this case were the facts similar, but, as already stated, the weight of the evidence is that the testator did not intend to return with them to this state when he took complainants to Ohio. The will itself, made but a short time afterwards, shows that he did not intend them to receive or enjoy the property here, and is a strong circumstance against his intention that they should remain here for any considerable length of time. The estate intended for them was all to be converted into money and deposited in the State Bank of Louisiana, in the city of New Orleans. The complainants were

to be supported and educated out of it. These educational opportunities could not be obtained in this state, or in any one of the slave states; at least they could not be in this state, and could not in any other slave state as they could in Ohio. Taking all the proof together, I am satisfied it was the intention of the testator that complainants should be returned to Ohio to remain, and that they should enjoy his bounty there, or at least not in this state; and that this case does not fall within the principles of the case of Hinds v. Brazealle, and that complainants were not the slaves of the testator at his death, but were free persons of color, temporarily in this state, just as it was contended by the Southern states, that slaves might be taken to a non-slaveholding state, and remain temporarily without becoming free.

Upon a careful examination of the provisions of the Code of 1857, then in force, no prohibition of law can be found against their doing so, had they been adults, and much less so when they were infants incapable to violate the law, or suffer its penalties. Article 80, § 12, c. 33, of the Code, provided that it should not be lawful for any free negro or mulatto to emigrate to, and become a resident of this state, and provided as a penalty that any justice of the peace might give him ten days' notice in writing to leave the state, and if he did not do so, issue a warrant, and cause him to be apprehended; and authorized the board of police to order him to be sold by the sheriff to the highest bidder as a slave for life, the proceeds to go into the county treasury; and further provided, that free negroes and mulattoes then in the state without leave might be dealt with in the same way. It will be observed, that to incur this penalty, the free negro or mulatto must immigrate to the state, and must further become a resident of the state; in other words must make it his home. This cannot be said of one who came here to remain temporarily, or for a short time; such a person cannot be considered a resident. Again, no penalty was incurred until after the ten days' written notice had been given, and a failure to depart on the part of the person so here without authority, and until this was done no law could be held violated. Thus three things were necessary to subject him to this severe penalty: First, he must emigrate to the state; secondly, reside in the state, that is, make it his home; thirdly, he must refuse or neglect to leave the state after having first been served with a written notice from a justice of the peace to leave the state, being allowed a temporary residence in the state after the notice, all of which pre-supposed that the party was capable of acting, and where action, or non-action, was a crime, the commission of which was visited with the severe penalty of becoming a slave for life. Such a penalty it cannot be supposed the legislature intended to inflict upon an infant incapable of committing any other crime. No provision is made by the Code for a free negro brought into the state in infancy. The statute in force before the adoption of the Code of 1857 did provide, that after they arrived at the age of sixteen years, and upon thirty days' notice to leave the state, and a refusal, they might be sold for one year. Upon a careful examination of the subject, I am satisfied their residence here, under the circumstances, was not a violation of law. And without the same being as a punishment for some crime of which the party was convicted, I know of no law by which a person once a slave, but freed therefrom, could be returned to his former condition of slavery; even his own voluntary agreement could not bind him to servitude for life, much less, if a female, to transmit the condition of slavery to her children. The theory in the case of Hinds v. Brazealle is, that the slave mentioned never was free.

Having determined that complainants were, at the time the testator made his will, free persons of color, permanently domiciled in Ohio, and only temporarily here, they were entitled to hold all the rights and provisions made for them by the will, which they could have done had they always resided in Ohio; and which brings us in the investigation to the next point of inquiry, and that is, what are those rights?

Defendants' counsel deny that they could then or now acquire anything, and rely upon the cases of Heirn v. Bridault, 37 Miss. 209, and Mitchell v. Wells, Id. 235, to sustain this position. These two causes were decided by the court at the same time, under the same circumstances, involving the same questions as to principle, and the judges were divided in opinion in the same way, so that the consideration of the one may be considered as the consideration of the other, with this difference in the facts; that in the former case the free negro had never been a slave in this state—only a resident free negro—and in the latter had been a slave in this state, and was taken by her owner to Ohio, and there emancipated by deed, and only remained there some eighteen months, when she returned to this state, and resided with her former owner as a servant in his family, until September, 1848, about one month after the death of the testator, when she married a free man of color who resided in Jackson, Mississippi, and resided with him here until 1851, when she returned to Ohio. In the former case the beneficiary in the will was a free woman of color, and came with the testator from New Orleans to this state, and resided with him as the mistress of his family, and had done so for a number of years before his death.

The principles announced by the judge who delivered the opinion of the court in this case, were that "alien free negroes and mulattoes, being without the protection of the Federal constitution as citizens of the United States, and being of a barbarian race, with whom

civilized nations have no commercial, social, or diplomatic intercourse, and hence regarded as perpetual enemies (though no war be waged against them), are incapable of taking or holding any species of property in this state; and a devise or legacy to any person of that class was absolutely void; and that all free negroes and mulattoes coming into this state from other states, were to be treated as alien enemies, and to have enforced against them the strictest rule of the ancient law applicable to alien enemies, except as to life and limb."

The same judge, in delivering the opinion of the court in Mitchell v. Wells, uses this language: "The policy of Mississippi being against emancipation, either here or elsewhere, of slaves once domiciled within her limits, her courts will not give any effect to the emancipation of a Mississippi slave in another state; and a slave so manumitted cannot, therefore, take or hold any property in this state, or maintain any suit in her courts." Although the facts in these cases are dissimilar to those in the case under consideration, it must be admitted, if the principles announced are held to be binding on this court, as is claimed, they would be decisive against the complainants. But upon a careful examination of the statute on wills, and of the authority to bring suits in the courts of the state, no prohibition will be found against such a disposition by a testator of his estate, or of its enforcement in the courts of this state. Therefore, there is no statute to construe making any such provision; and when left to judicial construction of the policy of the state, this construction will be found not to be the uniform construction given by the supreme court of this state.

In the early case of Leech v. Cooley, 6 Smedes & M. 93, it was held, that where a testator, by his will in 1836, directed his slaves to be set free, and sent to Indiana or Liberia, as they might prefer, and directed also a sale of his property, and part of the proceeds to be paid to his slaves thus liberated, the will was held to be valid, and that the executor could proceed with its execution; and that the bequest to the slaves was not void for want of capacity in the slaves to take. If they did not comply with the terms of the will, it was void; but if they did, it was valid. In the more recent case of Leiper v. Hoffman, 26 Miss. 615, it was held, where a conveyance was made to a negro over whom the owner had ceased to exercise acts of ownership, who had not been emancipated according to the laws of the state, but who afterwards removed to the state of Ohio, and by the acquiescence of the owner, and the residence in that state, afterwards became free, that she was entitled to the property conveyed, and to the right to bring and prosecute her suit for its recovery in this state. The learned judge, in delivering his opinion, held, that the principle announced in the case of Hinds v. Brazealle did not apply, and that the devise in that case was declared void, for the reason that the attempted manumission was intended to take effect in this state, in fraud of its laws; and in support of the principles decided in Leiper v. Hoffman, referred to the case of Ross v. Vertner, 5 How. [46 U. S.] 303, in which it is held, that it was not against the policy of the state of Mississippi for the owner of slaves to send them to Liberia, there to remain free, and that such a trust in his will was a valid trust.

But in the still more recent case of Shaw v. Brown, 35 Miss. 246, decided after the passage of the Code of 1857, the court held, that the owner of a slave domiciled in this state might lawfully remove him to another state, where emancipation is allowed, and manumit him in accordance with the laws of that state, and that the power so to do resulted from the absolute dominion of the owner over his property, and was not prohibited by the laws of this state, or against its policy, but was expressly recognized by the act of 1842; and I will here say, that the provision of the Code of 1857, when properly construed, does not conflict with the act of 1842 in this particular. Article 9, § 3, c. 33, which was doubtless in the mind of the learned judge who delivered the opinion of the court in the cases of Mitchell v. Wells and Heirn v. Bridault, does not apply to the case of an owner of a slave taking him to another state, where emancipation is allowed, and emancipating him, but refers to a case where provision is made for the emancipation of a slave after the death of the owner, the reason for which doubtless was to prevent slaves from importuning their owners, when old, or infirm in body and mind, to make such provisions for them; and the still stronger reason, that when such provision was made, the slaves so provided for might, in their eagerness to obtain the boon of freedom, take means to hasten it by procuring the death of their owner and benefactor. Article 97, § 14, c. 33, provides, that if any person shall take any slave from this state for the purpose of emancipating such slave, or if, having been emancipated elsewhere, such emancipated negro shall return to this state, or be brought back by the former owner, such former owner shall in no case be allowed to protect such emancipated negro, or to claim any right or authority over them; but such negro shall be dealt with as a free negro being in the state without authority. This provision shows clearly that the legislature did not intend to prohibit persons from taking their slaves out of the state for emancipation, but only intended to prevent their return and residence here, by cutting asunder all the relation between the former owner and the slave after such manumission. If, in the case of Hinds v. Brazealle, the provisions of the Code of 1857 had been in force when the slave was taken to Ohio, the court would have held him free upon his return to Mississippi, but without lawful authority to

remain. The case of Shaw v. Brown, whilst it decides that when the slave is taken by the owner to another state and manumitted, with the intention of an immediate return and residence in this state, it is a fraud against the laws of this state, and void, holds, that such intention must be immediately connected with, and made a part of the transaction of the emancipation; and also, that if the intention to return after manumission be abandoned, such intention, after abandonment, will not impair the rights of such free negro.

It is also held, in the same well-considered case, that it is not true that the states of the Union extend to each other no other rights than those given by the constitution of the United States; but on the contrary, the principles of private international law and the comity of nations apply with greater force, as between the inhabitants and citizens of the several states, than between foreign nations: and refers to the case of the Bank of Augusta v. Earle, 13 Pet. [38 U. S.] 519.

It is further held in that case, that although free persons of African descent were not citizens of the states in which they resided, within the meaning of the constitution of the United States, yet, though they were an inferior and subordinate class, having no rights except such as those who held the power of government might choose to grant them, they were, nevertheless, subjects and inhabitants of, and derived their rights of person and property from the states of their residence; and, by the comity of nations, they were entitled to the enjoyment of their rights in every other state in the Union, unless the exercise thereof was positively prohibited, or incompatible with the laws and policy of the state in which they were claimed; and further, that free negroes of other states are not regarded as outlaws, banished people, or alien enemies in this state, and as such entirely without the protection of our laws; but such persons, being inhabitants of co-states, are entitled, upon reasons of comity, to enjoy here all the rights secured to them in the place of their domicile which are not positively prohibited by law, or contrary to the public policy. And that the ingress and residence in this state of free negroes from other states was prohibited, but that the reason of that policy was in reference only to their presence and residence here, and in consequence of their improper influence with the slaves in this state, and the force of their example in producing discontent and insubordination in the slaves; and hence they were only debarred from exercising here such rights as required their personal presence. And that a free negro of another state might, therefore, lawfully be a legatee of a pecuniary bequest, which is directed by the will to be raised by the sale of the testator's plantation and slaves, and paid to the legatee out of the state,—just the provision made in the will of Colonel Mathews. Indeed, it is probable that this will was made with a full knowledge of this decision, the decision being made in April, 1858, and the will in the February following. The principles laid down in the case of Shaw v. Brown, are not in conflict with any decision made in the state, or with any law of the state, but are sustained both by the decisions in the cases stated, and the statutes, with the exception of the cases of Heirn v. Bridault, and Mitchell v. Wells, the weight of which as authority, is greatly weakened when it is a matter of public history that they were made during a time of great public excitement between the people of the slaveholding and non-slaveholding states; in none of which was this excitement greater than our own.

Judges, no matter how learned they may be, and honest of purpose, are subject to like influences with other men, and it would be strange if under such excitement and pressure of public opinion, they would not sometimes come to conclusions to which they would not come under other circumstances. But this is not the only reason that goes to weaken the weight of these cases as authority. While, so far as they related to the cases then before the court, they were the judgment of the court, and to be respected as such, yet the conclusions to which the majority of the court came were not those to which all the members of the court arrived. The learned judge who had delivered the opinion of the court in the cases of Leiper v. Hoffman, and Shaw v. Brown, was so convinced of the incorrectness of many of the opinions expressed that he deemed it his duty to deliver well-considered dissenting opinions in each case, in which the reasons given by him were then and are still to my mind much more convincing and satisfactory. The decisions of the court of the state as to her laws and public policy, to be authority, must have been continuous and uniform. Those that are conflicting, and especially those made under public excitement and pressure of public opinion, have been held by the supreme court of the United States not binding on that court; nor are they on this. In the case of Pease v. Peck, 18 How. [59 U. S.] 595, Mr. Justice Grier, in delivering the opinion of the court, uses this language: "When the decisions of the state court are not consistent, we do not feel bound to follow the last, if it is contrary to our own convictions; and much more so is that the case when, after a long course of consistent decisions, some new light suddenly springs up, or an excited public opinion has elicited new doctrines subversive of former safe precedent." The same doctrine is held in recent cases in Wallace.

I am satisfied, from a careful examination of the facts and the law bearing on this point, that the complainants are entitled to have the trusts in their favor in the will of the testator executed, unless they are barred therefrom by the proceedings had in the probate court of Warren county, affirmed in the high court of errors and appeals. The defendants'

counsel insist that they are; and this is the third question presented. It is insisted that the will directed the entire estate to be converted into money, and that such direction made the bequest personal, and not real estate; and that such being the case, the executor was the only necessary party before the court; and that the decree of that court declaring the complainants slaves, and incapable of taking under the will, is conclusive, and bars them from any right under the will; and numerous authorities are referred to to sustain this position. It is conceded that the general rule is, that real estate directed to be sold and converted into money will be treated as money, and money directed to be vested in the purchase of real estate will be treated as real estate. It is also true that the executor, as against all persons claiming the personal estate other than as legatees or distributees, does represent the personal estate, and none others need be made parties, as the executor represents the legatees or distributees, and also the interest of creditors, if the claimant is other than a creditor; and the judgment for or against him, in his representative capacity, binds those whom he represents; but after the debts and all other claims upon the property or fund are satisfied, and nothing remains but to appropriate the residue to the legatees or distributees, the executor ceases to be a representative, and becomes simply a bailee, holding the property or funds for those who are of right entitled to it; and the question as to whom it may belong is one in which the claimants are alone interested. It is a rule of law, too well settled in this state to be controverted, that no one can be deprived of his interest by judicial judgment, without being, by himself or a proper representative, made a party to it, with an opportunity to defend his rights. Where there is a right, there must be a remedy. Thus, the statutes of the state provide that, before a guardian's, executor's, or administrator's final accounts shall be confirmed, all the parties in interest must have been first cited to appear, and have an opportunity to show cause to the contrary, if any they have, why the same shall not be done, and for the reason the questions involved are alone between those entitled to the estate and the fiduciary agent in whose hands it has been placed. And when proceedings are to be had for the division or distribution of the estate or fund, all parties in interest must be before the court, because they, and they only, are interested in the decree that the court may pronounce. I am aware of no case in which a decree has been held binding upon one claiming an interest in an estate as legatee or distributee, who had not in some way been made a party to it, and by which decree he was deprived of his interest and right in the thing claimed.

There is no dispute as to the validity of this will, so far as to the forms of the law being complied with, and the testamentary capacity of the testator, or the validity of the other devises and bequests therein. The contest was one in which those claiming to be heirs at law and next of kin of the testator were parties on the one side, and these complainants and the bank on the other. These complainants were in no way made parties to it, and cannot in any way be bound by it. If they could have been bound by it, it would have had the effect of reducing them again to a state of slavery for life, without giving them a day in court—a proposition that would not, upon calm reflection, even in that day of excitement, have been maintained by any jurist. Indeed, the very Code, the provisions of which have been so earnestly invoked to sustain the defense, makes provision that any one held in slavery who claims to be free, may assert that right in the courts of this state; and makes provision for the protection of the slave against his master during the litigation. The rules of law and reasons against this point of defense are so palpable, reference to authority or further comment is unnecessary; and it must be held that the trusts under this will in favor of the claimants, as far as it can be done, must be enforced and executed. The will was admitted to probate on April 25, 1859, and was and has been notice to all the world of the trusts and provisions therein made: Consequently these heirs and next of kin of Colonel Mathews, and those who held under them, must be held chargeable with notice of the rights of claimants under the will. It cannot be held that their assignees are protected by the decree in the probate court, for they must be held to know the whole proceeding, and that it was without notice to complainants, and that they were not bound by it, for the reasons already stated. It is, however, contended by defendants' counsel, that this court can render no decree in this cause in favor of the complainants without having all the heirs at law of Colonel Mathews before it, who would have been entitled to the estate after payment of the debts and other legacies, had he died intestate, and that most of them being nonresidents of the state, have not been, and cannot be made parties, and that their interests are so blended that no decree can be rendered against those who are parties that will do justice to them. There is no controversy between the persons provided for in the will. The will being established and the complainants being entitled to the trust in their behalf, there are no parties in interest except those who have had the estate in possession. I am aware of no law or rule which requires the heirs at law and next of kin of a testator to be made parties to a proceeding to enforce the trusts created by the will, and for the very plain reason that they have no interest in it. Indeed, rule L., adopted by the supreme court, expressly provides that they shall not be made

parties; but in a bill to establish the will, and not for the enforcement of the trusts in it, then they may be parties; and such will be found to be the rule in all equitable proceedings. It is very different from a proceeding against those entitled to the trusts under the will; as we have seen, beneficiaries under the will are the parties directly interested.

The result is, that as these complainants were in no way before the court when Springer the executor's final account was confirmed, they were not bound by it, and he must account for the estate that went into his hands, and the administrator with the will annexed must account for the estate that went into his hands. The property, real and personal, that remains, must be sold, and the proceeds loaned at interest, or vested in safe securities until, as provided by the will, the complainants shall become twenty-one years of age; or, if Caroline shall marry, her portion then to be paid to her. There having been a misdescription of the bank intended as the custodian, and, upon the contingency mentioned, the beneficiary under the will, this part of the provision of the will must fail. If, however, any of the specific legacies under the will have not been satisfied, and are chargeable upon the fund to be raised as aforesaid, they must be first paid; whether such is the case or not, will be a subject of future inquiry. Decree accordingly.

MATHEWSON (CLARKE v.). See Case No. 2,857.

Case No. 9,278.

MATHEWSON v. SPRAGUE et al.

[1 Curt. 457.] [1]

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

GUARDIAN AND WARD—AD LITEM—OPPOSING INTERESTS—PROBATE COURT—JURISDICTION—NOTICE—WILLS OF LAND.

1. A statute guardian cannot represent his ward in court, in a matter where his interest is opposed to that of the ward, except by force of some statute authority, or by an appointment by the court; and no court would appoint such a guardian ad litem.

2. The court of probate has only a special and limited jurisdiction, and must act in the manner prescribed by statute; otherwise its acts are void. If it make a decree without notice, when the statute requires notice, a party entitled to notice may treat its decree as void.

[Cited in U. S. v. Hall (N. M.) 21 Pac. 86.]

3. The 10th section of act of Rhode Island of 1822, so far as it respects the service of notice to wards on their guardians, is repealed.

4. In Rhode Island the probate court has exclusive jurisdiction of the probates of wills of lands.

[Cited in Moore v. Greene, Case No. 9,763.]

[Cited in Olney v. Angell, 5 R. I. 202.]

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

This was an action of ejectment to recover an undivided part of four lots of land, situate in Cranston and Johnston. The plaintiff [George Mathewson] proved that William Sprague died seised of the lands, on the 27th of March, 1834, and it was admitted that he left three children, William, Amasa, and Almira, and that the plaintiff was one of four children of his daughter Susanna, who died in the lifetime of her father. The plaintiff, together with one sister and two brothers, were all minors, at the decease of their grandfather, and Amasa Sprague was their statute guardian. The defendants claimed under the will of William Sprague, and offered to put it in evidence. The plaintiff objected, because it had not been duly proved and allowed by the court of probate. On examining the will and its probate, it appeared, that William and Amasa Sprague, the testator's two sons, were executors and residuary devisees and legatees, and that far the larger part of the testator's property, including his lands, was devised and bequeathed to them. And on the production of the decree of the probate court, it also appeared that the will was presented by the executors for probate three days after the testator's death, and that the court dispensed with notice, by reason of the written consent of all parties known to the court to be interested, and residing within the state, that consent being given for the plaintiff, and his sister and brothers by Amasa Sprague, their guardian.

Carpenter & Ames, for plaintiff.
Greene & Robinson, for defendants.

CURTIS, Circuit Justice. The questions are, whether the probate of this will is defective, and if so, whether that defect renders the decree void, or only voidable by some appropriate proceeding to be had in that matter, by appeal or otherwise, as provided by law. To enable a statute guardian to bind his ward by a proceeding in a court of justice, some statute authority must be found for his act. The statutes of the several states on this general subject are not uniform, but I am not aware that any where the statute guardian is made, generally, competent to represent his ward in legal proceedings. The general rule certainly is, that a guardian ad litem is to be appointed for that purpose. 1 Johns. 509; 10 Johns. 486; 8 Cow. 365; 3 Chit. Gen. Prac. 288. And this rule extends to probate courts. Hart v. Gray [Case No. 6,152]. It is very clear that no court would appoint the statute guardian, guardian ad litem, if his interest were directly opposed to that of the ward. Parker v. Lincoln, 12 Mass. 16; Noyes v. Barker, 4 N. H. 406.

The defendants' counsel do not assert that Amasa Sprague, who was one of the residuary legatees and devisees under the will, and, therefore, strongly interested to procure

its probate, could, as statute guardian, represent and bind his wards, in that proceeding, unless some authority to do so can be found in the statute law of Rhode Island; but they urge that such authority is found in an act passed in 1822, and found in the Digest of 1822, p. 214. The 10th section of this act was as follows: "That previous to the rendering of any order or decree in any matter before them, the said court of probate shall give to all known parties interested, living within the state, at least three days' notice, that they may be heard thereon; which notice shall be served by the town-sergeant, or constable, or the sheriff or his deputy, by reading the same to the party, if found, or otherwise by leaving an attested copy at the last and usual place of abode of such party; and when infants or wards are interested, notice aforesaid shall be served on their respective guardians; or such court may give notice, as aforesaid, to all parties, by advertisement printed three successive weeks in some newspaper printed within this state." And the section then proceeds to declare the effects of an appeal upon the different kinds of decrees made by probate courts.

The first section of the act of January 20, 1824 (Pub. Laws R. I. 578), repeals so much of the tenth section of the said act as provides for the manner of giving notice. The second section requires, that previous to the rendering of any order or decree in any matter before them, the court of probate shall cause all parties known to them to be interested, living within the state, to have notice. It then prescribes different modes of giving notice, and then provides that if all such parties shall have given their consent in writing, the court may proceed without notice. It is argued that the clause in this tenth section, respecting the service of notice on guardians, is not repealed; and that if, by law, notice was to be served on the guardian, it was competent for him to consent to proceed without notice. I do not know that this necessarily follows, especially in a case like the present. It can hardly be supposed the law intended that a guardian, interested against his ward, would represent him in court; it must have expected that the effect of a notice to his ward, served on him, would be, that he would take care that his ward was properly represented in court by another; and not that he would consent to have the court proceed instanter, without actual notice to the ward, and without such fit representation being provided for by the ward, or his friends, or the court. And it does not seem to me that an authority to take a legal notice, of a length prescribed by law, for the ward, necessarily, and in all cases implies an authority to shorten the time and agree to a proceeding instanter. But it is not necessary to rest upon this; for I think this clause in the tenth section is repealed. The repeal is, of so much of the tenth section, as provides for the manner of giving notice. This is not a repeal of the whole section; but besides the first part of the section which relates to notices, there is another part which relates to the effect of an appeal. This satisfies the restrictive words, "so much," &c.; and though it is only what relates to the manner of giving notice which is repealed, yet the clause in question, which provides a manner of giving notice to wards by serving on their guardians, is clearly within the description of the part repealed. My opinion is, that this guardian was not empowered by any statute to consent in writing for his ward, and consequently, that the proceeding was irregular. And I think it very clear, that this irregularity was of such a nature to render the decree utterly void, as against this plaintiff.

A court of probate has only a special and limited jurisdiction. And being expressly required by statute, before making any decree, to cause those interested to have notice, if it proceeds to make a decree without complying with this requisition of law, any party entitled to notice, may treat such a decree as void; and this upon several grounds. 1. Because the court has not jurisdiction to determine the rights of such parties. This was held by the supreme court, in Harris v. Hardiman, 14 How. [55 U. S.] 344, in respect to a court of common law, which had rendered a judgment by default, without notice. And in numerous cases the same law has been applied to courts of probate. 11 Mass. 507; 5 Pick. 343; 18 Pick. 115; 3 Cush. 352; Hart v. Gray [supra]. 2. This court being of a special and limited jurisdiction can do no binding act which is prohibited by statute, and it is prohibited to make a decree without notice. 2 Mass. 120; 7 Mass. 70; 4 Mass. 117; 11 Mass. 513, 514, and the cases there cited. 3. The plaintiff could not appeal, for he had no notice of the decree; and no writ of error will lie; whenever a person interested, cannot have remedy according to law, by writ of error or appeal, he may avoid the judgment or decree by plea and proof; that is, whenever it is set up to affect his rights, he may aver its nullity. 11 Mass. 513, and cases there cited; 17 Mass. 91; 2 Metc. [Mass.] 138.

It has been argued, that though this may be so in cases affecting the person, these principles are not applicable to a decree of probate of a will. That this was a proceeding in rem; and when the will was filed the court obtained jurisdiction, and its decision that the guardian could consent for the ward, though it may have been erroneous, was an error occurring in the exercise of its jurisdiction. It is true, the proceeding is, in some sense, in rem; but so was the proceeding in 11 Mass. 507, where this subject was very carefully considered, and in 4 Mass. 117, and 7 Mass. 70, and 17 Mass. 91. These were decrees of partitions, which were strictly in rem. And there is no sound reason for any distinction between decrees in rem and in

personam. In The Mary, 9 Cranch [13 U. S.] 126, 142, 144, the supreme court, speaking of proceedings in rem, say: "Notice of the controversy is necessary in order to become a party; and it is a principle of natural justice, of universal obligation, that before the rights of an individual be bound by a judicial sentence, he shall have notice, express, or implied, of the proceedings against him. Where these proceedings are against the person, notice is served personally, or by publication; where they are in rem notice is served on the thing itself." In Bradstreet v. Neptune Ins. Co. [Case No. 1,793], Mr. Justice Story held such a proceeding void, for want of notice of specific allegations; and he uses this language: "I hold, therefore, that if it does not appear upon the face of the record of the proceedings in rem, that some specific offense is charged, for which the forfeiture in rem is sought, and that due notice of the proceedings has been given, &c., it is not a judicial sentence, &c." Yet, in that case, the vessel proceeded against was within the jurisdiction of the court. The case in 4 N. H. 406, is also directly in point. Nor can it be maintained that this error occurred in the exercise of jurisdiction. It is true, the probate court, on the receipt of the will, has jurisdiction for the purpose of placing and retaining the will on its files, and issuing the proper notices to the parties in interest, and causing witnesses to be summoned and sworn, and taking all steps preliminary to a hearing; but it has not jurisdiction to make a decree, until all parties, entitled by law to notice, have been duly notified; and if it proceed to make a decree without notice, it acts without authority, and its decree is void. It is of no importance, that it decided that notice was not necessary in the particular case, because the guardian had consented for the ward. If notice was necessary, by law, the court had no power to dispense with it, and whether it thought the dispensing power existed, or what were its reasons for thinking so, are immaterial. The result is, that this will has not been proved.

After this decision had been given, the defendants' counsel offered to prove the will in this action; but THE COURT ruled, that the only tribunal competent to receive the evidence, and pass on the probate of the will, was the court of probate; that the decree of that court, admitting or refusing probate, is conclusive, both as respects lands and personalty, and its jurisdiction over the question of probate is exclusive. The defendants' counsel then moved for a continuance to enable the defendants regularly to offer the will for probate to the proper court, and it was granted; THE COURT being satisfied that the defect in the proceedings was not occasioned by any fraud, but was merely a mistake, which the defendants ought to have opportunity to correct.

MATHEYS (COOPER v.). See Case No. 3,200.

MATHIESSON (UNION SUGAR REFINERY v.). See Case No. 14,397.

MATHOIT (UNITED STATES). See Case No. 15,740.

Case No. 9,279.

MATHUSON v. CRAWFORD.

[4 McLean, 540.] [1]

Circuit Court, D. Indiana. May Term, 1849.

CONTRACTS—LEX LOCI CONTRACTUS—REMEDY—LEX FORI.

1. The law of the contract must be regarded and enforced by all courts, wherever suit may be brought.

2. But this law can not embrace the remedy. The remedy belongs to the state where it is brought.

[This was an action of ejectment by Doe, on the demise of B. Mathuson, against Crawford.]

Smith & Yandees, for plaintiffs.

Harvy, Gregg & Hammond, for defendant.

OPINION OF THE COURT. This case is submitted to the court, on the following facts: The judgment upon which the land in question was sold was for a note in Cincinnati, dated on the 5th day of September, 1839, executed by the defendant to Caroline White, etc. The judgment was rendered in Indiana, 7th day of October, 1841, and was replevied by Amos S. Wells, on the 23d day June, 1842, fi. fa. issued and delivered to the sheriff, and on the 12th July, 1842, the land was valued, under the provisions of the statute, at $1200; on the 15th of August, 1842, the land was offered for sale and a return made, "no sale for want of bidders." On the 3d of July, 1844, the plaintiff's lessor purchased the land for $161, without regard to the appraisement laws. He the lessor of the plaintiff then being the owner of the judgment by assignment. On the 28th day of December, 1846, the sheriff made a deed for the land. It is now worth $800.

The question which arises from the above facts is, whether the sale made by the sheriff, of the land in question, without regard to the valuation laws, is void. The statute of Indiana, approved 13 February, 1841, provides, that no lands shall be sold for less than one-half their value, and that to be determined by appraisers under oath. This land sold for $160, less than half its appraised value, and less than half its real value as agreed. At the time the law required real estate to sell for its full value. Rev. Code 1843, p. 1044. This case is supposed to have been decided by this court in the case of Smith v. Atwood [Case No. 13,006]. In that case a motion was made to set aside the return of the marshal, and that

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

he be directed to collect the money under the laws of Pennsylvania, on the ground that the note on which the judgment was entered was made in Pennsylvania. The court overruled the motion. That was the decision given in the case referred to.

The case now before us calls upon the court to decide whether the laws of Ohio, where this note was made, shall control the execution on a judgment rendered in Indiana. And it must be admitted that the doctrine laid down in the case of McCracken v. Hayward, 2 How. [43 U. S.] 606, sustains the position taken, that the laws of Ohio must govern. In that case the court says, "the obligation of the contract between the parties, was to perform the promises and undertakings contained therein; the right of the plaintiff was to damages for the breach thereof, to bring suit and obtain a judgment, to take out and prosecute an execution against the defendant, till the judgment was satisfied pursuant to the existing laws of Illinois. Those laws, (that is the laws of the remedy), giving those rights, were as perfectly binding on the defendant, and as much a part of the contract, as if they had been set forth in its stipulations, in the very words of the law, relating to judgments and executions." No one can mistake the principle here laid down. It incorporates the remedy into the contract, as constituting an essential part of it. This being the rule, in regard to the remedy, we are not to look to the laws in force at the time it is actually sought, but we must refer back to the date of the contract, and inquire what laws were then in force. The legislature may have repealed them, but the simple act of making the contract keeps them in force, as a remedy, in defiance of legislative power. This, looking to the remedy only, is a startling position; and if it have no other merit, is certainly novel. We know, practically, that some of our state legislatures make, almost annually, alterations in remedial laws. How these different modes would work, all remaining in force as laws of contracts, remains to be seen. It would, certainly, greatly increase the perplexities of all sheriffs and marshals, and others who are called upon to perform similar duties. But the principle does not end here. The contract brings into any state where suit may be brought upon it, the remedy which the law gave in the state where it was entered into. This is clearly within the decision. And this places the law of the remedy, not only above the legislative control of the state where the suit is brought, but the contract brings into the state new remedies, of other states, never having been recognized in the state where they are to be enforced. And in carrying out such a principle, it might happen, and no doubt would occur, that the means of giving effect to a foreign remedy, legalized by the contract, do not exist in the state. Will the foreign law, brought into a state by the contract, enable the court or the parties to institute the necessary agencies to give it effect? The case in Illinois where the contract was made and enforced, gave some plausibility to the principles laid down in the decision; but it must be seen by every one who examines the subject, that the principle can not be carried out. It is impracticable, and can not be enforced in numerous cases. In the present case the laws of Ohio can not be recognized in Indiana, in giving a different remedy from the existing law here. No difficulties arise in giving effect, in any state to what is properly called the law of the contract, in contradistinction to the law of the remedy. The above decision confounds the two which are distinct in their nature and obligation, and treats them as one. In this, in my judgment, the error of the decision consists.

In the case before us, the note was given to a firm in Cincinnati, and payment was to be made there. We look to Ohio for the rate of interest, and also if there were indorsements, to the demand of payment and protest, and notice required by the law of Ohio. But as the remedy has been sought in Indiana, the laws of Indiana must govern. Not the laws in force at the date of the contract, for it having been made in Ohio, by no possible construction, could have had any reference to the laws of Indiana. Those laws are invoked for the first time in bringing the suit, and the law in force, regulating execution at the time judgment was rendered, must govern the case.

Case No. 9,280.

MATILDA v. MASON et al.

[2 Cranch, C. C. 343.] [1]

Circuit Court, District of Columbia. Oct. Term, 1822.[2]

SLAVERY—SUIT FOR FREEDOM—JURY—PREJUDICES—PRESUMPTION OF COMPLIANCE WITH LAW—LAPSE OF TIME.

1. In suits for freedom the court will not question the jurors, as they are called up to be sworn, as to their prejudices or prepossessions in favor of freedom, but leave the parties to their challenges.

2. A person relying upon the proviso in the Virginia law in favor of persons coming to reside in Virginia, and bringing their slaves with them and taking a certain oath, must produce competent testimony to prove that the terms and conditions of the proviso had been complied with, and in the absence of all testimony, no presumption can arise from lapse of time, to supply the defect of the testimony.

This was a petition for freedom [by the negress Matilda against Mason & Moore], founded upon an importation from Maryland to Virginia in the year 1792.

When the jury was about to be sworn, Mr. Jones, for defendants, stated that it had been an old practice in this court, in suits for

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

[2] [Reversed in 12 Wheat. (25 U. S.) 590.]

freedom, to ask each juror, before he was sworn, the following questions: (1) Have you any conscientious scruple which disinclines you to find a verdict against the petitioners for freedom, and inclines you to find a verdict in their favor, even when the law and evidence, upon strict legal principles, are against them? (2) Do you consider yourself in conscience, and upon principle, bound to find a verdict in favor of the petitioner, if the evidence be doubtful?

No objection to these questions was made by the petitioner's counsel, and the court did not, at the moment, object to them. The questions were put, and some of the jurors stated that they did not feel indifferent in such cases, and were set aside.

But THE COURT (THRUSTON, Circuit Judge, not giving any opinion), having referred to the cases of Reason v. Bridges [Case No. 11,617], in this court at December term, 1807, and Joice v. Alexander [Id. 7,435], at December term, 1808, and Davis v. Wood [Id. 3,659], at December term, 1813, said, that this case must not be drawn into precedent, as the court did not mean to sanction such a practice; believing that the rights of the parties are sufficiently protected by the right of peremptory challenge given by the statute, and by the common-law right to challenge for cause. That the court was not aware of any precedent for such a practice, and was not inclined now to adopt it.

Upon the trial, the facts, as stated in the bill of exceptions, appeared to be, that before December, 1792, James Craik removed into the county of Fairfax in Virginia, with intent to settle therein, and to become a citizen of Virginia, and did so settle and become a citizen of Virginia, and continued to reside therein till his death in 1814. That at the time of his removal he brought the petitioner, she then being his slave, with him into Virginia, and there held her and her children as his slaves until his death, when he bequeathed them to his widow, who in 1814 removed from Fairfax county into the county of Alexandria in this District, with her said slaves, and continued there to hold them as her slaves until her death in 1815, when she bequeathed them to the wives of the defendants Mason and Moore, who were then inhabitants of the District of Columbia. That all the magistrates who were in commission in the county of Fairfax in the year 1792 were dead before the year 1818.

Upon which state of facts the petitioner's counsel, Mr. Turner and Mr. Taney, prayed the court to instruct the jury, "that if the defendant wishes to avail himself of the proviso in the 5th section of the act of 1785, c. 77, it is incumbent on him to produce competent testimony to prove that the said James Craik had complied with the terms and conditions of the said proviso; and that, in the absence of all testimony, no presumption can arise from lapse of time or other facts in the case agreed, to supply the defects of such testimony."

Mr. Turner and Mr. Taney, for the petitioner. This case is not subject to the ordinary rules of evidence. Queen v. Hepburn, 7 Cranch [11 U. S.] 298, Mr. Justice Duvall's opinion. No lapse of time can bar a claim for freedom. Even in ordinary cases lapse of time must be attended by corroborating circumstances. Butler v. Craig, 2 Har. & McH. 226; 1 Phil. 110. The burden of proof, that he had complied with the conditions of the proviso, rests on the master. Garnett v. Sam, 5 Munf. 542, 546; Rose v. Kennedy [Case No. 12,049], in this court, July term, 1801; Garretson v. Lingan [Id. 5,251], in this court, at April term, 1821,—where this court decided that no such presumption can arise from lapse of time against a slave who is incapable of asserting his right.

Mr. Jones and Mr. Lear, contrà, contended that a presumption that the oath was duly taken, arises from the lapse of thirty years since the petitioner was brought from Maryland into Virginia, and the long continued possession of the slaves by the defendants and their ancestors, without any question having been suggested as to that fact, and the death of all the magistrates of the county who could have administered the oath, of which no record, or even certificate, was required by the law. The 5th section of the act of 1785, c. 77, is a proviso that nothing in the act contained "shall be construed to extend to those who may incline to move from any of the United States, and become citizens of this, if, within sixty days after such removal he or she shall take the following oath before some justice of the peace of this commonwealth." The law does not require even that the oath shall be reduced to writing, and even if it were, and certified, the certificate would not be evidence, unless made so by the statute. If nothing but direct and positive testimony to the fact is sufficient evidence, and all the witnesses are dead, and the lapse of time raises no presumption, and the burden of proof is on the master, there is no security whatever for property of this description. The law is highly penal, and every man is presumed to be innocent till the contrary is proved. The presumption is in favor of duty; the negative must be proved. 1 Phil. Ev. 150, § 4.

THE COURT (CRANCH, Chief Judge, contrà) gave the instruction as prayed; but the jury found a verdict for the defendants. THE COURT granted a new trial without costs.

The cause came on again to be tried at April term, 1823, when the same instruction was given, and the jury found a verdict for the petitioners. The defendants took a bill of exceptions, which after stating the facts, and instruction given as above, proceeds thus: "And thereupon the defendants insisted and contended before the jury that the facts given in evidence as aforesaid, do

not impose upon the defendants the necessity of proving by substantive evidence, that the said James Craik had taken the oath prescribed by the act of the general assembly of Virginia, passed in the year 1785, c. 77, within the time prescribed by that act; and that the jury, upon the said state of facts, ought not to find for the petitioner for the want of such substantive proofs on the part of the defendants. 2d. That the jury, under the circumstances so given in evidence, may presume that the said James Craik had taken the said oath in the prescribed time; but the court, upon the motion of the petitioners, overruled all the points so insisted upon and contended for by the defendants, and stopped the defendants' counsel from proceeding to maintain the points, or any of them, so insisted upon and contended for, before the jury, by the defendants."

Upon a writ of error the judgment in this case was reversed by the supreme court of the United States, and a venire facias de novo awarded. 12 Wheat. [25 U. S.] 590.

Memorandum. The case of Abraham v. Matthews, 6 Munf. 159, cited by Mr. Justice Johnson, in delivering the opinion of the supreme court, in this cause in 1827, was not brought to the notice of the court below.

MATILDA, The (UNITED STATES v.). See Case No. 15,741.

Case No. 9,281.

The MATILDA A. LEWIS.

[5 Blatchf. 520.][1]

Circuit Court, S. D. New York. Nov. 19, 1867.

OFFICERS—SECRETARY OF WAR—ORDER PROHIBITING EXPORTATION—CARRIERS—SHIPPING—BILL OF LADING—FAILURE TO DELIVER—SEIZURE—LIABILITY.

1. The order of the secretary of war, of the 13th of May, 1863, directing the commanders of departments to prohibit the purchase and sale of horses, mules and live stock intended for exportation, and to cause the value of the same to be appraised, and the articles to be reported to the quartermaster-general, and to be taken and appropriated to the use of the government, and the order of the secretary of the treasury, of the 19th of May, 1863, to the collectors of customs, directing those officers to refuse clearances for the exportation of horses, mules and live stock, and to cause the detention of all animals attempted to be exported in violation of such orders, and to report the detention to the commander of the nearest military district, for his action, in pursuance of such order of the secretary of war, were invalid, as not being authorized by any act of congress.

2. Under said orders, live fowls were not embraced within the term "live stock."

3. Where live fowls were put on board of a vessel, at New York, for exportation to Havana, and three bills of lading were signed for them, one of which was retained by the master of the vessel, and two of which were delivered to the consignor, and forwarded to the consignee, who made an advance thereon, and afterwards the fowls were seized by the collector of customs, under said orders, and removed from the vessel, and the bill of lading in the hands of the master was cancelled by the consignor: *held*, in action by the consignee against the vessel, on the two bills of lading, to recover the amount of such advance, because of the non-delivery of the fowls as Havana, that the vessel was liable.

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

This was a libel in rem, filed in the district court, by Philip E. Desvernine and Anthony Desvernine against the barque Matilda A. Lewis, to recover the amount of an advance made by them to one C. Glass, on the bills of lading of a shipment of seventy-four coops of live fowls, made by Glass, by that vessel, from New York to Havana, on the 6th of October, 1863. The district court dismissed the libel, and the libellants appealed to this court.

Robert D. Benedict, for libellants.
Charles Donohue, for claimants.

NELSON, Circuit Justice. The main defence set up, in this case, is, that the shipment was illegal, and the contract arising out of the bills of lading void. It appears, from the proofs, that the secretary of war issued an order, on the 13th of May, 1863, to the several commanders of departments, reciting, that information had been received at the department, that sundry persons were purchasing horses and mules, within the United States, for exportation, contrary to the executive order of November, 1862, and, to the end that, during the war, the military resources of the government should not be withdrawn from the country, directing the commanders of departments to prohibit the purchase and sale of horses, mules and live stock intended for exportation, and to cause the value of the same to be appraised, and the articles to be reported to the quartermaster-general, and to be taken and appropriated to the use of the government. The claims against the government were to be adjusted by the quartermaster-general. On the 19th of the same month, the secretary of the treasury issued an order to the collectors of customs, referring to the above orders, and directing those officers to refuse clearances for the exportation of horses, mules and live stock, and to cause the detention of all animals attempted to be exported in violation of the orders, and to report the detention to the commander of the nearest military district, for his action, in pursuance of the order of the secretary of war. The fowls in question were seized by the collector of the port of New York, under the orders above cited. The goods had been put on board, bills of lading had been given, and the vessel had cleared, before the seizure of the vessel and the fowls. Two of

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

the bills of lading had also been forwarded to the consignees of the goods, and the advance in question made by the agent of the consignees. After the seizure, the fowls were taken from the vessel, by an arrangement with the consignor and the custom-house officers, and the vessel was allowed to proceed on her voyage. The consignor cancelled the bill of lading in the hands of the master. The other two bills of lading had already been sent to the consignees, with advices of the advance made by their agent.

It is quite clear, that the defence to the claim for the advance on the bills of lading, and for the non-delivery of the goods at the port of destination, must rest on the validity of these orders. For, I agree that, if they can be upheld, and if the fowls are embraced within the term "live stock," the contract of shipment was illegal, and cannot be the foundation of a suit. Abb. Shipp. pt. 4, c. 13; and see Evans v. Hutton, 6 Jur. pt. 1, p. 1042. There is great difficulty, however, in upholding them. No act of congress has been referred to, nor have I found any, authorizing them. They amount, on the most mitigated construction that can be given to them, to an entire prohibition of the commerce of the country in the articles of horses, mules, cattle and sheep, all of which are confessedly within the scope of the orders—a commerce made lawful by our navigation laws and by treaty stipulations. This trade is absolutely suspended indefinitely; and, not only this, but the government, in the mean time, is made the general purchaser of all this description of property destined to a foreign market.

Moreover, if the construction given to the orders by the custom-house officers can be maintained, then I do not see but that all the domestic animals of the United States fell within the prohibition, and were taken out of the foreign commerce of the country. I am satisfied, however, that, upon a true and obvious interpretation, the article of fowls was not embraced within the scope of the orders, and that the custom-house officers misconstrued them. Indeed, it is due to the secretary to say that, on his attention being called to the subject, he disavowed the construction.

The cancellation of one of the bills of lading cannot protect the ship. The master should have had all the parts of the bills of lading delivered back to him or cancelled. The case is an unfortunate one, and hardship attends the decision, in either way in which the case may be decided; but I can only follow out the law of the case. The decree below must be reversed, and a decree be entered for the libellants.

MATLACK (LINDENBERGER v.). See Case No. 8,360.

MATLOCK (CHARLES v.). See Case No. 2,615.

Case No. 9,282.

In re MATOT et al.

[16 N. B. R. 485; 5 N. Y. Wkly. Dig. 529.] [1]

District Court, D. Vermont. Nov. 14, 1877.

BANKRUPTCY — PETITION — REQUISITE NUMBER OF CREDITORS—PARTNERSHIP—ACT OF BANKRUPTCY—DEFAULT—HOW OPENED.

1. Where the requisite number of creditors join in a petition against a firm, it is not necessary that they should all be creditors of the firm.

2. The taking of partnership property, when the firm is insolvent, to pay a debt not a debt of the firm, although each of the partners may be liable for it, is an act of bankruptcy.

3. Where the requisite number of creditors have signed the petition, an adjudication will not be set aside on the ground that such petition was procured by the bankrupts as an involuntary one to avoid the necessity of procuring the assent of the necessary number of creditors in case of a deficiency of assets; there can be no legal fraud in procuring an adjudication on involuntary proceedings unless it should be followed by a discharge that could not be had on voluntary proceedings. An adjudication by default can only be opened at the instance of a party to the default.

[In the matter of E. L. Matot & Co., bankrupts.]

WHEELER, District Judge. This is a petition brought by several creditors of the bankrupts, setting forth in substance that the adjudication of bankruptcy of the bankrupts, heretofore made, was upon a creditor's petition; that the petitioning creditors were not, in fact, creditors of the firm; that the requisite number and amount did not join in the petition; that the acts of bankruptcy alleged did not in fact exist; and that the petition was procured by the bankrupts themselves as an involuntary one to avoid the necessity of procuring the assent of one-fourth in number, and one-third in value of the creditors to a discharge in case of a deficiency of assets for the purposes of a discharge on a voluntary petition, and praying that the adjudication be set aside. The petitioning creditors and the bankrupts have answered this petition, and it has been heard on the petition, answers, proofs, and argument of counsel. Upon the proofs it may be somewhat doubtful whether both of the petitioning creditors are creditors of the firm to any amount at all, and if they are to any amount whether they are so as to all the claims set forth in their petition; but it does appear that one of them is a firm creditor to some amount, and that the other is an individual creditor, at least of one of the firm to some amount. By section 5121, Rev. St. U. S., two or more persons who are partners in trade may be proceeded against on the petition of any creditor of the partners, and the partnership property applied to the payment of partnership, and the individual property to the payment of individual debts. This sufficiently shows that,

[1] [Reprinted from 16 N. B. R. 485, by permission. 5 N. Y. Wkly. Dig. 529, contains only a partial report.]

if there was a sufficient number joined, the proceeding was a proper one as to both the firm and its members, and that under it there can be no appropriation of firm property to the payment of any other than firm creditors. It does not appear whether the requisite number did join or not, for it does not appear to what amount, if any, there are creditors other than the originally petitioning, and these petitioning creditors; and if these are all there are, these now petitioning were secured by attachment, and not entitled to be counted, and the requisite number did join. But whether they did or not it is conceded that the lack in number was not such as that this petition should prevail on that ground alone, and the establishment of the sufficiency in number establishes the propriety of proceeding against the firm, because, as before stated, they were proceeded against by at least one firm creditor. If firm property could be applied to individual debts before satisfying firm debts there would be more force to an objection that the petitioning creditors were not all firm creditors, but as such property cannot be so applied, and there is no question of distribution here now, it can have but little force. It does appear that partnership property was taken to pay a debt, not a debt of this partnership, strictly speaking, although it may be that each of the partners was liable for it, when the firm was insolvent, which constituted an act of bankruptcy within clause 7, § 5021, Rev. St. U. S. So that one of the acts of bankruptcy alleged did in fact exist.

If there was the requisite number of creditors to the petition, there could be no fraud by the proceeding on the ground of the want of them in respect to procuring a discharge without the requisite amount of assets, or the assent of the requisite number of creditors to entitle the bankrupts to a discharge, although they may have been instrumental in instituting the proceedings. And as it does not appear but that there was the requisite number, the foundation on which the fraud in this respect would rest does not appear on which to grant the petition, if that would be sufficient ground for granting it. Generally, the grounds on which such an adjudication can be set aside must be exceedingly few, if they exist at all in favor of creditors not parties. Of course a default, on which an adjudication was founded could be set aside in favor of the party defaulted for the same reasons that other defaults are set aside in favor of like parties, and new trials could be granted in bankruptcy proceedings in favor of parties to the former trials as in other proceedings. This adjudication was on a default, in proceedings substantially regular. The parties defaulted are satisfied. The law, whether justly or unjustly, required no notice to any others. They were not parties to the default, and as such, have no standing place to have it opened. The law goes further than to leave the finality and conclusiveness of the judgment to the ordinary rules pertaining to similar adjudications, and expressly declares that it shall be final. Act June 23, 1874, p. 213, § 13 [18 Stat. 182]. In the eye of the bankrupt acts, however it may be practically, it is no loss to creditors for their debtors to be adjudged bankrupts in bankruptcy proceedings, of which they have any right to complain. If the debtors turn out to be solvent, it is supposed that they will be paid in full, which is all they could ask; if insolvent, that they will be paid their ratable share with the others, which is all they can, justly to the others, claim. Hence, any person owing provable debts exceeding three hundred dollars in amount, may file a petition and be adjudged a bankrupt, and have his estate settled in bankruptcy proceedings, without making any creditor a party till after the adjudication. Rev. St. U. S. § 5014. So the debtor is supposed to be the only one interested in the question, whether he shall be adjudged a bankrupt or not in involuntary proceedings, and, in that view, the law provides for a trial in respect thereto between him and the petitioning creditors; and it emphasizes the result, as before mentioned, by providing that the judgment shall be final, as if to exclude interference up to that stage of the proceedings by others. As the bankrupt law contemplates the proceedings there could be no legal fraud in procuring an adjudication, unless it should be followed by a discharge that could not be had on voluntary proceedings. No intimation that collusion between a debtor, and less than the requisite number of his creditors, to procure his discharge without the co-operation of the requisite number, and without the necessary amount of assets, would be successful beyond remedy is intended. Perhaps his procurement of such proceedings, for such a purpose, would be good ground for refusing his discharge, which would be all he could gain, or any of his creditors lose, beyond what he could have on his own petition; and perhaps there would be other remedies. To point them out is not the present purpose. In this case it does not appear that there would be a deficiency of assets such as to make an involuntary petition preferabe for the bankrupts to a voluntary one; and without that it would be difficult to find collusion to avoid it. These now petitioning creditors, who, it seems to be considered, are partnership creditors, can have the partnership and individual creditors distinguished from each other, and the partnership and individual assets marshalled for their payment, and a discharge refused, if just grounds exist, and in that way obtain all that in view of the law, as it stands, and its purposes they are entitled to, without disturbing the judgment they complain of. The petitioners in this proceeding claim costs; but it is not clear that any are taxable. It is not a suit in which judgment can be rendered one way or the other; but is an application addressed rather to the discretion of the court. It may be that costs are taxable on such proceedings in the discretion of the court; but if so they

are not taxable of right, probably, and, under the circumstances, none are attempted to be awarded. The petition is dismissed.

MATT, The RICHARD. See Case No. 11,766.

MATTER OF.

[Note. Cases cited under this title will be found arranged in alphabetical order under the names of the parties; e. g. "Matter of Turner. See Turner."]

Case No. 9,283.

The MATTEAWAN.

[4 Ben. 106.] [1]

District Court, E. D. New York. March, 1870.

COLLISION—NEW YORK HARBOR—FOG—STEAMBOAT AND SLOOP.

Where a steamboat in the harbor of New York was proceeding in a dense fog, running close shut off, when she heard a fog horn off her starboard bow from a sloop which was working by sweeps, from an unsafe anchorage in the Narrows, towards the east shore of the bay, and on hearing the horn the engine of the steamboat was stopped, but was not backed, and she was allowed to drift, and the two vessels came in collision. *Held*, that the steamer was in fault for not backing; the sloop was not in fault for being under way in a fog.

[See The Aleppo, Case No. 157.]

In admiralty.

Benedict & Benedict, for libellant.

Beebe, Donohue & Cooke, for claimant.

BENEDICT, District Judge. On the afternoon of the 16th of March, 1868, the steamboat Matteawan bound from New York to Key Port, was proceeding down the bay in a dense fog, and the sloop Fame was working by sweeps from an unsafe anchorage in the Narrows to a place of greater safety, on the east shore of the bay. There was at the time but little wind. A fog horn was constantly blown from the sloop, and a whistle constantly sounded from the steamboat. While the steamboat was running shut off close, she heard the sloop's horn, and her engine was at once stopped, but no stern way was given her, and she was allowed to drift. Shortly, the sloop appeared through the fog a very short distance away. It was then too late for the steamboat to avoid her, and so the vessels came in contact. As to these facts, there is no dispute, but on the part of the claimant it is insisted that upon these facts, under the ruling of the circuit court in the case of The Sylph [Case No. 13,711], there can be no recovery, in as much as both vessels had undertaken to move in a dense fog.

The case of The Sylph, was a case of collision between two steamboats, in a fog, where both vessels stopped and were backing at the blow. The court below considered, that the nature of the blow indicated that The Sylph had not checked her way as much as possible, and she was accordingly in fault. The court above, however, held, that such negligence on the part of The Sylph could not be deduced from the evidence, and added, that the court would not feel bound to examine into conflicting testimony with great closeness, when both the vessels had deliberately undertaken to navigate the bay in a dense fog.

Neither the adjudication of the case of The Sylph [supra], nor the remark of the court, which I have quoted, have any bearing upon a case like this. Here it is shown by the pilot and engineer of the steamboat that, although they were running in a dense fog, and made aware of the presence of an approaching vessel by her horn, they omitted to give their vessel sternway, as they had abundant opportunity to do, but, on the contrary, allowed her to drift down upon the approaching vessel, and so caused the collision. In a fog, a steamboat cannot, under ordinary circumstances, take any chances; she must exercise all the precaution possible, and it was a clear duty on the part of the pilot of the steamboat, under the circumstances, on hearing the horn of the sloop, at once to give his vessel sternway, instead of which he allowed her to drift, and she thus came under the bows of the sloop. This negligence must render her liable for the damages sustained by the sloop. Let a decree be entered accordingly, with an order of reference to ascertain the amount.

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

MATTHESON (HOLIDAY v.). See Case No. 6,602.

Case No. 9,283a.

MATTHEW v. CHASE.

[17 Betts, D. C. MS. 49.]

District Court, S. D. New York. Nov. 21, 1849.

SEAMEN'S WAGES—DIMINUTION—DRUNKENNESS—PERFORMANCE OF DUTY—ALLOWING CLAIM—DEFICIENCY IN CARGO.

[1. The drunkenness of a mate in the home and foreign ports does not bar his right to wages, unless such habits interfered with the performance of his duties, and prejudiced the vessel.]

[2. The commission of improprieties by the mate on board cannot be implied from their perpetration, however frequently and disgracefully, out of the ship.]

[3. The act of the master in allowing the mate, at the end of the voyage, his full claim for wages, and giving a draft therefor, imports that, if there was cause of complaint against the mate for intoxication, it was overlooked or forgiven.]

[4. Although it might be implied from his office that a mate was in charge of a vessel, and intrusted with receiving or unloading a cargo, yet he cannot be charged with a deficiency in the cargo in the absence of evidence that he was put to that duty, or proof that cargo was lost.]

[This was a libel by Ezra Matthew against Alfred S. Chase.]

BETTS, District Judge. The libellant sues for $83.80, the balance of wages due him as mate on the barque Samosett on a voyage from New York to Mobile, thence to Rotterdam, and back to this port. The answer admits the services, and that upon the wages agreed, after deducting payments, a balance would remain in favor of the libellant to the sum claimed, but it alleges in diminution of the demand, and also by way of recoupment to the whole amount, that the libellant did not perform his duty to the ship, but, on the contrary, at Rotterdam, while the barque was taking on cargo, and in the port of New York, while discharging cargo, he was frequently and habitually intoxicated, and guilty of gross neglect and carelessness in taking in and discharging cargo and watching the vessel, and that a large quantity of tin, of the value of $95, part of the cargo, was thereby short, and could not be found, and the respondent was compelled to pay and did pay for the same the sum of $95, and he insists he is entitled to be reimbursed the same from the wages due the libellant to the full amount. The testimony proves that the libellant was grossly intoxicated at Rotterdam, and drank to excess in New York while the vessel was unloading; but there is no proof that he at the time was in charge of the vessel, or was intrusted with receiving or unloading the cargo, or that he was intemperate whilst on board the vessel. Both these facts might probably be implied from his office, yet there should be some evidence that he was put to the duty of taking in cargo, in order to charge him with its deficiency, if any was subsequently proved to exist. There is however no evidence produced to the loss of cargo. The master averred it when called on to pay the wages, and sets up the charge in his answer, yet offers no evidence in suppport of the allegation. That branch of the defence must accordingly be laid out of the case.

The drunkenness of the libellant might have been ground for an abatement of wages, or even for a total denial of them, had it occurred on board, or the master made it cause of discipline, or even objection, during the voyage. It is not shown he did so; on the contrary, on the terminating of the voyage he made up the amount of wages, and gave the libellant an order on the owner for the payment of $81.76 in full thereof. This was an implied concession that no exceptions were taken to the conduct of the libellant in executing the duties of his office. The instance of intoxication proved occurred on shore, and habits of indulgence and excess when out of the ship might not be incompatible with a strict observance by the mate of his duties on board. At least no evidence is given that at any time on the voyage he was incapable of duty, or any way neglected it.

The libellant proves a good general character of long standing, and that he has been intrusted with the command of vessels on foreign voyages, and is a competent seaman, and man of respectable standing, and of superior capacity as a seaman.

These facts do not disprove that he was drunk in Rotterdam and New York, but I must also say the fact of such intoxication cannot of itself bar the libellant's right to wages; his irregular habits must also be proved to have interfered with the performance of his duties, and prejudiced the vessel. The act of the master in settling with the libellant after his discharge in New York, allowing his full claim for wages, in giving a written draft for the amount, imports that if he ever had cause of complaint against the mate for intoxication it had been overlooked or forgiven. I am bound therefore to consider the charge as raised because of the supposed deficiency of cargo, subsequently brought to light, and not as resting on any prejudice to the service of the vessel in the particular itself. Had the mate disqualified himself by intemperance, and thus neglected or insufficiently performed his duties, it would have been easy to make it appear by witnesses on board, and the court would certainly mark the misconduct by saving to the vessel all the indemnity which would be afforded by a subtraction of wages due. The commission of improprieties on board cannot be implied from their perpetration, however frequently and disgracefully, out of the ship. There must be a decree for the libellant to the amount of his wages admitted by the answer to be unpaid. Decree for $83.80 and costs to be taxed.

Case No. 9,284.

MATTHEW v. RAE et al.

[3 Cranch, C. C. 699.] [1]

Circuit Court, District of Columbia. Dec. Term, 1829.

ALIENS—NATURALIZATION — ACT OF CONGRESS—STATE LAWS—RIGHT TO HOLD LAND.

1. An alien could not become a citizen of the United States, or of either of the states, in the year 1793, by taking the oaths, and otherwise complying with the requisitions of the naturalization laws of any one of the states.

2. An alien, as such, has a right, under the 6th section of the Maryland act of December 19, 1791, "concerning the territory of Columbia," &c. to purchase and hold lands in the county of Washington, D. C., and transmit the same to his alien heirs.

[This was an action by Matthew's lessee against Rae, Hayman and Lipsicum.]

Ejectment for lots in Georgetown, D. C. The plaintiff's lessors were aliens and claimed as heirs at law of James Redman, who was born in England, came to this country in 1793, and went through the forms of naturalization prescribed by the laws of Pennsylvania, passed in 1789, and by the

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

law of Maryland, passed in 1779. Congress had passed a general naturalization law in the year 1790 [1 Stat. 103].

THE COURT (THRUSTON, Circuit Judge, absent) was of opinion that Redman was not naturalized; the state naturalization laws being superseded, and annulled by the act of congress, whose jurisdiction upon that subject is, under the constitution of the United States, exclusive (Chirac v. Chirac, 2 Wheat. [15 U. S.] 261), and that, according to the case of Spratt v. Spratt, 1 Pet. [26 U. S.] 343, the plaintiffs, although aliens, were entitled to recover.

MATTHEWS (BIGELOW v.). See Case No. 1,401.

MATTHEWS (CADMUS, The, v.). See Case No. 2,282.

MATTHEWS (GOODYEAR v.). See Case No. 5,576.

Case No. 9,285.

MATTHEWS v. LYALL.

[6 McLean, 13.] [1]

Circuit Court, D. Michigan. June Term, 1853.

REMOVAL OF CAUSES—ALIEN—RIGHT TO DENY REMOVAL.

[Where all the requisites of the act of congress relative to removals have been complied with, the state court has no right to deny the removal; and, if it should so deny, all its subsequent acts in the cause are coram non judice and void.]

[Cited in Ellerman v. New Orleans, M. & T. R. Co., Case No. 4,382.]

[Cited in Lange v. Benedict, 73 N. Y. 36; Sharp v. Gutcher, 74 Ind. 364.]

The defendant being an alien, and being sued before the state court of Oakland county, filed a petition at the first term to remove the cause into the circuit court of the United States. Bond was given, to which there was no objection, and it appeared that the matter in dispute exceeded the sum of five hundred dollars. The state court refused to permit the removal. This court held, that the requisites of the act of congress having been complied with in this case, the state court had no right to deny the removal. The law declares, that, under such circumstances, the state court shall proceed no further in the case. And the supreme court have held, that all subsequent proceedings in the state court are coram non judice. [Gordon v. Longest] 16 Pet. [41 U. S.] 101. But in this case, the complainant dismissed his bill. This we suppose he had a right to do, whether the cause be considered in the state court, or in this court.

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

Case No. 9,286.

MATTHEWS v. MASSACHUSETTS NAT. BANK.

[Holmes, 396; [1] 1 Am. Law T. Rep. (N. S.) 512; 10 Alb. Law J. 199; 14 Am. Law Reg. (N. S.) 153; 20 Int. Rev. Rec. 110; 1 Cent. Law J. 469; 22 Pittsb. Leg. J. 38; 6 Leg. Gaz. 308.]

Circuit Court, D. Massachusetts. Sept. 3, 1874.

CONTRACTS—GUARANTY—STOCK TRANSFER — GENUINENESS—BANKS—TRANSFER BY CASHIER.

1. It is within the general authority of the cashier of a bank to sign, in its behalf, a blank transfer upon a certificate of stock in the name of the bank, held by it as collateral security for a loan, and deliver the certificate to the pledgor on payment of the loan.

[Cited in Windram v. French, 151 Mass. 550, 24 N. E. 914.]

[Cited in Com. v. Reading Sav. Bank, 133 Mass. 22.]

2. The signing a transfer in blank on a certificate of stock is a warranty of the genuineness of the certificate.

3. A stock certificate originally for two shares of stock in the name of C, which had been by him fraudulently altered so as to purport to be for two hundred shares in the name of a certain bank as collateral, was received in good faith by the bank from C, as collateral security for a loan to him. On payment of the loan by C, the cashier of the bank, as such, signed a transfer in blank upon the back of the certificate, and delivered it to C. Afterwards, the plaintiff in good faith received the same certificate from C, as collateral security for a loan then made to him. The plaintiff's loan was not paid. On suit by him against the bank to recover the amount of his loss, *held*, that the bank was liable.

Action at law [by Nathan Matthews]. The case was heard by the court upon an agreed statement of facts, the material parts of which are stated in the opinion. The first count in the declaration was as follows: "And the plaintiff says the defendant was possessed of a certain instrument in writing, purporting to be a certificate of stock issued to the defendant by the Boston and Albany Railroad Company, a copy whereof is hereto annexed, and pretended to be entitled thereunder to two hundred shares in the capital stock of the said Boston and Albany Railroad Company; and the defendant, in consideration of the sum of twenty-five thousand dollars paid to defendant by the plaintiff, on or about the twenty-eighth day of April, 1873, assumed the right to sell, and did sell, and agreed to deliver to the plaintiff, two hundred shares in the capital stock of the said Boston and Albany Railroad Company of the par value of one hundred dollars each, said stock being then and now worth in the market more than its par value; and, as evidence of such sale, and for the alleged purpose of transferring such stock, assigned in writing, and transferred and delivered to the plaintiff, said pretended certificate of stock, and thereby warranted its genuineness; and that the defendant was proprietor of the shares of stock therein described, and

[1] [Reported by Jabez S. Holmes, Esq., and here reprinted by permission.]

could convey a good title thereto by virtue of said assignment. A copy of said instrument of assignment is hereto annexed, the same having been indorsed on said pretended certificate.[2] But the plaintiff says that the defendant did not own at the time of said sale, and of the assignment of said pretended certificate, the two hundred shares of stock so sold and agreed to be delivered by the defendant to the plaintiff, and that the pretended certificate so purporting to have been issued to the defendant by said Boston and Albany Railroad Company was never in fact issued to the defendant by said company, and was not genuine, but was false, forged, and void, and the defendant was not the proprietor of the shares of stock therein described, and that the transfer and assignment of said pretended certificate conveyed no right or title in or to any shares of stock to the plaintiff, and was of no value, and that the plaintiff has received no consideration for the money so paid by him to the defendant. Wherefore, the defendant owes the plaintiff said sum of twenty-five thousand dollars, so paid by the plaintiff to the defendant, with interest thereon, but has never paid the same or any part thereof, though payment thereof has been duly demanded."

Dwight Foster and G. W. Baldwin, for plaintiff.

The defendant corporation, by signing the blank form of transfer, so far warranted the genuineness of the certificate that it is estopped from setting up the forgery as a defence to this action. This is well settled, as respects the transfer by indorsement of forged notes, checks, bills, and other negotiable instruments. State Bank v. Fearing, 16 Pick. 533; Hortsman v. Henshaw, 11 How. [52 U. S.] 184; Bank of U. S. v. Bank of Georgia, 10 Wheat. [23 U. S.] 333; Redf. & B. Lead. Cas. 650; Story, Prom. Notes, 380; Chit. Bills. 242; Bigelow, Estop. 428, and cases cited. Certificates of stock, "although neither in form or character negotiable paper, approximate to it as nearly as possible." Bank v. Lanier, 11 Wall. [78 U. S.] 377. The legal title passes by an assignment of the certificate and delivery, although there is no transfer upon the books of the corporation. McNeil v. Tenth Nat. Bank, 46 N. Y. 325. And certificates so assigned are articles of commerce, passing from hand to hand like commercial paper. Leitch v. Wells, 48 N. Y. 585. The form of assignment printed on the back of the certificate, if signed in blank by the stockholder to whom the same was issued, may be filled up by a subsequent purchaser of the stock. Bridgeport Bank v. New York & N. H. R. Co., 30 Conn. 273; In re Tahiti Cotton Co., L. R. 17 Eq. 279; Lickbarrow v. Mason, 2 Term R. 63. This establishes a direct relation between the last holder and the original owner of the certificate, and gives to the transaction the effect of negotiability, so far as is needed to justify this action.

The plaintiff makes out a prima facie case by putting in evidence a certificate purporting to stand in the name of the defendant, and duly transferred by it to him, for which he has paid in good faith a valuable consideration, and which turns out to be worthless. When that is done, the defendant cannot set up the falsity of its own representations by way of answer and defence, "as against them the plaintiff's case, though defective if the whole truth could come out, shall prevail." Gibson v. Minet, 1 H. Bl. 611. "Where the instrument is not negotiable, the maker may be affected by an estoppel in pais, if it be transferred upon his representation of its validity." Mechanics' Bank v. New York & N. H. R. Co., 13 N. Y. 638. It is upon this representation that this action is founded, and not upon the forged certificate as the instrument containing the contract. The plaintiff's right of action rests on equitable grounds. He has advanced money in good faith upon the security of a forged title represented by the defendant to be genuine, and, although the forgery was known to neither, the loss should fall on the person who, without due caution, took the instrument from the wrong-doer, and afterwards gave it currency. Bank of Commerce v. Union Bank, 3 Comst. [3 N. Y.] 230; Cabot Bank v. Morton, 4 Gray, 156. "It is not necessary that the party should design to mislead. If the act was calculated to mislead, and has actually misled another, acting in good faith, it is enough." Manufacturers & Traders' Bank v. Hazard, 30 N. Y. 226. Had the bank desired to limit its liability, the name of Coe should have been inserted. By neglecting to do this, the case is brought within the rule that "where one of two innocent persons must suffer, he who has put it in the power of another to do the wrong must suffer." Wood v. Steele, 6 Wall. [73 U. S.] 82. It is not necessary that the false representation, which is the foundation of this suit, should have been made to the plaintiff directly. It is sufficient "if it is made to the public generally, with a view to its being acted on, and the plaintiff, as one of the public, acts on it, and suffers damage thereby." Richardson v. Silvester, L. R. 9 Q. B. 36; Swift v. Winterbotham, L. R. 8 Q. B. 253; Gerhard v. Bates, 2 El. & Bl. 476.

The essential principle established by the authorities is, that one who affixes his signature thereby warrants or authenticates the genuineness of the instrument to which it is affixed. Van Duzer v. Howe, 21 N. Y. 531; Merchants' Bank v. State Bank, 10 Wall. [77 U. S.] 645, 650; Garrard v. Haddan, 67 Pa. St. 82; Dair v. U. S., 16 Wall. [83 U. S.] 4; Sprigg v. Bank Mt. Pleasant, 10 Pet. [35 U. S.] 264.

[2] "For value received the undersigned hereby transfer to ——— of ———, ——— shares of the capital stock of the Boston and Albany Railroad Company. H. K. Frothingham, Cashier. Dated at Boston, April 28, 1873."

Liability for injury sustained by reason of representations, carelessly made, which have proved false, has been enforced. New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30; Thomas v. Winchester, 6 N. Y. 397; Lobdell v. Baker, 3 Metc. [Mass.] 469; Preston v. Mann, 25 Conn. 131; Slim v. Croucher, 1 De Gex, F. & J. 518; Pickard v. Sears, 6 Adol. & E. 474; Ramshire v. Bolton, L. R. 8 Eq. 294; Hooker v. Hubbard, 97 Mass. 175; Collen v. Wright, 8 El. & Bl. 647; 2 Kent, Comm. 490, and note; 1 Smith, Lead. Cas. 270.

The fact that the signature of the defendant was given for the purpose of transferring title to the instrument, establishes a contract of sale between the defendant and the plaintiff, and brings the case within authorities which hold that the vendor of a specific chattel is responsible if the article be not a genuine article of the kind which the seller represents it to be. Gompertz v. Bartlett, 2 El. & Bl. 854; Jones v. Ryde, 5 Taunt. 488; Gurney v. Womersley, 4 El. & Bl. 133; Henshaw v. Robins, 9 Metc. [Mass.] 86; 2 Kent, Comm. 480, and note.

The defendant was negligent: 1. In trusting to Coe, the borrower, to obtain a transfer to them, from the Boston and Albany Railroad Company, of the two hundred shares of stock, instead of sending, themselves, to the office of the corporation to obtain the certificate. 2. In delivering the forged instrument to Coe, authenticated by a transfer signed in blank; thus giving it a currency and negotiability which it would not have possessed had Coe's name been inserted in the form of transfer, and putting it in his power to commit the fraud, upon which this suit is founded. The plaintiff was not negligent. He had a right to assume upon receiving this certificate, authenticated by the signature of the bank, that the defendant had obtained it from the railroad company in the usual way, which would have prevented the possibility of forgery or fraud in the body of the instrument. Espy v. Bank of Cincinnati, 18 Wall. [85 U. S.] 604; Lickbarrow v. Mason, 2 Term R. 63, and note in Smith, Lead. Cas. 1039.

Joshua P. Converse and Edward A. Kelly, for defendant.

The loan by the bank to Coe, and his delivery of the forged certificate of stock, as collateral, to the bank, was a transaction of which the plaintiff had notice; and the statement on the face of the certificate that it was held by the bank as collateral, was notice that the bank was not in fact the absolute owner, and that it was held only in pledge. Wilson v. Little, 2 Comst. [2 N. Y.] 443; 2 Kent, Comm. 579; 4 Kent, Comm. 138; Allen v. Dykers, 3 Hill, 593; Dykers v. Allen, 7 Hill, 497; White v. Platt, 5 Denio, 269; Newton v. Fay, 10 Allen, 505; Gen. St. Mass. c. 123, § 62; Id. c. 68, § 14. The certificate held by the bank having been given it by Coe as a pledge, when he paid the debt, the restoration of the certificate to him vested in him all the rights which the bank ever had. The possession of the certificate by Coe, after notice of its having been held in pledge, was notice to Matthews that the debt for which it had been held in pledge had been paid. The transfer in blank created no liability or obligation on the part of the bank to Matthews. The act of the cashier in signing and transferring the certificate to Coe was performed with the intention of restoring the pledge to Coe in discharge of the duty of the bank as pledgee, after the purposes of the pledge were answered, and not with any purpose of a sale of the certificate, or the stock supposed to be represented by it; and no contract of sale resulted from it. Langton v. Waite, 17 Wkly. Rep. 475; Ketcham v. Stevens, 19 N. Y. 499; Williamson v. Berry, 8 How. [49 U. S.] 685. By the statute of frauds the transfer in blank is void. Browne, St. Frauds, § 372; Champion v. Plummer, 1 Bos. & P. (N. R.) 252. When Coe paid the debt and took back what he had pledged, his right became as absolute and complete as when the pledge was given; and if he could not have sued the bank, it is submitted that he could not by a delivery to another person transfer a right of action against the bank. Certificates of stock are not negotiable instruments, and the transferees of such certificates acquire the same rights which their assignors had, and no more, and deal in relation to them at their peril. Mechanics' Bank v. New York & N. H. R. Co., 13 N. Y. 599, 622; McNeil v. Tenth Nat. Bank of New York, 55 Barb. 59; Bush v. Lathrop, 22 N. Y. 535; Mangles v. Dixon, 18 Eng. Law & Eq. 82, 95; Hil. Sales (3d Ed., 1869) 594, and authorities in note; Fisher v. Essex Bank, 5 Gray, 377; Athenaeum Life Assur. Soc. v. Pooley, 3 De Gex & J. 294. They are not in the nature of letters of credit, on the faith of which any one might act. Mechanics' Bank v. New York & N. H. R. Co., 13 N. Y. 629-631.

The doctrine that the sale of goods carries with it an implied warranty of title or genuineness cannot apply here. 1. The doctrine is intended to protect those who otherwise have no means of protecting themselves. Did the bank covenant with Coe that the certificate forged by him was genuine? 2. It is not like a covenant running with land, and good in the hands of third persons. 3. The doctrine applies only where the vendor is in possession, and sells goods as his own. 2 Kent, Comm. 478, and note (Holmes's Ed.); McCoy v. Artcher, 3 Barb. 323; Edick v. Crim, 10 Barb. 445; Baxter v. Duren, 29 Me. 434; Morley v. Attenborough, 3 Wellsb., H. & G. 508; Medina v. Stoughton, 1 Salk. 210; Ormrod v. Huth, 14 Mees. & W. 664; Emerson v. Brigham, 10 Mass. 197; 1 Pars. Cont. 457, 458; Huntington v. Hall, 36 Me. 501, and cases cited; Whitney v. Heywood, 6 Cush. 82, 86. 4. The bank never

was in possession of any thing but a forged certificate; and this Matthews has received. 5. The transfer is in the nature of a chose in action; and Matthews stands in the same situation as his assignor, and no covenants of warranty of title or genuineness are implied. Eaton v. Mellus, 7 Gray, 566. 6. Matthews received the certificate from Coe with constructive notice that the relation of trustee and cestui que trust had existed between the bank and Coe, which imposed upon him the duty of inquiry as to its character and limitations. And whatever is sufficient to put a person of ordinary prudence upon inquiry is constructive notice of every thing to which that inquiry might have led. Freeman v. Harwood, 49 Me. 195; Newton v. Fay, 10 Allen, 507; Shaw v. Spencer, 100 Mass. 390. 7. The transfer was of the identical certificate delivered to the bank, in performance of its duty as pledgee, upon the payment of the debt for which it was pledged, and was not a transfer of shares of stock generally. Westropp v. Solomon, 8 C. B. 345.

The declaration is in contract; and there is no allegation in the statement of facts that Matthews ever paid, or that the bank ever received, any thing for the alleged contract of sale. The amount advanced by Matthews was a loan to Coe; and the only money received by the bank was the debt paid to it by Coe; and neither was a legal consideration for a contract with the bank. Smith v. Bartholomew, 1 Metc. [Mass.] 278. The cashier had no authority or right to bind the bank to pay money upon any contract alleged, because: 1. He never had authority by virtue of his office, nor any authority delegated by the directors. Bank of U. S. v. Duren, 6 Pet. [31 U. S.] 51; U. S. v. City Bank of Columbus, 21 How. [62 U. S.] 356; Marsh v. Fulton Co., 10 Wall. [77 U. S.] 676. 2. There was no consideration for the alleged contract, and the same was therefore void.

The claim against the bank is too remote. Anthony v. Slaid, 11 Metc. [Mass.] 290; Brown v. Cummings, 7 Allen, 507. Damage without fraud, or fraud without damage, will not sustain an action. Randall v. Hazelton, 12 Allen, 412; Stone v. Denney, 4 Metc. [Mass.] 151.

The bank having no right to sell the stock, as the debt had been paid, the cashier could not make a sale. As neither the bank nor the cashier could sell the stock, the act of the cashier in signing the transfer in blank could not operate as an estoppel. Lowell v. Daniels, 2 Gray, 161; Bigelow, Estop. 480. There was no intent on the part of the bank to induce Matthews to act on the faith of the alleged representation. Plumer v. Lord, 9 Allen, 458. Matthews was a stranger to the alleged representation, and, therefore, it is no estoppel in his favor. Mechanics' Bank v. New York & N. H. R. Co., 13 N. Y. 638, 639. As the cashier had no right to sell the stock to the plaintiff, the alleged negligence in doing what he had no right to do could not bind the bank. Foster v. Essex Bank, 17 Mass. 479.

Matthews had no right to fill up the blank transfer, so as to make it appear to be a contract of sale to himself. 1. Because he dealt only with Coe, and derives his title from him and not from the bank. Ketcham v. Stevens, 19 N. Y. 499. 2. Because he cannot make a contract by which the bank is bound, which he knew, or was bound to know, is in opposition to its wishes and intentions. 3. Because the bank and Matthews were both pledgees of Coe, and the relation of vendor and vendee could not, and did not, exist between them.

There was no negligence on the part of the bank in receiving the certificate from Coe as a pledge for a loan to him, nor in the mode of transfer to him. The loss sustained by Matthews can be traced to his want of prudence and care in dealing with Coe. Gloucester Bank v. Salem Bank, 17 Mass. 42; Maule, J., in Westropp v. Solomon, 8 C. B. 345; Shaw v. Spencer, 100 Mass. 391; Boylston Nat. Bank v. Richardson, 101 Mass. 290; Bank of U. S. v. Bank of Georgia, 10 Wheat. [23 U. S.] 333.

If, under the peculiar circumstances of this case, no fault or negligence is imputable to either party, the loss must remain with Matthews where the course of business has placed it. Gloucester Bank v. Salem Bank, 17 Mass. 42. If it is claimed that the cashier was negligent or careless in the mode of transfer, it is submitted that the loss or injury sustained by the plaintiff is not the direct and immediate consequence of the alleged negligent act of the cashier. The felony of Coe in uttering the forged certificate, which he knew to be forged, and the laches of the plaintiff, were the direct and immediate causes of the loss to the plaintiff. Salem Bank v. Gloucester Bank, 17 Mass. 31; Hatch v. Searles, 2 Smale & G. 147.

SHEPLEY, Circuit Judge. The defendant, the Massachusetts National Bank, loaned to one James A. Coe twenty-two thousand dollars, payable on call with interest, taking from him his memorandum of indebtedness for that sum, with, as collateral security therefor, what purported to be a certificate of two hundred shares of the capital stock of the Boston and Albany Railroad Company issued to said Massachusetts National Bank, as collateral. This instrument was originally a genuine certificate for two shares of the capital stock of the Boston and Albany Railroad Company issued to H. E. Coe, but by false and forged erasures and interlineations it had been so altered as to purport to be a certificate for two hundred shares of its stock issued by said railroad corporation to the Massachusetts National Bank, as collateral.

The bank received the said certificate in

good faith and without any suspicion of its fraudulent character, and in supposed fulfilment of the promise of James A. Coe to give as security for the loan aforesaid two hundred shares of the capital stock of said railroad corporation. Subsequently, upon payment by said Coe to the bank, he received back his memorandum of indebtedness; and the cashier of the bank, for the purpose and with the intention of restoring the collateral to Coe, returned to him the fraudulent certificate, with the usual printed form of transfer on the back thereof, signed by H. K. Frothingham, cashier of said bank, in blank.

About two weeks after the surrender by the bank of this certificate to Coe with the transfer in blank of the cashier on the back of it, the plaintiff, Matthews, pursuant to his agreement to loan Coe twenty-five thousand dollars on call with interest, received from Coe, in good faith, the said fraudulent certificate with the blank assignment on the back thereof, supposing the same to be a genuine certificate for two hundred shares of said stock issued by the corporation and duly transferred and assigned so as to enable him to obtain a new certificate therefor in his own name; and on receipt thereof loaned the sum of twenty-five thousand dollars. The signature of the cashier was well known to Matthews, who correctly supposed the signature on the blank assignment to be genuine. Coe was tried and convicted for obtaining money by false pretences; and indictments for forgery are now pending against him, and he has been declared bankrupt. The next day, or very soon after the day when the money was loaned by Matthews, the fact first became known to plaintiff and defendant of the fraudulent alteration of the certificate before it came into possession of defendant, and plaintiff thereupon notified the bank that he should hold it responsible for any loss sustained by him by reason of the premises. This action is brought for the recovery of the damages thus sustained.

The real question presented in the case is, whether the bank by signing the blank transfer has so far warranted the genuineness of the certificate that it is estopped from setting up the forgery as a defence to this action.

Defendant denies that the cashier had authority or right to bind the bank by the contract declared on. Cashiers of a bank are held out to the public as having authority to act according to the general usage, practice, and course of business conducted by the bank. Their acts, within the scope of such usage, practice, and course of business, will in general bind the bank in favor of third persons possessing no other knowledge. Morse v. Massachusetts Nat. Bank [Case No. 9,857]; Minor v. Mechanics' Bank, 1 Pet. [26 U. S.] 70; Merchants' Bank v. State Bank, 10 Wall. [77 U. S.] 604. One of the ordinary and well-known duties of the cashier of a bank is the surrender of notes and securities upon payment; and his signature to the necessary transfers of securities or collaterals, when in the form of bills of exchange, choses in action, stock certificates, or similar securities for loans, which are personal property, is an act within the scope of the general usage, practice, and course of business in which cashiers of a bank are held out to the public as having authority to act. Undoubtedly the ordinary duties of a cashier do not comprehend the making of a contract which involves the payment of money, without an express authority from the directors, unless it be such as relates to the usual and customary transactions of the bank. But the transfer of certificates of stock held as collateral is certainly one of the usual and customary transactions of banks, and the public would be no more likely to require evidence of a special authority to the cashier to make such transfer than of a special authority to draw checks on other banks, or to perform any other of the daily duties of his office.

The signature of the cashier must therefore be considered as the signature of the bank, and the question returns, whether such blank assignment on the back of the certificate by the bank be so far a warranty of the genuineness of the certificate that the bank is estopped from setting up the forgery as a defence. In the case of forged negotiable instruments, it is well settled that the indorser warrants that the instrument itself and the antecedent signatures thereon are genuine. Story, Prom. Notes, § 135; State Bank v. Fearing, 16 Pick. 533; Hortsman v. Henshaw, 11 How. [52 U. S.] 183; Critchlow v. Parry, 2 Camp. 182; Canal Bank v. Bank of Albany, 1 Hill, 287. The indorser's liability in these cases is properly placed upon the ground of estoppel. "This proceeds," says Judge Story, "upon the intelligible ground that every indorser undertakes that he possesses a clear title to the note deduced from and through all the antecedent indorsers, and that he means to clothe the holder under him with all the rights which by law attach to a regular and genuine indorsement against himself and all the antecedent indorsers. It is in this confidence that the holder takes the note without further explanation; and if each party is equally innocent, and one must suffer, it should be the one who has misled the confidence of the other, and by his acts held out to the holder that all the indorsements are genuine, and may be relied on as an indemnity in case of the dishonor thereof." This is a statement of the grounds upon which the rule of law rests as applicable to negotiable instruments, but the reasoning would seem to apply with equal force and pertinency to the case of a transfer of a certificate of stock by indorsement in blank. Stock certificates are sold in open market like other securities, and form the basis of commercial transactions. In the language of Davis, J., in Bank v. Lanier, 11 Wall. [78 U.

S.] 377: "Although neither in form nor character negotiable paper, they approximate to it as nearly as practicable." In Leitch v. Wells, 48 N. Y. 613, it is said: "Since the decision of the case of McNeil v. Tenth Nat. Bank, 46 N. Y. 325, certificates of stock, with blank assignments and powers of attorney attached, must be nearly as negotiable as commercial paper." The common practice of passing the title to stock by delivery of the certificate, with the blank assignment and power, has been repeatedly proved and sanctioned in cases which have come before the courts in New York. In New York & N. H. R. Co. v. Schuyler, 34 N. Y. 41, the rights of parties claiming under such instruments were fully recognized by the court, and such mode of transfer was shown to be the common practice of the city of New York. It is well settled that the form of assignment printed on the back of stock certificates, when signed in blank, may be filled up by a subsequent purchaser of the stock. Kortright v. Commercial Bank of Buffalo, 20 Wend. 91, and 22 Wend. 348; Bridgeport Bank v. New York & N. H. R. Co., 30 Conn. 273. The certificate in this case, as it came from the bank, contained on the same piece of paper, and on the back of the certificate, a blank assignment, which was all that was necessary to transfer the title of the stock as between the parties. The defendant must, therefore, be held to have intended and agreed that whoever should present the certificate so issued from the bank, with the assignment executed in blank, should be entitled to fill up the blanks with his own name, and to have a transfer of the stock made to himself on the books of the company. The certificate accompanied with the transfer, executed in blank, has a species of negotiability of a peculiar character, but one well recognized in commercial transactions and judicial decisions, and absolutely essential in the usage and necessities of modern commerce to make such certificates available in commercial transactions. Even when such blank assignments, or powers of attorney to transfer stock, are under seal, the blanks may be filled up according to the agreement of the parties at the time. Bridgeport Bank v. New York & N. H. R. Co., 30 Conn. 274, 275; Redf. R. R. § 35, and cases cited. The decisions to the contrary in the English courts have not been followed in this country, and they were influenced not merely by a rigid adherence to the technical rules of the common law in relation to instruments under seal, but by the policy of the stamp system. But the case of Walker v. Bartlett, 36 Eng. Law & Eq. 368, and later English decisions, recognize the validity of blank transfers of stock, and that such transfers of stock impose upon the holder of them the obligation to pay calls upon the shares while they remain his property. In Kortright v. Commercial Bank, 20 Wend. 94, speaking of the filling up of a blank transfer of stock and power of attorney, Nelson, C. J., after stating that this is in strict conformity with the universal usage of dealers in the negotiation and transfer of stocks according to the proof in the case, goes on to say: "Even without the aid of this usage, there could be no great difficulty in upholding the assignment. The execution in blank must have been for the express purpose of enabling the holder, whoever he might be, to fill it up. If intended to have been filled up in the name of the first transferee, there would have been no necessity for its execution in blank; Barker might have completed the instrument." The right to fill the blank in a blank transfer of stock is recognized by the supreme court of Massachusetts in Sewall v. Boston Water Power Co., 4 Allen, 277.

Matthews clearly had the right, having advanced the sum of twenty-five thousand dollars upon the supposed security of this blank assignment of stock, to fill up the blank with his own name and with the place of his residence, and whatever was necessary to make the instrument complete as an assignment and transfer to him of the shares described in the certificate. The case finds that the cashier signed the assignment in blank for the purpose and with the intention of restoring the pledge to Coe. But even if he went further, and agreed with Coe that Coe should fill the blank with his own name, such private understanding between him and Coe would not have affected the rights of third parties who parted with their property in good faith without negligence, upon the faith of the certificate of the cashier that the bank undertook to assign, and did assign, to whoever might be the lawful holder of the instrument, the amount of stock described therein. As above quoted from Nelson, C. J., "If intended to have been filled up in the name of the first transferee, there would have been no necessity for its execution in blank." Frothingham "might have completed the instrument." What possible explanation can be given of the course of the cashier in giving to Coe an assignment in blank rather than a transfer to Coe himself, other than to enable Coe to dispose of the certificate so that the holder could take his title directly from the bank, and that the instrument might be used according to the well-known usage of dealing with stock certificates, passing from one purchaser to another without the inconveniences and delays consequent upon manifold transfers on the records of the corporation? If the bank intended to limit the assignment to a particular assignee, or to a less number of shares than the number described in the certificate, the limitation should have appeared in the assignment. The assignment in blank purports to assign what is described in the certificate to the lawful holder, whoever he may be, who may fill the blank. The signature is given for the purpose of transferring title; and whenever the blank is filled, a contract of sale is established between the party who

has signed the blank assignment and the person whose name is rightfully filled in as assignee.

It is contended in behalf of the bank that the transfer in blank created no liability or obligation on the part of the bank to Matthews, because the circumstances under which the certificate was received by the bank and surrendered to Coe indicate clearly that the act of the cashier in signing and transferring the certificate to Coe was performed with the intention of restoring the pledge to Coe in discharge of the duty of the bank as pledgee after the purposes of the pledge were answered, and not with any purpose of a sale of the certificate or the stock supposed to be represented by it. But there is nothing in the case to show any knowledge on the part of Matthews of any such intention on the part of the cashier. The certificate purports to be a certificate that the bank held the shares as collateral, but does not show that they were collateral for a debt of Coe's to the bank. Such a certificate of stock with the transfer in blank of a responsible bank might, in the ordinary course and usage of dealing in stocks, pass through the hands of many successive purchasers. The possession of the certificate would afford no indication that the holder of it was the person who had originally transferred it to the bank as collateral. If Coe had consented to a sale by the bank of the collateral to pay his debt, or if the bank had in any way acquired the right to sell it, and had sold it, if the assignment had been in blank, the purchaser would have been in the same condition, and Matthews, in dealing with such a purchaser, would have received no better evidence of title against the bank than he received from Coe. Had the bank desired to sell this stock, and placed it in the hands of a broker with a blank transfer in the usual course of business, Matthews, in buying from the broker, would have received no better evidence of title against the bank than in the present case. The mere words "as collateral" in the instrument do not tend to put the purchaser on inquiry, except so far as relates to the authority of the bank to dispose of the collateral as between the bank and its debtor. If this inquiry had been made, it would only have resulted in the information that the assignment was made in its actual form by the joint act and consent of the debtor and the bank. The name of the pledger was not settled in the certificate, as is required by the statute of Massachusetts (Gen. St. Mass. c. 68, § 13). In fact, if Matthews had gone to the bank to make inquiries, he could only have learned that, Coe having paid his debt to the bank, the certificate had been surrendered to him by the bank with a transfer in blank. There would have been nothing in this information to lead him to doubt the genuineness of a certificate to which the bank had given currency by its signature, and on the faith of which he would have learned the bank had loaned twenty thousand dollars, which had been paid. The bank or the cashier did not then doubt the genuineness of the instrument, and no inquiry at the bank would have inspired doubts in the mind of Matthews, there being no such doubts in the minds of the officers of the bank. Nor is it perceived how the bank can contend with any show of reason that Matthews was negligent in not inquiring at the office of the railway corporation. If the duty of making such an inquiry was incumbent on any one, it was surely incumbent on the bank to ascertain the genuineness of the instrument before they gave currency to it, and lulled suspicion and doubt by the responsibility of their own signature. The answer to all the positions taken by the defendant as to notice to Matthews from the words "as collateral" in the instrument, is that there is nothing to connect Coe with those words. There is nothing on the face of the papers, and there was nothing in the fact of the possession of the instrument by Coe, to show that he was the person for whose debt the stock was held as collateral. Had not Matthews a right to suppose, upon receiving this certificate authenticated by the signature of the bank, that they had obtained the certificate themselves from the railroad company in the usual way, thus preventing the possibility of fraud or forgery before receiving as collateral for a loan and before authenticating it with their signature? It is difficult to see in what respect Matthews was negligent.

The defendant, on the other hand, negligently placed confidence in Coe to obtain a transfer from the railroad company of the two hundred shares on which they loaned the sum of twenty-two thousand dollars, instead of taking their certificate directly from the company. But the negligent act which especially imposes upon them a liability in this case is, that they delivered the forged instrument to Coe, authenticated by their signature in blank to a transfer, thus giving to it a currency and negotiability which it would not have possessed had they made the transfer directly to Coe. Thus the bank put it in the power of Coe to commit the fraud on Matthews on which this suit is founded.

In McNeil v. Tenth Nat. Bank, the language of the opinion is precisely applicable to a case like the present: "Such, then, being the nature and effect of the documents with which the plaintiff intrusted his brokers, what position does he occupy towards persons who in reliance upon those documents have, in good faith, advanced money to the brokers or their assigns on a pledge of the shares? When he asserts his title, and claims as against them that he cannot be deprived of his property without his consent, cannot he be truly answered, that by leaving the certificate in the hands of his brokers, accompanied by an instrument bearing his own

signature which purported to be executed for a consideration, and to convey the title away from him, and to empower the bearer of it irrevocably to dispose of the stock, he in fact 'substituted his trust in the honesty of his brokers for the control which the law gave him over his own property,' and that the consequences of a betrayal of that trust should fall upon him who reposed it, rather than upon innocent strangers from whom the brokers were thereby enabled to obtain their money?" If the bank only intended to revest in Coe whatever it acquired from him, it would have been perfectly easy to have limited the transfer to that extent only. A private understanding that such was the intention between Coe and the cashier could not affect the rights of those who, if misled, were misled by the acts of the bank. If the bank, by giving to Coe the transfer in blank with its signature, exhibited him to the money-dealing public as having the competent right of pledge and disposal, with all the usual evidences of such right, it substituted its trust in the honesty of Coe for the control which the bank should have exercised itself over the transfer of the instrument, and should suffer the loss consequent upon his betrayal of the trust, rather than to suffer it to fall upon an innocent stranger.

If the conditions upon which the apparent right of control which the bank conferred upon Coe were not expressed on the face of the instrument, but remained in confidence between the bank and Coe, the case is not distinguishable in principle from that of an agent who receives secret instructions qualifying or restricting an apparently absolute power. Jarvis v. Rogers, 15 Mass. 389; Pickering v. Busk, 15 East, 38; Fatman v. Lobach, 1 Duer, 354; New York & N. H. R. Co. v. Schuyler, 34 N. Y. 31.

One of two innocent parties must suffer in this case by the fraud of Coe. Under similar circumstances, courts have repeatedly held that the party must suffer who has exhibited the greater degree of negligence. The leading case on the indorsement of bills of lading, Lickbarrow v. Mason, 2 Term R. 63, is an authority on this point. See also Lobdell v. Baker, 3 Metc. [Mass.] 469; Polhill v. Walter, 3 Barn. & Adol. 114.

The bank is precluded from setting up the fact of the forgery of the instrument, because it would be a wrong on its own part and an injury to others whose conduct has been influenced by the acts and omissions of the bank. Swayne, J., in Merchants' Bank v. State Bank, 10 Wall. [77 U. S.] 645, says, "Estoppel in pais presupposes an error or a fault, and implies an act in itself invalid. The rule proceeds upon the consideration that the author of the misfortune shall not himself escape the consequences and cast the burden upon another." Clifford, J., recognizes this principle in his dissenting opinion in that case: "If a bank may be held liable in any case upon a certificate of their cashier that a check is good when they have no funds of the drawer, it is not because the cashier is authorized to make such certificate, but because the bank is bound by his representation, notwithstanding it is false and unauthorized." An estoppel is a salutary rule which prevents a man from proving that to be false which he has once represented to be true, when others have acted on the faith of his representation.

The fact that Matthews has also a right of action against Coe, who is a convict and a bankrupt, does not preclude him from a remedy against the bank. Gurney v. Womersley, 4 El. & Bl. 133.

Upon the facts as agreed in this case, the plaintiff is entitled to judgment, and, according to the agreement of parties, the case is to be referred to an auditor to assess the damages. Judgment accordingly.

Case No. 9,287.

MATTHEWS v. MATTHEWS.

[Cited in Kain v. Gibboney, Case No. 7,595. Nowhere reported; opinion not now accessible.]

Case No. 9,288.

MATTHEWS v. MATTHEWS.

[2 Curt. 105.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1854.

PLEADING AT LAW — DEBT ON AWARD — PLEA OF REVOCATION — GENERAL ISSUE — NOTICE OF AWARD — DAMAGES AND COSTS — GENERAL DEMURRER.

1. There being four counts in a declaration, each founded on an alleged submission and award, a plea purporting to answer the whole action, but alleging only a revocation of one submission, and not showing which one of the four alleged, is bad on general demurrer.

2. A plea to an action of debt on an award, that the referees never made any such award as is averred in the declaration, is bad, as amounting to the general issue.

3. Ordinarily, notice of an award need not be averred; aliter if it be specially provided in the submission that notice shall be given to the parties.

4. An averment that an award was duly published, is equivalent to an averment, that the notice of the award, required by the submission, was given.

5. An action of debt lies for two sums, distinctly awarded, the one for damages, and the other for costs; and the omission to add them together, and go for the sum of both, as a sum single, is bad only on special demurrer.

6. A count on an award, that on the delivery of a release and the payment of a sum of money by the defendant to the plaintiff, the plaintiff was to deliver a release to the defendant, no averment of readiness or offer by the plaintiff to release the defendant, is bad on general demurrer.

[Cited in Smith v. Boston & M. R. Co., 88 Mass. (6 Allen) 270.]

7. A count showing differences, a submission of them, an award upon those differences, of a

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

sum of money to the plaintiff, though very general, is good on general demurrer.

This was an action of debt in four counts. As the questions arose upon a part of the pleadings, it is necessary to set out their substance. The declaration was as follows:

First count. For that whereas certain differences having arisen and being depending between the said plaintiff [Edward Matthews] and the said defendant [Nathan Matthews], the said plaintiff and defendant heretofore, namely, on the eighth day of July, in the year of our Lord one thousand eight hundred and fifty-two, at Boston, aforesaid, by a certain indenture bearing date, namely, the day and year aforesaid, after reciting, among other things, that the said parties had had for many years numerous transactions and dealings one with the other, and had at times stood in the relation of partners, and at other times in the relation of agents one for the other, and had at various times assumed and incurred liabilities one for the other, and had in divers other ways been connected and interested in business and property, and that said plaintiff and defendant were desirous of settling up and closing all their matters, and to that end of ascertaining the true state of the accounts between them, and of the indebtedness of one to the other, and of the respective rights and liabilities of each in relation to any and all matters, and to any and all property real and personal, and any interest therein of every nature and description in any way connected with any transaction between the said plaintiff and defendant, or which was, or could be in any way a matter of difference between them, so that the respective rights of the said plaintiff and defendant, to any property, real and personal, or to any interest therein, or under any agreement thereto, might be ascertained, and the requisite acts be done, and conveyance made by, from, and to each party, in order to fix, establish, and settle such rights, and so that the outstanding liabilities of the said plaintiff and defendant, whether joint or of one for the other might be determined, and the same be assumed and discharged by the proper party, and the indebtedness of one to the other might be paid and satisfied, and so that all matters between the said plaintiff and defendant, or in regard to which there was or could be any difference between them, might be adjusted, settled, and closed up, did refer and submit all said matters so by them desired to be settled as aforesaid, to the arbitration and decision of James W. Convers, Harrison Fay, and Abel G. Farwell, merchants, and doing business in said city of Boston, arbitrators indifferently elected and named as well by and on the part and behalf of the said defendant, as by and on the behalf of the said plaintiff, and in and by said indenture did empower said Convers, Fay, and Farwell, in any award they or a majority of them might make and publish in relation to any and all of the matters submitted to them as aforesaid, to direct either said plaintiff or defendant to specifically perform any contract subsisting between them, the said plaintiff and defendant, to convey and transfer to the other any property, real or personal, or any interest therein, to make all draft orders or assignments, to assume, pay, satisfy, and discharge any outstanding liabilities, and to pay to the other any sums of money as the said Convers, Fay, and Farwell, or a majority of them, should deem proper, to carry out and effectuate the settlement of the matters so submitted to said Convers, Fay, and Farwell, as aforesaid, (and the said plaintiff and defendant, in and by said indenture, did covenant and agree with each other to stand to, abide, and perform any and all the orders, decisions, and awards of said Convers, Fay, and Farwell, or a majority of them, of and concerning the matters so submitted to them, the said arbitrators, as aforesaid, as the same should from time to time be made known to said plaintiff and defendant.) And in and by said indenture it was further provided, that all the expenses and costs of said reference, so made as aforesaid, should be borne equally by the said parties, and the said arbitrators were empowered in any award which they, the said arbitrators, or a majority of them, might at any time make, to fix the costs of said proceedings under said indenture, so far as the same should then have been had. And the said plaintiff further saith, that the said Convers, Fay, and Farwell, having taken upon themselves the burden of said arbitration, did in due manner, namely, on the thirtieth day of September, in the year of our Lord one thousand eight hundred and fifty-three, at Boston aforesaid, duly make and publish their award of and concerning the said matters so submitted to said Convers, Fay, and Farwell, as aforesaid, and did, among other things, thereby award that there was due and owing from the said defendant to the said plaintiff the sum of thirty-three thousand eight hundred and twenty-seven dollars and seventy-eight cents, and did, among other things, order and award that the said defendant should pay to the said plaintiff the said sum of thirty-three thousand eight hundred and twenty-seven dollars and seventy-eight cents, within forty days from the said thirtieth day of September, with interest from said last-mentioned day. And did, by the said award, among other things, find, that the costs and expenses of said arbitration were forty-four hundred dollars, and did award that the said Nathan should pay one moiety thereof, namely, the sum of two thousand two hundred dollars, and that the said Edward should pay one moiety thereof, namely, the sum of two thousand two hundred dollars, as by said award, reference being thereunto had will more fully appear; which said award was afterwards, namely, on the day and year last aforesaid, in Boston aforesaid, duly published and made known to both the said parties.

And the said plaintiff avers, that the said defendant did not, nor would not, within said forty days from the said date of said award, pay to the said plaintiff the said sum of thirty-three thousand eight hundred and twenty-seven dollars and seventy-eight cents in the said award mentioned, or any part thereof, nor hath he since paid the same, nor any part thereof, although requested so to do. And the plaintiff further avers, that the said defendant did not and would not pay the said half of said costs and expenses, namely, two thousand two hundred dollars, so awarded to be by him paid as aforesaid, and that the plaintiff was by reason thereof, and in consequence of such refusal of the defendant, obliged to pay, and did pay, the whole of said costs and expenses, namely, said sum of four thousand four hundred dollars, whereby an action hath accrued to the said plaintiff to demand and have of and from the said defendant, the said sum of thirty-three thousand eight hundred and twenty-seven dollars and seventy-eight cents, with interest thereon from the date of said award, and the said sum of two thousand two hundred dollars, yet the defendant hath not yet paid the said sums or any part thereof.

Second count. Also for that whereas heretofore, namely, on the eighth day of July, in the year of our Lord eighteen hundred and fifty-two, divers other controversies and disputes had arisen, and were then depending between the said plaintiff and the said defendant, for the determination whereof the said plaintiff and the said defendant, on the same day and year aforesaid, at Boston aforesaid, by a certain other agreement of submission bearing date the same day and year aforesaid, mutually submitted themselves to stand to the award and determination of James W. Convers, Harrison Fay, and Abel T. Farwell, or any two of them, arbitrators indifferently named, elected and chosen by and between the said parties to arbitrate, award, order, judge, and determine of and concerning the same controversies and disputes as the same should be made known to the said plaintiff and defendant. And the said plaintiff, in fact, says, that they, the said Convers, Fay, and Farwell, the said arbitrators, having taken upon themselves the burden of the said arbitration, they, the said Convers, Fay, and Farwell, afterwards, on the thirtieth day of September, in the year of our Lord eighteen hundred and fifty-three, at Boston aforesaid, did make their certain other award of and concerning the premises so referred to them as aforesaid, in writing under their hands and seals, ready to be delivered to the said parties, or either of them who should desire the same, bearing date the same day and year last aforesaid; and by the said last-named award, they, the said Convers, Fay, and Farwell, did award and determine among other things, that the said defendant should pay to the said Edward the certain other sum of thirty-three thousand eight hundred and twenty-seven dollars and seventy-eight cents within forty days from the date of said award; and further, by the said award, they, the said arbitrators, did order and award that the said defendant should also, within said forty days from said date of said award, make, execute, and deliver to the said plaintiff a release under seal of him, the said defendant, his heirs, executors, and administrators, of and from each and all debts, controversies, variances, liabilities, rights, claims, demands, causes of action, and matters and things whatsoever, whether at law or in equity, which he, the said defendant had, or might, or could have had at said date of said agreement of submission, against the said plaintiff, and all other matters and things in relation to which there was or might have been any difference between said plaintiff and defendant at the said date of said agreement of submission, excepting certain claims against the said plaintiff for moneys which were in and by said award ordered to be paid by the said plaintiff to the said defendant, and excepting the claim which the said defendant had upon and against the said plaintiff, that said plaintiff should, for and during the continuance of a certain lease in said award mentioned, save said defendant harmless for or on account of any breaches of the covenants or conditions of said lease as in said award was ordered and provided; and further, by the said award, they, the said arbitrators, did order and award that upon the payment to the said plaintiff by the said defendant of the said sum of thirty-three thousand eight hundred and twenty-seven dollars and seventy-eight cents with interest as aforesaid, and upon the delivery to the said plaintiff of said release from said defendant as aforesaid, he, the said plaintiff, should execute and deliver to the said defendant a release under seal by him the said plaintiff, his heirs, executors, and administrators, of and from each and all debt controversies, variances, liabilities, rights, claims, demands, whatsoever causes of action and matters and things, whether at law, or in equity, which he, the said plaintiff had a right, or could have had, against the said defendant at the said date of said agreement of submission, and of and from all other matters and things in relation to which there was or might have been any difference between the said plaintiff and defendant, at the said date of said agreement of submission, excepting a claim which the said plaintiff had against said defendant to have a certain lease mentioned in said award assigned to him the said plaintiff by the said defendant as is ordered and provided in and by said award; and the plaintiff avers, that the said defendant did not, nor would, within said forty days from the date of said award, nor at any other time hitherto, pay or cause to be paid to the said plaintiff the said sum of thirty-three thousand eight hundred and twenty-seven dollars and seventy-

eight cents, or interest thereon, which by the said award was to have been paid by the said defendant to the said plaintiff within said forty days according to the form and effect of said award, but therein wholly failed and made default, and by reason of the premises and of the said sum of money still remaining wholly due, in arrear, unpaid, and unsatisfied, an action hath accrued to the said plaintiff to demand and have of and from the said defendant, the said sum of thirty-three thousand eight hundred and twenty-seven dollars and seventy-eight cents, with interest thereon from the date of said submission, yet the defendant hath not paid the same or any part thereof.

Third count. Also, for that whereas the said defendant, on the day of the date of this writ, at Boston aforesaid, was indebted to the said plaintiff in the sum of thirty-three thousand eight hundred and twenty-seven dollars and seventy-eight cents, upon and by virtue of a certain other award made by James W. Convers, Harrison Fay, and Abel G. Farwell, on a certain other submission, before that time made by the said plaintiff and the said defendant to the award and determination of the said Convers, Fay, and Farwell, concerning certain matters in difference then depending between the said plaintiff and the said defendant, and upon which said reference the said Convers, Fay, and Farwell awarded that the said defendant should pay to the said plaintiff the sum of money aforesaid within forty days from the thirtieth day of September now last past, with interest thereon from the said last-mentioned day; and the plaintiff avers that the said defendant did not, nor would, within said forty days, nor at any time hitherto, pay to the said plaintiff the said sum of thirty-three thousand eight hundred and twenty-seven dollars and seventy-eight cents, or any part thereof, whereby and by reason of the non-payment whereof, an action hath accrued to the said plaintiff to demand and have of and from the said defendant the sum aforesaid. Yet the defendant hath not paid the sum nor any part thereof.

Fourth count like first, with omission of the part in parenthesis.

2d. Plea. Actio non, &c., because the said instrument referred to by the plaintiff, and set forth in his writ as an award between these parties, and alleged to have been made and published on the thirtieth day of September last, was not made and published on that day, and was not signed till long after all authority of the persons alleged to have been referees between the parties by the plaintiff had been terminated by the plaintiff himself, and this the defendant is ready to verify. Wherefore he prays for judgment if the plaintiff ought to have and maintain his action against him. To this plea the plaintiff demurred generally, and it was joined.

6th Plea. Actio non, &c., because he says that the persons alleged by the plaintiff to have been referees between the parties, never made any such award as the plaintiff alleges, and this he is ready to verify; wherefore he prays judgment if plaintiff ought to have and maintain his action against him. To this plea the plaintiff demurred specially, assigning for cause that it amounted to the general issue.

11th Plea. Actio non, &c., because he says that the plaintiff by an instrument under the hand and seal of the plaintiff, and bearing date the thirtieth day of October, eighteen hundred and fifty-three, did, before the said persons named as referees had made any decision between the parties under the submission set forth by the plaintiff, revoke the said submission, and this the defendant is ready to verify; wherefore he prays judgment whether the plaintiff ought to have and maintain this action against him.

To this plea the plaintiff replied: 1. And the said plaintiff, as to the said plea of the said defendant by him eleventhly pleaded to the second count of the said declaration, says that he the said plaintiff by reason of any thing by the said defendant in that plea alleged ought not to be barred from having and maintaining his aforesaid action thereof against him the said defendant; because he says that subsequently to the making of the said alleged revocation, the said plaintiff and defendant mutually consented that said referees should proceed under said submission, and make their award thereon, and mutually agreed to stand to and abide the award of said referees, thereunder, and the plaintiff says that the said referees did make their award of and concerning the premises so submitted, as in said second count of the declaration is alleged and pleaded. And this he the said plaintiff is ready to verify; wherefore he prays judgment and his debt aforesaid, together with his damages by him sustained on occasion of the detention thereof to be adjudged to him, &c. 2. And the said plaintiff, as to the said plea of the said defendant by him eleventhly pleaded to the fourth count of the said declaration, says that he the said plaintiff, by reason of any thing by the said defendant in that plea alleged ought not to be barred from having and maintaining his aforesaid action thereof against him the said defendant, because, protesting that the defendant did not revoke said submission in manner and form as he has in his said plea alleged, for replication nevertheless the plaintiff says, (that after the making of said award by said referees, as in fourth count alleged, namely, on the first day of December last past, the said defendant and plaintiff mutually agreed to accept and stand to and abide said award, and as well the said defendant as the said plaintiff assented to and then ratified and confirmed the said award and the acts and authority of the said referees in making and publishing said award.) And this he the said plaintiff is

ready to verify; wherefore he prays judgment and his debt aforesaid, together with the damages by him sustained on occasion of the detention thereof to be adjudged to him, &c. To these replications the defendant demurred generally, which was joined.

Bartlett & Thaxter, for plaintiff.

C. G. Loring and C. M. Ellis, contra.

CURTIS, Circuit Justice. This is an action of debt upon awards, set out in four counts in the declaration. Among other pleas the defendant has pleaded, secondly, as follows: (Here the second plea, as set out above, was read.) There are four counts in this declaration purporting to be for four distinct causes of action, and this plea is pleaded to all. It begins in bar of the action. Yet its subject-matter can answer only one count. It avers that "the instrument referred to by the plaintiff, and set forth in his writ, as an award between these parties, and alleged to have been made and published on the thirtieth day of September last, was not made," &c. There are three such instruments declared on. The plea, if good, can answer but one of them, and there is no means of knowing which one it is intended to answer. For both these reasons the plea is bad. First, because it is pleaded to the whole declaration, when it contains an answer to only one count; second, because it is impossible to decide which of these counts it was intended to answer. This is not the only defect in the plea. As already stated, there are four counts in the declaration. In three of them, an award founded on an instrument of submission is declared on. In the other count, no instrument of submission is referred to. The plea relies on a revocation of an instrument of submission as a bar to the action. Manifestly it cannot bar the count in which no such instrument is mentioned, and which is in no way dependent on it, and as the plea is to all the counts, and fails to answer one of them, it is bad on demurrer. The sixth plea is as follows: (Here the sixth plea, as set out above, was read.) This plea denies what the plaintiff would be obliged to prove under the general issue, and consequently is bad for that cause, which has been specially assigned in the demurrer taken to it. 3 Barb. 56; Wats. Arb. 208.

Without making any serious effort to support these pleas, the defendant insists that it will appear that the declaration is also bad. It was objected to the first count, that though it shows a special agreement in the submission to perform the orders and awards of the referees as the same should from time to time be made known to the parties, it is not averred that notice was given to the defendant of the award therein declared on. Ordinarily, notice by the plaintiff to the defendant, of an award, is not necessary to be averred or proved, because the first lies as much in the knowledge of the defendant as of the plaintiff. 2 Saund. 62, note 4; Child v. Horden, 2 Bulst. 144. But where, as in this case, it is specially provided that notice of the award shall be given to the parties, it is no award, until such notice is given. Id. It should appear in this count, by some sufficient averment, that notice was given to the defendant, of the award declared on. The court avers that the award was duly made and published. The word "duly," would not, of itself, be sufficient to supply the want of a substantive allegation of a fact, necessary to the validity of the award. Everard v. Paterson, 2 Marsh. 308, 6 Taunt. 645. But "duly published," is an averment that the kind of publication required by the submission was made. For publication is made by notice from the arbitrator to the parties that his award is in readiness and can be known to them if they choose to know it; this amounts to notice and publication of the award, and such a publication satisfies a requirement in a submission, that notice of the award shall be given to the parties. MacArthur v. Campbell, 5 Barn. & Adol. 518; Musselbrook v. Dunkin, 9 Bing. 605. This objection to the first count is, therefore, not sustained.

It is further objected to the first and fourth counts, that the action of debt will not lie for two sums distinctly awarded, the one for damages and the other for costs. This is not tenable. Every action of debt on a judgment is open to the same objection, for judgments are for one sum assessed as damages, or awarded as the debt, and another for costs. There is a technical defect in these counts in the declaration, that they do not add the two amounts together, and go for the sum of both as a sum single; but I do not consider this to be bad on general demurrer. It is also urged that these counts show that the award was of a sum of money "among other things." But it does not appear that any of these "other things" were awarded to the plaintiff, and so it is not a valid objection to an action of debt. The objections which have been made to the first and fourth counts are not sustained.

The second count alleges an award, that upon the payment by the defendant to the plaintiff, of a sum of money and the delivery of a release, the plaintiff was to deliver a release to the defendant; and without an averment that the plaintiff was ready or willing, or offered to deliver his release, it goes for the recovery of the money. I am of opinion that a readiness by the plaintiff to release and notice to the defendant of such a readiness, were necessary to be averred. Taking the statements in the declaration to be true, the acts of the parties were to be concurrent, and an action cannot be sustained by either without averring and proving a readiness on his part to perform and notice thereof, or something sufficient to dispense therewith. 1 Chit. Pl. 359. For this cause, I hold the second count bad in substance.

Whether an action of debt will lie for a sum of money, where that, together with a release, was awarded, I do not determine. See 1 Saund. 201a, note 1; Cro. Car. 137; 12 Mod. 84. The second count having been held bad for another cause, and that count alone showing an award of releases, it is not necessary to decide that question.

I consider the third count good. It is very general, but I believe it contains all that is necessary. It shows certain differences existing between the parties, a submission of them to referees named, and an award upon those differences, of a sum of money to the plaintiff, pursuant to the submission. This may be a good title; and as it is confessed by the demurrer, it is sufficient.

Having thus held all the counts, except the second, good, it remains to consider the eleventh plea, and the replications thereto. Questions of great nicety have been argued upon the demurrer taken to the replications of this eleventh plea. But as the first of these replications which are demurred to, goes to support the second count only, and as that has already been held to be bad, and as I consider the plea to which this other replication is made, as also bad, I shall not express an opinion thereon. It was suggested at the bar, that a decision of these questions might have an important bearing upon questions, which are expected to arise on the trial of the issues of fact. But it cannot be now known that those questions will be presented then, precisely as they are now, upon these pleadings. Their aspect may be more or less varied when they shall arise out of the evidence, and I do not think a decision of them can be anticipated, without some risk of injustice. It is far safer to decide them, when all the facts on which they depend shall be before the court, rather than to attempt to do so now, upon certain abstract averments in the pleadings. The eleventh plea is bad for the same cause as the second plea. It shows, in bar of the whole action, a revocation of one submission only. Four submissions are shown by the declaration. The result is that the second count, and the second, sixth, and eleventh pleas are bad. The other counts are good.

Case No. 9,289.

MATTHEWS et al. v. MENEDGER et al.

[2 McLean, 145.] [1]

Circuit Court, D. Ohio. July Term, 1840.

JUDGMENT—ON TRESPASS—BAR—ELECTION—PRINCIPAL AND AGENT—INDEMNIFICATION—SPECIAL LIEN—POSSESSION—INTEREST AS DAMAGES.

1. A judgment against one of several joint trespassers, is no bar to an action against another individual for the same trespass.

2. Having several judgments for the same trespass, the plaintiff may make his election on which one he will take out execution.

3. In such a case there can be but one satisfaction. The same rule applies in the action of trover, for successive conversions, by different individuals, of the same property.

4. The record of a judgment for the same cause can only be received in evidence to bar the plaintiffs' action, or to show that certain proceedings, under it, have operated to change the right of property.

5. Where a person becomes an agent to purchase wheat, or any other article, and a part of the money raised to pay for the wheat was obtained on his credit, he may withhold the delivery of the wheat, until he is indemnified. And this is especially the rule where the principal is insolvent, and the liability of the agent to pay is about to be enforced.

6. A factor has a lien for all advances, on account of his principal, for balances due, or for liabilities incurred in the course of their business. But this lien is special, and is connected with the possession of the property.

[Cited in Jordan v. James, 5 Ohio, 100; McGraft v. Rugee, 60 Wis. 409, 19 N. W. 531.]

7. If the property be voluntarily delivered, the lien is extinguished, and can not be reasserted. But if the delivery be special, so that the factor still retains the control of the property, the lien is not relinquished.

8. A jury, in the exercise of their discretion, may give interest on the value of property converted, as a part of the damages.

[This was a suit for damages by Matthews and Hopkins against P. & E. L. Menedger.]

Ewing & Stansbery, for plaintiffs.

Vinton & Wright, for defendants.

OPINION OF THE COURT. This is an action of trover, for a flatboat, and five thousand bushels of wheat, in barrels and sacks. It was proved that the plaintiffs were merchants in Baltimore, and in September, 1836, they made a contract with McCourtney and Read, merchants of Wheeling, to purchase for them a large quantity of wheat, which they were to have shipped to the plaintiffs by the way of New Orleans. Flatboats were to be used in conveying the wheat to New Orleans. At the time of the contract the plaintiffs advanced to McCourtney and Read ten thousand dollars, in two drafts of five thousand dollars each, which were paid at maturity. McCourtney and Read despatched an agent, by the name of Matthews, to Parkersburg, who made a contract with Chevalier, a resident of that place, to purchase the wheat at five per cent. upon the cost; McCourtney and Read to furnish the money. The sum of one thousand dollars was paid in a check by Matthews, and this Chevalier stated was sufficient, as it would enable him to make a small advance to the farmers on the purchase of the wheat. Chevalier having purchased about four thousand bushels of wheat, called on McCourtney and Read for money to complete the payments on this purchase, who drew a bill of exchange on E. Dorsey, for three thousand dollars, payable to the order of Cowgill & Son, at some bank in Baltimore. This bill was accepted by Dorsey, and made payable to Chevalier, by the indorsement of Cowgill & Son. It was negotiated by one of the banks

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

at Wheeling or Pittsburg, and the proceeds were paid to Chevalier, he being the last indorser. A flatboat was sent down to Spencer's farm, near Parkersburg, by McCourtney and Read, in charge of Ford, to receive the wheat. Shortly after this McCourtney and Read failed, and made an assignment of their effects. Before this was done they applied to Forsythe and Atturbury, of Wheeling, to become the agents of the plaintiffs, and represented that, they having advanced money to buy wheat, it was just that the wheat purchased should inure to their benefit. The proposed agency was accepted by Forsythe and Atturbury, and they despatched Matthews, as their agent, to Chevalier to inform him of the failure of McCourtney and Read, and that the wheat belonged to the plaintiffs; and he was, also, authorized to inform Chevalier that the bill for three thousand dollars, indorsed by him, would not be paid. Matthews communicated this intelligence to Chevalier before the loading of the boat was completed, there having been placed on board of it between fifteen hundred and two thousand bushels. This was the first intimation received by Chevalier that the plaintffs had any interest in the wheat. He acted as the agent of McCourtney and Read, and supposed he made the purchase on their account. There was no more wheat delivered on board the boat after the arrival of Matthews; and Chevalier directed Ford to take the boat to Gallipolis, where he would meet him. The boat was taken to Gallipolis, and, on the arrival of Chevalier, he sold the wheat to the defendants, with the barrels in which a part of it was contained; the sacks they returned to the boat. The defendants paid to Chevalier eighteen hundred dollars for the wheat; and, owning a merchant mill, they manufactured it, and sent the flour to New Orleans, where it was sold at a good profit. Before the sale of the wheat to the defendants they admitted that Chevalier informed them of the circumstances, but what those circumstances, thus communicated, were, does not appear from the evidence.

The defendants offered in evidence the record of a judgment, in 1839, against Chevalier, in favor of McCourtney and Read, in the state of Virginia, in an action of trover for the same wheat. And, on the record, there was an indorsement that the suit was brought for the benefit of Matthews and Hopkins. To the introduction of this record the plaintiffs objected, as it was not between the same parties, and could for no legal purpose be received in evidence. But the defendant's counsel insisted that it was evidence, if not as a bar to the plaintiffs' action, to show where the legal right to the wheat was vested, to influence the jury in their assessment of damages in the present action; and, also, to show that, by the judgment in Virginia, the right of property, in the wheat, became vested in Chevalier. The form of the action in Virginia was the act of the attorney, and if he, by mistake, brought the action in the names of McCourtney and Read instead of the plaintiffs, that should not operate to their prejudice. So far as that action was concerned, the plaintiffs were bound by the acts of their attorney, as matters of form as well as to matters of substance, but beyond these they were not bound. The indorsement on the record, that the suit was brought for the use of the plaintiffs, is a fact, which it is not perceived can be received as evidence in this case. The indorsement was the act of the attorney, and cannot affect the rights of the plaintiffs in any other suit. Nor can the court perceive how the damages, recovered in the Virginia judgment, can influence the jury in the present case. The parties are different, and the evidence is different. How then can the jury be guided, or in the least degree influenced, by the verdict in Virginia? If the Virginia judgment can be received in evidence, it must be received in bar of the plaintiffs' action, or to show a change of property.

The defendants' counsel do not insist that, under the circumstances, the Virginia judgment is a bar to the present action. To constitute a bar the judgment must not only have been for the same subject matter, but between the same parties. Did the Virginia judgment operate to vest the right of property in Chevalier, the defendant? That this effect must be given to the judgment, is strongly insisted on by the defendant's counsel. And if this position be sustained there is an end to the present action. For, if the right of property to the wheat was in Chevalier, his sale to the defendants can not be shaken. How can the obtainment of the judgment operate a change in the right of property? Before the rendition of the judgment the plaintiffs had the right of property, and a demand against Chevalier for converting it to his own use; and after the judgment this demand remains, though it has assumed a different form.

A judgment against one of several joint trespassers is no bar to an action against either of the others. There is some conflict of decision on this point, but the weight of authority, and the current of modern decisions, sustain the above principle. All joint trespassers are liable severally as well as jointly, and the rule is well established, that there may be several judgments against different individuals for the same trespass, but only one satisfaction. Wright v. Lathrop, 2 Ohio, 33; 8 Cow. 43; 1 Johns. 290. After several judgments are obtained for the same trespass, the plaintiff may make his election, on which judgment he will take out execution; and, having done this, he can not proceed on the other judgments. From this it appears that one joint trespasser can not plead in bar a prior judgment against another for the same trespass; but to be a good bar the plea must state that the prior judgment has been satisfied, or, at least, that the plaintiff has elected to take the judgment by issuing execution on it. Where the judg-

ment has been satisfied, which extinguishes the demand of the plaintiff, for the value of the property, the right of the property must, consequently, vest in the defendant. He has paid its value to the plaintiff, and, in addition, perhaps, something for the manner in which the property was taken. But before this satisfaction the defendant can set up no color of right to the property, on the ground that a judgment has been obtained against him for its value. The same rule that applies in a case of joint trespassers, in regard to the plea of a prior judgment in bar, and the change of property, must apply with equal, if not greater, propriety, in successive actions of trover, brought against different individuals, for the conversion of the same property.

In the case under consideration the judgment against Chevalier did not vest the property in him, and, consequently, he had no right, on this ground, to sell it to the defendants. And if the defendants, on demand, refused to deliver the property to the plaintiffs, they were guilty of a conversion, and are liable in this action. From these considerations the court think the record of the Virginia judgment is not evidence to bar the plaintiffs' action; to influence the jury in their assessment of the damages in this case; to show in whom the legal right to the property is vested; or, for any other conceivable legal purpose. Before the jury the counsel contended that the right of property was clearly shown, by the evidence, to be in the plaintiffs. That McCourtney and Read acted as their agents, and received from them ten thousand dollars. That the indorsement of the draft, by Chevalier, for the three thousand dollars, gave him no lien on the wheat purchased. That it was an ordinary case of indorsement, which gave the indorser no specific lien on the property of the drawer, when it might happen to come into his hands. But that, if a lien could arise out of this transaction, the delivery of the wheat, by Chevalier, on board of the plaintiffs' boat, and to Ford, their agent, who had charge of the boat, it was relinquished, and can not afterwards be asserted. That this delivery placed the wheat as much out of the power and control of Chevalier, as if it had been delivered into the warehouse of the plaintiffs. That the lien of a factor or agent is inseparable from the actual or implied possession of the property. That a tortious possession does not divert the lien, but that every voluntary relinquishment of the possession of the property is an abandonment of the lien. That the greater part of the wheat purchased was not delivered, and that to such part, if a lien existed, the plaintiffs could set up no claim, as against Chevalier, without indemnifying him. That it was not shown that Chevalier had paid more than one half of the three thousand dollar bill, though he had the bill in his possession; and having retained more than half of the wheat purchased, and the sum of eighteen hundred dollars received from the defendants, he was bound, in justice, to account to the defendants for any loss or damages they should sustain by the purchase of the wheat. That if the plaintiffs should recover in this action, they would still be losers, by the failure of McCourtney and Read, about eight thousand dollars, and that Chevalier could have no ground of complaint, if he, by giving credit as an indorser to the same firm of McCourtney and Read, should, also, sustain a loss which, at most, would be very small in comparison with the plaintiffs'.

These positions were all controverted by the counsel for the defendants, and they insisted there was no such delivery of the wheat, in question, as divested the lien of Chevalier. The court instructed the jury, substantially, as follows:

After recapitulating the evidence, as above stated, you must be satisfied, gentlemen, that the legal right of property in this wheat was in the plaintiffs, before you can find in their favor. And this the plaintiffs insist has been shown by the contract with McCourtney and Read, the advance to them of ten thousand dollars, and the fact of the purchase of the wheat, by Chevalier, under their direction. So far as it regards this right, it can be of no importance, whether Chevalier had any knowledge of it or not. He, no doubt, until after the failure of McCourtney and Read, considered himself as their agent in purchasing the wheat. And he looked to them, only, for the necessary funds. But this could not, in any respect, affect the agency for the plaintiffs, under which McCourtney and Read acted. It is by no means necessary, in establishing their right, for the plaintiffs to show that the same money advanced to McCourtney and Read was handed over to Chevalier. Having made the advance, McCourtney and Read were bound, in good faith, to purchase the wheat and pay for it; and so far as such purchase was made by themselves or their agent, as against them, the legal right to the wheat, was, unquestionably, in the plaintiffs. If the indorsement, by Chevalier, of the three thousand dollar draft, was one of ordinary occurrence, as contended by the plaintiffs' counsel, it is clear that it gave him no specific lien on the property of the drawer. But is this the character of that transaction? Chevalier had engaged to purchase wheat for McCourtney and Read, and had, in fact, purchased four thousand bushels, at one dollar per bushel, having received from them an advance of one thousand dollars; he calls upon them for funds to complete his payments, and the sum of three thousand dollars is raised, partly on his credit. And about the time he was to deliver the wheat, he is informed that McCourtney and Read had failed, and that the bill which he had indorsed would not be paid. Under these circumstances had not Chevalier a right to withhold the delivery of the wheat until he

was indemnified? The court think he had, whether such delivery was demanded by McCourtney and Read or the plaintiffs. In making the purchase Chevalier acted as the agent of McCourtney and Read; and the rule of law which applies to a factor will apply equally to him. A factor has a lien on the property of the principal, in his hands, for all advances made, and for any balance that may be due. The lien, also, exists for responsibilities incurred by the factor for the principal, in the general course of their business. And this is, especially, the case where the principal is insolvent, and the liability of the factor is about to be enforced. 3 Har. & J. 339; 6 Greenl. 51–57; 10 Wend. 318; 2 Kent, Comm. 638, 639.

No case could well be imagined which could more strongly illustrate the propriety and justice of the rule, which gives a lien for responsibilities incurred, than the one under consideration. But this lien is put an end to by a voluntary delivery of the property. And this case must turn on the fact of the delivery of the wheat, by Chevalier, in the boat, to Ford, the agent of McCourtney and Read, or of the plaintiffs, it matters not which. The boat was purchased by McCourtney and Read for the plaintiffs, in pursuance of their contract, and the management of the boat was committed to Ford. It seems from fifteen hundred to two thousand bushels of wheat were delivered on board of this boat by Chevalier. This was done before he was informed of the insolvency of McCourtney and Read; that the wheat belonged to the plaintiffs; and that the bill he had indorsed would not be paid. Now, if there was an unconditional delivery of this wheat to the agent of the plaintiffs, or of McCourtney and Read, the lien was abandoned. The factor or agent can not stop property in transitu, where he has voluntarily delivered up the possession of it, on any pretence that he has a lien upon it for advances made on account of the principal. Having parted with the possession of the property he has relinquished his lien and can not reassert it. The owner may, in some cases, regain the possession of property, sold and delivered by him, and hold it until the payment of the consideration shall be received. But this can not be done by a factor whose interest is special, and connected with the possession. If you shall find that the delivery of the wheat was conditional, and, in fact, made to Ford as the agent of Chevalier, and to be subject to his control, then there was not such a delivery as divested Chevalier's lien, and the plaintiffs must fail in their action. If the wheat had been lost between the place where it was put on board of the boat and Gallipolis, whose loss would it have been? This may illustrate the character of the delivery. For if there was such a delivery as to make the loss that of the plaintiffs, then there is no ground on which the lien of Chevalier can be enforced. With the possession he parted with the lien. But, on the contrary, if the loss, had one occurred, could have been charged to Chevalier, then he did not part with the possession, or the lien connected with it.

The jury will determine from the evidence as to the effect of the delivery of this wheat, under the above rule. It is immaterial, if you shall find for the plaintiffs, whether the defendants had notice or not of the foregoing circumstances, prior to their purchase of the wheat. For if the lien of Chevalier was extinguished by a delivery of the property, he could convey no right to it which can defeat the plaintiffs' title. A demand of the property, by the plaintiffs, under such circumstances, and a refusal by the defendants, is all that is necessary to sustain the action. Should you find for the plaintiffs, you have a right, in the exercise of your discretion, to include interest on the value of the property sold to the defendants from the time of its conversion, as a part of the damages.

The jury could not agree on their verdict, and they were discharged by the court, and the cause was continued.

At the subsequent term the case was submitted to the jury on, substantially, the same charge, when the jury found for the plaintiffs.

Case No. 9,290.

MATTHEWS v. OFFLEY.

[3 Sumn. 115.] [1]

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

SHIPPING—PENALTIES—ACTION—HOW BROUGHT—DESTITUTE SEAMEN—REFUSAL TO TRANSPORT—AMERICAN SEAMEN—WHO ARE—DESERTION.

1. An action for a forfeiture or penalty must be brought in the name of the government, and not of a private person, unless some other mode is expressly provided by statute.

[Cited in United States v. Chapel, Case No. 14,781; Briscoe v. Hinman, Id. 1,887; United States v. Willetts, Id. 16,699.]

[Cited in Ransdell v. Patterson, 1 D. C. Ct. of App. 491.]

2. Under the act of congress of 1803, c. 62, [2 Story's Laws, 883; 2 Stat. 203, c. 9], providing for the recovery of a penalty, for the benefit of the United States, where a master refuses to take destitute seamen on board and transport them to the United States, the action for the penalty must be brought in the name of the United States, and not of the consul or vice-consul.

3. Under the act above mentioned, the certificate of the consul is prima facie evidence of the refusal of the master to take the seamen on board, and of all the facts stated in the enacting clause, which are necessary to bring the case within the penalty.

[Approved in Burbank v. People, 90 Ill. 555. Cited in Holmes v. Hunt, 122 Mass. 517.]

4. If a seaman be entitled to the privileges of an American seaman, and be destitute, the consul is the proper judge as to the ship on board of which he should be placed for his return to the United States.

5. Foreigners, while employed as seamen in the merchant-ships of the United States, are

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

deemed to be "mariners and seamen of the United States," within the language and policy of the act of 1803, c. 62 [c. 9].

[Cited in United States v. Parsons, Case No. 16,002; Dustin v. Murray, Id. 4,201; Re Ah Tie, 13 Fed. 293.]

6. The fact of desertion from an American ship,—whether she be in port or not at the time when the seaman becomes destitute,—does not supersede the authority of the consul to require another American ship to bring him to the United States.

[Cited in Re Ah Tie, 13 Fed. 293.]

Error to the district court of Massachusetts in an action of debt, brought by the defendant in error, against the plaintiff in error, to recover the penalty of one hundred dollars, prescribed by the act concerning consuls, &c., of the 28th February, 1803 (Act 1803, c. 62 [2 Story's Laws, 883; 2 Stat. 203, c. 9]), for his refusal, as master of the brig Gem, to take a destitute seaman of the United States on board at the port of Smyrna, at which the defendant in error was vice-consul of the United States.

The declaration was in substance as follows:—"For that the said Matthews, heretofore, to wit, on the 28th day of September last past, was the master and commander of a certain brig called the Gem, a ship or vessel of the said United States, owned by certain citizens thereof, whose names are as yet unknown to the said vice-consul; and which said brig, then lying in the port of Smyrna aforesaid, being a foreign port, was bound to the port of Boston, a port in the said United States; and he, the said Matthews, then and there being the master of said brig, was requested by the said vice-consul to take on board the said brig one William Mann, being then and there a destitute seaman of the said United States, and to transport the said Mann to the port of Boston aforesaid; and the said vice-consul then and there tendered to the said Matthews the sum of ten dollars, as a compensation for receiving and transporting the said Mann as aforesaid; but the said Matthews did then and there wholly refuse to receive the said Mann on board the said brig, against the law, peace, and dignity of the said United States, and contrary to the form of the statute of said United States in such case made and provided: By reason whereof, and by force of said statute, the said Matthews has forfeited and become liable to pay the sum of one hundred dollars, to be recovered for the benefit of the said United States, by the said vice-consul, in his own name. Yet the said Matthews, although often required, has not paid to the said consul the said sum," &c.

Upon the trial upon the issue of nil debet in the district court [case unreported], a verdict was found for the original plaintiff, upon which judgment was entered; and a bill of exceptions being taken at the trial by the original defendant, the cause was now brought to this court.

The bill of exceptions was in substance as follows:—To maintain the issue on his part, the plaintiff's counsel offered in evidence the certificate of the plaintiff, as vice-consul of the United States for the port of Smyrna, which is in the words and figures following, viz.:

"Consulate of the United States. I, David W. Offley, vice-consul of the United States, hereby certify, that on the twenty-eighth day of the present month of September, as vice-consul aforesaid, I requested Richard Matthews, master and commander of the brig Gem, of Boston, of the burthen of one hundred and sixty-one tons, or thereabouts, then being a vessel belonging to a citizen or citizens of the United States, and lying in the port of Smyrna, to take on board his said brig William Mann, a seaman of the United States, and then being destitute within my official district, and to transport him to Boston, the port for which the said brig was then destined and soon to sail, on such terms not exceeding ten dollars for the said seaman; and that I then and there tendered to him, the said Richard Matthews, the sum of ten dollars for the said seaman as a compensation for receiving and transporting him as aforesaid, the said seaman being ready to be received (and then and there present) by the said Richard Matthews on board his said brig. But the said Richard Matthews, then and there and ever afterwards, altogether refused and neglected to receive the said seaman on board his said ship, and to transport him as aforesaid. In faith whereof, I have made this certificate under my hand and official seal, at Smyrna, this 30th day of September, one thousand eight hundred and thirty-six. (L. S.) (Signed) David W. Offley, Vice-Consul."

"I, David W. Offley, vice-consul, do hereby certify that the foregoing is a true copy from the original, existing in the register of this consulate. Witness my hand and the seal of office, at Smyrna, this 30th day of September, 1836. David W. Offley, Vice-Consul."

This was objected to as evidence of any facts therein stated, except the refusal of the defendant to take said seaman on board, but the district judge admitted the said certificate as prima facie evidence of all the facts therein certified to. The plaintiff's counsel also produced and put into the case a custom-house copy of the list of the crew of the ship Mars for the voyage referred to in the deposition hereinafter mentioned, and the name of the said William Mann there appeared as one of the said crew.

The defendant's counsel requested the judge to order the plaintiff to be nonsuited, because the action should have been in the name of the United States, and not in the name of this plaintiff; but the judge ruled that the action was rightly brought in the name of this plaintiff.

The defendant's counsel further requested the judge to instruct the jury, that if the said

seaman had deserted from the ship Mars at Smyrna, the consul had no authority to require the defendant to take the said seaman on board his vessel, while the Mars was lying in the port of Smyrna, but should have restored him to the ship Mars; and that while the Mars was lying in the port of Smyrna, the said seaman was not a distressed seaman within the meaning of the statute on which the action was founded. And he further requested the said judge to instruct the jury, that, if the said William Mann was a British seaman, he had no American character, except while he continued to be one of the crew of an American ship, and that, by deserting from the Mars in the port of Smyrna, his American character was at an end, and he was no longer entitled to protection and relief as an American seaman. But it was left to the jury to consider and determine, whether it was satisfactorily proved by the evidence given, that the said William Mann was an Englishman, or a deserter from the ship Mars; or whether the ship Mars was in the port of Smyrna when the defendant was required by the consul to receive the said Mann on board the brig Gem, of which he was master. And the jury were further instructed by the judge, that the consul might rightfully judge on board of what vessel, then being in the port of Smyrna, belonging to a citizen of the United States, and bound to the United States, he would place the said William Mann, if then and there a destitute mariner of the United States in that port, though it were now proved, that the said William was at that time an English subject, and a deserter from the ship Mars; that, having acquired the character of a mariner of the United States, by becoming one of the crew of the ship Mars, in manner above stated, he was, if destitute or in distress, entitled to relief from the consul of the United States, under the act of congress on the subject; and the consul might rightfully require the defendant to receive him on board for conveyance to the United States, on the terms specified in and by the act aforesaid; and that the defendant, master of the ship Gem, could not legally refuse compliance with such requirement, on the ground, that the ship Mars, of which the said William Mann was one of the mariners, was at that time in the port of Smyrna.

B. R. Curtis, for plaintiff in error.
Mr. Mills, Dist. Atty., for the other side.

STORY, Circuit Justice. Three questions have been made and argued at the bar. The first is, whether the present action is well brought by the vice-consul in his own name to recover the penalty, or whether the action ought not to have been brought in the name of the United States. Upon general principles, where a pecuniary penalty or forfeiture is inflicted for any public offence or wrong, it seems clear, that the action to recover the penalty or forfeiture must be brought in the name of the government, and not in the name of any private party, unless some other mode for the recovery is prescribed by some statute; and the usual remedy in cases of a pecuniary penalty is an action or information of debt by the government itself. Ex parte Marquand [Case No. 9,100]. This is the rule of the common law; and, therefore, it has been held, that a suit will not lie by a common informer for such a penalty, unless power is given to him for that purpose by statute (Fleming v. Bailey, 5 East, 313); neither will an indictment lie for such a penalty, unless also specially allowed by statute (Rex v. Malland, 2 Strange, 828; Ex parte Marquand [supra]), for it is properly recoverable as a debt in a court of revenue, by the government; and is in no just sense, a criminal proceeding. The whole question on this point, then, resolves itself into this: whether the present action by the vice-consul has been authorized by any statute of the United States.

The act of 1803, c. 62 [c. 9], on which this suit is founded, in the 4th section, makes it the duty of our consuls and vice-consuls, &c., to provide for destitute seamen within their districts; and requires all masters of American vessels bound to some port of the United States on request of our consuls and vice-consuls, &c., to take such seamen on board, and transport them to the United States upon certain terms and conditions prescribed by the act; and inflicts upon the masters a penalty of $100 for refusing so to do. Nothing is said in the act as to the person by whom, or the mode in which, this penalty shall be sued for or recovered "for the benefit of the United States, in any court of competent jurisdiction." Now, this section is a substitute for the seventh section of the act of 1792, c. 24 [1 Stat. 255], on the same subject, which the act of 1803, c. 62, § 5 [2 Story's Laws, 883; 2 Stat. 203, c. 9], has repealed; and which prescribed, that the penalty therein provided for the like refusal of the masters, should be sued for and recovered "for the benefit of the United States, by the said consul or vice-consul in his own name, in any court of competent jurisdiction." The omission of these latter words in the act of 1803, c. 62 [c. 9], would seem to furnish a clear proof of a change of the legislative intention as to the mode of suing for the penalty; and it seems to me, is decisive of the question. The omission of the words must be attributed to design, and leaves no ground, upon which a court of justice can presume any right or authority of the consul or vice-consul, &c., to sue; since the whole penalty is to be for the benefit of the United States. The second section of the act of 1803, c. 62 [c. 9], furnishes also an indirect argument to the same effect. By that section, the masters of American ships, on their arrival in foreign ports, are required to deposit the ship's papers with the American

consul or vice-consul, &c.; and it inflicts upon the master, for the refusal or neglect so to deposit them, a penalty of $500, which is to be recovered "by the consul, or vice-consul, &c., in his own name, for the benefit of the United States, in any court of competent jurisdiction." The common maxim is, "Expressio unius est exclusio alterius." If the legislature meant to provide for the recovery of the penalty in the same manner, in each case, they would have naturally used the same language, and have inserted the same provisions. But, if we are satisfied that the omission was purely the result of accident, or negligence, or mistake, it would not aid the court on the present occasion; for courts of justice are not at liberty to supply the defects of legislation, even if they were at liberty to presume them to be unintentional, or founded in mistake or negligence. My opinion is, therefore, that this point is fatal to the very foundation of the present suit. But counsel on each side have requested the court to give an opinion upon the other points in the cause, in order to settle the merits of the controversy, which would otherwise be brought forward in another suit, in the name of the United States.

The next question is to the ruling of the learned judge of the district court, in admitting the certificate of the vice-consul, stated in the bill of exceptions, as primâ facie evidence of all the facts therein certified; whereas, the counsel for the original defendant contended, and now contend, that it was not evidence, except of the refusal of the defendant to take the seaman on board. The fourth section of the act of 1803, after the provisions which have been already alluded to, proceeds to declare, "And the certificate of such consul or commercial agent, given under his hand and official seal, shall be primâ facie evidence of such refusal, in any court of law having jurisdiction for the recovery of the penalty aforesaid." The whole question turns upon what is to be understood as intended to be included in the statute. Is it the dry naked fact, that the master refused to take a seaman on board, giving his name, at the request of the consul, &c.? Or does the statute mean by the words "such refusal," a refusal under the circumstances stated in the preceding part of the section? My opinion is, that the latter is the true interpretation of the statute. It meant to provide, that the certificate should contain and be evidence, primâ facie, of all the facts stated in the enacting clause of the section, which is necessary to bring the case within the penalty; for all those facts are indispensable to make it "such refusal" as the statute contemplates. Upon any other construction the enactment would be wholly nugatory for all the purposes of enforcing the statute; since every material fact to enforce the penalty must be proved aliunde the certificate. The statute placed confidence in the consul, as a public officer, bound to the performance of highly responsible duties, and meant to make his certificate the proper and ordinary proof, though not conclusive proof, of all the facts to sustain a suit for the penalty. That is to say, it meant that he should certify, that the seaman was a seaman of the United States, was destitute, that he requested the master of an American ship, bound to the United States, to take him on board and transport him to a port of the United States, for the statute compensation, with a proviso that he should not be compelled to take more than two seamen for every one hundred tons burthen of the ship, and that he refused so to do. "Such refusal," and no other, would constitute an offence within the statute; and such refusal and no other is to be certified. Now, the present certificate contains the allegations of these necessary facts; and none other; and, therefore, it seems to me, that it was properly admissible, in the whole, according to the ruling of the district judge.

The third and last question is, as to the instruction given to the jury by the district judge upon the prayer of the counsel for the original defendant. The instruction in substance was, that the consul was the proper judge on board of what American vessel he would place the seaman (William Mann), if destitute; that if he was an English subject, and a deserter from another American ship (The Mars), then in the same port of Smyrna, yet, having acquired the character of a seaman of the United States by becoming one of the crew of the Mars, he was, if destitute, entitled to relief from the consul, and the consul might rightfully require the original defendant to take him on board; and the defendant could not lawfully refuse to take him on board, on the ground of his being a deserter from the Mars, and her being in the same port.

In regard to the first part of the instruction, it does not seem to me that there can be any real ground for doubt. If a seaman be entitled to the privileges of an American seaman, and be destitute, the consul is the proper judge on board of what ship he should be placed, for his return to the United States.

In regard to the other parts of the instruction, it has not been contended that no other destitute seamen are within the act of 1803, c. 62 [c. 9], except those who are American citizens. It is notorious, that our laws authorize and allow foreigners to be employed as seamen in the merchant-ships of the United States; and while so employed, they are clearly within the protection of our laws; and it seems to me they are to be deemed to be "mariners and seamen of the United States," within the language and policy of the act of 1803, c. 62 [c. 9]. There seems a studious caution in the act not to confine the relief to American citizens; but to give the benefit of it to all seamen in the merchant service, whether natives or foreigners. But the argument is, that foreigners are no longer

to be considered as holding the character of "mariners and seamen of the United States," than while they actually belong to a ship of the United States in that character. I greatly doubt if that proposition is maintainable in its full extent. Many cases may be stated, in which such a construction would involve great inconveniences and hardships, and be repugnant to the sound policy of the act. Suppose, for example, an American ship, with some foreigners composing a part of her crew, should be totally lost by shipwreck on a foreign coast; or should be captured and condemned in a foreign country; or should be sold in a foreign country; it would be a violent construction of the act to insist, that because the foreign seamen were absolved from their contract by such a disaster or sale, they were to lose their character as American seamen, although they were intent upon an immediate return to the country for the purpose of engaging anew in our merchant's service, and they and their families had a known domicil in the United States. Suppose a foreign seaman should be left ashore by one of our ships, on her departure from a foreign port, by accident, or mistake, or design; it would be difficult to support the doctrine, that he thereby lost his character as an American seaman in such a case, if his avowed domicil was in the United States. I do not know, that it ought to make any difference, if the case should be that of a foreign seaman voluntarily discharged from an American ship in a foreign port; or turned ashore for gross misconduct; or compelled to quit the ship from cruelty or gross ill treatment by the officers of the ship; if in each of these cases the seaman had his domicil in the United States, and had a bonâ fide intention to return to and remain in our marine service. It seems to me, that, where a foreign seaman has once acquired a domicil in the United States, and is engaged in our merchants' service, and retains, if I may so say, the habits of that service, and upon every discharge from one ship still has the animus revertendi to that service and domicil, he must be treated as intending to retain his acquired character of an American seaman, and his acquired American domicil. Some overt act on his own part, such as engaging in some foreign service, or resuming his original native character, or disowning his American character and domicil, seems to me indispensable to rebut the presumption that he still attaches himself to the American service. It does not strike me that his desertion from another American ship, at least, unless followed up by engaging in some foreign service, ought to have such an effect. If his desertion be without good cause and unjustifiable, although he has broken the shipping articles on his side, it is not dissolved. He cannot shake off his contract in this way. He is still in contemplation of law a seaman of the ship from which he deserted, and may be compelled to return to duty. If, on the other hand, upon his desertion the master justifiably declines to take him on board again, and cuts him adrift from the ship's service, he will then be discharged from the ship's service; but it by no means follows, that he is to be deemed discharged from the American marine service altogether, or that he has ceased, ipso facto, against his will, to be entitled to the protection of American seamen. I am, therefore, by no means prepared to admit that the fact of desertion from the Mars, if fully established, would, in this case, prove that the seaman was not entitled, if destitute, to the privileges of the act.

Nor do I think that the fact of the Mars being in port, supposing the seaman to have deserted from her, would per se establish that he was not a destitute seaman within the sense of the act. If the master of the Mars would not receive him on board again, he might be truly said to be a destitute seaman, if he could not find any other employment in the American service. The fact that the Mars was at the time in port would be a strong ingredient in the case to establish that he was not a destitute seaman, if he would have been received again on board of the ship for duty. But of itself it cannot be held, in point of law, as conclusive proof that he was not destitute. But I do not find that this point was ever required to be put to the jury under this aspect. Nor do I find any thing in the instructions of the district judge which precluded the jury from taking this matter into consideration, as matter of fact. For these reasons it does not appear to me, that there is any error in the instruction of the district judge given to the jury. The mere dry fact, that a seaman has deserted from an American ship, whether she be in port or not at the time, when the seaman became destitute, does not seem to me to supersede the authority of the consul to require another American ship to bring him to the United States. If the ship, from which he has deserted, has left the port, I do not understand, that the argument insists, that the consul may not, if he is destitute, require him to be brought home in another ship. Mere desertion, then, does not oust the consul's authority, or disqualify the seaman from the protection and assistance intended by the act. The fact of the ship's being still in port, from which he deserted, does not, in point of law, show, that he is not destitute, however proper, as a matter of fact, it may be for the consideration of the jury on that point.

Upon the whole my opinion is, that the two last objections to the ruling of the district judge are not maintainable. But, inasmuch as the suit is not brought in the name of the United States, and the vice-consul is not authorized by law to bring it in his name, the judgment must be reversed. Judgment reversed accordingly.

Case No. 9,291.

MATTHEWS v. SKATES et al.

[1 Fish. Pat. Cas. 602; Merw. Pat. Inv. 663.] [1]

Circuit Court, S. D. Alabama. April, 1860.

PATENTS—INVENTION—WHEN REACHED—DATE OF PATENT—IDEA FIRST PERFECTED—SIMILARITY OF STRUCTURE—EQUIVALENTS.

1. It is not until the reflections, investigations, and experiments of the inventor have reached such a point of maturity that he not only has a clear and definite idea of the principle and of its application, but has reduced his idea to practice and embraced it in some distinct form, that it can be said that he has achieved a new and useful invention. This must necessarily be sometime, more or less, before the date of the patent, and sometime, more or less, after the first conception by the inventor.

2. To defeat a patent, it must appear that the invention was substantially communicated to the patentee by some other person, so that, without the exercise of any inventive power of his own, he could have applied it to practice.

3. Though others may have previously had similar ideas, and may have experimented upon them, the person who first perfected the idea and made it capable of practical use, is the inventor, and entitled to a patent.

4. Similarity in the structure, appearance, and effect of two things, is presumptive evidence of their being made in the same way.

5. It is not necessary to constitute an infringement that a man should work by the specifications contained in the patent. He might not even know there was such a patent, and yet infringe it.

6. Where a patent is granted for a composition made of several ingredients, it covers and embraces known equivalents of each of the ingredients.

7. An equivalent of any substance is another substance having similar properties, and producing substantially the same effect.

This was an action [by William J. Matthews against B. S. Skates and others] on the case tried before Judge Jones and a jury, to recover damages for the alleged infringement of letters patent [No. 5,767], for an "improved composition for metallic packing in steam engines," granted to Green S. Cox, October 2, 1849. The invention consisted of a composition of lead, zinc, tin, and antimony, for the purpose of forming a steam-tight packing.

Anderson & Boyles and Overall & Moulton, for plaintiff.

E. S. Dargan and F. M. Taylor, for defendants.

JONES, District Judge, (charging jury). This action is brought by the plaintiff, as assignee of a patent issued to Green S. Cox, October 2, 1849, to recover damages for an alleged infringement by the defendants. The patent to Cox, with the specifications attached, has been read in evidence to you, and it is admitted that it was duly assigned to the plaintiff in July last. The defendants, among other grounds of defense, insist that the invention described in the patent to Cox was previously known to and used by Babbitt, and is covered by a prior patent to Babbitt, which is also in evidence before you.

That you may properly understand the nature and effect of these patents, as instruments of evidence, I will first state to you the object and source of the provisions of the patent laws. The object of the patent laws is to encourage inventors by securing to them for a limited period (fourteen years) the benefit of their inventions. It is not every invention, however, that will be thus encouraged. To be entitled to a patent, the applicant must not only be the first inventor of the thing to be patented, but the invention must be new and useful. To guard the public as far as possible against patents being taken out by other persons than the first inventors, or for little, frivolous, useless changes or inventions, a particular office has been established, called the "patent office," under the superintendence of a commissioner of patents.

A number of examiners are appointed, presumed to have skill and experience in such matters. Every application for a patent must be addressed to this office, and subjected to the scrutiny of these officers. The applicant must make oath that he is the original inventor; he must file specifications minutely describing his invention, and furnish accurate models or specimens of his invention. He must show that his invention is new and useful. All this must be done to the satisfaction of the proper officers of the government, before a patent will be granted. Having gone through this ordeal, the law very properly makes the patent, when issued, prima facie evidence that the invention is new and useful, and that the patentee is the first inventor. The construction of the patent to Cox, and also of the patent to Babbitt, presents questions of law for the court to decide. It is for the court to decide, from the language of the patent and the specification attached to it (which is part of the patent) what is the invention embraced by Cox's patent, and what is the invention embraced by Babbitt's patent, and to determine whether they are or are not substantially the same. The invention of Babbitt is an improved mode for making boxes for axles and gudgeons in the manner set forth in his specifications; that is to say, by the casting of hard pewter or composition metal, of which tin is the basis, into said boxes, they being first prepared and provided, or not, with rims or ledges, and coated with tin, as described in the specifications. This is not a patent for the making of tin, pewter, or any composition metal, but for making boxes for axles or gudgeons of the materials, and in the manner described in his specifications. In Cox's patent, some difficulty arises from a slight

[1] [Reported by Samuel S. Fisher, Esq., and here reprinted by permission. Merw. Pat. Inv. 663, contains only a condensed report.]

variance between the language used in the first part and that used in the latter part of the specification. The patent recites that Cox "alleged that he has invented a new and useful improved composition for metallic packing in steam engines." In the specifications, Cox states that the nature of his invention consists in a composition of the following metals, to-wit: lead, zinc, tin, and antimony, for the purpose of forming a steam-tight packing, etc. He then states the proportion in which these metals are to be generally used in making the composition, and the manner in which the composition is formed into rings and applied as packing. He concludes as follows: "What I claim as my invention, and desire to secure by letters patent, is the application of the composition above described, for the purpose of packing steam engines." There is manifestly some difference in the language of this claim, and the recital of his claim in the first part of the patent. But the granting part of the patent gives him an exclusive right to his invention, "a description whereof is given in the words of said Cox, in the schedule hereto annexed, and is made a part of these presents." The invention described in the schedule or specification is therefore the thing patented to Cox—that is, the application of metallic rings, made of a composition of lead, zinc, tin, and antimony, for the purpose of packing steam engines, in the manner described in his specification. This is an entirely different thing from that which was patented to Babbitt, and is not covered by Babbitt's patent.

There are four principal and material questions of fact for the jury to determine from the evidence. 1st. Was this alleged invention of Cox new and useful? However new an invention may be, it can not be legally patented unless it was also useful; and however useful it may be, it can not be legally patented unless it is new. If, therefore, you find, from the evidence, that the application of the composition described by Cox, for the purpose of packing steam engines, was not new or not useful, the patent would be void, and you should find for the defendants. In determining this question of fact, I charge you that the patent itself is prima facie evidence that this invention is both new and useful. Curt. Pat. 30; Alden v. Dewey [Case No. 153].

It is only prima facie evidence, however, and its effect is to throw upon the defendant the burden of proving that the invention is not new or is not useful. If the composition described in Cox's patent was known and used either for packing or other purposes, before his invention of it, in a form or manner substantially the same as that described by him, it would not be a new invention. A mere new use or application of a material or composition previously known is not a new invention. The point of time to which you are to look in deciding this question is the time of the invention. It is neither the date of the patent, nor is it the time when the idea was first conceived by the inventor. It is the time when the idea is not only distinct and complete in the mind of the inventor, but that idea is reduced to practice and embodied in some distinct form. Curt. Pat. 43. This must necessarily be sometime, more or less, before the date of the patent, and sometime, more or less, after the first conception by the inventor. When the idea first entered into the mind of the inventor, it is, almost necessarily, in a crude and imperfect state. His mind will naturally dwell and reflect upon it. It is not until his reflections, investigations, and experiments have reached such a point of maturity, that he not only has a clear and definite idea of the principle and of the mode and manner in which it is to be practically applied to useful purposes, but has reduced his idea to practice, and embraced it in some distinct form, that it can be said he has achieved a new and useful invention. That is the real time of his invention, though it may be months or years before he obtains a patent for it. Indeed, he would be none the less an inventor though he never obtained a patent for it. In determining the question whether the invention was new or not, that is the time to which you are to look, and not merely the date of the patent.

Cox, the patentee, has been examined as a witness before you, and he tells you he first conceived the idea of using a metallic compound for packing for steam engines in 1837, when he was an engineer on a steamboat on the Chattahoochie river; that he experimented on it from time to time; that in 1847, he became part owner of a steamboat on the Chattahoochie, and then first used the composition, as described in his specification, and found it useful and successful. You are the judges of what degree of bias he labored under when testifying, and of what weight and credit is to be given to his testimony. You are also to give due consideration to the testimony of other witnesses on this point, and decide upon the whole testimony whether the alleged invention was or was not new and useful at the time it was made. If you find it was not new or not useful, there is an end of the case, and you must render a verdict for the defendant. If, however, you find that it was new and useful, you will proceed to inquire into the next material question of fact, viz:

2d. Was or was not Cox the first inventor of the matter patented to him? In order to constitute a man an inventor, it is generally necessary that he must have exercised some inventive faculty of his own. I say generally necessary, because there might, no doubt, be cases in which an invention might be the result of pure accident. But the fact that he has received some ideas, hints, or suggestions on the subject from others, would not prevent him from being considered an inventor, and entitled to a patent as such. To have that effect, it must

appear that the invention was substantially communicated to him by some other person, so that, without the exercise of any inventive power of his own, he could have applied it in practice. Though others may have previously had similar ideas, and may have experimented upon them, the person who first perfected the idea, and made it capable of practical use, is the inventor, and entitled to a patent. Curt. Pat. 48. The patent to Cox is prima facie evidence that he is the original inventor of the invention described in the patent. This throws upon the defendant the burden of proving that some other person was the inventor. I presume you remember the evidence on this point on both sides. It is for you to weigh and consider all the evidence, and determine from it whether Cox was or was not the first inventor. If he was not, that ends the case, and you should find for the defendants. If he was the first inventor, then you will proceed to inquire into the next material fact, viz:

3d. Have the defendants infringed on the patent granted to Cox or not? To determine this point properly, you should bear in mind what is claimed as Cox's invention, and what is patented to him. He did not claim a patent for metallic packing for steam engines of every description. Any one might, no doubt, make packing of lead, tin, copper, type-metal, or any other metal or composition previously known, without infringing on Cox's patent right. To constitute an infringement of his patent, the packing must be made substantially of the same materials as those described in Cox's patent. It is not necessary to constitute an infringement, that a man should work by the specifications contained in the patent. He might not even know there was such a patent, and yet infringe on it. Neither will a slight or immaterial change in the ingredients, or the manner of preparing them, make any difference. If, for example, a man were to use the ingredients specified in Cox's patent, and were to add a small portion of some other metal, say of copper or silver, or were to vary the proportions so that the result was not materially changed, it would be an infringement. In this case, it is not disputed but that the defendants made rings of some metallic composition for the packing of steam engines.

The question of fact for you to decide from the evidence on this branch of the case is this: Was the packing so made by the defendants substantially the same with that described in Cox's patent, or was it not? The burden of proof on this point rests on the plaintiff. He must prove that it is substantially the same. The plaintiff, to do this, has proved the manner in which Cox's metallic composition is made, and has produced a specimen of it before you, which you can examine. He has also examined witnesses as to the manner in which the defendants make metallic packing, and has produced a specimen before you which he proves came from the defendants' foundry. You can look at that specimen, also, and compare it with the other. It has been decided that similarity in the structure, appearance, and effect of two things is presumptive evidence of their being made in the same way (Curt. Pat. 226, 227), and such is the law. One of the defendants' witnesses, Mr. Stevens, who had been in their employment for many years as foreman, testified that the defendants, in making metallic packing, did not follow the specifications of Cox's patent: that they used lead, copper, tin, and antimony, generally varying the proportions as their customers wanted it harder or softer, and that he had no knowledge or recollection of their ever using zinc until within the past month. The principal difference between the two compounds, according to the testimony of this witness, is, that in Cox's, zinc is used, while in the defendants', copper, in place of zinc. It is insisted on the part of the plaintiff, that even if this be so, copper is, in such a composition, an equivalent of zinc, and its use instead of zinc, does not prevent the manufacture from being an infringement of Cox's patent. The law on this subject is, that where a patent is granted for a composition made of several ingredients, it covers and embraces known equivalents of each of the ingredients.

An equivalent of any substance is another substance having similar properties and producing substantially the same effect. Whether in such a composition as this, copper is an equivalent of zinc, is a question of fact for you to decide from the evidence, if you consider it material. Under the charges given, you will decide whether the defendants have or have not infringed on the plaintiff's patent right.

If you find from the evidence that Cox was the inventor of the invention described in his patent, and that the invention was at the time of its invention new and useful; and further, that the defendants have infringed on the patent right secured by Cox's patent, since the assignment to the plaintiff, and before the commencement of this suit, you will then inquire what damages the plaintiff has thereby sustained. Proof has been given, though not of a very exact character, of the profits made by the defendants since July last by the manufacture of the metallic packing. On this basis you can make some estimate of the damages. The amount of damages is stated by the counsel of the plaintiff, not to be their principal object in this case. The principal object is to establish the plaintiff's right. Still, if he is entitled to recover at all, you should give him such an amount of damages as, under the evidence, you find is the actual damage sustained by him by the defendants' infringement of his right.

MATTHEWS (UNITED STATES v.). See Cases Nos. 15,741a and 15,742.

Case No. 9,292.

MATTHEWS v. WADE.

[1 MacA. Pat. Cas. 143.]

Circuit Court, District of Columbia. Sept., 1850.

PATENTS — INTERFERENCE APPEALS — AUTHORITY OF JUDGE TO STRIKE OUT REASONS OF APPEAL —REHEARINGS BY COMMISSIONER—FOREIGN PATENTS.

[1. The filing of the reasons of appeal is a proceeding in the patent office, over which the judge has no control, and he cannot order any of them stricken out; but when brought before him on appeal, if invalid, he will overrule them.]

[2. Under the act of 1836, §§ 7, 8 (5 Stat. 119), the power of the commissioner is not exhausted by once deciding a question of interference, and giving notice to the parties; but where cause is shown, as that material evidence was not received in time for the hearing, he may permit the unsuccessful party to withdraw his application, and refile it, and then declare anew an interference between the same parties.]

[Cited in brief in Fassett v. Ewart Manuf'g Co., 58 Fed. 364.]

[3. An application which, by permission of the commissioner, is withdrawn, and instantly refiled in the same words, must be regarded as a continuing application, so that a foreign patent, issued for the same invention more than six months before such refiling, but after the original filing, will not prevent the issuance of a patent.]

[4. The questions of the practicability and usefulness of the invention are within the discretion of the commissioner, and are not made the subject of an appeal, in a case of interfering applications.]

Appeal from the decision of the commissioner awarding priority of invention to Moses M. Matthews in respect of the "application of and substitution of rosin for linseed and other oils in the manufacture of printing ink."

Opinion of Reverdy Johnson, Attorney-General:

I have carefully considered the questions submitted to me in the case of Wade v. Matthews, conflicting claimants for a patent for applying rosin oil in the manufacture of printers' ink. The facts are these: In 1848 Wade applied for a patent, but before it was issued the like application was made by Matthews. An interference was then duly declared and notice given to the parties as in such case required. Neither party being present on the day fixed for the hearing, and no evidence received, the then commissioner (Mr. Burke) decided the priority of invention in favor of Wade, because of the priority of his application; and notice was given to Matthews that unless he appealed from the decision by a limited day a patent would be issued accordingly. An appeal was not taken; but before the time limited for taking it Matthews withdrew his application, received back his deposit of twenty dollars, and filed a new application in the words of the first. The commissioner declared an interference, and gave notice to the parties, as in the case of the original interference. Wade insists that the decision of the commissioner, upon the former application is a bar to the present, and that he has a right to a patent.

Your first inquiry is, "Can the unsuccessful party, under the circumstances, withdraw his application and refile it, and the * * * commissioner declare an interference? A proper answer to this question depends altogether, I think, upon the construction of the seventh and eighth sections of the act of July 4th, 1836, "to promote the progress of useful arts." 5 Stat. 117. There are no other provisions affecting it. If by these the entire authority vested in the commissioner is executed when he decides in a case of interference in favor of either party, and his duty, therefore, in the issuing of a patent is but ministerial, then the course pursued in this instance in declaring a second interference as between the same parties was illegal, and Wade is entitled to his patent. It is certainly true that a special authority once fully exercised is exhausted; and it is equally true that it can only be exercised in the way prescribed. It is also clear, as a general rule, that in such jurisdictions powers not delegated are not to be implied; but it is equally clear that where not expressly prohibited, they may be implied if necessary to the discharge of a power which is delegated. No authorities are cited for these propositions, as they are familiar and perfectly well settled. What, then, are the powers in a case like the present of the commissioner, and when are they fully exhausted? The power to issue a patent is under the seventh section of the act of 1836, and it is only authorized to issue when, "upon examination, it shall appear to him" that the same had not been invented or discovered by any other person in this country prior to the alleged invention or discovery thereof by the applicant, or that it had not been patented or described in any printed publication in this or any foreign country, or had not been in public use or on sale with the applicant's consent or allowance prior to the application.

Being satisfied as to these several facts, and also satisfied that the invention is sufficiently useful and important, it then, and only then, becomes his duty to issue a patent. Under this provision it is manifest that the whole subject rests in the judgment of the commissioner until the patent is actually granted. It is that grant which finally decides the question submitted to him; and by the plain words of the law his authority to make the grant depends upon his being satisfied, at the moment he does make it, upon each one of the points made by the law necessary to the validity of the application. The remainder of the section only provides a mode in which, when the decision is against the applicant, he may have it reviewed by another tribunal, being by that act a board of examiners, and now, under the eleventh sec-

tion of the act of March 3, 1839 (5 Stat. 353), the chief judge of the District of Columbia. As far as this section of the act of 1836 is concerned, it is clear that the authority of the commissioner is not only not exhausted by any preliminary or intervening opinion he may form on the question of title to patent before he issues the patent, but that his duty is not performed, and, on the contrary, is violated, if at the time he issues it he is not satisfied upon the facts necessary under the law to the validity of the claim. Let us now see if in this respect there is any difference between the seventh and eighth sections of the act. I think not. In the eighth, as well as in the seventh, in my opinion, the power of the commissioner is not extinguished and the matter put beyond his reach by anything to be done by him short of the issuing of the patent. The proceeding in the present case was had under the eighth section. That section provides that when an application for a patent is made which in the opinion of the commissioner would interfere with any other patent for which an application may be pending, or with any unexpired patent which shall have been granted, it shall be the duty of the commissioner to give notice thereof to such applicants or patentees, as the case may be; and if either shall be dissatisfied with the decision of the commissioner on the question of priority of right or of invention, on a hearing thereof he may appeal from such decision on the like terms and conditions as are provided in the preceding section; and the like proceedings shall be had to determine which, or whether either, of the applicants is entitled to receive a patent as prayed for.

It will be seen that this provision, as far as the act of the commissioner is concerned, refers to but one of the grounds upon which he is to be satisfied under the seventh section, and that but partly; that is to say, the ground of priority of invention between the applicant and any other applicant whose application is pending, or any unexpired patent, although other conditions required by the prior section are here omitted. Was it, then, the purpose of this section to limit the authority of the commissioner, or rather to limit his duty as that was prescribed by the previous section? Under that I think it is clear that at the moment of issuing the patent his authority exists in full force, and his duty in equal force, to patent or not, as he may be satisfied of the title. Does this latter section authorize him to issue a patent to one who he not only is not satisfied is entitled to it, but who he may be satisfied is not entitled to it? I think not. The title to patent depends on the seventh section. Its provisions must be found to give it; and up to the period when, under these, the commissioner is empowered, it is made his duty, to decide for or against the application. He must have like authority, and it must be equally his duty to decide under the eighth section. If this was not the case, this result would follow: that the act in one section would make the claim depend upon the judgment of the commissioner at the time of issuing the patent, and in the other, though the reason was precisely the same, would make it wholly independent of what might at that time be his opinion. The act, I think, is not liable to such an objection. The two sections are to be considered together, although they look, in part, to different states of things. In connection with the application, they look to the same end—the granting a patent only to the party entitled to it under the act. The latter is not to be construed to repeal that part of the former which does not only not empower the commissioner to issue the patent unless he is satisfied upon each of the conditions upon which it makes the claim to rest, but, on the contrary, makes it his duty, unless so satisfied, to refuse it. But what places this view beyond doubt is that the eighth section contains no authority to issue a patent at all. It contains no provision which, in words or by implication, can be construed to give the power. The patent, then, is issued under the authority of the seventh section, and can only go to him who, at the time it is issued, the commissioner is satisfied is entitled to it under the terms of the section. These, as already stated, so far from authorizing him to grant when he is not satisfied as to priority of invention, prohibit his granting it.

The whole object of the eighth section was to have the applicant and another applicant or patentee holding an unexpired grant for the same invention, as to priority of invention between themselves, as one of the means of satisfying the commissioner upon one of the points specified in the previous section. But it was not its purpose to limit his authority as to time nor to change his duty, as these were regulated by that section. They continue, as I think, to govern both, and are not performed, so as to put the subject beyond his control, until the patent is actually granted; nor do I see that the inconvenience or injustice supposed by the counsel of Wade to result from this construction will ensue. It is thought that by allowing the course adopted in this instance the controversy could never be brought to a close. But this is not so. The commissioner has control of the whole matter. When satisfied of the title, he will issue the patent; and it is his duty to issue it. The permission to withdraw an application in such case will be granted or not, as the commissioner may be satisfied or not. It is no answer to this to say that it leaves the right of parties to depend upon the discretion of the officer, and not upon the law. His discretion is not a loose and undefined one, which he may use in each case merely as he wills or desires. It is a legal discretion, or rather a judgment, founded upon the law, and duly to be exercised where, in his opinion, the law demands it This de-

mand is made when the commissioner is called upon to issue a patent to an applicant who he is either satisfied is not entitled to it or doubts as to the title under the only section of the law which gives him authority to issue it—the seventh section. But the delay and inconvenience suggested which might be the consequence, in some cases the injustice, which might result to the true inventor or to the public from the opposite construction, commends this to adoption. Whilst in a spirit of true policy the act carries out the constitutional provision for the promotion of the "progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries," it at the same time guards the public against abuse, by requiring the commissioner at the very last moment to be satisfied that he is securing the real author or inventor the exclusive right to his own discovery, and not sanctioning an invalid or fictitious claim, and thereby furnishing the means of annoying and injuring the public. I have no doubt, therefore, that the commissioner, in the present instance Mr. Burke, had authority to receive the second application of Matthews, and that it was his duty so to do under the circumstances, and that the opinion he gave upon the former application, no patent having issued to Wade, is not a bar to such a proceeding. I decline for the present answering the second question, so far as it is not covered by this opinion, as it is not called for by the present case; but if you think that an answer is required for the proper execution of the duties of the commissioner, I will give it at a moment of more leisure than I now have.

Upon the receipt of this opinion at the patent office, the Hon. Thomas Ewbank, who had in the meantime become commissioner of patents, appointed a new day of hearing upon the testimony already taken, both parties having stipulated to that effect. Before the day of hearing, Wade moved for a further postponement of the day of hearing, to enable him to take new testimony, accompanying the same with affidavits of the witnesses to be called, setting forth the facts expected to be proved. This motion was denied by the commissioner, upon the ground that the proposed testimony, if admitted, would not materially affect the decision. Final decision was had in due course upon the merits of the controversy, awarding priority of invention to the said Matthews; and thereupon the present appeal was taken to the judge, praying him to reverse the said decision of the commissioner and all other acts of the office, down to the granting of letters-patent to the said Wade, and assigning ten reasons of appeal, as follows: 1. That the commissioner of patents having, on the 15th of February, 1849, decided a question of interference previously declared between the claims of Wade and Matthews to a patent for the manufacture of printers' ink by the use of rosin oil, and having given notice thereof to the parties that unless Matthews appealed by the 10th day of April then next a patent would be granted to the said Wade, and there having been no such appeal, the commissioner's power over the subject was spent, and the decision could not be reconsidered or renewed by him, and he therefore had no power to act in the present case. 2. That the commissioner was unauthorized by law to allow Matthews, after the question of interference was decided against him, to withdraw the application and receive back any portion of his deposit. 3. The question of interference in this case having been declared in favor of Wade, it is res adjudicata between the parties, and it is final and binding upon them both, and can only be reversed upon appeal to the chief justice, or by a proceeding in a court of equity of the United States. 4. The commissioner having acted upon and rejected Matthews' application, had no power to receive and act upon it again. His authority to act upon it having been once executed, was spent and gone, and he could not execute that power a second time. 5. If the commissioner had power to grant a rehearing in his discretion, he could not lawfully do so without allowing the party in whose favor the decree had been made to be heard on the question. 6. The commissioner erred in not granting the postponement asked for by Wade. 7. A patent having been lawfully decreed to Wade, which decree has never been annulled or vacated or appealed from, and having been challenged to this proceeding as a patentee, the law requires, and it is the duty of, the commissioner to issue one to him, as previously decreed. 8. The commissioner is forbidden by law to issue a patent to Matthews, because it is clearly and indisputably proved, and not contradicted or denied, that a patent was issued for this same invention in England in July, 1848, and in France in August of the same year—both more than six months before Matthews made his present application. 9. The inventions of Wade and Matthews are not identical, and Matthews' is not one which he can use, nor is it one which he has reduced and put in practice, or which is useful. 10. The evidence clearly shows that Wade, and not Matthews, is the first inventor of the improvement claimed, and the commissioner should have so decided; and for that reason his decision should be reversed.

At the hearing, counsel for Matthews moved to strike the first eight and latter part of the ninth reasons of appeal from the record, upon the ground that they involved questions not within the jurisdiction of the judge. The judge being in doubt as to his power to strike reasons of appeal from the record, directed argument to proceed upon the entire case, reserving his decision upon the motion until the final decision of the case.

The Commissioner in Reply: The questions raised in the first, fourth, and seventh reasons of appeal were involved in the opinion of the attorney-general; and as that officer is provided to advise and give opinion in all legal questions that may arise in the executive departments of the government, the questions are not properly before the court. There are two prominent acts of the commissioner which frequently occur in the discharge of his official duties: the one is called the rejection of an application, and the other a decision on an interference—each of equal importance to the parties interested, and neither necessarily final nor decisive of the issue of a patent. It is in accordance with this view that the practice of the office, established at the reorganization in 1836, has been steadily maintained to the present time. So far as the importance or the responsibility of the act extends, the review of an ordinary rejected application and that of a decision upon an interference are regarded as the same; each is a decision upon the testimony then before the office; and should anything then occur to arrest the execution of the judgment —as the filing of a caveat by another inventor, the arrival of a foreign journal announcing that the invention was patented abroad before the filing of the domestic application, or the filing of an application by another inventor—the commissioner considers himself bound by the spirit, if not by the letter, of the law to review or reverse his decision according to the testimony, whether the case be an ordinary rejected application or the decision on an interference. The former of these is almost of daily occurrence, while the latter is not without precedent. The noted case of interference between Coleman Coburn and a German by the name of Ferdinand Stark, in the Eolian attachment to the piano-forte, is a case in point. The following is the history of the case: In 1845 Coburn and Coleman each applied for a patent. An interference was declared between the inventions, and decided in favor of Coburn. But before the patent was issued, Stark applied for a patent for the same invention, and an interference was declared between the invention of Coburn and that of Stark, and the latter, by being permitted to go behind the printed publications of the day, by taking testimony in a foreign country, was declared to be the first inventor. But the counsel for Coburn (the Hon. Senator Berrien) submitted to the commissioner that an error had been committed in allowing the foreigner to go behind the printed publications, by taking testimony in a foreign country; the commissioner re-examined the subject in connection with the seventh section of the act approved July 4th, 1836, and became satisfied that he had before interpreted the act erroneously. A new day of hearing was appointed, and a new decision was made reversing the former, and the patent was finally granted to Coburn on the 1st of February, 1847. As to the fifth and sixth reasons of appeal, the act of 1839 (section 12) provides that the commissioner shall have power to make all such regulations in respect to the taking of evidence to be used in contested cases before him as shall be just and reasonable; and as this subject is intrusted to the discretion of the commissioner, it follows that the law will not disturb him in the exercise of his duties, so long as his rules of practice are neither unjust nor unreasonable. With respect to the eighth reason of appeal, the evidence adduced in the decision shows that Matthews used the invention in November, 1846, or about a year and three-quarters before the foreign patents alluded to were issued. The ninth and tenth reasons of appeal are inconsistent with each other and with the other reasons of appeal. As to the ninth, the claims show for themselves that the inventions of the two parties are identical, the concluding part of Matthews' claim not affecting its scope. The tenth reason presents the principal question before the judge.

R. H. Gillet, for appellant.

1. There is no statute giving the judge a power to order any of the reasons of appeal, which have been filed in the office in accordance to law, to be stricken out. If they are not valid reasons, the judge in his final judgment upon the whole case will overrule them, but they must be heard and considered.

2. The judge has jurisdiction of all questions which arise in the case. Bain v. Morse [Case No. 754]. Under the eighth section of the act of July 4, 1836, the jurisdiction of the board was not limited in anything. That section of the law gave them ample authority to review the decisions of the commissioner made under the seventh section. Whatever he might decide under it the board might examine. They were not confined to the third or fourth points; they could consider and reverse the whole. If their power stood on the seventh section alone, the jurisdiction would be ample; but under the eighth section, the authority given was still broader. By the eighth section it is enacted that if either of the conflicting applicants should be "dissatisfied with the decision of the commissioner on the question of priority of right or invention, on a hearing thereof he may appeal from such decision on the like terms and conditions as are provided in the preceding section of this act, and the like proceedings shall be had to determine which, or whether either, of the applicants is entitled to receive a patent as prayed for." By that act the board of examiners had perfect jurisdiction over the whole question. They might decide whether either of the contesting applicants is entitled to the patent, or which of them, or declare that neither of them shall have it. The judge stands precisely in the place of the board of examiners, and can do all that they could do. He has therefore a right to inquire into everything going to show whether Matthews or Wade is in this case entitled to the patent,

or whether it can lawfully be granted to either. The jurisdiction of the judge extends over the whole case—not only to the question who was the first inventor or true inventor, but every other question which touches the title of either party to the patent. If there is such a limitation as is contended for, it equally excludes any decision on the question of interference; that question, under the statute, stands on the same ground as all others.

3. The rules of the patent office are not binding on the judge. The question whether an application for a patent can be withdrawn and a new one put in is not a question exclusively for the commissioner. He has no such discretion. A judge, after pronouncing judgment, cannot refuse to tax the costs and sign the roll on his mere personal discretion. There is not a word in the statute about discretion. It is this alleged discretion which has cast a cloud over this entire case.

The supervision of the judge is not confined to the testimony in the case. The act directs the commissioner in a case of appeal to send up everything in the case, that the judge may consider it. The eleventh section of the act of 1839 says "that the commissioner shall also lay before the judge all the original papers and evidence in the case, together with the grounds of his decision, fully set forth in writing, touching all the points involved by the reasons of appeal, to which the revision shall be confined." The language shows that the judge is to review all that has been before the commissioner. If he was to be confined to the evidence alone, why was the commissioner required to send all the rest of the papers?

Edmund Burke, for appellee.

1. The first, second, third, fourth, fifth, sixth, seventh, eighth, and the latter part of the ninth reasons of appeal embody matter not within the jurisdiction of the judge sitting as a court of appeal from the commissioner of patents. The jurisdiction of the judge is limited by the eleventh section of the act of March 3d, 1839, by which he is substituted for the board of examiners provided for in the seventh and eighth sections of the act of July 4th, 1836. The act of 1836 confined the jurisdiction of the board of examiners to the particular grounds on which the commissioner refused the patent. It gave the board no authority to inquire into any of his previous acts, nor to surpervise the rules and regulations of the patent office or the usages and customs prevailing in that office in regard to the mode of transacting its business. The grounds upon which the commissioner was authorized to refuse a patent were—first, want of novelty; second, abandonment to the public by sale or allowing its use; third, want of utility or importance; fourth, want of a sufficient specification. These are the four grounds on which the commissioner was authorized to refuse a patent; and it was to these points alone that the revision of the board of examiners was confined. They had no authority whatever to inquire into the matter. They could not inquire whether the proceedings before the commissioner had been informal and incorrect; whether a duty of $30 had been paid; whether a model had been duly deposited in the office or duplicate drawings been filed; or whether the application had been before made, and rejected, withdrawn, or renewed. On the contrary, their power was confined to the particular grounds of his decision, as stated by the law itself. And, therefore, inasmuch as the same jurisdiction, and that only which the board of examiners possessed, was transferred by the eleventh section of the act of March 3, 1839, to the judge, he cannot embrace in his review of the decision of the commissioner any other matters than those which were legally cognizable by the said board.

2. The eighth section of the act of July 4, 1836, provides, in the event of a conflict of inventions, for the proceeding called interference, and it gave the right of appeal from the decision of the commissioner to the board of examiners constituted by the eighth section of that act, to which right the judge succeeded by the eleventh section of the act of 1839. This jurisdiction, therefore, like that of the board, is confined to the question of priority of right or invention. He cannot go back to the question, and inquire into the correctness of the proceeding prior to his declaration of interference, nor can he inquire into the mere practice of this office, nor its rules, regulations, usages, and customs, or whether the commissioner has improperly, and not for good reason, refused a postponement or continuance of the hearing. If the judge were to assume this power, he would then in fact constitute himself the commissioner of patents, and the latter would in fact occupy the position of, and possess no more power than, a clerk under the judge. Congress in giving him jurisdiction over the decisions of the commissioner in certain specified cases, which must be his alternate and not his interlocutory decisions, never contemplated giving him unlimited power over the acts of the commissioner.

3. It is true that the judge in some of his former opinions intimates that his power extends to all the points involved in the reasons of appeal; but in these cases the question of jurisdiction was not expressly raised. The reasons required to be filed must relate exclusively to the particular matter appealed from and involved in the commissioner's decision. He cannot inquire into the mere ministerial acts of the commissioner. The board of examiners had no jurisdiction in such cases, and the commissioner can have none. Woodworth v. Stone [Case No. 18,021]; Whittemore v. Cutter [Id. 17,600]; Ex parte Janney [Id. 7,209].

4. If the jurisdiction of the judge were coextensive with the "reasons of appeal," all

matters whatsoever might be brought within its embrace. The party appealing must thus compel the judge to inquire into and decide the question whether the examiner who examined the case had been duly appointed by the commissioner, and qualified by taking the oath required by law, or whether the commissioner himself was duly appointed and commissioned, or even whether the president of the United States, from whom the commissioner holds his commission, was duly elected and qualified according to the constitution.

5. If, as assumed in the first four reasons of appeal, the judicial power of the commissioner was exhausted by the first decision, and the matter is now res adjudicata, the remedy is not by appeal but by mandamus to compel the commissioner to exercise the ministerial duty of issuing the patent, or by impeachment for malfeasance. So, if the commissioner were about to issue a patent unlawfully for an invention patented abroad more than six months before filing the application in this country, the remedy is not by appeal, but by injunction.

6. The questions of utility and reduction to practice were decided by the commissioner before the question of interference was raised, and are not before the judge.

7. With regard to the fifth reason, the law gives no right to a party to be heard upon a motion to rehear. It is a matter entirely within the discretion of the commissioner, for reasons satisfactory to himself, to determine that the ends of justice require a rehearing.

8. With regard to the sixth reason, it is well established that a superior tribunal in proceedings at law has no power on appeal to reverse the decision of the inferior tribunal on a motion for a continuance arising under its own rules of practice.

9. Finally, the matter set forth in the reasons of appeal, above objected to, have not been appealed from, and are not properly before the judge. The only matter appealed from is the decision of the commissioner on the question of interference and novelty of invention, and others cannot be brought before the judge in this proceeding by way of assignment of errors.

10. The identity and priority of invention involved in the ninth and tenth reasons of appeal are admitted to be proper and legitimate subjects of inquiry in this proceeding.

CRANCH, Chief Judge. The first question is upon the motion of the appellee to order a certain portion of the reasons of appeal which had been filed in the office to be stricken out. The filing of the reasons of appeal is a proceeding in the office over which the judge has no control. The proceedings in the office are all under the superintendence and control of the commissioner, who is uncontrolled in the discharge of the duties of his office, except so far as an appeal is expressly given by law. No reason of appeal can be considered as valid which would not justify the commissioner in refusing the patent. If the commissioner has received and filed the reasons of appeal, the judge cannot order him to strike them out. They wait to be heard and decided; and when brought before him upon appeal, if they are not valid, he will overrule them.

The first reason of appeal is, in substance, that the commissioner, by deciding the question of interference in favor of Wade, and giving notice thereof to the parties, had spent all his power over the subject, and therefore had no power to act in the present case. This reason of appeal is answered by the opinion of the attorney-general, in which I fully concur. The same answer may be given to the second, third, fourth, fifth, sixth, and seventh reasons of appeal. They were matters within the discretion of the commissioner, and over which the judge had no control —no jurisdiction—these matters not having been made the subject of appeal nor valid grounds of appeal. As to the eighth reason of appeal, I doubt whether the English and French patents obtained by Wade, or for his benefit, even if obtained more than six months before Matthews' application, would be good cause for reversing the decision of the commissioner in favor of Matthews if he was the first inventor; but it appears by the proceedings in the office that the first application of Matthews was on the 12th of May, 1848; the English patent obtained by Wade was in July, 1848; and although Matthews' first application was withdrawn, yet it was instantly renewed in the same words, and must be considered as a continued application; so that six months had not expired after the English and French patents were issued before Matthews' application. But it seems that the foreign patents must be issued before the American discovery.

As to so much of the ninth reason of appeal as regards the practicability and usefulness of the invention, and the reducing of it to practice, these were matters for the consideration and within the discretion of the commissioner until the patent should be finally issued, and are not made the subject of appeal. Nothing preliminary to the issuing of the patent is a valid ground of appeal, unless made so by the law. The said first clause of the ninth reason of appeal and the tenth reason of appeal are proper subjects of appeal, and involve the merits of the case. The said first clause of the ninth reason denies the identity of the inventions, and the tenth avers that the evidence shows that Wade, and not Matthews, is the first inventor of the improvement claimed. The identity of invention is admitted by all the previous proceedings in the case, and particularly by the agreement of Matthews and Wade of the 12th of April, 1849, to use the testimony already taken. Exhibit C.

There is nothing left, therefore, but the

question of priority of invention involved in the tenth reason of appeal, and this plea depends upon the evidence. The question is not whether Wade made a better printing ink than that made by Matthews, but is, which of them first invented or discovered the application and substitution of rosin oil for linseed and all other oils in the manufacture of printing ink. The evidence is voluminous and intricate, and in some respects contradictory, and the question of priority of invention must of necessity be decided upon consideration of all the evidence "produced before the commissioner." The evidence is all in writing, and it cannot be necessary that I should point out any part of it as the particular ground of my decision. Upon a careful consideration of the whole of that evidence, I am of opinion, and so decide, that Thomas M. Matthews is the first inventor and discoverer of the application and substitution of rosin oil for linseed and other oils in the manufacture of printing ink, and therefore "is entitled to have a patent as prayed for."

[Subsequently, on October 1, 1850, letters patent No. 7,686 were granted to M. M. Matthews. For another case involving this patent, see the opinion of Johnson, Atty. Gen., in Wade v. Matthews, 1 MacA. Pat. Cas. 145.]

MATTHEWS (WADE v.). See Case No. 17,029.

MATTHEWS (WOOD v.). See Case No. 17,955.

MATTHEYS (COOPER v.). See Case No. 3,200.

MATTHIAS (The PIZARRO v.). See Case No. 11,199.

MATTHIESSON (UNION SUGAR REFINERY v.). See Cases Nos. 14,398 and 14,399.

Case No. 9,293.

MATTINGLY v. SMITH.

[2 Cranch, C. C. 158.] [1]

Circuit Court, District of Columbia. Dec. Term, 1818.

ARREST—CIVIL—CAPIAS AD SATISFACIENDUM—INSOLVENCY.

The court will not, on motion, quash a ca. sa. issued by the clerk of this court upon a judgment of a justice of the peace, upon the ground that the defendant had applied for the benefit of the insolvent laws of Maryland, and had obtained an order, and given bond, for his appearance in St. Mary's county, Maryland, but had not yet obtained his final discharge.

The defendant moved the court to quash a ca. sa. issued by the clerk of this court upon the judgment of a justice of the peace, because he had applied for the benefit of the insolvent laws of Maryland, where he resided, and had obtained an order, and given bond for his appearance in St. Mary's county, by which he is protected from arrest in Maryland, but had not yet obtained his final discharge.

THE COURT overruled the motion, and refused to quash the ca. sa.

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

Case No. 9,294.

MATTINGLY v. THREE HUNDRED AND FIFTY-SEVEN BALES OF COTTON.

[2 Flip. 288; 8 Cent. Law J. 227; 7 Reporter, 485.] [1]

Circuit Court, W. D. Tennessee. Nov. Term, 1878.

SALVAGE COMPENSATION—RULE ON HIGH SEAS NOT SAME AS ON RIVERS.

1. Where the district court allowed one-third of the value of a cargo for salvage services which did not consume more than, or a little more than, half an hour's time of a tug, it was set aside on appeal on the ground of its being exorbitant and excessive; the amount of $750 being deemed reasonable, which sum was adjudged to the salvors.

2. Salvage compensation in cases arising on the high seas cannot be safely followed in cases arising on the western rivers, as the peril of life is generally much less.

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

[The material facts are as follows: The steamboat Mary Bell, a large vessel, was discovered to be on fire about two o'clock p. m. of the 27th day of February, 1876, while she was lying at the levee of the port of Vicksburg, Mississippi. She was taking on a cargo of cotton, her head being to the shore and her stern extending out into the Mississippi river at an angle of about forty-five degrees. On her larboard side, and to some extent caught under her guards, was the small steamboat Yazoo Belle, partially laden with cotton; and on her starboard side and next to the levee, but having sufficient room to be turned around, was the small steamboat Tallahatchie, likewise partially laden with cotton, which last named cotton was that involved in this litigation. The flames on the Mary Bell spread quite rapidly, and in this condition of affairs, and in response to the whistle of the Mary Bell for assistance, the steam-tug John Bigley, which was then some half mile distant, steamed to the place of disaster, with the crew at the time on board, to render such assistance as might be needed. The tug first made fast to the Yazoo Belle, she being in more immediate danger from the fact that the wind blowing off shore carried the flames in her direction, and towed her out of reach of the peril. The tug then returned as soon as possible, and having made fast to the Tallahatchie, likewise towed her to a safe place, first below, and afterwards above, the burning steamboat. This tug was

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission. 7 Reporter, 485, contains only a partial report.]

the only steamer in port that could have rendered such assistance at the time; and the strong probabilities were that the Tallahatchie, as well as the Yazoo Belle, with their remaining cargoes, would have been destroyed, but for this service. Other parties were attempting to move the Tallahatchie to another position, and had moved her slightly, but with no great prospect of ultimate success. The time actually consumed in towing the Tallahatchie away from the fire was from five to ten minutes; and together with the time consumed in removing her to a position above the burning steamboat, aggregated about a half hour. While aid was being rendered to the Yazoo Belle, the orginal crew of the tug was joined by two others of the crew, who were off watch at the time, also by one of the owners, and by one or more persons belonging to the crews of the Yazoo Belle and Tallahatchie, and they all equally participated in the remaining service, the crew of the tug, all the time during its rendition, not being required to leave their vessel. The owners of the tug and her regular crew are the libelants in this suit, and seek a salvage compensation. Some of the libelants' witnesses testified that the tug, in rendering this assistance to the Tallahatchie and cargo, was exposed to danger, because of the proximity of the burning steamboat; and that the lives of those on board of the tug were likewise imperilled by the heat, by danger from exploding steampipes, and by risks from the probable falling of the chimneys, and also of the side-houses of the Mary Bell, which in fact fell soon after the Tallahatchie was towed away; but they consider that the tug might, at any moment, have quickly steamed away from the place of disaster.

[The cotton on board the Tallahatchie, which had come out of the Yazoo river, was consigned in part to Memphis, Tennessee, and in part to New Orleans, Louisiana. That consigned to Memphis was, after the fire, reshipped at Vicksburg for Memphis on the steamboat Capitol City, without objection by the salvors; but upon its arrival at Memphis, it was arrested in this cause, and was soon afterwards released on bond, it having been claimed by the Hernando Insurance Company and Planters' Insurance Company, both of Memphis, Tennessee, with small lots by other persons. The libelants dismissed their suit as to one hundred and nineteen bales of cotton, which was shown by claimants' proof not to have been on board the Tallahatchie at the time of the service; and this left two hundred and twenty-three bales to be adjudicated upon, out of the three hundred and forty-two bales actually seized under the warrant of arrest.

[Upon the hearing of the cause in the district court the libelants were awarded salvage at the rate of ten and seventy-nine one hundredths dollars per bale, the agreed value of the cotton being thirty-two and fifty one hundredths dollars per bale, which allowance, with interest on the amount, made the decree of the district court two thousand six hundred and eighty-six and eighty-five one hundredths dollars, against such of the cotton as was held liable. The cotton so held liable was the portion of the original cargo, which had been claimed and bonded by the Hernando Ins. Co. and the Planters' Ins. Co., by reason of the insurance risks they had therein; and therefore a personal decree was rendered against each of the claimants, and their sureties, for their respective proportions of the aggregate salvage awarded, together with the costs taxable, on said two hundred and twenty-three bales of cotton. The decree recites that the allowance made is based upon a like compensation voluntarily paid to libelants by the New Orleans Board of Underwriters, for the rescue of their cotton on board of the Yazoo Belle and Tallahatchie, and saved at the same time with the Memphis cotton. The New Orleans Underwriters paid forty-five hundred dollars for the saving of four hundred and seventeen bales, and did so voluntarily, though under circumstances not necessary to mention.][2]

J. M. Gregory, for libellants.

T. B. Turley and H. C. Warinner, for claimant.

BAXTER, Circuit Judge. The claimants have appealed to this court and here complain of the decree below as awarding an excessive compensation in salvage. I cannot concur with the district court in the amount allowed. Upon the statement of the case as presented by the proctor for libellants, I think the sum of seven hundred and fifty dollars most ample compensation in the way of salvage. Indeed, I think five hundred dollars would be liberal; but I fix it at seven hundred and fifty dollars to cover interest. There is no doubt in my mind but that, if libellants had been called upon to do the work at a stated price, they would have gladly undertaken it for one hundred dollars. Their own proof shows that the ordinary compensation charged by the tug for towage was ten dollars per hour. I cannot consent to adopt the rule, which seems to have grown up among some of the courts, exercising maritime jurisdiction over the western rivers, of allowing such large awards of salvage.

The learned counsel for the libellants insists that upon the principles laid down in the text-books, and under the precedents established, the amount allowed below, being about one-third the value of the cotton, is not excessive. I cannot adopt this view. In former years such services as these, requiring but little time and labor, were rendered by steamboats on the rivers as acts of courtesy to each other, without any demand for

[2] [From 8 Cent. Law J. 227.]

compensation. But beyond this, "in salvage claims arising on the western rivers, the precedents of courts administering the admiralty law of the ocean in regard to the amount of compensation, cannot be safely adopted, because the peril of life is generally much less." McGinnis v. The Pontiac [Case No. 8,801]. This principle I most cordially approve; and while it may be true that in the multiplicity of courts and judges having salvage causes before them, some of them have been disposed to adopt and apply, in large degree, the theory of compensation recognized in ocean salvage; still, for myself, I am wholly unwilling to countenance or continue such extreme liberality in the exercise of my judicial discretion. In this circuit over which I am required to preside, and so long as I occupy my present position, I shall be careful to guard the property of suitors, whether they be insurance companies or general owners, against what seem to me to be excessive or extortionate demands; and in the expression of the judicial discretion vested in me under the law, I shall make for this circuit such precedents in the matter of salvage allowance as seem to me just and proper according to the circumstances of each case.

There are no facts presented in this record justifying a larger allowance than that I have fixed. The danger of peril to the tug and her crew, alleged in behalf of the salvors, and mentioned in their testimony, was more fanciful than real, and could, at any moment, have been withdrawn from and escaped. The time occupied in the rendition of the service was very short, and these elements, taken in connection with the other circumstances surrounding the transaction, lead me to the conclusion that the allowance of the gross sum of seven hundred and fifty dollars, instead of a pro rata per bale, or on the entire value of the property saved, is the proper amount to be awarded as salvage in this cause. But I adjudge this amount free of all costs, and direct the whole of the costs in the district court and in this court to be taxed against the claimants.

The decree of the district court is, therefore, reversed and modified as indicated in the opinion, and the decree will be entered accordingly.

Case No. 9,295.

MATTINGLY v. UNITED STATES.

[1 Hayw. & H. 195.] [1]

Circuit Court, District of Columbia. May 4, 1844.

CRIMINAL LAW—FEES—JUSTICE OF PEACE — ILLEGAL DEMAND—INSTRUCTIONS OF COURT—GENERAL VERDICT.

1. It is illegal for a justice of the peace knowingly to demand by color of his office payment of any fees other than those established by law.

2. It is an indictable offense for a justice of the peace to demand in any case civil or criminal the payment of any other fees than those established by law.

3. The jury ought to follow the opinion of the court and should be guided in matters of law by the instructions of the court as prayed by the parties in the cause.

4. The jury have a right to find a general verdict, and thus decide the law and the facts.

In error to the criminal court.

The plaintiff in error was indicted for taking illegal fees as a justice of the peace.

Archibald Nicholls entered a complaint before [Edward] Mattingly, a justice of the peace, stating that he had been robbed of his pocket-book containing fifty dollars, and that he suspected a man named Fisher of having committed the robbery. The justice issued a warrant against Fisher directed to John Cryer, a constable. Fisher was arrested and taken before the justice, and after a preliminary examination was taken in charge by the constable during the night. At the trial the next day the prosecuting witness, Nicholls, stated that the pocket-book was found on another person. The prisoner was thereupon discharged and a nolle pros. entered by the justice. The justice demanded of the complainant the sum of $3.42, which he alleges was due him and the constable and the witnesses in the case. Nicholls at first refused to pay it, but finally did, taking a receipt for the same. The grand jury brought in an indictment against the justice of the peace. The case came on for trial before Judge Dunlap, of the criminal court. The defendant plead not guilty. The jury returned a verdict of guilty. The defendant prayed for a writ of error on the following bill of exceptions:

During the trial the defendant offered to read in evidence the record and proceedings in the case of U. S. v. Clarke [Case No. 14,803], a justice of the peace for Washington county, District of Columbia, for extortion in receiving fees in a criminal case from the prosecutor, to show the usage and practice of the justices of the peace in Washington county, District of Columbia, in receiving fees in such cases; to the reading of which the United States through their attorney objected, and the court refused to permit the same to be read; to which refusal the defendant excepted.

During the trial and after the evidence had closed the defendant through his attorney moved the court to give the following instructions to the jury: 1st. That should the jury be satisfied from the evidence that the defendant took the fees under a belief that he had a right to take them, although he had no legal right so to do, but thought that he had, he is not guilty as charged in the indictment. 2d. That notwithstanding the defendant may have illegally charged and received the fees named in the indictment, un-

[1] [Reported by John A. Hayward, Esq., and Geo. C. Hazleton, Esq.]

less they were wilfully and corruptly demanded and received, he is not guilty as charged in the indictment. 3d. That notwithstanding the defendant may have illegally charged and received the fees named in the indictment, if Nicholls voluntarily paid them, without a threatening or some act of violence of the defendant more than that of a request or demand so to do, the defendant is not guilty as charged in the indictment. 4th. That should the jury be satisfied from the evidence that Nicholls, from whom the fees were demanded and who paid the same to the defendant, was not a party to the suit, but it was a case between the United States and one Fisher, then the defendant, having no legal right to demand the fees of said Nicholls, he being no party to the proceedings, is not guilty in such case of extortion. 5th. That notwithstanding the jury be satisfied from the evidence that the defendant acted illegally in demanding and receiving the fees stated in the indictment, yet if they be satisfied that his heart and intention were pure, he is not guilty as charged in the indictment. 6th. That should the jury be satisfied from the evidence aforesaid that the defendant took the fees named in the indictment under his judgment that he was entitled to the same and that his intention was not to do an illegal or extorsive act by so doing, he is not guilty as charged in the indictment. 7th. That should the jury be satisfied from the evidence that it was usual for the justices of the peace in the District of Columbia to receive payment from others than the parties to a proceeding in a criminal case, that in criminal cases it is evidence from which the jury may infer that the defendant did not take the said fees with an evil or improper intention, and, if so, he is not guilty as charged in the indictment. 8th. That notwithstanding the defendant may have illegally charged and received the fees named in the indictment, unless they were demanded and received with intention to commit an illegal act and to do a wrong, he is not guilty as charged in the indictment. 9th. That should the jury be satisfied from the evidence that the defendant told Nicholls that he had to pay the fees and that after he had so told him Nicholls went out of doors and after consulting with others came in and offered to pay them, if the defendant would give a receipt for them, and that the defendant did give the receipt and asked and received the same, then he is not guilty as charged in the indictment. 10th. That should the jury be satisfied from the evidence that the defendant received from the said Nicholls only such fees as are charged in civil cases for similar services and that the money paid him was for his own fees, the fees of the constable, and a witness, and that the defendant paid over to the constable his part of said fees and to the witness what he was entitled to, then it is evidence from which the jury may infer that the defendant had no wrong or evil intention in receiving said fees. 11th. That should the jury be satisfied from the evidence that the defendant did not knowingly demand and receive the fees named in the indictment as illegal fees and such as he was not entitled to receive for himself and the constable and witness, he is not guilty as charged in the indictment.

Which instructions THE COURT refused to give; to which refusal the defendant through his counsel excepted.

The defendant also asked the court through his attorney to give the following instruction: That notwithstanding the defendant may have illegally charged and received the fees named in the indictment, if Nicholls voluntarily paid them the defendant is not guilty as charged in the indictment.

THE COURT gave this instruction, with the qualification: "But if the jury should be satisfied from the evidence aforesaid that the traverser demanded and received said fee by color of his office from said Nicholls, the said Nicholls protesting that said fees were illegal, the jury may infer that said Nicholls did not voluntarily pay said fees."

BY THE COURT (charging jury). In rendering a verdict you have a right to determine both the law and the fact, but that in matters of law you ought to follow the opinion of the court and should be guided in matters of law by the instructions of the court given and prayed for by the parties to the cause. It is illegal for the magistrate knowingly to demand and receive by color of his office fees from a citizen in a criminal case who is not a party to the same, and should you be satisfied from the evidence that the traverser demanded and received the said fees, as stated in the bills of exceptions, from the prosecutor Nicholls unlawfully, wilfully, extorsively, and by color of his office, you may find him guilty as charged. No magistrate in any case civil or criminal can rightfully demand and cause the payment of any fees other than those established by law. The traverser in the present case had by his docket entries appearing to treat the prosecutor Nicholls as a party to the case and had adjudged said Nicholls to pay said fees, he had no legal right to order him to pay said fees. It would be hard, indeed, if a person coming forward as a witness for the United States, as the prosecuting witness had done, himself a sufferer by the theft, should be made to pay fees to the magistrate who had conducted the investigation. If fees or compensation of any kind was chargeable, it ought to be to the United States and not to the complainant.

The defendant through his counsel excepted to the charge of the judge to the jury. The bill of exceptions was signed by the judge of the criminal court. A writ of error was granted. The case being argued by the several counsel and on due consideration by the

circuit court, the judgment of the criminal court was affirmed, and that the defendant pay a fine of fifty dollars and costs.

MATTINGLY (UNITED STATES v.). See Case No. 15,743.

Case No. 9,296.

Ex parte MATTISON.

[Cited in Electoral College of South Carolina, Case No. 4,336. Nowhere reported; opinion not now accessible.]

MATTISON (RICHARDSON v.). See Case No. 11,790.

Case No. 9,297.

MATTISON v. WALKER.

[1 Biss. 62.] [1]

Circuit Court S. D. Illinois. July Term, 1854.

LAND GRANT—AUDITOR'S DEED—EJECTMENT—EVIDENCE.

1. An auditor's deed is prima facie good, and is a title deducible of record within the meaning of section 2, c. 66, Rev. St. Ill.

2. When coupled with seven years' possession and payment of taxes, it is sufficient to protect a party who can connect himself with it.

At law.

Mr. Williams, for plaintiff.

Mr. Browning, for defendant.

McLEAN, Circuit Judge. This is an action of ejectment, brought to recover the southeast quarter of section 14, 2 north, 5 west, in Adams county, patented to William Purdy, the 18th of November, 1837. Purdy and wife conveyed the same to Schuyler and Mattison, 1 June, 1852. This was plaintiff's title; possession of defendant was admitted. The defendant claimed under a deed from E. C. Merry, auditor of the state of Illinois, to Robert H. Peebles, dated February 2, 1830, sale made the 14th of January, 1820, for the tax of 1827.

This proceeding was under the law of 1827. A deed from Peebles to Tillson was given in evidence, dated 27 June, 1830, recorded December 6th, 1830. Tillson conveyed to Russel Nevers, September 7th, 1830, recorded June 11th, 1831, and through mesne conveyances by a deed to Walker, the defendant, dated September 9th, 1847, under a contract of purchase, dated January 7th, 1840. The execution and delivery of this deed was proved, and also, that the defendant had been in the possession of the premises seven years, under his deed, before this suit was commenced. Tax receipts admitted.

The 11th section of the act of March 3d, 1845, that "no person who has or may have any right of entry into any lands, tenements, or hereditaments, of which any person may be possessed by actual residence thereon, having a connected title in law or equity, deducible of record, from this state or the United States, or from any public officer or other person authorized by the laws of this state to sell such lands for nonpayment of taxes, or from any sheriff, marshal, or other person authorized to sell such land on execution, or under any order, judgment, or decree of any court of record, shall make any entry therein, except within seven years from the time of such possession being taken; but when the possessor shall acquire such title after the time of taking such possession, the limitation shall begin to run from the time of acquiring title."

In the case of Irving v. Brownell, 11 Ill. 402, the court held that the auditor's deed to land, made in pursuance of a sale of land for taxes, under the law of 1827, will not show a complete title in a party without proof that the prerequisites of the law have been complied with.

The words "claim and color of title made in good faith," under the law of 1839, mean such a title as, tested by itself, would appear to be a good prima facie title; such a title, connected with seven years' actual possession and payment of taxes becomes invincible.

An auditor's deed is a title deducible of record under the law of 1835, and is sufficient to protect a party who can connect himself with it and show that he has been possessed of the premises by actual residence under such title, for seven years. That the facts bring this case within the 11th section of the above act, seems to be undoubted. His possession is protected, whether we regard the deed under which the defendant claims immediately, or the deed of the auditor under which he claims remotely. They are both prima facie good upon their face. The possession for seven years being proved, and also the payment of taxes during that period, this, as I suppose, gives a clear title, or at least, defense, under the statute and the decision of the supreme court, above cited.

The statute of limitation was intended to aid defective titles;—not a title defective upon its face, but a title prima facie good upon its face, under which the defendant entered in good faith, and continued to occupy the land the term of time required. Judgment for defendant.

NOTE. As to validity of auditor's deed, consult Vance v. Schuyler, 1 Gilman, 160; Thompson v. Schuyler, 2 Gilman, 272; Hill v. Leonard, 4 Scam. 140; Irving v. Brownell, 11 Ill. 402; Messinger v. Germain, 1 Gilman, 631; Wiley v. Bean, Id. 302; Graves v. Bruen, 11 Ill. 431; Tibbetts v. Job, Id. 453; Schuyler v. Hull, Id. 462; Woodward v. Blanchard, 16 Ill. 425.

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

MATTOCK (UNITED STATES v.). See Case No. 15,744.

Case No. 9,298.

MATTOCKS v. FARRINGTON.

[2 Hask. 331.] [1]

District Court, D. Maine. Feb. 1879.

BANKRUPTCY—ATTACHMENT IN STATE COURT—OBJECTION BY ASSIGNEE—RETURN—APPRAISERS—JUDGMENT—LEVY—PRIORITY—DETERMINATION BY ASSIGNEE.

1. A creditor, having attached the property of his debtor four months prior to the latter's bankruptcy proceedings, if the assignee in bankruptcy does not intervene and object, may prosecute his suit in a state court to judgment and execution, regardless of the bankrupt proceedings, and may levy the execution upon the property attached.

2. The return of an officer, stating that the appraisers who acted in making a levy upon real estate are disinterested persons, is conclusive evidence of that fact.

3. Under the statutes of Maine the return of an officer, stating that the land levied upon by virtue of an execution cannot be divided by metes and bounds without damage to the whole, wherefore he levied the same upon a fractional part of the premises, is conclusive upon the parties to the judgment and their privies.

4. A levy is held to take effect from the date of an attachment when it appeared from the whole record that the land levied upon was the same that had been attached, even though the officer's return upon the execution did not disclose the fact.

5. It is not the duty of an assignee in bankruptcy, when a parcel of the bankrupt's estate is wholly absorbed by the first lien thereon, to determine the validity of subsequent liens, nor their priority.

Bill by [Charles P. Mattocks] the assignee in bankruptcy of Moses A. Pennett against [Ira P. Farrington and others] various creditors of the bankrupt to determine the validity of their respective pretended liens upon the property of the bankrupt under levies of an execution against him made thereon, after he was adjudged bankrupt, without leave from the bankrupt court.

The respondents answered that their respective levies were made upon executions from the state court in accordance with the provisions of the statutes of Maine to enforce attachments existing more than four months prior to their debtor's bankruptcy proceedings, and that the same are valid.

Thomas H. Haskell, and Nathan Webb, for orator.

Herbert M. Sylvester and Moses M. Butler, for respondents.

FOX, District Judge. Pennett was adjudged bankrupt February 5, 1878, on his voluntary petition filed January 29, 1878, and the complainant was appointed assignee March 1, 1878. He has brought this bill to determine the validity and amount of certain liens and incumbrances on an estate in this city which formerly belonged to the bankrupt, all persons interested having been made respondents.

The claims of Farrington, being of the greatest amount and involving the full value of the estate, and it being claimed that they are entitled to a priority, will first be examined. In December, 1876, Pennett mortgaged this estate to one Valpy to secure the payment of $700. This mortgage was assigned to Farrington January 23, 1878. No question is made by any party as to the validity of this mortgage, or as to its priority over any other incumbrance, and Farrington, therefore, is entitled to hold the same, and to receive the full amount thereof from the estate.

Various parties, having under the laws of Maine claims for laborers and materials furnished by them to Pennett to be used and employed in the erection by him of the house on this estate, and for which they had a lien by Revised Statutes of Maine more than four months before the filing of this petition by Pennett, duly commenced their actions for the enforcement of their respective liens, and therein attached this property; these actions were duly entered at the September term of the supreme court for this county, and were all defaulted and continued from term to term for judgment. In January, 1878, all these claims and the suits then pending were assigned to Farrington, and a special judgment was rendered in each of said suits on the fourteenth day of March, 1878, by the direction of Farrington and for his benefit, and the same were afterwards satisfied by a levy on the estate within thirty days after the rendition of the judgments. These judgments were so taken without any application to the district court for authority so to do; nor was any notice given to the assignees of the pending of said actions, or that the plaintiffs intended to take their judgments and issue executions thereon; and for these reasons, it is urged that the judgments were invalid and the liens were lost.

Whether a party, having an attachment in the state court upon a bankrupt's estate saved from the operation of the bankrupt act, could without the sanction of the bankrupt court, proceed in his suit, obtain judgments, and satisfy the same from the bankrupt's estate so attached, was for a long time a matter of serious doubt, the practice now being uniform in the various districts. In Maine, application was usually made to the district court for leave to prosecute the suit in the state court to final judgment, which was granted upon condition that the judgment should be satisfied upon the property incumbered by the attachment.

In Doe v. Childress, 21 Wall. [88 U. S.] 642, the supreme court of the United States decided that when an attachment in a suit returnable to the state court was made more than four months before commencement of bankruptcy proceedings, if the assignee did not intervene, the state court might proceed and render judgment and issue execution, and the sale of the property so attached

[1] [Reported by Thomas Hawes Haskell, Esq., and here reprinted by permission.]

would vest a good title in the purchaser. In the opinion, the court on page 646, says: "Where the power of a state court to proceed in a suit is subject to be impeached, it cannot be done except upon an intervention of the assignee, who shall state the facts and make the proof necessary to terminate such jurisdiction. This rule gains whether the four months' principle is applicable, or whether it is not applicable."

In Eyster v. Gaff, 91 U. S. 525, Judge Miller says: "The opinion seems to have been quite prevalent in many quarters at one time, that, the moment a man is declared bankrupt, the district court, which has so adjudged, draws to itself by that act not only all control of the bankrupt's property and credits, but that no one can litigate with the assignee's contested rights in any other court, except in so far as the circuit courts have concurrent jurisdiction, and that other courts can proceed no further in suits of which they had at that time full cognizance; and it was a prevalent practice to bring any person, who contested with the assignee any matter growing out of disputed rights of property or of contracts, into the bankrupt court by the service of a rule to show cause, and to dispose of these rights in a summary way. This court has steadily set its face against this view." It was there decided that a state court cannot take judicial notice of the proceedings in bankruptcy in another court, and that it is its duty to proceed as between the parties before it until, by some proper pleading in the case, it is informed of the changed relations of any of the parties to the subject matter of the suit.

By section 5106, Rev. St., it is provided that "no creditor whose debt is provable shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined; and any such suit or proceedings shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge, provided there is no unreasonable delay." To obtain the benefit of this provision, it is necessary that the state court should be legally notified of the pending of the proceedings in bankruptcy; if not so notified, it may proceed with the cause. The statute would seem to contemplate that the bankrupt should apply for the stay of the proceedings, and in Louisiana it was held that he alone could move in this behalf (Jones v. Clifton [Case No. 7,457]); while in Massachusetts it was held that the state court, in such a case, might proceed to judgment, "if neither the bankrupt nor the assignee moves for a stay of proceedings" (Ray v. Wight, 119 Mass. 426).

Language may be found in the opinion in Norton v. Switzer, 92 U. S. 364, 365, that may seem to imply that a cause thus pending in a state court could not be prosecuted to judgment excepting to determine the amount; but it could not have been intended that a state court was unauthorized to render judgment in a suit in which there was a valid attachment made more than four months prior to the commencement of proceedings in bankruptcy, and in which the bankruptcy of the defendant was not brought to the notice of the court, as the contrary had been repeatedly decided by the supreme court.

Under the later decisions of the supreme court, the judgments in these suits in the supreme court were not affected by the proceedings in bankruptcy, nor by the plaintiffs not having obtained the consent and authority of the district court to prosecute the same to judgment and execution, and levy on the estate attached.

Various objections are taken to the levies, three of which are alone worthy of much consideration.

I. It is said that it does not appear that the appraisers were disinterested men as required by the statute. Upon the execution, the officer states in his returns that the appraisers were disinterested, and, in all of his returns, he refers to and adopts as a part of his return, the returns of the appraisers; and in every instance in their return, they state they were disinterested; by this practice, the appraisers' return becomes incorporated with and a part of the officer's return, as sanctioned by Rev. St. c. 76, § 5; and he has thus certified to their being disinterested. The return of this fact by an officer on an execution has always been held conclusive on the parties and privies; and the fact, that one of the appraisers was a brother-in-law of Farrington, the assignee of the execution, cannot be received to contradict the officer's return; and if admissible, it would seem not to be entitled to any effect in destroying the levy, as this appraiser was selected by the debtor, who should be estopped from disturbing the levy on this account, after having seen fit to choose a relative of the creditor in interest to act in his behalf.

II. A further objection to these levies is, that they were made on undivided fractional portions of the premises, and the officer, as he states in his return, determined that the premises could not be divided by metes and bounds without damage to the whole. It is said it was the duty of the appraisers to determine this fact, and not the duty of the officer, and, therefore, the requirements of the statute have not been complied with. It may be that in Massachusetts, under the language of their act, appraisers are the proper persons to decide this question. Such would seem to be the result of the authorities cited in Pickering v. Reynolds, 111 Mass. 83; Sanborn v. Chamberlin, 101 Mass. 408; but the statute in this state is somewhat different, and in Mansfield v. Jack, 24 Me. 98, it was decided that "the return of an officer, that the land upon which an execution is to be

levied cannot be divided without prejudice to or spoiling the whole, is conclusive of the fact as between the creditor and debtor and those claiming under them."

III. It is further objected that it does not appear from the execution to what estate the lien attached, or that the property levied upon was the same to which the lien did attach, or that it was taken for the purpose of enforcing a lien. When the whole record is examined, it discloses all the facts that are requisite to establish the validity of the lien, and that the estate levied upon was that to which the lien attached; and there is no provision of law, which requires that all such facts should again be set forth in the officer's return; they having become a part of the record, it is all that is requisite.

As the entire estate is exhausted by the prior claims of Farrington, it is unnecessary to determine as to the rank and position of the subsequent claims of other respondents; and as the unsecured creditors can in no event realize any advantage therefrom, it is not the duty of the assignee to call upon the court to pass upon the rights of these various parties; but they should be required, at their own expense, to litigate these matters between themselves, if they are advised so to do. Decree accordingly.

Case No. 9,299.

MATTOCKS et al. v. LOVERING et al.

[1 Law & Eq. Rep. 401.] [1]

Circuit Court, D. Massachusetts. April 4, 1876.

BANKRUPTCY—DEBTOR BUYING CLAIM — SET-OFF.

A debtor buying a claim against the bankrupt after known insolvency and contemplated bankruptcy of his creditor, cannot set:off the claim against his debt. In such a case the debtor can only prove his claim and receive a dividend thereon, as his assignor could have done.

Bill in equity by the assignee in bankruptcy of Norris, Hall & Co., alleging the following facts: Norris, Hall & Co., the bankrupt, failed before February 10, 1874. On that day a meeting of the creditors was held at which a member of the firm of Stoddard, Lovering & Co. was appointed one of a committee of creditors to determine whether Norris, Hall & Co. should be put into bankruptcy. Stoddard, Lovering & Co. held notes of Norris, Hall & Co. to the amount of $476.-23. Geo. W. Cady & Co. were indebted to Norris, Hall & Co. in the sum of $4942.30. On the 11th of February, the next day after the meeting of the creditors, Stoddard, Lovering & Co. made a colorable sale of the notes held by them to Cady & Co., and received therefor the notes of Cady & Co., nearly equal in amount to the notes of Norris, Hall & Co. sold to Cady & Co. A petition for adjudication in bankruptcy against Norris, Hall & Co. was filed February 25th. Adjudication was had March 17th, and the assignees were appointed April 17th, 1874. Cady & Co. have attempted to off-set the notes thus purchased by them against their indebtedness to the firm of Norris Hall & Co. The bill in equity against Stoddard, Lovering & Co. prayed that the sale to Cady & Co. might be decreed to have been in fraud of the bankrupt act [of 1867 (14 Stat. 517)] and of the rights of the assignees and the creditors, and that they might be decreed to hold the notes of Cady & Co., and any sums received in payment of them, as trustees for the assignees and creditors, and to pay to the assignees the full amount of the debt owing by Cady & Co. to the bankrupt, less the dividend which Stoddard, Lovering & Co. would have received on their claim, if proved in bankruptcy against the estate of Norris, Hall & Co. There was a demurrer to the bill.

SHEPLEY, Circuit Judge, held, that a court of equity would not enforce any off-set of the claim purchased by Cady & Co. against the claim of the assignees of Norris, Hall & Co. upon Cady & Co. A court of equity would not allow a debtor, after known insolvency and contemplated bankruptcy of his creditor, by the purchase of his out-standing liabilities, to absorb, perhaps, the whole assets of the bankrupt in the entire payment of one portion of his liabilities, leaving the balance of the debts without any dividend, thus defeating that equal distribution of the assets among all the creditors. The result was that Stoddard, Lovering & Co. had a right to sell their demands to Cady & Co., who in equity succeeded to the rights only which Stoddard, Lovering & Co. had to prove their debt and receive a dividend, but could not in equity claim to set-off the debt to Stoddard, Lovering & Co. against the debt due from Cady & Co. to the assignees of the bankrupt estate. Bill dismissed without costs to either party.

[NOTE. The court subsequently vacated the order for dismissal, and allowed the case to stand on the docket. The complainants then moved to amend, on the ground that an actual sale was made by the defendants, which enabled a set-off to be made, and by means of which the defendants gained an undue advantage. The motion for this amendment was denied, and the bill dismissed without costs. 3 Fed. 212.]

Case No. 9,300.

MATTOCKS v. ROGERS et al.

[1 Hask. 547.] [1]

District Court, D. Maine. Dec., 1874.

CONTRACTS — IN WRITING — CONSTRUCTION — COPARTNERSHIP—LIABILITY TO CREDITORS—FRAUD —BANKRUPTCY—ACTION BY ASSIGNEE.

1. A writing should be construed so that all its provisions may have force and effect if possible, and the intent of the parties prevail.

[1] [Reprinted by permission.]

[1] [Reported by Thomas Hawes Haskell, Esq., and here reprinted by permission.]

2. A copartnership is not established by a writing, stipulating that the first party shall furnish $3,000 and his services to the other to be used in his business for one year at a stipulated price, when the first party may elect to become a permanent and equal partner by increasing the sum furnished to $5,000 or to withdraw the same, and that the sum so furnished meantime shall not be chargeable with losses, notwithstanding, a provision in the writing that the first party "becomes a partner in said business from this date under the above conditions" and under a specified firm name.

3. Such first party, who transacts business under such firm name, and who holds himself out to the public as a copartner in the business, is liable to creditors as a copartner, and in case of insolvency of both partners, the sum so contributed by him to the business is partnership assets.

4. It is a fraud upon partnership creditors, for such first party, after both parties have become insolvent, to release to his associate all interest in the assets of the business, and receive therefor from him his notes for the $3,000 originally contributed to the business, payable to a third person, who, acquainted with all the facts had loaned the same to such first party to invest in the business, a part of such notes being endorsed by a fourth person, secured therefor by a mortgage upon the copartnership assets.

5. The assignee in bankruptcy of such copartnership may in equity invalidate such transactions as fraudulent and void.

In equity. Bill by [Charles P. Mattocks] an assignee in bankruptcy to annul a fraudulent transfer by the bankrupts [John T. Rogers, Jr., Frances E. Rogers, Dwight T. Golder, and Edward T. Elden] of their copartnership assets for the benefit of an individual creditor of one of the copartners. The answer denied any copartnership between the bankrupts, and averred that the bankrupt, Rogers, Jr., having borrowed $3,000 from his mother, Frances E. Rogers, loaned the same to Golder, who in consideration of a release from Rogers, Jr., gave his notes to the mother for the same, and a mortgage upon his business assets to Elden to secure him for endorsing a part of the notes; that the transaction was without fraud, bona fide, and valid. Replication being made the cause was heard on bill, answer and proof.

Charles P. Mattocks, pro se, and Edward W. Fox, with him.

William L. Putnam, for Frances E. Rogers.

Fabius M. Ray, for J. T. Rogers, Jr.

John Rand, for E. T. Elden.

FOX, District Judge. The plaintiff as assignee of D. C. Golder & Co., as well as of the individual members of the firm, has brought this bill to set aside a transfer made by John T. Rogers, Jr., one of said firm, on the 29th day of January last, of his interest in the copartnership effects, to his said copartner D. C. Golder, and also to obtain a surrender and cancellation of the notes given by said Golder to Frances E. Rogers, the mother of said John T., as a consideration for the said transfer, for the sum of three thousand dollars, two of which notes, each being for one thousand dollars, were endorsed by E. T. Elden.

It appears that on the 24th day of Sept., 1873, said John T. Rogers, Jr., and D. C. Golder entered into a written agreement by which said Rogers was to advance to said Golder three thousand dollars to be employed by said Golder in his business as a manufacturer of ladies' garments, and he was also to contribute for the common benefit all his time, &c., to the best of his ability in the business; for the capital and services so contributed he was to receive from said Golder, the sum of eleven hundred dollars per year. The agreement further stipulated, that the capital so furnished by said Rogers should not in any degree be held responsible or liable for any losses in the business during the year ensuing, at the termination of which time said Rogers was to receive the capital contributed by him, or he could as he should then elect become a permanent and equal partner by increasing his capital to five thousand dollars. The agreement then concludes as follows: "The said John T. Rogers, Jr., becomes a partner with the said Dwight C. Golder in said business from this date, under the above conditions, the firm name to be Dwight C. Golder & Co."

Rogers borrowed from his mother, Frances E. Rogers, the full amount of three thousand dollars, which was by him paid into the concern, and he continued to give his time and services, as required, to the business until the 29th day of January. His name appeared on the business card of Dwight C. Golder & Co. as one of the firm comprised of Golder and Rogers; all the business was transacted in the firm name, and it was well understood in the community, that he held himself forth to the public as a member of and jointly interested in the business of the firm of Dwight C. Golder & Co. No account of stock was taken at the time of the formation of this copartnership, and I am well satisfied, that Rogers from his entire ignorance of this particular branch, as well as his lack of experience generally in business matters, was very much deceived by the misrepresentation of Golder as to his condition and standing in Sept., 1873. Large debts, to a very considerable amount, were subsequently contracted in the name of Dwight C. Golder & Co. in the course of their business, which now remain unpaid, and the only means from which the same can be in any part satisfied is from the proceeds of sale of the stock formerly belonging to Dwight C. Golder & Co., and there is not sufficient to discharge the full amount.

From the admissions of both Golder and Rogers, it is shown that in Jan., '74, the firm was deeply insolvent; that both Golder and Rogers were well aware of their condition, and that Rogers was desirous of withdrawing with his advance of $3,000 from the business. To effect this there was a final dissolution, on the 29th day of January, of the

firm of Dwight C. Golder & Co., and Rogers, by an instrument under seal, conveyed to Golder in consideration of the three thousand dollars, all his right, title and interest, as a member of the firm, in and to all the stock and fixtures of Dwight C. Golder & Co., together with all his interest in the rights, credits and book accounts of said Dwight C. Golder & Co., with authority to use the name of said Rogers in collecting the same. It does not appear, that any agreement or understanding was had between Rogers, Jr., and Golder, as to the debts due from Dwight C. Golder & Co.; they were not assumed by Golder, nor did he in any way agree to relieve or indemnify Rogers from his liability on account thereof.

Mrs. Rogers was desirous of receiving the amount she had loaned her son, and in these negotiations was represented by her husband John T. Rogers, who is shown by the evidence to have been fully cognizant of the pecuniary condition of Dwight C. Golder & Co., and that they were then insolvent; and Mrs. Rogers is, of course, to be held chargeable with all the knowledge or information derived in this respect by her agent, whilst in the conduct of her business. John T Rogers therefore would not accept the individual security of Dwight C. Golder, in payment for the three thousand dollars, but insisted on further security; and it was eventually agreed between Golder and himself, he acting in his wife's behalf, that Golder should make three notes of one thousand dollars each, payable in two, four, and six months to Mrs. Rogers, and that the last two should be endorsed by Edward T. Elden, Golder's father-in-law. Elden agreed to endorse these notes, on condition that he was secured therefor by a mortgage from Golder on the stock. These notes were made and endorsed as agreed, and the mortgage was given by Golder to Elden, which not only secured these endorsements, but also other liabilities of Golder to Elden for a very considerable amount. These latter claims have all since been proved as unsecured claims against Golder's estate in bankruptcy by Elden, and Elden has relinquished all claims under his mortgage in respect to them, but he insists that his mortgage is a valid subsisting security for his endorsement of the two notes held by Mrs. Rogers, if he is held liable as endorser. The petition in bankruptcy was filed by the firm creditors against D. C. Golder & Co., Feb. 18, 1874.

It is contended, in behalf of Mrs. Rogers, that J. T. Rogers, Jr., did not become a copartner with Golder by their agreement of Sept. 24, notwithstanding the statement contained therein at its close, "that said John T. Rogers, Jr., becomes a partner with said Dwight C. Golder in said business from this date, under above conditions, the firm name to be Dwight C. Golder & Co.;" that the whole instrument is to be examined, and its legal effect to be gathered from all contained therein, rather than from any single clause, and that it is clearly manifest, that although the parties might have supposed a copartnership, inter sese, was thereby created, that in law such was not the legal result of the entire instrument, as Rogers was not to have any right or interest in the property, but was only to loan the concern the three thousand dollars for one year, on which and for his services during that time, he was to receive a fixed compensation of eleven hundred dollars, in no way dependent on the profits or loss of the business; that he could not demand any account from his associate; had no right to claim that accounts ever should be kept of the transactions, and that it was expressly stipulated, that the capital contributed by Rogers shall not in any degree be held liable or responsible for any losses in the business of said Dwight C. Golder & Co.

Upon this branch of the case, the court is of the opinion that the construction given to this instrument by the counsel for Mrs. Rogers is the true one, and that the latter clause in the agreement, that Rogers is to become a partner with Golder, must be taken in connection with the stipulation that it is to be "under the above conditions," which as a whole are not sufficient to constitute a general partnership, as between the parties to such agreement. As between themselves, Golder became the debtor of Rogers for the amount thus advanced, and the same was not at the risk of the business. Rogers acquired, as against Golder, no legal interest in the effects of Dwight C. Golder & Co., but the legal title thereto was in Golder alone. It is therefore claimed quite strenuously, that by the dissolution in January and the bill of sale from Rogers to Golder the latter acquired nothing; that no interest in the estate of D. C. Golder & Co. whatever, passed thereby to Golder, as the whole was already vested in him, and that all that was really then accomplished was the repayment of the loan of three thousand dollars by Golder, for which he was indebted to Rogers, the same being made to Mrs. Rogers, by the authority of her son in satisfaction of the amount for which he was then indebted to her.

As between Rogers, Jr., and Golder, it may well be conceded that such was the effect of the arrangement; but there were others who were alike interested in the property of Dwight C. Golder & Co., who were no parties to these proceedings, and whose rights should not be compromised thereby; and these were the creditors of Dwight C. Golder & Co., who are now represented by the complainant. While no partnership inter sese existed between Rogers and Golder, yet to all intents and purposes, so far as the creditors of Dwight C. Golder & Co. were interested, Rogers and Golder were copartners. They were jointly liable as copartners for all the debts of Dwight C. Golder & Co., and the property held and acquired in the name of the firm was copartnership property, which

the creditors had a right under the provisions of the bankrupt act to claim should be first appropriated to the discharge of the firm liabilities. For these reasons the court holds that both Rogers and Golder are estopped as against the firm creditors, to claim that the property which had been acquired in the firm name was in truth the property of Golder alone, and that by a secret agreement between them, he, Rogers, had no interest therein. It is not claimed that firm creditors were cognizant of any such agreement; on the contrary, all their dealings were with the firm of Dwight C. Golder & Co.; they sold to that firm, gave credit to the firm on the faith of the firm obtaining the title to the purchases made. Rogers in every way possible held himself out as liable for the firm debts, and that the firm obtained the entire title to the property purchased in the firm name. At the time of the dissolution, he again sanctioned this view of his relation, by advertising to the world at large his withdrawal from the firm, and his transfer of all interest in its estate to his copartner; and having so conducted himself from the inception of his connection with the business, a court of equity is bound in respect to all who have dealt with him, trusting to that relation as the true one, not to allow him to insist on something entirely different, and thereby derive a benefit to himself and his individual creditors, in fraud of his copartnership creditors.

The rights of the partnership creditors must be considered the same, as if the copartnership in the present case had been of the ordinary, usual character, and are not to be affected by the secret agreement between its individual members. Under what circumstances can one member of a firm, convey to his copartner the partnership effects, so that the transfer will be valid and effectual against the firm creditors and the assignee in bankruptcy of the copartnership?

In Wilson v. Robertson, 21 N. Y. 592, it is said: "It will be conceded, that the creditors of a firm are legally and equitably first entitled to the partnership effects. Such creditors have a claim upon the joint effects, prior to every other person, which the court will enforce and protect alike against the individual partners and their creditors. * * * An appropriation of the firm property, to pay the individual debts of one of the partners is, in effect, a gift from the firm to the partner, a reservation for the benefit of such partner or his creditors to the direct injury of the firm creditors. Can it reasonably be doubted, that when an insolvent firm assign their effects for the payment of the private debts of a member, for which neither the firm, nor the other members, nor the firm assets, nor the interests of the other members therein, are liable, such an assignment and appropriation are a direct fraud upon the joint creditors of the assignors?"

In Ransom v. Van Deventer, 41 Barb. 307, it was decided: "That a division by partners of the copartnership assets between themselves, and the transfer of such assets by the individual partners in payment of their private debts when the partnership is insolvent, is in point of law a fraud upon the creditors of the partnership. Such a transfer of the partnership effects is invalid, as against the creditors of the firm, and the property remains partnership property, until it comes to the hands of a bona fide purchaser for a valuable and new consideration. If the person to whom the property is transferred, has notice that it is partnership property, and he takes it in payment of a precedent debt, he will not be deemed a bona fide purchaser."

In that case, in a creditor's bill by plaintiffs as judgment creditors of a firm, they were allowed to reach the proceeds of a note given to the firm, and endorsed over to a creditor of one member of the firm by the consent of the other members, the firm being insolvent; but the party to whom the note was endorsed was entirely ignorant of such insolvency. The learned judge, in giving the opinion of the court says: "What is a partnership but a single person in law, having as such, debts and credits and rights as a single person? The assignment, or transfer without assignment, of the property of an insolvent partnership, is precisely the same violation of the rights of creditors that it would be if it were in fact a single person, and the gift to one of the partners, or to his creditors, or for his benefit, does not vary or affect the principle. It is the giving away in either case, of the property of an insolvent debtor, at the expense of, and in fraud of his creditors."

In a late case before the New York court of appeals (Menagh v. Whitwell, 52 N. Y. 146) it was decided, that "a transfer by one partner of an interest in, or a lien given by him upon the corpus of the partnership property to pay an individual debt, although made with the consent of the other partners, is fraudulent and void as to the creditors of the firm, unless the firm was at the time solvent, and sufficient property remained to pay the partnership debts."

The insolvency in the present case is clearly established, and there would be sufficient property remaining to pay out a small dividend upon the company liabilities, if this amount of $3,000 is first paid therefrom; and it is also clearly shown, that both of the partners, as well as the agent of Mrs. Rogers, at the time well knew of this insolvency, and this scheme was adopted for the payment of Mrs. Rogers by Golder from the property which formerly belonged to Dwight C. Golder & Co., Rogers still remaining liable for all the firm debts.

In Re Cook [Case No. 3,150], the court says: "A sale by one partner to his copartner, when the firm is insolvent and upon the eve of bankruptcy, which if upheld, would operate to apply the property of the retiring partner

to the payment of the individual debts of the partner purchasing, is presumptively fraudulent as to the firm creditors, and the courts should set aside such sale, and distribute the property as firm property to the payment of the firm debts."

If the legal effect of such transfer would be to change the order of payment and prefer certain creditors, the private creditors over the firm creditors, it would be void as creating a preference, contrary to the provisions of section 35 of the bankrupt act.

It is claimed further in behalf of Mrs. Rogers, that if the court should hold that the property of Dwight C. Golder & Co., notwithstanding the transfer by Rogers to Golder, still remained company property liable for the payment of firm liabilities, that the remedy of the plaintiff is to be sought in the marshalling of the assets and postponing the payment of Golder's individual liabilities, until the partnership liabilities are fully paid, and that Mrs. Rogers should be allowed to retain her claim against Golder, as promissor of the notes, in case he does not obtain his discharge in bankruptcy, and should also be permitted to collect of Elden the two notes which he endorsed. By this course being adopted, it is said the rights of the creditors will be fully protected, and Mrs. Rogers will not be deprived of any rights to which she is entitled.

Courts of equity are not in the habit of allowing parties engaged in a fraudulent proceeding, to dictate as to the course to be adopted by those whose rights are affected by such proceedings; it is not for one thus situated to ask the court to require the other party to select that method of redress, by which the guilty party will derive more or less advantage from his fraud; on the contrary, it is rather the duty of the court, and of all parties interested, to sanction that method of redress, which will be most likely to prevent further attempts of a similar character, and to compel parties to abstain from all schemes in violation of law. A court of equity will not lend its aid, so as to require a party to adopt that course which shall render the fraudulent conduct of a party as profitable and advantageous as possible to him.

These proceedings of Jan. 29 were, according to the authorities before cited, fraudulent and void as to the firm creditors; and the assignee of the firm, by this bill, asks that they may be so decreed and set aside, and that the property may come to his hands unincumbered thereby, and without any cloud upon the title as individual property of Golder, but on the contrary as being the estate of Dwight C. Golder & Co.

In cases of this description, the courts in bankruptcy have frequently adjudged such transfer by a partner to his copartner as void, and that the property still remained firm property; and when property has been thus fraudulently conveyed, an assignee may resort to a court of equity, to recover the same for the benefit of the estate. As said by Curtis, J., in Carr v. Hilton [Case No. 2,436]: "A fraudulent conveyance is no effectual conveyance as against the interests intended to be defrauded. * * * The case of the assignee is, therefore, that the lands in question are the property of the debtor, and that he prays the aid of this court to remove an apparent cloud upon his title, which though void, interferes with the discharge of his official duty." It would be difficult to find language more applicable to the present case. Here copartnership estate has come to the hands of the assignee as belonging solely to the firm, with a cloud upon it by reason of the proceedings which are here sought to be impeached. The legal title stood in Golder alone when the property passed to the assignee, but this had been procured through the fraud of the parties, and the property in truth belonged to the firm as respects the rights of the firm creditors in relation to it, and it is to remove this cloud and restore the true condition of things which are asked for by this bill. As remarked by Judge Curtis (Carr v. Hilton [supra]): "In my opinion the property fraudulently conveyed is to be deemed property of the bankrupt, and was by the decree vested in the assignee. This enables him to maintain the bill."

The 14th section of the bankrupt act [of 1867 (14 Stat. 522)] expressly declares, that "all the property conveyed by the bankrupt, in fraud of his creditors, * * * shall in virtue of the adjudication of bankruptcy and the appointment of the assignee, be at once vested in such assignee, and he may sue for and recover the said estate."

The firm, in fraud of their creditors, made a transfer of the firm property to one of the members of the firm. The case is brought within this section most clearly, and the assignee is authorized thereby to recover the same.

In Pratt v. Curtis [Case No. 11,375], Lowell, J., says: "Great confusion would arise from any rule, which required creditors to follow the property on their own account; * * * and on the other hand, full power is given to this court, to set aside all fraudulent conveyances by which creditors are affected, and to marshal all assets."

The present case is quite similar to Re Waites [Id. 17,044], and to Re Johnson [Id. 7,369]. By a dissolution of the firm when insolvent, and an application of the firm's property to the payment of the private debts of the partners, a fraud was attempted in the way of a preference in violation of the bankrupt law. In this latter case, Judge Lowell says: "The point to which I now refer is this: when the bankrupt act lays down a positive rule of distribution of the joint and separate assets, and creates a fraud before unknown, called a preference, it is obvious that partners, who owe debts of both kinds, may commit that fraud, by conveying their

joint property to a separate creditor, or even by dissolving their firm and dividing their property, and thus working out a preference to all their separate creditors."

The assignee in the present case has certainly good cause for resorting to this remedy, and for asking a complete rescission of the contract made at time of dissolution, and for a surrender and cancellation of the notes given by Golder to Mrs. Rogers; because if Mrs. Rogers is allowed to retain the notes and enforce her remedy against Elden as endorser, Elden in his turn would assert the validity of his mortgage, which he held as security for such liability. It may be, that the assignee might be in a condition to defend against such claim of Elden, and establish its invalidity under the provision of the bankrupt law; but the result, on the evidence now before the court, is not entirely free from doubt, and the assignee, therefore, should not be compelled to take the risk of a lawsuit, and rely upon establishing a successful defense against a security upon the property, given to the endorser at the time he assumed the liability. In the opinion of the court, the whole transaction being in fraud of the firm creditors, and it being the duty of the assignee to protect their rights, he was well justified in striking at the root of the evil, instead of endeavoring by circuitously striving to avoid in part its bad effects; and these participants in the fraud have no cause for complaint, if thereby they are deprived of all benefit from their fraudulent schemes, instead of being permitted to derive a partial advantage therefrom, by the assignees pursuing a different course. "Ex pacto illicito non oritur actio."

The transfer to Mrs. Rogers of the Golder notes was most clearly a fraudulent preference by John T. Rogers, Jr., of his individual creditor, and was therefore a fraud upon his other creditors; and for this cause, she could not be allowed to retain the notes, and withhold them from the plaintiff in his capacity of assignee of John T. Rogers, Jr. But upon the other grounds, I think there has been sufficient shown to set aside the whole transaction, and require Mrs. Rogers to surrender up and cancel the notes of D. C. Golder, received by her in satisfaction of her claim against John T. Rogers, Jr., and it is so ordered and decreed.

Bill dismissed as to Golder without costs. Decree for complainant against the other respondents.

[See Case No. 5,510.]

Case No. 9,301.

MATTOX et al. v. CADY et al.

[7 Am. Law Rec. 613.]

Circuit Court, N. D. Ohio. Oct. Term, 1878.

BANKRUPTCY—DEBTOR BUYING CLAIM—SET-OFF—KNOWLEDGE OF INSOLVENCY.

Where involuntary proceedings in bankruptcy are commenced and prosecuted against a bankrupt under the U. S. bankrupt laws of 1867 [14 Stat. 517], and an assignee is duly appointed, who commences suit against a debtor of such bankrupt to recover the amount of an account due him, such debtor is entitled to have set-off against his indebtedness notes against said bankrupt which he may have purchased and become the bona fide owner and holder of, at any time before the petition in such voluntary proceedings was filed, although the debtor, when he purchased said notes, had knowledge that such bankrupt was then insolvent.

Petition: (1) Plaintiffs [Charles P. Mattox and others] in their petition set forth their title to sue as assignees in bankruptcy of Norris, Hull & Co. (2) That on petition of Lucius Beebee and others, filed in U. S. district court of Maine, on the 25th day of February, 1874, Norris, Hull & Co., on the 2nd day of March, 1874, were duly declared bankrupts, and April 17, 1874, plaintiffs were duly elected assignees. (3) April 15, 1876, plaintiffs commenced suit against defendants [George W. Cady and others, doing business as Geo. W. Cady & Co.] on an account due the bankrupts, amounting to $4,826.30, on which interest is claimed from Feb. 11, 1874.

Defendants' Answer: The account set up in the petition is not denied, but "set-off" of two notes held by the defendants is set up in the answer. Said two notes were made by Norris, Hull & Co. to their own order, and indorsed by themselves in blank. One note, dated Nov. 20, 1873, at four months, for $2,384.12; one other note, dated Dec. 2, 1873, at four months, for $2,384.11. These notes are alleged in the answer to have been made and indorsed and delivered about the dates of the same to Stoddard, Lovering & Co., and on the 11th day of February, 1874, sold, transferred and delivered to defendants; and they then and thereby became, and ever since have been, the owners of said notes, and that the said notes defendants ask may be allowed to them by way of set-off against plaintiffs' claim, and that they, defendants, may have judgment accordingly.

Reply of Plaintiffs: (1) That on the 11th day of February, 1874, and many months prior thereto, Norris, Hull & Co. had been hopelessly insolvent, of which Stoddard, Lovering & Co., and defendants at the time aforesaid (Feb. 11, 1874), had knowledge; and that said transfers of said notes, if any were made, were only colorable, and not bona fide, and made for the purpose of enabling Stoddard, Lovering & Co. to realize in full upon said note through defendants, who were indebted to Norris, Hull & Co., as set forth in the petition. Plaintiffs therefore deny that defendants are holders of said notes, except for benefit of Stoddard, Lovering & Co. (2) That on the 11th day of February, 1874, Norris, Hull & Co. were, and for several months prior thereto had been, hopelessly insolvent. Proceedings in bankruptcy were then threatened and imminent against Norris, Hull & Co., of which facts both Stoddard, Lovering & Co. and defendants had full knowledge. That defendants

were then and there indebted to Norris, Hull & Co., as stated in the petition. That said transfers of said notes, if any such were made, were made for the purpose of enabling Stoddard, Lovering & Co. to realize in full on said notes, instead of receiving a dividend thereon in bankruptcy, and for the purpose and with intent of preventing the plaintiffs from collecting the account against them, and with the purpose and intent of giving said Stoddard, Lovering & Co. an unjust and illegal preference over the other creditors of Norris, Hull & Co. And plaintiffs charge that if said notes were transferred at anything less than their face, such transfer was with intent and purpose of enabling Stoddard, Hull & Co. to realize more than they could in bankruptcy, and also with intent and purpose of making defendants to discharge their debt with said notes at their face, although defendants had paid for said notes much less than their face. That if any transfer of said notes were made by Stoddard, Lovering & Co. to defendants, they were not made in good faith, and defendants are not entitled to off-set the same against said account, but must be remitted to prove the same in bankruptcy. (3) That being ignorant as to whether any transfer of said notes was made to defendants, as stated in the answer, plaintiffs deny the same.

The case was argued elaborately by Willy & Terrill, for plaintiffs, who cited: Bump, Bankr. (9th Ed.) 420; Hitchcock v. Rollo [Case No. 6,535]; Sawyer v. Hoag, 17 Wall. [84 U. S.] 610-622; 8 Gray, 572; Wat. Set-Off, § 113; 2 Johns. 274; 20 Johns. 137; Hilliard, Bankr. 224; Avery & H. Bankr. 157; Bump, Bankr. (7th Ed.) 381, 382; 27 Ohio St. 365; and commented on Hovey v. Home Ins. Co. [Case No. 6,743], and Moore v. Harley [Id. 9,764].

J. P. Bishop, and C. J. Noyes, for defendants, argued the case at length, citing and commenting on the following authorities: Hitchcock v. Rollo [supra]; Rollins v. Twitchell [Case No. 12,027]; Sawyer v. Hoag, 17 Wall. [84 U. S.] 610; In re City Bank [Case No. 2,742]; Hovey v. Home Ins. Co. [supra]; Hunt v. Holmes [Case No. 6,890]; Fuller v. Sterglitz, 27 Ohio St. 361; 4 Ohio St. 593. On the point of notice of insolvency of Norris, Hull & Co., and putting on inquiry, etc., they cited Goodwin v. Simmons, 20 How. [61 U. S.] 343; Woolfolk v. Bank of America, 10 Bush, 504.

Before BAXTER, Circuit Judge, and WELKER, District Judge.

WELKER, District Judge. A jury in this case was waived, and the facts, with the evidence, were submitted to the court at a former term, but the case has been continued for argument and under advisement to this term, and has been argued at length, orally and elaborately; briefs have been submitted by counsel on each side. All the testimony in the case has been reduced to writing, and we have a full report of it before us, so there can be no controversy as to what was the testimony on the trial. The matters in controversy fully appear in the pleadings.

The questions presented and discussed by counsel are mainly as follows: 1. Were Norris, Hull & Co. insolvent when defendants acquired the notes which they seek to set off in this case? 2. Did the defendants know of the insolvency of Norris, Hull & Co. when they became the purchasers of these set-offs? 3. Was the purchase of the notes by the defendants a bona fide one for their own benefit, or for a valuable consideration? 4. Supposing the purchase to have been unobjectionable in other respects, what effect would knowledge on the part of the defendants of the insolvency of Norris, Hull & Co. when they made the purchase, have on their right to have the set-offs allowed?

First. As to the insolvency of Norris, Hull & Co. when the defendants purchased the notes in question, there seems to be no doubt. In fact it is admitted by their counsel. This being the case—

Second. Did the defendants know this when they acquired these notes? We have carefully considered this point. The testimony on the trial showed that before the transfer to defendants of these notes, Stoddard, Lovering & Co., a firm doing business at Boston, Mass., had knowledge of the insolvency of Norris, Hull & Co., but it nowhere appears that this was known to defendants, Cady & Co., unless they acquired such knowledge in the negotiations by which they acquired the notes in question. The defendant Awl was called as a witness on behalf of Cady & Co., to prove the purchase by them of these notes, and was cross-examined by plaintiffs' counsel, and defendant, Geo. W. Cady was called as a witness in behalf of plaintiffs, and both testified that they had no knowledge of the insolvency of Norris, Hull & Co. when they bought the notes. It is insisted, however, by plaintiffs' counsel, that the circumstances attending the purchase and what was said at the time, were sufficient to charge them with notice.

What were these circumstances, and what was said that should charge them with such notice? It appears that Norris, Hull & Co. were doing business in Portland, Me., and the defendants in the city of Cleveland, O. They had business transactions with Norris, Hull & Co. down to the very day of the purchase of these notes, Feb. 11, 1874. This business was done by correspondence. A short time before the purchase, they were applied by one Dresser, as agent of Stoddard, Lovering & Co., who offered to sell to them the notes in question, and if Cady & Co. received notice of the insolvency of Stoddard, Lovering & Co. it must have been during these negotiations. We have failed to find in the testimony anything equivalent to notice to

the defendants of this insolvency, when they took the notes. It is said that during these negotiations Cady & Co. asked Dresser why Stoddard, Lovering & Co. wished to dispose of this paper, and the reply was that they had more of it than they wanted to keep, and wished to dispose of some of it. This would not have a tendency to charge them with notice of the maker's insolvency for such transactions are of very common occurrence. Other circumstances and conversations at the time are referred to, to charge them with notice, such as the remark of Dresser that they were tricky, but taken altogether, come very far short of proving that Cady & Co. had knowledge of the insolvency of Norris, Hull & Co. when they made the purchase of these notes.

It is further insisted on in argument by plaintiffs' counsel that at least the circumstances were such as to put Cady & Co. on inquiry when they made the purchase that the makers of the notes were insolvent. Whatever might have been the law formerly on this subject, such is not the law now, when applied to negotiable paper. It is so held by the supreme court of the United States in Goodwin v. Simmons, 20 How. [61 U. S.] 243; also in Woolfolk v. Bank of America, 10 Bush, 504; and is now a fixed rule of law. To charge Cady & Co. with notice of the insolvency of Norris, Hull & Co., the testimony ought at least to be as strong as would be required in cases where preferences have been made which are declared void by the bankrupt act. But the testimony here falls far short of what would be required in such cases.

We think, therefore, that the evidence in this case is insufficient to show that the defendants had knowledge when they purchased these notes of the insolvency of Norris, Hull & Co.

3. Did they pay value for these notes, so as to be entitled to be treated as bona fide purchasers and holders, and not as trustees for Stoddard, Lovering & Co.? On this point, it clearly appears that they paid a sufficient consideration and were fully protected in this respect, and, so far as this point is concerned, they are entitled to have the set-off made as claimed by them. This, of course, determines the case in favor of the defendants. Here we might stop and not determine the further point, but as the point has been made and discussed we think it ought to be decided. This is the fourth point above stated which is, supposing the question of notice of the insolvency had been found against Cady & Co., but that in other respects they were bona fide purchasers, would they then be entitled to have the set-off allowed? This we are compelled to answer in the affirmative. We do this knowing that there is not complete accord in the decisions that have been made on this subject. If the purchase of a set-off is otherwise unobjectionable, knowledge that the debtor is insolvent at the time of the purchase will not prevent the set-off being made. The law as to set-off under the bankrupt law of 1867 is as follows: "And be it further enacted, that in all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set-off against the other, and the balance only shall be allowed or paid, but no set-off shall be allowed of a claim in its nature not provable against the estate. Provided, that no set-off shall be allowed in favor of any debtor to the bankrupt of a claim purchased by or transferred to him after the filing of the petition." Of debts and proof of claims under the same law: "And be it further enacted, that all debts due and payable from the bankrupt at the time of the adjudication of bankruptcy, and all debts then existing, but not payable until a future day a rebate of interest being made when no interest is payable by the terms of the contract, may be proved against the estate of the bankrupt." As we read the law of 1867, as to set-off and proof of claims, this case comes within the letter and meaning of the law. It was necessary, in establishing a rule under which claims against a bankrupt might be purchased and set off. Congress provided substantially, that this might be done at any time—in case of involuntary bankruptcy—before the filing of the petition. In this case, the claims sought to be set off were purchased two months before the petition was filed. To hold that notice of the insolvency of the bankrupt at the time of acquiring the claims sought to be set off—he being a holder for value would permit the set-off—would, in our opinion, in effect, be ingrafting upon this law what is not contained in it, and which congress never intended should be embraced within its meaning.

Finally, it has been said that the defendants' claims not being due when the petition was filed, they were not proper set-offs; under the statutes of Ohio. This question came up in Fuller v. Steiglitz, 27 Ohio St., on page 361. It is there said: "Again, many cases arising under the bankrupt laws adopt a broader rule."

The court, in 4 Ohio St. 593, say: "They have very little, if any, application to this case. Those statutes have generally permitted a set-off of mutual credits, whether due or not, and have therefore, administered a much broader equity than the ordinary law of set-off." The law of set-off, therefore, under the United States bankrupt law, is to be administered by that law, and by the express provisions of that law the claims set up as set-offs, as in this case, are, if mutual debts or credits, allowed, whether already matured or not.

We, therefore, come to the conclusion on the whole case that the defendants are entitled to have their set-offs allowed, and we give judgment accordingly. We are sustained in this decision by the cases: In re City Bank, etc. [Case No. 2,742], and Hovey v. Home Ins. Co. [Id. 6,743]; the holding in which cases we approve.

Case No. 9,302.

The MAUD WEBSTER.

CHALMERS et al. v. HOWELL.

[8 Ben. 547.] [1]

District Court, S. D. New York. Nov., 1876. Jan., 1877.

COLLISION—AT PIER—LOCALITY—JURISDICTION—LIGHTS—FAIRWAY—PRESUMPTION.

1. Under a contract between H. and the proper officer of the United States, H. was engaged in furnishing the materials for, and constructing the pier for, a lighthouse to be erected at the Middle Ground, Stratford Shoals, in Long Island Sound. He had carried the work up about four feet above high-water mark, and had inside of the ring of stone work, and supported by four wire guys anchored outside of the rip-rap wall, a derrick which he used in the work. This derrick was run into on the night of September 2d, 1875, by the schooner M. W., which struck one of the guys, and both the schooner and the derrick were injured, and cross libels were filed to recover damages. The shoal, on which the pier was being built, was out of the fairway, and, for more than two years before, it would have been impossible for any vessel to sail over the spot because of loose stones and rip-rap, placed there as a foundation for the pier before H. began his work. No light had been placed by H. on the structure. He had asked permission to place one, but it had been refused by the engineer-in-chief of the light-house department. *Held*, that it must be presumed that jurisdiction over the place where the pier was being erected had been ceded to the United States.

2. The schooner was out of her proper course when she struck the derrick.

3. H. was not in fault for having no light and no watchman on the structure, and was not liable for the damage to the schooner.

4. The court had no jurisdiction of the claim of H. for injury to the derrick, the damage not being done upon the water.

[Cited in The M. R. Brazos, Case No. 9,898; The C. Accame, 20 Fed. 643; Leonard v. Decker, 22 Fed. 742. Quoted in The Professor Morse, 23 Fed. 806. Cited in The City of Lincoln, 25 Fed. 836; Milwaukee v. The Curtis, 37 Fed. 706; The H. S. Pickands, 42 Fed. 240; The John C. Sweeney, 55 Fed. 543; Homer Ramsdell Transp. Co. v. Compagnie Generale Transatlantique, 63 Fed. 848.]

5. The locality of an injury is the locality of the thing injured and not of the agent by which the injury is done.

[Cited in The Professor Morse, 23 Fed. 804.]

[These are two libels. One by David V. Howell against the schooner Maud Webster, George S. Chalmers and others owners, to recover damages sustained by a collision between the schooner and Howell's derrick. The other was by the owners of the schooner against Howell to recover the damages sustained by the schooner, due to such collision, which they claimed was owing to Howell's negligence in placing his derrick in such a position.]

Albert Stickney, for libellant.

George A. Black, for claimants.

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

BLATCHFORD, District Judge. David V. Howell files a libel against the schooner Maud Webster, to recover the sum of $4,000, as the amount of the damages sustained by him, in consequence of the schooner's having come in contact with a derrick and other articles belonging to the libellant. The libel alleges that the libellant, under a contract between himself and the proper officer of the United States, acting for the United States, was engaged in furnishing the materials for, and constructing the pier for, a light house to be erected at the Middle Ground, Stratford Shoals, in Long Island Sound, and owned and had at that place a derrick and tackle and machinery, stone and material, which were being used by him in constructing said pier under said contract; that, on the 2nd of September, 1875, the schooner Maud Webster ran into and upon the said derrick and other articles and damaged them; that the weather, at the time, was clear, and the schooner was in a place where she would not have been with the exercise of care and good seamanship, and the collision was occasioned by negligence on the part of the schooner, her master and crew, and not by any negligence of the libellant or any of his agents or servants; and that the case is within the admiralty and maritime jurisdiction of this court. The libel prays for process against the schooner, and that she may be condemned and sold to pay such damages.

The answer to said libel alleges that the collision caused damage to the schooner, and was occasioned by no negligence on the part of the master and crew of the schooner; that the weather was thick and the night dark, and the schooner was, at the time, properly navigated, with a watch properly stationed and attentive; that there was no light on the derrick, nor was any one on the same, and it had been very recently erected in a place where vessels of the draft of the schooner were in the habit of passing; that the derrick and other articles had, at the time of the collision, been very recently put in the navigable waters of Long Island Sound, and were negligently left by the libellant without light or watchman, or anything to indicate their existence to vessels navigating the waters of the Sound; that the lights of the schooner were properly placed and burning; and that the collision was occasioned wholly by the negligence of the libellant.

The owners of the schooner file a libel against Howell to recover for the damages sustained by the schooner. That libel contains substantially the same allegations that are found in the answer to the libel filed by Howell. The answer to the libel filed by the owners of the schooner contains substantially the same averments that are found in the libel filed by Howell.

It is very plain, upon the evidence, that the schooner was very much out of her proper course. Her proper course would have been a considerable distance to the north of the

pier or else south of the light-ship. The light-ship was considerably south of the pier. I think the evidence shows that, if a careful watch had been kept on board of the schooner, she would not have been where she was. Either through want of attention and observation on the part of those who were on her deck at the time, or through want of seamanship on their part, they allowed their vessel to strike this pier. The place where the pier was being erected was a shoal. Before any attempt was made to put a structure there, there had never been more than two feet of water there at low tide. The rise of the tide there was about five feet. The schooner might, perhaps, have gone over the spot safely before anything had been done there towards erecting the pier. But, for more than two years before this collision happened, it had been impossible for any vessel to sail over the place, because of loose stones and rip-rap placed there as a foundation for the pier. Buoys and charts showed that the proper course for vessels was wide of this spot. The light-ship was the recognized northern limit of the southern channel way, and the buoy to the north of the pier was the recognized southern limit of the northern channel way. The loose stones and rip-rap above referred to, had been placed there a long time before Howell had anything to do with the work. Howell had carried the work up to a height about four feet above the surface of the water, at high water. Notices from the United States light-house department that a light-house was being built at this spot, had been published in several newspapers. It is not shown that the master of the schooner in fact knew of the existence of this structure there.

But, although the schooner was out of her proper course through some cause, it is contended on her part, that, if there had been a light set upon the structure, or a watchman upon it to warn her off, she would not have struck it, and that it was the duty of Howell to have had a light or a watchman upon it. It must be presumed that jurisdiction over the place where this pier was being erected had been ceded to the United States, inasmuch as it is provided by law that no light-house shall be built on any site until cession of jurisdiction over the same has been made to the United States. Rev. St. U. S. § 4661. By section 4666 of the Revised Statutes of the United States, all works of construction in respect of light-houses are placed under the immediate superintendence of such engineer officer of the army of the United States as shall be detailed for the service. It is proved that Howell asked permission to put a light on the structure, but was forbidden by the engineer-in-chief of the light-house department to do so, on the ground that the lights of the light-ship were the proper lights to guide vessels, and that a light on this structure might lead vessels astray. Independently of this, this structure was not in any channel or fairway. If Howell had had a vessel there, and the schooner had struck the vessel, Howell would not have been in fault in not having a light or a watchman on such vessel, because such vessel would not have been moored in any channel, roadstead or fairway where vessels were accustomed to go. A fortiori, no such obligation rested on Howell, in respect of the structure in question. There being no fault on the part of Howell, the libel against him must be dismissed, with costs.

In respect to the libel filed by Howell against the schooner, I am of opinion that this court has no jurisdiction of the subject-matter of that suit. The objection to the jurisdiction was not taken in the answer, and, although the attention of counsel was called to the point at the trial, it seemed to be supposed on the part of the schooner, that, if this court had jurisdiction of the suit against Howell, it must have jurisdiction of the suit against the schooner. But as an objection to jurisdiction in respect of subject-matter is one which may be taken at any stage of a case, even in an appellate court, and even though not raised in pleading, it is the duty of the court to decline jurisdiction when want of jurisdiction is clear.

If Howell had been held to be in fault for negligently causing an obstruction to navigation, this court could have made a decree against him in the suit brought by the owner of the schooner. It could have exercised jurisdiction over a case of such negligence, because the damage sustained by the schooner would have been sustained on the water, in the course of her navigation, through an obstruction to navigation, although the thing which formed the obstruction which injured the schooner was affixed to and a part of the earth, and was not afloat. Philadelphia, W. & B. R. R. Co. v. Philadelphia & Harve de Grace Steam Towboat Co., 23 How. [64 U. S.] 209; Packet Co. v. Atlee [Case No. 10,341]; Atlee v. Packet Co., 21 Wall. [88 U. S.] 389. But where, although the origin of the wrong is on the water, the consummation and substance of the injury are on the land, the admiralty has no jurisdiction. In this case, the schooner which did the injury to Howell's property was on the water, was afloat and engaged in navigation, but Howell's property was a part of the soil of the earth, or was affixed to it, and was wholly on land. In a case of tort, there can be no jurisdiction in the admiralty, unless the substantial cause of action, arising out of the wrong, was complete upon navigable waters. This was decided in the case of The Plymouth, 3 Wall. [70 U. S.] 20. In that case a vessel lying at a wharf, in navigable water, took fire, owing to the negligence of those in charge of her. The fire communicated to and consumed the wharf and some buildings on it, with their contents. The owners of the burned wharf and buildings sued the owners of the vessel, in admiralty,

to recover for the loss. The district court and the circuit court dismissed the libel for want of jurisdiction and the supreme court affirmed the decrees on the same ground. In that case, it was urged, that, as the vessel was a maritime instrument, the tort was necessarily a maritime tort, but the court expressly overruled that view. The present case does not differ from the one cited.

In the case of The Neil Cochran [Case No. 10,087], a corporation owning a swing bridge, which spanned a navigable river, but was so constructed as to swing out of the way of vessels which wished to pass, sued a vessel in rem, in the admiralty, in the district court for the Northern district of Ohio, to recover for damage done by her to the bridge by negligently running into it. The point was taken that the wrongful act alleged did not constitute a maritime tort, and the court held, on the authority of the case of The Plymouth [supra], that, although the negligence or origin of the wrong was on board of a vessel, an instrument of commerce, and although the vessel was, at the time of the negligent act, on navigable waters, yet the whole damage or consummation of the injury was on land, and the admiralty court had no jurisdiction of the suit.

In the case of The Ottawa [Case No. 10,616], the lessees of a wharf or dock, which extended from the shore over the water of a navigable lake, sued a vessel in rem in the admiralty, in the district court for the Eastern district of Michigan, to recover for damages done by her to the wharf, by negligently colliding with it. The court held that the injury done to the wharf could not be considered as done upon the water; that the wharf must be considered as land, or as on the land, or as the shore; that it was of no consequence that the damage was done by a vessel, if it was not also done upon the water; and that the court had no jurisdiction of the suit. Although the criterion of admiralty jurisdiction in cases of tort is locality, yet, as was correctly remarked in that case, the place or locality of the injury is the place or locality of the thing injured and not of the agent by which the injury is done. See, also, The Rock Island Bridge Case, 6 Wall. [73 U. S.] 213, 216; Russell v. The Empire State [Case No. 12,145], Russell v. The Asa R. Swift [Id. 12,144].

In England, there is a statute (Act May 17, 1861; 24 Vict. c. 10, § 7) which provides that "the high court of admiralty shall have jurisdiction over any claim for damage done by any ship." This has been held to give that court jurisdiction over every case of damage done by any ship, and to authorize a suit in rem against a vessel, in admiralty, by the owners of a breakwater, to recover for injury done by the vessel to the breakwater. The Uhla, L. R. 2 Adm. & Ecc. 29, note. There is no such statute of the United States, giving such an enlarged jurisdiction to the courts of admiralty. The question is left to be decided under the provision of the constitution (article 3, § 2) which says that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction," and under the 8th subdivision of section 563 of the Revised Statutes, which says that the district courts shall have jurisdiction "of all civil causes of admiralty and maritime jurisdiction." Under these provisions, the suit against the vessel cannot be maintained, and the libel in it must be dismissed, with costs.

A re-argument of the suit of Howell against the schooner, for the damage done to the derrick, was had and the following decision was given, in January, 1877:

BLATCHFORD, District Judge. In deciding this case recently, I held that the libellant's injured property was "a part of the soil of the earth, or was affixed to it, and was wholly on land." The libel alleges that the libellant had, at the Middle Ground, Stratford Shoals, in Long Island Sound, where he was erecting a pier for a light-house for the United States, a derrick and tackle and machinery, stone and material, which were being used by him in constructing said pier, and that the schooner Maud Webster ran into and upon said derrick and other articles and damaged them. The libel seeks to recover such damages in rem against the schooner. The evidence was, that whatever there was belonging to the libellant, which was damaged by the schooner, was not afloat, and did not rest upon any floating support, or upon any boat or vessel or raft which had at any time floated, and was not anchored there, in the sense in which a vessel or a buoy is anchored to the soil below so as to float on or in the water above, but was sustained against the force of gravity wholly by direct pressure upon the soil of the earth. On these facts, I held, on the authority of the cases of The Plymouth, 3 Wall. [70 U. S.] 20; The Neil Cochran [Case No. 10,087]; and The Ottawa [Id. 10,616],—that the damage was not done upon the water, because the locality of the thing injured was not upon the water, and that the admiralty had no jurisdiction of the suit.

At the request of the counsel for the libellant, this question has been re-argued before me. The libellant had constructed a circle of rip-rap about 70 feet in diameter. The interior of this was open both across and down through the water in it to the soil of the bottom, except where a ring of stone was built up to a line above the surface of the water. At low water men could stand on the bottom inside of the ring. There was a derrick there, used in constructing the pier, but not to remain there after the completion of the light-house. The derrick consisted of an upright, the lower extremity of which rested on the soil at the bottom of the water inside of the rip-rap, and the upright rose through what water was there into the air, and was

steadied above by four wire guys which extended to a distance and were anchored to the soil at the bottom of the water outside of the rip-rap. The derrick had an arm or arms above. It is claimed by the libellant that the schooner struck one of the guys.

It is urged that the place where the accident occurred was on the high seas, and not within the limits of any state, and was, therefore, not on the land. The view is, that as it happened in the midst of the water, it must be considered as having happened upon the water. It is also contended that the derrick was there only temporarily; that it was resting on the bottom of the high seas; that such bottom was not land; and that the property injured must all of it be regarded as personal property on the high seas.

I cannot regard the injury to the libellant's property as having occurred on the water, in the sense of the decisions above cited, although, in one sense, it occurred in the water, because it occurred at a place in the midst of or surrounded by the waters. The property was not in use for purposes of navigation, and was none of it afloat, and was all of it supported by direct pressure on the soil of the earth. It was no more upon the water, and the injury to it did not any more happen on the water, than did the injury to the wharf in the cases of The Plymouth [supra] and The Ottawa [supra], or the injury to the bridge in the case of The Neil Cochran [supra].

I must adhere to my decision dismissing the libel, with costs.

Case No. 9,303.

The MAUD WEBSTER.

[1 Hask. 325.] [1]

District Court, D. Maine. Feb., 1871.

COLLISION—DRIFTING—STRICT WATCH—MANAGEMENT DIFFICULT—RIGHT OF WAY—BOTH IN FAULT—DAMAGES.

1. A vessel on the port tack, drifting with the current, and hardly moving ahead so as to be controlled by her helm, is in fault for colliding with a vessel on the starboard tack that could have avoided her, if the vessel first named could have prevented the collision by strict watch, and by either going about or by taking inboard her boom so as to go clear.

2. A vessel on the starboard tack, approaching a vessel on the port tack controlled by circumstances that rendered her management difficult, is in fault for colliding with her, when the collision might have been avoided by proper exertions in the management of the first named vessel although she had the right of way.

3. When both vessels are in fault and contribute to the collision, the damages should be equally divided between them.

In admiralty. Libel in rem promoted in behalf of the owners of a smack, sailing upon the starboard tack, against a schooner on the port tack, lumber laden, drifting, and hardly moving so as to be controlled by her helm, for damages from collision. The cause was heard on libel, claim, answer and proofs.

Thomas B. Reed, for libellant.
W. C. Crosby, for respondents.

FOX, District Judge. The libellant is the owner and master of the fishing smack Matilda of the burthen of thirty-two tons, and claims in his libel damages to the amount of $180 from an alleged collision between the two vessels near Sheep Island in the Penobscot Bay, about 6 a. m., May 16, 1870. The smack was light, on a return voyage from Boston to Rockport, and the evening previous came to anchor below the Cow buoy, on Sheep Island bar, the libellant alleging she was well in towards the westerly side of the island. The Maud Webster is a large schooner, was loaded with lumber and bound from Bangor to a port in Connecticut. She came to anchor the evening before outside of Owl's Head, and the next morning between four and five got under way in company with the schooner A. B. Russell of Portland, Conn., Mr. Gaffey, master, also lumber loaded, and bound outwards. The tide was just turned to flood, as is admitted by both sides. It is alleged in the libel, the wind was N. E. by E., and that the collision was caused by the schooner running into the smack when getting under way. The answer states the wind as E. S. E., and under all the circumstances it is important to determine which of these statements as to the course of the wind is correct. The libellant and one of his hands support the averment in the libel, whilst the master, mate and one of the crew of the schooner state the wind as is alleged in the answer, and this statement is sustained by the testimony of the master of the A. B. Russell, who preceded the schooner in working out from Owl's Head, and was but one-fourth of a mile distant from the vessels at the time of the collision. He states, "The wind was E. S. E., quite light under Munroe Island. That both vessels got under way about the same time, but that his went ahead on account of the Maud Webster not being in good trim. That there was not wind enough to give their vessels steerage way opposite Munroe Island. That the Maud Webster was taken by the current across Muscle Ridge channel and quite near to Sheep Island bar and the Cow buoy, notwithstanding they endeavored to pay her off all they could, by shoving out the main-boom as far as possible to leeward." If the wind had been N. E. by E., or from that quarter, these vessels would not have taken the course they did and drifted over near to the island on the east side of the channel, but would have had a fair wind down the channel. I am satisfied therefore from this circumstance that the wind was not as is alleged in the libel, but was about E. S. E. as given in the answer, and as it is sworn to have been by three persons on

[1] [Reported by Thomas Hawes Haskell, Esq., and here reprinted by permission.]

board the schooner and the master of the A. B. Russell, in contradiction of two only from the smack.

The libel alleges that "the smack was anchored to the southward and eastward of the Cow buoy, close into Sheep Island, out of the channel and track of vessels, and that while getting under way, before the jib could be got into position to pay her off, the Maud Webster passed the Cow buoy, then hauled to, attempted to and finally did pass to windward of the Matilda and between her and Sheep Island, and there run into the Matilda, catching her jib-stay by the schooner's main-boom, which was on the starboard side, doing certain damages, &c."

The answer avers that "the Matilda had a fair wind for running up the channel, and came along with all her sails set and full, starboard tacks on board, and could easily have avoided the collision as she had the whole passage to leeward and might have kept off with proper management, but by negligence ran so near that her jib-stay caught under the schooner's main-boom, and that the collision occurred forty or fifty yards southwest of the buoy."

The libel is sustained by the two witnesses from the smack, they swearing she was not in motion, but that her anchor had broken ground and was hove in after the collision, which they swear occurred one quarter of a mile south-easterly from the buoy.

Those from the Maud Webster testify that the smack was under full sail at the rate of two and one half or three knots, and that the collision occurred a little to the southwest of the Cow buoy.

It is to be lamented that in a case of so small magnitude, there should be on almost every material fact a direct conflict between those on board the respective vessels, and I have been compelled to rely, to a great extent, on the testimony of the master of the A. B. Russell, to determine as to the real state of the case, especially when his statements are corroborated by other circumstances. He was a witness on the stand, a man of more than ordinary intelligence, I should judge, who showed he was well acquainted with the localities and had every opportunity of knowing as to the real state of the facts, and also gave his testimony without any apparent feeling or prejudice for or against either party.

With the wind as the libellant alleges, could these two vessels have come in contact in the place claimed in the libel, one-quarter of a mile south and east of the buoy? I think it is incredible that the collision took place at that point. Whilst the vessels were under the lee of Munroe and Sheep Islands, they were to a very great extent without the influence and power of the wind, as it was light, and the islands broke off its force and effect, but as Mr. Gaffey says, "after the schooners were outside of the buoy, they then began to feel the effect of the wind and his vessel made three knots." With the wind N. N. E. it was a fair wind from the buoy to sea, the N. E. point of Ash Island, which vessels pass bound out, being S. S. W. from the buoy. The schooner therefore, with the wind N. N. E., could have laid her course directly S. S. W., and could not have gone to the eastward so as to come into collision with the smack which was lying S. E. from the buoy as is claimed by the libel, close in under the island, out of the course of vessels bound up and down the bay.

With the wind E. S. E. the schooner would have had it directly abeam, and after she had passed and had got beyond the island, the breeze was sufficient to give her steerageway and let her hold her course without drifting to the eastward as she had done when in the narrow passage above. With the wind obstructed by the islands, after the buoy was passed, the channel was much broader and the breeze of much more power, and there was no occasion for the Maud Webster to have fallen away to the eastward as is supposed.

Mr. Gaffey states, that he preceded the Maud Webster and was one-quarter to three-sixteenths of a mile ahead at the time of the collision, sailed on a course of S. S. W., after passing 100 feet westward of the buoy, and on that course passed to windward of the smack; that she was then under way, and as he passed her noticed a man throw down his handspike and take the helm, and that she had on her mainsail and jib, that they were full and drawing; that at the time of the collision the smack had gone ahead one-eighth to three-sixteenths of a mile and that the two vessels when the collision occurred were between him and the buoy, so that he could not see the buoy. The A. B. Russell, being on a course of S. S. W. from the buoy, passed to windward of the Matilda. It follows as a matter of course that the Matilda was not at anchor at the time of the collision one-quarter of a mile S. E. of the buoy, as has all along been insisted on by the libellant and his witness. The weight of the testimony as well as circumstances, about which there can be no question, establish that the collision occurred S. W. of the Cow buoy and from 200 to 300 feet distant from it; and I am satisfied that the smack was under way and at least one-eighth or one-quarter of a mile from her anchorage, notwithstanding the statement of the libellant and his witness, that she was not in motion, and her anchor had only broken ground. All the witnesses from the schooner show that the smack was sailing so fast as to break water considerably, and Mr. Gaffey agrees with them by saying that she had gone one-eighth to three-sixteenths of a mile from where he passed her, and that the lightness of the wind gave the smack the advantage.

By the 20th article of the rules established by congress in relation to navigation, it is provided that no ship shall under any circumstan-

ces neglect proper precautions "which may be required by ordinary practice of seamen, or by the special circumstances of the case." Although she was on her starboard tack, it was the duty of the smack to have used proper precaution to have prevented the collision. The courses of the two vessels at the place where the collision occurred, one sailing N. N. E. and the other S. S. W. with the wind abeam, was such that with a proper lookout and ordinary seamanship the smack could have avoided the schooner; being the lightest vessel and easiest to manage with the light breeze, she could without any difficulty have gone a very slight distance to leeward and passed by without interference. There was no one on the watch, the master was in his berth, and from his own statement "that there was quite a breeze at the time, and if the smack had been under way he could have prevented the accident," I am compelled to the conclusion that the smack was in fault, which occasioned or contributed to the accident. The least attention of those on board the smack to the position of the Maud Webster, and noticing that her mainboom was swung hard to leeward and stopped out, would have satisfied them that the schooner was not easily managed and controlled with the wind as it then was, and must have admonished them that they on their part were bound to exert themselves to prevent a collision; but instead of so conducting, nothing was done on the part of those on board the smack to avoid a collision until it had become unavoidable.

The Maud Webster was also in fault up to the time of her passing the buoy; with the light wind obstructed by the islands she appears not to have been entirely under the control of her helm. She was setting so far to the eastward across the channel, that it was found necessary to swing out the mainboom so as to throw her head off to pass by the buoy, but no necessity of this kind continued after she was beyond the buoy. The force of the wind was then more operative. She was beyond the obstruction of the island, and she had a free course from the bar to Ash Island. There was no longer any occasion for her boom being off as it had been, and if a proper, skillful watch had been on duty forward and descried the Matilda running down so close to them, he would have informed the captain seasonably, and the course of the Maud Webster should have been changed or the boom swung on board so as not to endanger the other vessel. There was no man on watch and no such precautions were taken. By the 12th article of the rules of navigation, "ships with the wind on the port side, shall (ordinarily) keep out of the way of the ship with the wind on the starboard side." The Maud Webster had the wind on her port side, and it was incumbent on her to keep out of the Matilda's way if she could. If therefore, she had it in her power by a change of course to have avoided the Matilda, she should have done it, or if by swinging on board her boom the collision would have been prevented. it should have been done. I have no doubt therefore, the collision might with proper care have been avoided by the Maud Webster, and I therefore find she also occasioned and contributed to the injuries.

The decree will be, that both vessels were in fault, and occasioned and contributed to the collision, and the damages and costs of the two vessels must be equally divided between them. Cause referred to an assessor.

Case No. 9,304.

In re MAUER.

[5 Sawy. 66.] [1]

District Court, D. Nevada. Jan. 17, 1878.

BANKRUPTCY—PETITION AND SCHEDULES—VERIFICATION BEFORE NOTARY.

The petition and schedules may be verified before the attorney of the debtor, he being a notary public.

In this matter the debtor [Henry Mauer] verified his petition and schedules before his attorney who was a notary public. The register deeming such verification irregular, certified the question for decision.

E. B. Stonehill, for debtor.

No one in opposition.

HILLYER, District Judge. The rule that affidavits taken before the attorney in a cause cannot be read is an old rule of practice in the courts of king's bench and exchequer in England. It is a technical rule and is limited in actions at law to the attorney on the record, and in equity cases to the solicitor. People v. Spalding, 2 Paige, 326. It does not apply to an affidavit taken before counsel in the suit (Willard v. Judd, 15 Johns. 531), nor to a solicitor who was not named on the record though a partner of the solicitors of record (Hallenback v. Whitaker, 17 Johns. 2). The rule ought not to be extended to cases where the notary is called upon to do a merely ministerial act in which no exercise of judgment or discretion is required, such as swearing a party to the truth of a bill, or petition, or answer. McLaren v. Charrier, 5 Paige, 530. Although the attorney is the legal adviser of the deponent the affidavit may be read if he is not attorney on the record. Williams v. Hockin, 8 Taunt. 435. The rule is further limited to affidavits taken in a cause pending. It does not extend to those taken preparatory to the beginning of one. Vary v. Godfrey, 6 Cow. 587. Affidavits to hold to bail taken before the cause was commenced were held sufficient in Haward v. Nalder, Barnes' Notes Cas. 60, and it has always been the practice in the English courts to permit affidavits of service of process to be

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

sworn to before the attorney in the cause, and also proof of service of the declaration in ejectment. Doe v. Roe, 2 Younge & J. 284; Steph. N. P. 1440.

The affidavits in this matter were not taken in a cause pending, and hence are not to be rejected, as the authorities show. The petition, schedules and inventory must all be made out and verified before being filed and before any bankruptcy proceeding is begun. I am not disposed to extend the rule beyond the cases cited. There is no reason to suspect the least improper influence over the affiant, or to doubt that if these verifications were held bad for the reason assigned the debtor would swear to the same thing immediately before some other officer.

The clerk will certify this decision to the register.

Case No. 9,305.

MAUGER v. HOLYOKE MUT. FIRE INS. CO.

[Holmes, 287;[1] 3 Ins. Law J. 55.]

Circuit Court, D. Massachusetts. Dec., 1873.

INSURANCE—FIRE—POLICY — CONSTRUCTION — INTENTION—FACTS AND CIRCUMSTANCES EXISTING.

1. Policies of insurance are to be construed largely according to the intention of the parties, and for the indemnity of the assured, and the advancement of trade.

[Cited in Moulthrop v. Farmers' Mut. Fire Ins. Co., 52 Vt. 130.]

2. The intention of the parties may be shown by evidence of facts and circumstances existing when the insurance was effected, but not stated in the policy.

[Cited in Moulthrop v. Farmers' Mut. Fire Ins. Co., 52 Vt. 130.]

Hearing upon the report of an assessor appointed to assess damages after a default. The suit was brought [by Victor E. Mauger] to recover for a loss under a policy of insurance issued by the defendant. The only question in the case was as to the interpretation of several policies of insurance, the material parts of which are stated in the opinion.

Abbott & Jones and Shattuck & McFarland, for plaintiff.

Ives & Lincoln, for defendant.

SHEPLEY, Circuit Judge. The question in this case arises upon the facts stated in the report of the assessor appointed to assess damages upon a default. On the 20th of April, 1872, the assured (Armstrong & Co.) effected insurance to the amount of $3,000, "on their new lithographic printing-press, contained in the fourth story of brick building situate No. 13 Bowker street, Boston, Mass. It is understood that $300 of the amount shall attach on hand-presses." Just before effecting this insurance, Armstrong & Co. had purchased a new lithographic-press worth $3,500, and of a smaller size than the one subsequently purchased, and referred to in the defendant's policy. Permission was given July 3 for removal to fourth and fifth stories of stone and brick building corner of Milk and Devonshire streets, Boston. On the twenty-eighth day of June following, Armstrong & Co. procured insurance to the amount of $4,000 "on their lithographic-presses and ink-mill, with shafting and belting connected therewith, contained in the fourth and fifth stories of stone building 57 Milk street, corner of Devonshire street." At this date Armstrong & Co. had two steam lithographic-presses and several hand-presses.

Oct. 30, 1872, Armstrong & Co. purchased the steam lithographic-press, described in defendant's policy now in suit, which insured them in the sum of $4,300, from Nov. 1, 1872, to Nov. 1, 1873, "on their Hugh & Kimbers No. 6 steam lithographic-press, size 30x40, situate in chambers of granite and brick building, situate No. 57 Milk street, corner Devonshire street," payable, in case of loss, to the plaintiff.

By the terms of that policy defendant is liable to pay the plaintiff three-fourths of the value of that property on the twenty-second day of January, 1873, being sixty days after the date when proof was made of the loss by fire, which occurred on the tenth day of November, 1872, unless that amount is to be reduced under the provisions of the following clause in the policy: "In case of any other contract of insurance upon the property hereby insured, whether such contract be valid or not, as against the parties thereto, or either of them, the assured shall not, in case of loss or damage, be entitled to recover of this company any greater portion of the loss or damage sustained than the amount herein insured shall bear to the whole amount insured on said property."

At the time of the fire, Armstrong & Co. had in their chambers, 57 Milk street, corner of Devonshire street, three steam lithographic-presses; also hand-presses and ink-mill, and shafting and belting.

Defendant contends that all the policies attach to the press last insured, and that the clause in relation to double insurance is applicable in adjusting the loss.

That the policy of the 20th of April did not attach, is too clear to require any argument or authority. That was in effect an insurance of $2,700, upon a specific steam lithographic-press, described as the new one contained in the fourth story of brick building situate No. 13 Bowker street, and of $300 on hand-presses. No possible construction of the language could make this insurance cover any other steam lithographic-press than the then new one thus specifically described.

The language of the second policy of June 28, 1872, "on their lithographic-presses and ink-mill, with shafting and belting connected therewith, contained in the fourth and fifth stories of stone building, 57 Milk street, corner of Devonshire street," is not so specific.

[1] [Reported by Jabez S. Holmes, Esq., and here reprinted by permission.]

Policies of insurance are to be construed largely according to the intention of the parties, and for the indemnity of the assured, and the advancement of trade. Facts and circumstances dehors the instrument may be proved in order to discover the intention of the parties. Stacey v. Franklin Fire Ins. Co., 2 Watts & S. 506. This was the case of an insurance upon "merchandise generally, including liquors and groceries contained in store No. 37 South Wharves, for use of whom it may concern, say merchandise without exception." A second insurance was effected in another company, "on coffee and other merchandise, without exception, either on board the John Sargeant at this port, or in the brick store No. 37 South Wharves, in the city of Philadelphia." A loss happened by fire on goods in the store No. 37, not brought in the John Sargeant, or landed therefrom. After admitting evidence outside of the policy of facts and circumstances to show the intention of the parties as to the second policy being a specific insurance on other goods not covered by the first, it was held, that, as thus explained, there was not necessarily a double insurance, but that the first might be on goods generally in the store, and the second on specific goods brought by the John Sargeant, or landed in the store therefrom. Explaining the policies in this case in the light of the attending facts and circumstances at the time they were effected, the intention of the parties is arrived at without difficulty. The first policy was clearly on the new steam lithographic-press, definitely described and located. The policy of June 28, was on the two lithographic-presses then in the chambers corner of Milk and Devonshire streets, and was not intended to apply, and did not apply, to any steam lithographic-presses to be subsequently placed there. It was not a floating policy on a stock of merchandise in a store, bought for sale, and with the intention of replacing it as sold, and keeping the stock good; but on specific machinery, intended for permanent use in the location described. It was not expected or intended to embrace, and the literal meaning of the words used does not embrace, any presses not then in the building. It could only embrace such presses subsequently placed in the building, if explained by facts and circumstances dehors the policy, and the facts and circumstances do not thus explain it, or aid such a construction. The policy of Oct. 30 is specifically upon the third steam lithographic-press not in the building when the other insurances were effected, and not within the description in those policies. There was, therefore, no double insurance. The assessor, holding that the insurance procured April 20, 1872, and June 28, 1872, does not apply to the property covered by defendant's policy, has assessed the damages at $3,450, with interest thereon from Jan. 22, 1873. His report is confirmed, and judgment will be entered accordingly. Judgment accordingly.

MAUK (UNITED STATES v.). See Case No. 15,745.

MAUL (EISEMAN v.). See Case No. 4,322.

Case No. 9,306.

MAUL v. SCOTT.

[2 Cranch, C. C. 367.] [1]

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

EXECUTION—RETURN NULLA BONA—SALE BY DEBTOR—ALIAS.

The lien upon the personal property of the debtor, arrested by the delivery of a fieri facias to the marshal, is lost by the return of nulla bona; and is not waived by the delivery of an alias fieri facias to the marshal, so as to overreach an intermediate sale by the debtor.

The plaintiff claimed property in a horse, which the defendant, as deputy marshal, had taken as the property of one E. P. Taylor, upon a fieri facias at the suit of A. B. The horse had been sold by Taylor to the plaintiff, Maul, on the 10th of January, the horse then being in the possession of one Edward Stone, as bailee of Taylor, who on that day gave a written order to Stone to deliver the horse to Maul. On the 29th of January, a fieri facias against Taylor was issued in favor of A. B., returnable on the 4th Monday of March, and delivered to the marshal on the 19th of February, and returned nulla bona. On the 27th of April, an alias fieri facias was issued and delivered to the marshal, upon which the marshal took the horse as the property of Taylor.

Mr. Hewitt, for defendant, contended that the lien, if any, which took place on the 19th of February, continued (notwithstanding the return of that fieri facias nulla bona), up to the time of the delivery of the alias fieri facias to the marshal, on the 27th of April.

THE COURT, however (THRUSTON, Circuit Judge, contra), said that the lien was lost by the return of the fieri facias, nulla bona, and was not revived by the delivery of the alias fieri facias to the marshal. Verdict for the plaintiff. Motion for new trial on the ground of misdirection of the jury on that point, overruled.

Case No. 9,307.

MAULDIN v. CARLL.

[3 Hughes, 249.] [2]

Circuit Court, D. South Carolina. May 18, 1878.

ATTACHMENT—DEBTOR WITHOUT THE JURISDICTION—AUTHORITY TO ISSUE.

Whether an attachment can issue from a court of the United States against the property of a citizen of another state, he not being in the state, at the suit of a citizen of the state.

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

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

The case was a suit brought for the recovery of damages for an alleged breach of contract in the purchase of a cargo of lumber. In accordance with the practice of the state court, which has been held to have been carried into the United States court by force of the provisions of the act of congress of 1872 [17 Stat. 44], the process by attachment has been heretofore referable to any United States court since that enactment in suits of that character. In the case before the court warrant of attachment was issued to the marshal, who arrested the schooner Frances and her cargo at Georgetown, S. C., seeking to attach the interest of Jesse Carll, a part owner of the vessel and the defendant in the action. The provisions of the 1st section of the act of 1875 [18 Stat. 470] re-enacted the law of 1789 [1 Stat. 73], which reads as follows: "No civil suit shall be brought before either of the said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at time of serving such process, or commencement of such proceeding, except as hereinafter provided."

It was contended by Mr. Conner, for plaintiff, that the language of the 8th section would cover his attachment process. The section reads as follows: "When in any suit commenced in any circuit court of the United States, to enforce any equitable or legal lien upon or claim to, or to remove any incumbrance, or lien, or claim upon the title to real or personal property within the district where such suit is brought, one or more, of the defendants therein shall be inhabitant of or found within the said district, or shall voluntarily appear thereto, it shall be lawful for the court to make an order directing such person to appear, plead, answer or demur," etc.

Messrs. Simonton & Barker, who represented the vessel attached, contended that the legal or equitable claim upon or claim to incumbrance or claim upon the title to real or personal property, contemplated by the 8th section, must exist before the suit brought for its enforcement, and could not be created by or in said suit.

After hearing the argument, BRYAN, District Judge, decided that he was controlled by the language of the 1st section of the act, but expressed himself dissatisfied with the conclusions to which his mind was forced by the words of the statute.

On motion of Messrs. Simonton & Barker, the following order was signed:

"United States of America, District of South Carolina, Fourth Circuit. W. H. Mauldin, a citizen of South Carolina, v. Jesse Carll, a citizen of New York. It appearing to the court that a warrant of attachment in the above-entitled cause has been issued by the clerk of the circuit court, together with a summons and complaint in a civil suit for damages for an alleged breach of contract, directed against the defendant, and that under said warrant the marshal of the United States has seized, or attempted to seize, the schooner Frances, lying in the port of Georgetown, South Carolina, with her cargo on board, ready to sail; that said seizure has been made, or attempted, on the ground of an alleged interest of the defendant, Jesse Carll, as part owner in said schooner; it also appearing that the defendant, Jesse Carll is not an inhabitant of this district, or found here at the commencement of such proceedings. After hearing argument of counsel on a motion to set aside proceedings as not warranted by law, the court being of opinion that the first section of the act of congress, approved March 3, 1875 (entitled 'An act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from state courts and for other purposes'), forbids a civil suit to be brought in the circuit court of the United States against an inhabitant of another district, and not found within the district at the time of commencing the proceeding, and that the suit above stated is not within the exceptions of the act of 1875 as therein provided: Now, on motion of Simonton & Barker, it is ordered, that the warrant and summons, and complaint be, and the same are hereby set aside, and the marshal do forthwith release the said schooner Frances and her cargo. It is further ordered that each party pay his own costs."

Case No. 9,308.

In re MAULE.

[1 MacA. Pat. Cas. 271.]

Circuit Court, District of Columbia. June, 1853.

PATENTS—NOVELTY—COMPOSITION OF MATTER—METALLIC PAINT.

[A metallic paint produced by well-known methods, and without the use of any new ingredient, from the refuse left in the manufacture of bi-chromate of potash, is not patentable as a new composition of matter, although the applicant was the first to utilize the refuse for this purpose.]

[This was an appeal by William P. Maule from the refusal of the commissioner of patents to grant him a patent for a metallic paint, alleged to be a new and useful composition of matter, made from the refuse produced in the manufacture of bi-chromate of potash.]

Thos. H. Speakman, for appellant.

MORSELL, Circuit Judge. The original application was filed on the 15th of December, 1851, and withdrawn, and the return fee paid to him. On the 13th of March, 1852, the same party filed another application for a patent for the same refuse material, to be treated in the same way and for the same purpose. This application was inclosed and sent on to the office in a letter from Mr. Maule's counsel bearing date on the 11th of

March, 1852, in which letter he says: "The invention is a valuable one. The paint is manufactured at very little cost, being produced from an article which has heretofore been considered of no value, and yet it is of very superior quality for the purpose intended—for forming an almost purely metallic coating, very hard and durable. It has already been extensively used, and is very highly recommended." In a subsequent letter he incloses a printed paper dated 10th of February, 1852, from which it appears by the certificates of sundry persons that previously to that time, and previously to the application of the 13th of March just stated, the article for the invention of which the patent was prayed had been publicly bought and sold with the knowledge and consent of Mr. Maule. The provision in the statute of 1836 [5 Stat. 117], authorizing the party to withdraw his application is in these words: "In every such case, if the applicant shall elect to withdraw his application relinquishing his claim to the model, he shall be entitled to receive back twenty dollars—part of the duty required by this act—on filing a notice in writing of such election in the patent office, a copy of which, certified by the commissioner, shall be a sufficient warrant to the treasurer for paying back to the said applicant the said sum of twenty dollars." Section 7. Whether under such circumstances a statutory objection existed at the time of filing the second application to the claim for a patent, I express no opinion, no such objection having been raised.

It appears from the papers in the cause that another application, dated the 10th of September, 1852, was presented to the office by the appellant, in which he says: "I have invented a new and improved metallic paint." And he proceeds to give a full and particular description thereof, at the close of which he says: "What I do claim as my invention, and desire to secure by letters-patent, is the before-described paint manufactured from the insoluble metallic residuum or refuse which remains after the extraction of the soluble parts in the manufacture of the chromate of potash or soda from chromic iron ore." This application was examined and rejected by the commissioner upon the ground that the alleged invention was not patentable for the want of novelty; and upon notice given an appeal was taken from the said decision and refusal to grant the patent as aforesaid. The reasons for which said appeal were duly filed, and the substance of which are—First. The application is not for making paint out of the oxides, &c., of iron, but from the residuum from the manufacture of bi-chromate of potash, which is a substance of a distinctive character well known in the arts, and is to be considered without reference to the elements of its composition. Second. The discovery of the peculiar properties of this substance, which render it capable of being manufactured into a most valuable paint, and its application to that purpose by the process of cleansing and manufacture pointed out in the specification, constitute a patentable invention under the sixth section of the act of congress of July 4, 1836. Third. Though these properties were due entirely to the oxide of iron which the substance contains, and which have been known to be applicable to the same purpose, yet the discovery of these ingredients existing in this refuse material in such combinations and proportions as to render it useful to mankind in the manner now applied by Mr. Maule, together with the manner of preparation pointed out for rendering it capable of use, are patentable, a new and important result in the arts being produced thereby. Fourth. Though the amount of novelty or invention was small, yet this discovery is patentable on account of its great utility. The manufacture of the residuum into paint, in connection with the manufacture of bi-chromate of potash, is, therefore, a great improvement of the trade. The paint yields a large profit.

The commissioner, in order to show the absence of patentable invention, in answer to the reasons of appeal, makes a comparative analysis between what the appellant states the ingredients of the residuum to be and what is stated in the books of the composition of chromic iron, from which the conclusion is deduced that iron rust or oxide of iron must give the leading character to the material, and the residue will be red or brown, according as the roasting has been more or less skillfully conducted. "Mar's Colors" are referred to, in which are to be seen various paints prepared from the oxide of iron, mixed with other bodies, and of similar colors. To the second reason, to show that appellant was not the first to discover that this refuse is capable of being pulverized, washed, dried, and mixed with oils to form a paint, he says there is but one operation common to all these substances by which each is converted to a paint, namely, washing (when necessary), drying, pulverizing, and mixing with oil. This process, therefore, is not new. As to the washing, the books direct that the chromate of potash shall be lixiviated with water to save all of its salts. Third, that as to the discovery of the ingredients existing in this refuse mineral in such proportions as to render it useful and give it value, and to produce a new and important result in the arts, the same was no new discovery by the appellant. The books give the analysis of this ore, and show how to find out the exact composition; and so also with respect to the process. Mr. Maule has added substantially nothing to the knowledge of the chemical arts that was not known before. As to the difference in the expense, the red oxide of iron is one of the most abundant and most easily pulverized (next to the ochres) of all earthy minerals, and is known under the name of bog-iron—hematite. This makes a paint equal to any iron

paint, of a strong reddish-brown color, and it is very abundant. And so as to the hematites and other ores of iron. To the fourth, Mr. Maule's paint has no title to claim on the score of utility. It has not been shown to be better than any other ore or mineral. No invention has been proved. The mere repetition of this well-known process on any mineral or other matter, whether new or old, does not constitute a patentable invention. On the day and place appointed for the hearing said appeal, according to previous notice duly given, an examiner from the office appeared, and, as required of the commissioner by law, the said reasons of appeal and all the original papers in the case, together with the grounds of said commissioner's decision fully set forth in writing, touching all the points involved by the reasons of appeal, were laid before me; and the said appellant filed his arguments in writing in support of his claim.

It will therefore appear that the appellant states his claim to a patent to be for a metallic paint. The invention, he says, consists in making paint from the refuse insoluble matter which remains after the extraction of the soluble parts in the manufacture of chromate of potash from chromic iron ore; that this article has hitherto been considered as of no value in the principal establishments for the manufacture of the bi-chromate of potash in this country and in Europe; it is thrown out as a valueless commodity. The appellant has discovered that it is a valuable article for paint, when properly prepared, and has practically applied it to that purpose, by which about fifteen per cent. profit is gained in the manufacture of bi-chromate of potash and the public supplied with a valuable paint at a very cheap rate. The rejection by the commissioner appears to have been upon the ground that there was no new composition of matter, no new process, but one substantially formed of old ingredients, and by an old process, and, therefore, that there was no patentable invention. I do not understand from the argument in reply that anything is claimed because of any new ingredient in the refuse composition, or because of the process out of and by which the paint is manufactured, but that it is contended that the paint itself is a new and useful composition of matter and a patentable invention manufactured from said worthless residuum, and that he pretends to no claim whatever in connection with the manufacture of the chromate of potash; that his invention begins where that process leaves off. This manufacture, however, thus claimed to be a new composition and a patentable invention, has no feature in it that can constitute a new invention, unless its being manufactured out of the said residuum makes it so.

It is contended that it is within the provisions of the act of congress of July, 1836, § 6, which says "that any person or persons having discovered or invented any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement on any art, machine, manufacture, or composition of matter not known or used by others before his or their discovery or invention thereof, and not at the time of his application for a patent in public use or on sale with his consent or allowance as the inventor or discoverer, and shall desire to obtain an exclusive property therein, may make application in writing to the commissioner of patents expressing such desire; and the commissioner, on due proceedings had, may grant a patent therefor." In the construction of this part of the statute as it regards this class of subjects, I suppose the test to be that the combination or process of compounding it must be new.

The cases of The King v. Wheeler, 2 Barn. & Ald. 345, and Crane v. Price [4 Man. & G. 580] were cited for the purpose of supporting the principles that wherever there is sufficient utility to render any discovery better or more valuable to the community, or to those engaged in the particular trade, there is a sufficiency of invention to support a patent; that a patent may be granted for the use of things already known, and producing effects already known, and acting in a manner already known, provided those effects be produced so as to be more economically or beneficially enjoyed by the public. Again, if there be anything material or new which is an improvement of the trade, that will be sufficient to support a patent. Crane's Case, one of those which is referred to for these principles, is amongst the most modern English cases upon the subject, and in which most, if not all, of the previous decisions on these points were reviewed. That case is decided with a view to the construction of the British statute of monopolies, according to the construction given to which, it must be considered as less restrictive than the terms contained in our statute. There are certainly dicta to be found in that and other English cases going to the extent with respect to the beneficiary and economical result contended for in the argument in this case. But it will be found by a critical examination of the facts in the case that there was enough in the case to warrant the decision without going to the extent of those dicta; that is, there was a new and material feature in the combination—that of the hot air blast—which had never been used in that particular combination before. This, together with the result, was a sufficient invention.

The argument, also, is that the objection of double use does not apply; that in this case it is not the double use of a thing before known, but the production of a new article from a substance which, though already known, was not known to have any use at all; that it is of no consequence that some, or even the principal, ingredients in the new article thus produced have been used for the same purpose before, if the composition

claimed be new in its particular combination, proportions, or manner of being produced, and otherwise patentable. And for this Ryan v. Goodwin [Case No. 12,186], is relied on. In that case it will be found, as correctly stated in Curtis, that the patent claimed as the invention of the party a new and useful improvement in the making of friction matches by means of a new compound; and it was said that the ingredients had been used before in the making of matches. The court said that the true question was whether the materials had been used before in the same combination, and if not, that the combination was patentable. But in this case the compound out of which the paint was manufactured or made had no new ingredients in it, unless its being said to be a residuum would supply that deficiency; and I cannot agree that it would. In Howe v. Abbott [Id. 6,766], the rule of law laid down is that you cannot have a patent for a result merely without using some new mode or process to produce it. Again, it must be admitted that if new at all, it was only so because of the occasion; and the rule is that if the occasion only is new, that is, produced by old agents and by an old mode, it is not patentable. And so the supreme court of the United States in a very recent case have decided that a patent is not good for an effect or the result of a certain process merely. There is still another case of Steiner v. Heald, in 2 Car. & K. 1022. I have not had it in my power to obtain the book in which the case is reported, but will state the notice of it in Lund, Pat. p. 18. The invention patented was for extracting from spent madder a certain coloring matter used in dyeing, and known by the name of "garancine." The opinion is a very long one. I can therefore state such parts only as will show the reasoning and opinion of the court: "A person discovers a process by which he can get from fresh madder a large quantity of an article, which I must now take to be well known, called 'garancine.' Somebody applies precisely that same process to madder that has been merely boiled. There is no magic in a name or in any language that could be used. The boiling of madder gets out only some of it; this process gets out the rest of it. And in my opinion, in point of law, if the matter is reduced to that, you cannot take out a patent for using a perfectly-known process to get the residue of an article from a material which is known to furnish it, the process being one by which you could get, in the first instance, more or the whole of the article; and by your use of the process you merely get the residue which the common process left behind." Again, at page 22, the judge says: "There is no magic in calling this spent madder. It is madder that has undergone a process by which the whole virtues are not extracted. It appears to me that it is precisely the same as if you applied a process to grapes already imperfectly squeezed, by which you squeezed a little more juice out of them than was formerly done. I do not think you could have a patent for that, for see what it would lead to: If a person in manufacturing districts where they extract metal from certain ores were to find that by applying a process to an ore you could get ten per cent. more of the metal, and it then became worth working the refuse that might stand around in heaps, covering many acres, possibly, it would be just worth while to work that over again by the new process. I am clearly of opinion that no stranger could step in and say: 'Now, I will have a patent for using your process which you have given to the public. I will have a patent for using it to this old rubbish, because it may yield some ore.' I do not think that would do." I have referred to and cited this case for the principles settled by it, which I think are applicable to the case before me.

Upon the best consideration, therefore, which I have been able to give this case, the conclusion to which I have arrived is that the decision of the commissioner is right and correct, and I do hereby affirm the same.

MAUNIER (UNITED STATES v.). See Case No. 15,746.

Case No. 9,309.

MAUPIN et ux. v. PIC.

[2 Cranch, C. C. 38.] [1]

Circuit Court, District of Columbia. Dec. Term, 1811.

PLEADING AT LAW—CONTRACT—ASSUMPSIT—PLEA IN BAR—ANOTHER SUIT PENDING.

1. When a contract has been executed, indebitatus assumpsit will lie for the amount due upon it.

2. Evidence of the pendency of a suit between the plaintiff Catherine alone, by the name of Catherine Frisset, against the present defendant, for the same cause of action, at the time of bringing the present suit, will not support the issue upon the plea of the pendency of a suit between the parties to the present suit.

[This was an action at law by Maupin and Catherine, his wife, against Francis Pic.] Indebitatus assumpsit for work and labor.

Mr. Morsell, for defendant, contended that as there was a letter stating the terms to be twelve dollars a month, and no count upon that special agreement, the plaintiff could not recover upon the indebitatus assumpsit. 1 Com. Cont. 228.

But THE COURT (FITZHUGH, Circuit Judge, absent) said that, when a contract has been executed, indebitatus assumpsit will lie for the amount due upon it.

There was a plea in bar, that, at the time of commencing this suit, there was another suit depending between the same parties for

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

the same cause of action. The evidence to support this issue was of a suit by Catherine Frisset alone, who was one of the present plaintiffs, for the same cause of action, which was discontinued after the present suit was brought.

THE COURT instructed the jury that it was not such a suit between the same parties as would support the issue on the part of the defendant.

MAURAN v. The H. B. FOSTER. See Case No. 6,290.

Case No. 9,310.

MAURAN v. WARREN et al.

[2 Lowell, 53.] [1]

District Court, D. Massachusetts. Aug., 1871.

AFFREIGHTMENT — CHARTER-PARTY — STIPULATION — PORT OF NECESSITY — COMMISSION — AGENT CREDIT FOR DRAWBACK.

1. In a charter-party made by a master of a vessel at a foreign port, it was stipulated, that, if the ship should put into a port of necessity, she should be consigned to the charterers or their agents, who were to pay disbursements, charging two and a half per cent commission on the amount, take care of the cargo, and have general charge of the business of the ship. Whether a master can lawfully bind himself to consign the vessel to any particular person in case of disaster, quaere?

2. Where, in a port of necessity, the master did put his vessel in charge of the charterer's agent,—*held*, the latter might properly require the master to produce his accounts when applying for money; such being the usage of the port.

3. Where the charterer had the funds ready, and kept them ready, to pay the disbursements, and the master broke off the negotiations and employed some one else,—*held*, the charterer might recover, as damages, the commission agreed on.

4. By the terms of the charter-party this commission of two and a half per cent was to pay for all the services of the agent, and he could not charge five per cent. though the usage of the port was to make that charge.

5. Where the charterer's agent was to have a commission on freight at the port of discharge, this is to be reckoned on the freight received, and not on the gross freight list, some of which could not be collected.

6. Where an agent, in accordance with a usage of business, receives back from the average adjuster a part of the amount charged for his services, he must credit his principal with the amount of such discount or drawback. An agent is not to receive payment from both sides; and a custom to do so would be void.

The libellant [Suchet Mauran, 2d], residing at Providence, R. I., was the owner of the ship Helen Clinton, of which S. C. Sprague was master, who, in August, 1868, being at Liverpool, chartered the ship to the respondents [George Warren and others], a firm doing business at Liverpool and Boston, for a voyage to the latter port. It was agreed, among other things, that the ship should be discharged by the charterers at Boston, who should collect the freight and averages, charging two and a half per cent commission on the amount; and that if the ship should put into any port before reaching her destination, she should be consigned to the charterers or their agents, "who are to pay disbursements, charging two and a half per cent commission on the amount of the same, take care of the cargo, and have general charge of the business of the ship." In the course of the voyage the vessel suffered damage, and was obliged to put back to Queenstown, where she was unloaded and repaired. The charterers were applied to by the master to furnish the money, and agreed to do so, and referred him to Messrs. James Scott & Co., of Queenstown, as their agents, who furnished him £200, and afterwards refused to make further advances. The agents testified that they were ready and willing, and offered, to make all necessary advances, if the master would send them his bills and accounts, as, according to their testimony, was the custom of the port in like cases. The master swore that the agents gave no reasons, but simply refused to let him have more money. There was a further conflict of evidence upon the question whether the libellant, who had gone to England on notice of the disaster, had made a new contract with the respondents varying the terms of the charter-party. This libel was brought to recover a balance of freight; and the respondents claimed the right to retain the commissions which they would have earned at Queenstown, if the master had been supplied with funds, &c., by them, and certain charges and commissions said to be due them at Boston.

F. Goodwin, for libellant.

1. The stipulation that the ship shall be consigned to the charterer's agent is ultra vires. The duty of the master at a port of necessity is to act on his own responsibility, for the benefit of all parties, and he cannot waive this right and duty. See Pope v. Nickerson [Case No. 11,274]; Hurry v. Hurry [Id. 6,922]; The Sir Henry Webb, 13 Jur. 639; Warren v. Skolfield, 104 Mass. 503.

2. We are not estopped, by suing on the charter-party, to set up that this charge is void, because, where an agent exceeds his authority, it is the excess only that is void. Story, Ag. §§ 166, 272.

3. The agents failed to perform the duties required of them.

4. If liable at all, it is only for two and a half per cent on the disbursements.

J. D. Ball, for respondents.

LOWELL, District Judge. In the case cited from the Massachusetts Reports, Warren & Co. acted merely as brokers, and the master appears to have given a gratuitous promise to consign the ship to them, which the court suggests is probably void. Here they

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

were charterers, and had a right to say where the vessel should discharge, and their commission was part of the consideration for the entire contract. I must confess, however, that I have considerable doubts whether a master can bind himself to put his vessel into the hands of the charterer's agents at a port of necessity. But in this case he made the assignment after the disaster, when he had a right to do so; and his action seems to have met the approbation of the libellant, so that no question of ultra vires arises. All that I have to decide is, why the contract was broken, and whether the respondents are entitled to any damages which they can recoup in this action.

Upon the preponderance of the evidence, it seems to me that the true account is that given by the Scotts; that the master refused to show his bills. This is the only theory that reconciles nearly all the evidence, and indeed all, if we suppose that the master has forgotten the reasons given for the refusal. It seems a reasonable and proper precaution for the consignees to take, and is sworn to be usual at Queenstown, to require the accounts to be exhibited; and the master ought not to regard it as any imputation on his honesty. I do not think it is shown that a new contract was entered into in this particular in the interview between the libellant and Mr. Warren. It is not likely that any such point should have been brought up; and the statement of Mr. Mauran appears to be rather of a result, as it rested in his mind after the interview, than of the words, or even the substance, of the conversation; and as the burden rests on him to make out this new contract, and as he is contradicted by Mr. Warren, and to some extent by the other respondents, I cannot hold that he has proved his new contract. Then the case is, that the respondents were ready and willing to furnish the money in the usual way, and, as they swear, kept it on hand for that purpose. It seems to me they are fairly entitled to the two and a half per cent on the disbursements. I remain of the opinion expressed at the hearing, that the true construction of the charter-party is, that they were to charge only this commission. There is evidence that five per cent would have been a reasonable charge, and was paid to the agent actually employed; but this cannot overrule the contract, which agrees for the lesser commission. The respondents undertake to divide the usual commission, and to charge one half of it as the commission on disbursements, and the other half for general care of the business; but the custom does not so divide it. If the usual charge had been two per cent, the libellants would still be entitled to two and a half; and so they are when it is five or more. The evidence that an additional two and a half per cent would be a reasonable charge for the general conduct of the business, is only an argument founded on the fact that five per cent is the usual charge at Queenstown, and would be equally strong in favor of three, four, or five per cent, if they had been necessary to make up the usual charge at that port. If the case had been that the master applied to the respondents to do his business for the agreed commission, and they had insisted that they should charge the usual commission, he might well have refused to employ them, and would have had his action against them if he had been obliged to employ some one else at five per cent. It is only on this ground that the contract can be understood, or perhaps supported, at all. But the evidence does not show that this was the cause of quarrel, and, upon the whole, I think they are entitled to their two and a half per cent. This seems to me the true measure of damages for not using the money which was ready and waiting.

The respondents have charged precisely what Dawson, the agent who was applied to, and acted, did charge; namely, five per cent on disbursements, £25 for care of cargo, and one per cent for indorsing the draft drawn by the master on Baring Brothers, at four months, for the amount of the dis bursements. The measure of damages for not fulfilling the contract and not employing the respondents ought not to include one per cent for indorsing a bill which they never indorsed. It may be that they were to be paid by a bill on a banker, but the libellant would have been at liberty to pay them in some other way. They might as well add the interest for four months, which, I suppose, was added to the draft. For a like reason it seems to me the £25 ought not to be charged. It was for services not rendered, and does not come into the damages for not employing the respondents.

Coming to the charges in Boston, I understand the questions raised to be,—1. Whether a commission is to be charged on the total amount of the general average loss, or only on that paid by the cargo and the freight. 2. Whether the commission is to be on the face of the freight bills, or only on the amount collected. 3. Whether the discount which the average adjuster allowed to the respondents from the face of his bill ought to be credited to the libellant, so far as his proportionate share is concerned.

The evidence is not sufficient to enable me to decide the first point to my own satisfaction. I do not know what part the respondents took in the adjustment, nor how these sums were in fact settled and collected. I will hear the case further on this point, if either party desires it.

The second point involves only a trifle, as I apprehend. The true rule is, that the libellant, by the terms of the charter-party, takes the risk of the solvency of the shippers; but if any freight cannot be collected, he is not to be charged a commission on it.

It is said to be usual for the adjuster to make some discount from his regular charge, for the benefit of the person who gives him

the business. This is common in many trades and callings; but it is plain that, when an agent receives such a drawback, he must credit his principal with it. It is, in fact, a deduction from the bill; and he who pays the bill is entitled to it. I have known this question to come up in various forms, and in different courts; but the result has always been the same. The respondents are to have their agreed compensation from the libellant for doing his business, and the expenses. If they can get any work done at less than the market rate, he must have the reduction. It is precisely as if the agent at Queenstown had received a commission from both sides, the libellant and the materialmen. I know this is often done; but no court could sanction it as against the principal, and I have not been instructed that any court ever did sanction it. The libellant's proportion of the discount must be credited to him. Interlocutory decree for libellant. Damages to be made up in accordance with this opinion.

MAURICE (UNITED STATES v.). See Case No. 15,747.

Case No. 9,311.

MAURO v. BOTELOR.

[2 Cranch, C. C. 372.] [1]

Circuit Court, District of Columbia. April Term, 1823.

RENT—GOODS WITH BAILEE.

Chairs, left with a painter to be repaired, are not liable for his rent.

[This was an action at law by Philip Mauro against Charles W. Botelor.]

Replevin, for fifteen chairs. Avowry for rent arrear. Verdict for the plaintiff, subject to the opinion of the court upon the following case: Mauro rented the premises of Ann McGunnigle at $150 a year, payable quarterly, for the purpose of having chairs painted therein by one Burden, employed by him for that purpose, Mauro paying the workmen engaged in the work. The chairs were deposited there by Mauro while he was such tenant, for the purpose of being painted and finished as aforesaid, and continued there until the premises were rented by one Esby, a chair-painter, and six months afterward. After Esby took the premises Mauro told him he should want the chairs painted by him, but not till he should give an order for that purpose. The chairs remained there four or five months before Mauro gave the order for painting them; and about a month before the distress was laid, he ordered the chairs to be painted and finished, and they would have been finished and delivered before the distress, but that Esby could not get a certain part of the work done in time. The chairs were distrained for two quarters' rent due from Esby. When the distress was laid, Esby was finishing them and kept them in the house for that purpose.

Judgment for plaintiff, on the case stated.

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

Case No. 9,312.

MAURO et al. v. RITCHIE.

[3 Cranch, C. C. 147.] [1]

Circuit Court, District of Columbia. May Term, 1827.

PRACTICE — DISTRICT OF COLUMBIA — ORPHAN'S COURT—APPEAL—REVIEW—REHEARING—GUARDIAN—APPOINTMENT TO FULL AGE—REMOVAL.

1. An appeal from the orphans' court, in Washington county, D. C., will be dismissed, if the transcript of the record be not transmitted to this court within thirty days after the order appealed from.

2. The orphans' court has a right to review its sentence, although thirty days have elapsed, and the party has lost his right of appeal from the original sentence; and from the judgment of the orphans' court, upon that review, an appeal lies to this court.

[Cited in Archer v. Meadows, 33 Wis. 175; Estate of Leavens, 65 Wis. 447, 27 N. W. 324.]

3. The difference between a rehearing and a review is, that a rehearing may be had before enrolment of the decree, but after enrolment the party is put to his bill of review.

4. A petition for a review in the orphans' court is analogous to a bill of review in chancery.

[Cited in Estate of Leavens, 65 Wis. 447, 27 N. W. 324.]

5. A judgment of the orphans' court against the petitioner, upon demurrer to the petition for review, is, in effect, a judgment that the errors suggested in the petition for review, as apparent on the record, were not such as ought to have induced the orphans' court to reverse its decree; and from this judgment of the orphans' court the party may appeal to this court.

6. The authority of a guardian appointed by the orphans' court, under the power given by Act Md. 1798, ch. 101, c. 12, § 1, continues until the full age of the infant; and such guardian cannot be removed, unless for refusal to give security, when required by the orphans' court.

7. After a guardian has been appointed by the orphans' court, the infant has no right, at the age of fourteen, to choose another.

[Cited in Smoot v. Bell, Case No. 13,132.]

8. By the common law, it was only where there was a guardian in socage, or by nurture, (in which cases the guardianship continued only till fourteen,) that the infant had a right, at that age, to choose a guardian.

9. Different kinds of guardians: (1) in chivalry; (2) in socage; (3) by nature; (4) for nurture; (5) by statute; (6) by custom; (7) by the chancellor; (8) by the ecclesiastical courts; (9) ad litem; (10) by election.

10. Of the four kinds of guardians at common law, one only exists in Maryland, namely, guardian by nature.

11. Guardian by nature, at the common law, has no authority over the lands of the infant; but his authority over the person of the infant continues until he is of full age.

12. The English statutes of 4 & 5 Phil. & M. c. 8, and 12 Car. II. c. 24, so far as they au-

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

thorize a father, by his will to appoint a guardian to his infant children, are in force in Washington county, D. C.

[Cited in Re Stockman, 71 Mich. 181, 38 N. W. 876.]

13. Under the Maryland statutes, it seems that the guardian by nature has the custody of the estates, as well as of the person of the infant, until the age of twenty-one; but the father was the only guardian by nature recognized by those statutes.

14. If the infant have no father, nor testamentary guardian, the orphans' court has the right of appointing the guardian to any infant who has an interest in lands, by descent or devise; or is entitled to a legacy, or distributive share of the personal estate of an intestate.

15. By the term "natural guardian," in the act of 1798, must be intended such a natural guardian as is entitled to the guardianship of the estate, as well as of the person of the infant.

16. The act of 1798 does not in any manner recognize the right of the infant to choose a guardian at any age.

17. The orphans' court, whenever it has authority to appoint a guardian, may appoint him to the full age of the infant.

18. An infant cannot choose a guardian, nor can the court appoint a guardian, unless the infant be personally brought into court.

19. A guardian cannot be removed, without notice and citation to show cause.

Appeal from the orphans' court, who had removed the appellants, (who had been duly appointed guardians of John W. Ott, an infant,) and appointed the appellee, John T. Ritchie, guardian in their place.

Before CRANCH, Chief Judge, and MORSELL and THRUSTON, Circuit Judges.

CRANCH, Chief Judge. On the 13th of September, 1826, Joseph Forrest and Philip Mauro, by J. Marbury, "their attorney," applied to the orphans' court for leave to file their petition, praying that court to review its order, granting to John T. Ritchie the guardianship of John W. Ott, to whom the petitioners had been appointed guardians in the year 1821; and that the said John T. Ritchie may be cited to answer the prayer of the petitioners. Whereupon that court ordered that leave be given as prayed, and that a citation be issued against the said Ritchie, returnable to the 20th of September, 1826. The petition was accordingly filed, stating the appointment of the petitioners as joint guardians of John W. Ott; that they gave bond, &c.; that the said John W. Ott is still under age, being about fourteen years old, and still subject to their control and care; that on the 9th of August, 1825, John T. Ritchie, ("who, your orators pray, may be made defendant to this bill of review,") made application to be appointed guardian to the said orphan, and filed a letter from the said orphan, dated from Frederick city, in the state of Maryland, on the 14th of July, 1825, directed to the judge of the orphans' court of the county of Washington, in the District of Columbia, in which he represents himself to be fourteen years of age, and states that he chooses the said J. T. Ritchie as his guardian, and requests that he may be appointed. Whereupon the judge of the orphans' court, without notice to the petitioners, without having caused the orphan to be brought into court, and without further evidence, or other proceeding, by a decretal order appointed the said J. T. Ritchie guardian of the infant, which decretal order is signed and enrolled; that they are aggrieved thereby, and that it is erroneous, and ought to be reversed and annulled. And they assign for error: (1) Because the petitioners were appointed guardians under Act 1798, c. 101, c. 12, § 1, which gives the court power to appoint a guardian for an infant until the age of twenty-one, and that having exercised that power, by appointing the petitioners guardians of the infant till his age of twenty-one, it was not competent for the judge to remove the petitioners and appoint a new guardian except for cause shown, in the omission or neglect of duty, &c.; and if such neglect were alleged, the petitioners were entitled to be cited and heard. (2) Because the infant had no right, at the age of fourteen, to choose a guardian, having had guardians appointed until he should be twenty-one years of age. (3) Because the infant was not brought into court, and under the inspection and examination of the judge; that his age, competency to choose, and wish might be distinctly known to the judge. (4) Because the petitioners were not cited to show cause why they should not be removed, and the said Ritchie appointed guardian. (5) Because the petitioners had no notice of the application and appointment of the said Ritchie until after the said order was made, and had no opportunity to object to the same. "For all which errors in the said decretal order your orators have brought this bill of review, and humbly conceive that they should be relieved therein. In tender consideration whereof, and for that there are divers errors and imperfections in the said decretal order and proceedings, by reason whereof the same ought to be reviewed and reversed, &c.; and to the end that the same may be reviewed and reversed, &c., and that the said J. T. Ritchie may answer, &c., and that your orators may be relieved according to equity and good conscience, may it please your honor to grant your orators a subpoena to the said J. T. Ritchie," &c., and they file a record of the proceedings referred to. The said J. T. Ritchie appeared on the 20th of September, 1826, and prayed further time to answer, which was given to the 27th, when he appeared by Mr. Swann his solicitor, and said, "that the bill of review, so as aforesaid exhibited against him, and the matter therein contained, are not sufficient in law to compel him to answer the said bill," &c. "wherefore for want of a sufficient bill in this case the said John prays that the said bill may be dismissed," &c. And the said Joseph and Philip, by J. Marbury their attorney, say that the bill, &c., is sufficient in law, &c. &c.

The cause having been submitted to the

judge of the orphans' court, without argument, he decreed that the prayer of the petition could not be granted, and that the petition be dismissed with costs. Upon which decree the petitioners appealed to this court.

The original order, appointing the petitioners guardians, was in these words: "March 21, 1821. Catharine Ott having declined the appointment of guardian to the infant children of her son, the late Doctor John Ott, it is by the court this day ordered, that Joseph Forrest and Philip Mauro, both of said county and district, be appointed joint guardians of the said orphan children of Doctor John Ott, deceased, they entering into a bond of $20,000, for each guardianship, with William Cooper and Hanson Gassaway securities." On the 9th of August, 1825, John T. Ritchie made application to the court to be appointed guardian to John W. Ott, and filed the following letter: "Frederick City, Frederick County, July 14th, 1825. To the Honorable Mr. Lee, Judge of the Orphans' Court for Washington County, in the District of Columbia. Honorable Sir,—I beg leave hereby to make known to you that I am the son of Doctor John Ott, late of Georgetown, in the District of Columbia, deceased, and am above the age of fourteen years, but under twenty-one; and I do choose for my guardian, my uncle, John T. Ritchie, of Georgetown aforesaid; and do hereby make application to you, sir, and request that you will be pleased to appoint him my guardian; that thereby he may possess and exercise the right of protection to myself and the property that has descended to me. With great respect, I remain your most obedient servant, John W. Ott." On the back of which letter was the following affidavit: "Maryland, Frederick County, ss. On the 14th day of July, 1825, personally appears John W. Ott, son of Doctor John Ott, late of Georgetown, in the District of Columbia, deceased, the individual whose signature is attached to the within letter, before the subscriber, a justice of the peace in and for said county; and the said John W. Ott, being by me privately examined apart from and out of the hearing of all persons whomsoever, declares that he had written the within letter for the purpose of having it delivered to the Honorable Judge Lee as thereby directed, with the view to procure the appointment of his uncle, John T. Ritchie, to be his guardian, and that he has not been induced to choose his said uncle to become his guardian by threat or ill usage of his said uncle, or of any other person, or through his or their displeasure. Witness my hand, George Rohr."

It is noted on the record of the orphans' court, that the court delivered an elaborate written opinion, concluding with a decree that the petition of Forrest and Mauro be dismissed with costs. It appears from that opinion, the substance of which was published in the National Intelligencer of the 25th of December, 1826, that although the counsel of Mr. Ritchie objected to the court's opening the case upon this bill of review, yet the court did open it; and did reconsider and confirm its former decree; and the question whether that court had power thus to review its decree is to be considered as reserved for the appellate court. The appeal from the original decree appointing Mr. Ritchie guardian, was dismissed by this court at May term, 1826, because the transcript of the record was not transmitted within thirty days after the decree. It is now contended by the counsel of Mr. Ritchie that the present appeal is to the refusal of the orphans' court to review its former decree, and not to the decree which in effect affirmed its former decree; so that the only question now before this court, as they contend, is, whether the orphans' court erred in refusing to reconsider its former decree. But the elaborate opinion of that court shows that it did review its former decree, and that it was because it found that decree to be correct that it passed the decree for dismissing the petition of Forrest and Mauro. The former decree was reviewed, and in fact affirmed. Does the appeal from this last decree bring before this court the question whether the former decree was correct? If it does, and if this court should be of opinion that the first decree was erroneous, and that the orphans' court, upon the review or rehearing, ought to have reversed that decree, is it competent for this court to reverse it? If the orphans' court, in its discretion, had a right to review or rehear the cause, and did review or rehear it, we suppose no one will doubt the right of either party to appeal from the new decree made at the rehearing.

The first question, then, is, whether the orphans' court had a right, circumstanced as the cause then was, to grant a rehearing, or to review its decree. It is said that the proceedings of the orphans' court are analogous to those of a court of chancery, and that by the rules of that court a cause cannot be reheard after the decree has been enrolled; and that it is considered as enrolled after the expiration of the term in which the decree was rendered. To this it is answered, that the orphans' court has no terms. It sits every day, or whenever the judge thinks proper. That its decrees are never, in fact, enrolled, and are only to be found in the paper minutes of the court. That the court is not bound by the rules of the chancery court; and if it were, yet in courts of chancery a rehearing is often had after the term in which the decree is pronounced, and is always within the discretion of the court, who will, and often have set aside the enrolment for the purpose of letting in a party to a rehearing. 1 Har. Ch. Prac. 649, and to this effect were cited the case of Travis v. Waters, 1 Johns. Ch. 48; and Consequa v. Fanning, 3 Johns. Ch. 364. See also the case of Mills v. Banks, 3 P. Wms. 1, 8, where a cause was reheard after a lapse of eighteen years, and where

the chancellor says that a rehearing is in the discretion of the court, and is not always a matter of right; and in one case, where the decree was not enrolled, the court refused to discharge an order for a rehearing, although at the distance of about twenty-four years. The principal difference between a rehearing and a review, is in this, that a rehearing may be had before enrolment of the decree; but after enrolment the party is put to his bill of review, which, if it be founded upon new matter of fact, discovered since the closing of the commission to examine witnesses, cannot be filed without leave granted upon petition; but if it be founded upon error in matter of law apparent upon the record, no such previous permission of the court is necessary. In the latter case, "the constant method is to put in a plea, and demur, namely, a plea of the decree, and a demurrer against opening the enrolment; and an answer is rarely required, unless the same be ordered by the court; so that in effect a bill of review cannot be brought without leave of the court, in some shape; for if it be founded upon matter apparent in the body of the decree, then, upon the plea and demurrer, the court judge whether there are any grounds for opening the enrolment; and if upon matter of fact newly discovered, the court, upon the petition for leave to file the bill, will judge whether there be any foundation for such leave." 1 Har. Ch. Prac. 170.

The court, then, had a right to review its decree. In the present case, leave was granted "to file a petition, praying the court to review its order, in granting to John T. Ritchie the guardianship of John W. Ott." This petition was analogous to a bill of review in chancery, and points out the errors in law apparent upon the record for which it alleges that the decree ought to be reversed. It admits that the decree had been signed and enrolled, and prays that it may be reviewed and reversed. To this bill, or petition, the defendant, Mr. Ritchie, was cited to answer; and, having appeared, filed a general demurrer; to which there was a general replication and joinder. The decree of the orphans' court thereupon was, that the prayer of the petition cannot be granted, and that the petition be dismissed, with costs. This decree must be referred to the demurrer, and considered as a judgment in favor of the defendant, upon the issue of law joined by the parties; and cannot be considered as the mere exercise of the discretion of the court in refusing to review its decree, or to rehear the cause. That discretion was exercised, and perhaps expended in the order for leave to file the bill of review. The decree is, in effect, a judgment that the errors, suggested in the bill of review as apparent on the record, were not such as ought to have induced the orphans' court to reverse its decree appointing Mr. Ritchie guardian to John W. Ott. The parties had, by the demurrer and joinder, submitted to the court a matter of law, (of right,) not of discretion. The court decided the matter of right, and the parties, aggrieved by the decree, have appealed to this court. The question, then, upon this appeal, is, whether that matter of law, (or right,) thus put in issue by the parties, has been correctly decided by the orphans' court.

The bill of review states five grounds of error: (1) That the petitioners, Forrest and Mauro, had, by a previous order of the court, been appointed guardians of John W. Ott, by virtue of the first section of the 12th chapter, Act 1798, c. 101, and that it was not competent for the court to remove them, except for cause shown, in the omission or neglect of some duty; nor without being cited and heard. (2) That the orphan, having had a guardian appointed for him until the age of 21, had no right, at the age of 14, to choose a guardian. (3) That he was not brought into court to choose his guardian. (4) That the petitioners were not cited to show cause why they should not be removed; and (5) That they had no notice of the application and appointment of Mr. Ritchie, until after he was appointed.

1. By the 1st section of the 12th chapter of Act 1798, c. 101, it is enacted, "that whenever land shall descend, or be devised to a male under the age of 21 years, or to a female under 16," "and the said male or female shall not have a natural guardian, or guardian appointed by last will, agreeably to the statute in that case made and provided," (12 Car. II. c. 24,) "the orphans' court shall have power to appoint a guardian to such infant until the age of twenty-one years, if a male, and until the age of sixteen, if a female, or marriage." Under this clause of the statute, the petitioners Forrest and Mauro were, in 1821, appointed joint guardians of the infant children of Dr. Ott. As the court had power to appoint them guardians until the full age of the infants, and as they were appointed generally, without limitation of time, their authority continues until the infants respectively attain that age, unless it be lawfully revoked by the court. The orphans' court has no express power, under the statute, to remove a guardian, or to revoke the appointment, except in the single case of his refusing to give security when required; and by the 20th section of the 15th chapter of Act 1798, c. 101, it is enacted, "That the orphans' court shall not, under any pretext of incidental power or constructive authority, exercise any jurisdiction whatever, not expressly given by that act, or some other law." If it claim jurisdiction to remove a guardian for any other cause, it must claim it as a jurisdiction incidental to the power of appointment. But all incidental jurisdiction is expressly forbidden by the statute. The orphans' court, therefore, had no power to remove the guardians, or to revoke their authority, they never having refused to give the security required.

2. But it has been contended that an infant has a common-law privilege of choosing a guardian at the age of fourteen, and that this privilege has been "sanctioned by the uniform usage, in England and this country, of a thousand years;" that it is "a solemn, immemorial right;" and that the statute, when it authorized the court to appoint a guardian until the infant should attain the age of twenty-one years, meant to say, "unless the orphan, after he shall arrive to the age of fourteen years, shall object to such appointment, and ask permission to choose another guardian." [2] But it was not contended that this was an absolute right to choose a guardian; but a right to be exercised under the "surveillance" of the court; for it was admitted that the court would not appoint the person nominated by the orphan if he "were non compos, convicted of an infamous crime, or notoriously dissolute and immoral; nor unless he gave ample security for the faithful discharge of his trust." The statute does not in the slightest manner recognize, or allude to, the right of the infant to choose his guardian; but by giving the court an absolute power to appoint a guardian till twenty-one, evidently negatives the idea of any such right; for such a right is inconsistent with the power given to the court. But it seems to have been taken for granted that, by the common law, the infant had a right to choose his guardian in all cases. This is not true. When there was a guardian in chivalry, or by nature, or by statute, the infant had no right to choose. It was only when there was a guardian in socage, or for nurture, in which cases the guardianship continued only till the age of 14, that the infant's right of election existed.

By the law of England there are various kinds of guardians: (1) Guardian in chivalry; (2) in socage; (3) by nature; (4) for nurture: (these four were by the common law); (5) by the statute of 4 & 5 Phil. & M. c. 8, and 12 Car. II. c. 24, § 8, by which statutes the father has a right, by deed or last will, to dispose of the custody of his infant children until their age of 21, or for a less time, and these are called "testamentary," and sometimes "statutory" guardians; (6) guardians by the custom of particular manors, cities, &c.; (7) guardians appointed by the lord chancellor, exercising, in this respect, the royal prerogative of parens patriae; (8) guardians appointed by the ecclesiastical courts; (9) guardians ad litem, appointed by any court in which the interests of an infant are litigated (3 Bl. Comm. 426; Harg. Co. Litt. 88b, note 16); these are, in general, only appointed pro hac vice, and continue only until such interest is finally disposed of by the court; (10) guardians by election.

1. Guardian in chivalry existed only when the infant inherited lands holden by knight's service. This guardian had the custody of the person and lands of the infant until his full age of twenty-one, and took the profits to his own use without account; and also the value of the marriage of his ward. The infant had no right to elect a guardian. This tenure was abolished by the statute 12 Car. II. c. 24, and with the tenure went the right of guardianship connected with that tenure.

2. Guardianship in socage arose, like that in chivalry, wholly out of tenure. It was necessary that the ward should have inherited lands holden in socage. It continued only until the heir attained the age of fourteen, although some have said that it continued until the age of twenty-one, unless the ward, after his age of fourteen, should have elected another guardian. King v. Pierson, And. 313; Lit. § 123; Byrne v. Van Hoesen, 5 Johns. 67. The guardian in socage had the custody of the person and of the lands; but wholly for the benefit of the ward. The guardian in socage must be the next of kin, to whom the lands of the infant cannot by any possibility descend.

3. Guardianship by nature, existed only where the ward was heir apparent of the guardian, and extended only to the person of the ward. The father was always guardian by nature of the person of his heir apparent, even when the infant inherited lands holden by knight's service, and where the lord was guardian of the estate. Guardianship by nature continued until the full age of twenty-one; and the infant had no right to elect a guardian. This guardianship did not extend to the younger children who were not heirs apparent. Guardian by nature has no right to the custody of the infant's estate. H. St. G. Tucker's notes on 1 Bl. Comm. 461.

4. Guardianship for nurture extended only to the custody of the persons of those infants who are not heirs apparent, and continued only until their age of fourteen years, and none could have it but the father or mother. It only occurs where the infant is without any other guardian. After fourteen the infant is at liberty to choose his guardian. How this election is to be made, at common law, does not appear in any book that we have consulted.

The court of chancery, exercising, in regard to infants, the prerogative of the king as parens patriae, will appoint guardians whenever such appointment is necessary for the purpose of protecting the infant's general interest, or for the purpose of sustaining a suit, or of consenting to the marriage of the infant. In re Woolscombe, 1 Madd. 213. But it could never have been required, by the common law, that all the infants in the kingdom who had not guardians provided by the common law, should be brought into the court of chancery, to obtain them. The ecclesiastical courts have claimed a

[2] See the judge's opinion in the National Intelligencer of the 25th December, 1826.

right to appoint curators or guardians, as to legacies, and distributive shares of the personal estates of intestates, and this right has been admitted by the common-law courts; but their right to meddle with the persons of infants has been denied both by chancellors and by common-law judges. 4 Burn, Ecc. Law, 88, 91; Banes v. Lowder, 3 Keb. 834; Bishop of Carlisle v. Wells, 3 Jones, 90, 2 Lev. 162; Buck v. Draper, 3 Atk. 631; Rex v. Delaval, 3 Burrows, 1436. There is a dictum of Lord Chancellor Hardwicke in 2 Ves. Sr. 375, that "supposing there was no testamentary guardian, nor a mother, if the infant has any socage land, and is of the age of twelve, if female, or of fourteen, if male, they are allowed to choose their guardian; as is frequently done on the circuit, and is the constant practice, and what this court frequently calls on infants to do; though this is still liable to any reasonable objection made to such choice." Mr. Hargrave, in note 16 to Co. Litt. 88b, understands the expression "on circuit" to mean before a judge on the circuit. We have not found this practice alluded to in any other book, unless it be in Style, 456; but it is so explicitly stated by Lord Hardwicke that we must take it to be so; and it is probable that the appearance of the infant, and his choice, with the approbation of the court, were entered upon the minutes of the court, and constituted the only evidence of the title of the guardian thus chosen. This practice is, by Lord Hardwicke, confined to the case where the infant has socage land; and probably to the case where there had been a guardian in socage, which could only be where the infant took by descent. A person cannot strictly be said to have land unless he has a freehold estate; for none but a freeholder can be tenant to the precipe, or be the owner of real estate. Where an infant had land by purchase, and not by descent; or where he had only personal property, it does not appear that a guardian could be elected or appointed before a judge on the circuit.

The right of the ecclesiastical courts to appoint a curator of guardian for the personal estate, is probably no more than the right of every court to appoint a guardian ad litem (3 Salk. 177, pl. 14; 3 Burrows, 1436); for those courts, having jurisdiction as to wills and legacies, and the ordering of distribution of intestate estates, all legatees, and persons entitled to distributive portions of intestate estates, were parties before them; and if any of those parties were infants, those courts, as every other court, would have had a right to appoint guardians ad litem to protect their interests, so long as they were pending before those courts, and to receive and apply the money or other property which they should receive under the orders of such courts, who would have a right also to take security from such guardians for the faithful execution of their trust. This is probably the only foundation of the power of the ecclesiastical courts to appoint guardians; and it will not support a claim to appoint a guardian for the person of the infant, (Loury v. Reynes, 2 Lev. 217,) or for his personal estate acquired in any other way than by bequest, or in the course of distribution. In the case of guardian for nurture it does not appear in what manner, or before whom the infant, when he attained the age of fourteen, was to make his election; it is probable, however, that it was to be made as in the case of tenure by socage. Nor does it appear that an infant, by the law of England, had a right to choose a guardian in any case where a guardian had been appointed for him by any person having a discretion to choose, unless such appointment were expressly limited to the time of the infant's attaining the age of fourteen, which it is believed, in analogy to the rule of the common law in guardianship in socage and for nurture, was generally the case in appointments by the court of chancery, and by the ecclesiastical courts; after which age of fourteen they were generally permitted to nominate their guardians, and if the courts perceived no material objection, they appointed the guardians thus nominated. And. 313, 2 Lev. 217. After the statute of 12 Car. II. c. 24, which abolished tenures by knight's-service, almost all the tenures became tenures in socage, and, consequently, almost all guardianships as to lands, fell upon persons not personally chosen by anybody. It was right that these accidental guardianships should be removable at the age of discretion of the infant; but the same reason did not apply to guardians selected by any authority competent to choose persons well qualified to take care of the interest of the infant. Hence the statute of 12 Car. II. c. 24, § 8, authorized the father to appoint a guardian to his child until the age of twenty-one, without recognizing any right in the child to choose a guardian. This provision, Mr. Justice Blackstone seems to think, was made in consideration of the imbecility of judgment in children of the age of fourteen.

Of the four kinds of guardianship at common law, it is believed that only one exists in this country, namely, guardianship by nature. Tenancy by knight's-service, and, consequently, guardianship in chivalry, never existed here, as the lands were, by charter, to be holden in free and common socage. Guardianship in socage cannot, since the Maryland statute of descents, 1786, c. 45, exist here, because there cannot be found any of kin to the infant, who may not, by possibility, inherit the land. Guardianship for nurture cannot exist here, because it is applicable only to such children as are not heirs apparent; and here all are, by that statute, heirs apparent, and, consequently, guardianship by nature exists in this country, and applies to all the children. But a

guardian by nature, at the common law, has no authority over the lands of the infant, and, perhaps, not over his personal estate; as it has been decided, both in England and in some of these states, that he has no right to receive a legacy bequeathed to his ward. See Harg. Co. Litt. 88b, and note 12; Genet v. Tallmadge, 1 Johns. Ch. 3; Anderson v. Darby, 1 Nott & McC. 369; May v. Calder, 2 Mass. 59; Strickland v. Hudson, 3 Rep. Ch. 168; Dagley v. Tolferry, 1 P. Wms. 285; Eq. Cas. Abr. 300, pl. 2; Gilb. Cas. 103; Philips v. Paget, 2 Atk. 80; Cooper v. Thornton, 3 Brown, Ch. 96, 186; Cunningham v. Harris, cited by the master of the rolls, in Cooper v. Thornton; Tucker's notes to 1 Bl. Comm. 462; 1 Vern. 295; 1 Johns. Cas. 217.

5. Statutory guardianship. The statute of 4 & 5 Phil. & M. c. 8, which, by implication, gave the father a right to appoint a guardian, by deed or will, to his daughters until the age of sixteen, and upon the death of the father, without such appointment, gave the custody of the daughters to the mother; and the statute of 12 Car. II. c. 24, § 8, which authorized the father to appoint, by deed or will, a guardian for his infant children until their full age, were in force in Maryland; and the latter is expressly recognized and referred to in the testamentary system of Maryland of 1798 (chapters 101, 12, § 1). These statutes are now in force in this country, and such guardians may now be appointed by the father.

6. Guardians by custom are unknown in this country.

7. Guardians by appointment of the chancellor. The chancellor in Maryland, it is believed, never had the power of appointing guardians, except ad litem.

8. Guardians by appointment of the ecclesiastical courts. No such courts exist in this country. The judge, or commissary-general, or deputy-commissaries, who exercised in Maryland the only remnant of ecclesiastical jurisdiction transferred to this country, had no such power. It was, by Act Md. 1715, c. 39, vested solely in the commissioners of the county courts, that is, the justices of the county courts.

9. Guardianship ad litem. All the courts had power to appoint guardians ad litem, to protect the interests of infants in their respective courts.

10. Guardianship by election, as mentioned by some of the English writers, has never been recognized in this country. Hargrave, in his note 16 to Co. Litt. 88b, says: "The right of making such an election arises only when, from a defect of the law, the infant finds himself wholly unprovided with a guardian."

Lord Coke, in Co. Litt. 87b, says: "If a man be seized of a rent-charge, rent-seck, common of pasture, and such like inheritances which do not lie in tenure, and dieth,—his heir within the age of fourteen years,—in this case the heir may choose his guardian; but if he be of such tender years as he can make no choice, then (if the father hath made no disposition of the custody of the child,) it were most fit that the next of kin, to whom the inheritance cannot descend, should have the custody of him. And whosover taketh the rent, &c., the heir shall charge him in an account. But if he hold any land in socage, in that case the guardian in socage shall take into his custody as well the rent-charge, &c., as the land holden in socage, because he hath the custody of the heir." This is a case in which Lord Coke supposes that the heir may choose his guardian before the age of fourteen. Mr. Hargrave remarks upon it, that "Lord Coke only takes notice of such an election where the infant is under fourteen; and, as to this, omits to state how, and before whom, it should be made. Nor have we yet met with any prior or cotemporary writer who supplies the defect. As to a guardian after fourteen, it appears, from the ending of guardianship in socage at that age, as if the common law deemed a guardian afterwards unnecessary. However, since 12 Car. II., enabling a father to appoint a guardian to his children till twenty-one, it has been usual, for want of such a guardian, to allow the infant to elect one for himself." "Such election is said to be frequently made before a judge on the circuit. 2 Ves. Sr. 375. But we do not think this form to be essential. The last Lord Baltimore, when he was turned of eighteen, having no testamentary guardian, and being under the necessity of having one for some special purposes, relative to his proprietary government of Maryland, named a guardian by deed." "Indeed, it seems as if there was no prescribed form of an infant's electing a guardian after fourteen, any more than there is before; and therefore election by parol might, perhaps, be sufficient, though it would be wrong to trust to a mode so unsolemn. But we do not wonder at the deficiency, because guardianship by election of the infant is of very late origin; it being, we believe, not only unnoticed by any writer before Lord Coke, except Swinburne, but there still being no cases in print to explain the powers incident to it, or whether an infant may change a guardian so constituted by himself. Even Lord Coke, we see, though professing to enumerate the different sorts of guardianship, and though he had before mentioned the latter one, omits it here." Co. Litt. 88b. "Whence it may probably be conjectured that, in his time, it was, in strictness, scarcely recognized as legal."

What Swinburne says in part 3, § 11, respecting the right of the infant to choose his tutor, applies only to the custom of the province of York. Buck v. Draper, 3 Atk. 631. Thus we see that the right of infants, at the age of fourteen, to choose their guardians, is not universal, nor has been "of a thousand years' standing." By the law of Maryland

(Act 1715, c. 39, § 7), "If any part thereof (that is, of the intestate's estate) belong to an orphan who is capable of choosing his guardian, such orphan shall be called to court (the county court) and shall then and there choose his guardian, into whose hands the said orphan's estate shall be committed; but if such orphan be not at age, then the justices aforesaid (of the county court) shall put the persons, lands, goods, and chattels of the orphans into the hands of such person or persons as they shall think fit, and take a bond, with two sufficient sureties, in the names of the orphans themselves, for the securing and delivering the said estate to said orphans, or their guardians, when thereunto lawfully called." The persons thus appointed, before the orphan is of age to choose his guardian, are, by the act, called trustees. It is not expressly said in the act how long these trustees shall exercise the rights of guardianship; but, from their being bound to deliver up the property to the orphans themselves, it is evident that the guardianship was to continue, or might continue, until the orphans should be of full age, and capable of receiving the possession of their estates; and by the provision being in the alternative, namely, to deliver up the estates to the orphans, or to their guardians, it is equally evident that guardians might be afterwards appointed; but as the county court had power, upon the trustees' refusal to give new security when required, "to remove the orphan's estates out of their hands" (Act 1715, c. 39, § 20), "and to remove the person and estate of such orphan into other hands" (Act 1729, c. 24, § 6), it does not necessarily follow that the trustees so appointed were to be removed of course, upon the infant's attaining the age of fourteen; nor that the infant, after such appointment, had a right, at the age of fourteen, to choose his guardian; for the obligation of the trustees to deliver up the estate to the guardian, when required, might be only an obligation to deliver it to the person into whose hands the court should order it to be removed, in the cases referred to in the 20th section of Act 1715, c. 39, and 6th section of Act 1729, c. 24.

This idea is corroborated by the 33d section of Act 1715, c. 39, by which, if a guardian should commit waste, and should fail to give security as the court should require, to answer to the orphan for the waste, when at age, the orphan (if at age to choose his guardian,) should elect his guardian; but if not of age to make such election, the court should appoint such other person as they should think meet; and the guardian so elected, and the other person so appointed, were to hold and enjoy the land and plantations until the orphan should "come to age." By this section, the persons appointed by the court while the orphan was under fourteen years of age, were required to hold the estate granted, until the full age of the infant; therefore, taking together the 7th, 20th, and 33d sections of Act 1715, with the 6th section of Act 1729, and Act 1763, c. 24, it seems to us that the right of the infant to elect a guardian, which is clearly recognized by those acts, is confined to the case where the infant is without a guardian or trustee already appointed by the court, or by the father, under the statutes of 4 & 5 Phil. & M. c. 8, or 12 Car. II. c. 24. By Act 1763, c. 24, the court was authorized, on application, to permit an orphan of fourteen years of age to choose his guardian; and if under fourteen, the court was to appoint the guardian, even before the distributive share of the orphan was certified by the commissary to the county court; and the guardian so appointed was to have the same power as a guardian otherwise appointed, viz. to hold the estate until the full age of the orphan. The act of Maryland of 1777 (chapter 8), by which the orphans' court was erected, gives to that court all the powers before vested in the county courts, or in the commissary general, in relation to guardians and testamentary affairs. Thus the law stood until the legislature revised the several acts upon the subject, and adopted the system reported by the chancellor of Maryland in Act 1798, c. 101.

In the previous acts nothing was said of guardians by nature, or natural guardians, or testamentary guardians, except that the latter are excluded from the operation of the 30th section of the act of 1715, which requires the guardian to ascertain the annual value of the real estate, &c., the words are "other (orphans) than such whom the testator in his lifetime, by his last will or testament, hath otherwise ordered and disposed of." But those acts only provided for the case of orphan infants; that is, fatherless infants. The legislature seems to have supposed that the father, as guardian by nature, had the custody and care of the real and personal estate, as well as of the person of his child; and does not seem to have considered the mother of an orphan as his guardian by nature, after the death of the father. This was not so at the common-law. By that law the guardian by nature, had only the custody of the person of his heir apparent; and, after the death of the father, the mother, if living, was guardian by nature to her heir apparent. The grandfather was also guardian by nature to his grandson, if he was his heir apparent. So the grandmother, the uncle, the aunt, &c., would, each, be guardian by nature to his or her heir apparent; and yet the old acts of Maryland, in all such cases, authorized the county courts to appoint guardians, although there were already, by the common law, guardians by nature whose authority over the person of the infant, continued until he arrived at the age of twenty-one years.

Those acts, and especially the act of 1715, having provided for a guardian in every case, except the case of an infant whose father was living, ought to be construed as having

virtually declared that the father, as guardian by nature, should have the custody and care of the real and personal estate of the infant, as well as of his person. But the acts did not give the courts authority to require surety from the father, as natural guardian, unless that authority were given by the 20th section of the act of 1715, which enacts, "that the justices of the county courts take able and sufficient security for orphans' estates, and inquire yearly of the security; and if there be just cause, that they require new and better security; and upon refusal to give new and better security, that they remove the orphans' estates out of their hands." This section was not deemed sufficiently explicit to enable the county court to demand security from guardians, chosen by infants of fourteen years; and to remedy this defect, an act was passed in 1752 (chapter 3), expressly for the purpose of enabling the court to require security from such guardians; but that act did not apply to guardians by nature. If the 20th section of the act of 1715, did not, by its general terms, include guardians chosen by infants, it could not include natural guardians nor testamentary guardians. Indeed, if testamentary guardians had not been expressly recognized in the 30th section of the act of 1715, it would be difficult to maintain that the general words, in which the 7th section gives the power of appointment to the county court, would not be justly construed as repealing the statutes of 4 & 5 Phil. & M. c. 8, and 12 Car. II. c. 24, so far as they might have been supposed to operate in Maryland. But it is believed that those statutes have always been considered as in force in Maryland, so far as to authorize a father to appoint, by his will, a guardian for his infant children.

Again, the 7th section of Act 1715, c. 39, by giving power to the court to appoint a guardian for every orphan who is entitled to a distributive share, superseded, in all such cases, the common-law right of guardianship by nature, except in the case of the father; so that neither the mother, nor the grandfather, nor the uncle, could, in such cases, be guardians by nature, in Maryland. From whence it follows, that after the statute of descents (Act 1786, c. 45), and before 1798, in Maryland, there were only three kinds of guardians, viz.: (1) Testamentary guardians under the statute of 4 & 5 Phil. & M. c. 8, and 12 Car. II. c. 24; (2) natural guardians; (3) statutory guardian, viz. guardian appointed by the county court under the statute of 1715, and by the orphans' court under the statute of 1777 (chapter 8). For although the orphan, at the age of fourteen, had a right to choose a guardian, the appointment was still to be made by the court; and although the persons appointed by the court, when the orphan was under the age of fourteen, were called trustees, yet they were, in fact, guardians, and had all the rights, and were subject to all the duties of guardians; they are, indeed, sometimes called guardians in the same act of 1715. The infant, if no guardian had been appointed for him, and if his father were not alive, when he arrived at the age of fourteen, had a right to choose his guardian in court; but if a testamentary guardian had been appointed, or if the court had appointed a guardian for him before his age of fourteen, or if his father were living, he had no right to choose his guardian. If this be the true construction of the law of Maryland previous to 1798, the provisions of the act of that year (chapter 101) will be perfectly intelligible.

The act of 1798 (chapters 101, 12) does not, like the act of 1715, confine the power of the court to the case of orphans entitled to a distributive share of an intestate personal estate, but extends it to all infants to whom lands shall descend, or be devised, or who may be entitled to a legacy, or to a distributive share of the personal estate of an intestate, if the infant have no natural or testamentary guardian. By "natural guardian," in this statute, must be intended such a natural guardian as is entitled to the guardianship of the estate, as well as of the person of the infant. At common law, there was no such natural guardian; the guardian by nature, under that law, being only entitled to the custody of the person of his heir apparent. The previous law of Maryland, recognized only one natural guardian entitled to the guardianship of the estate of the infant; and that was the father. If, then, the infant have no father, nor testamentary guardian, the orphans' court has the right of appointing the guardian. The act of 1798, does not, in any manner, recognize the right of the infant to choose his guardian at any age. On the contrary, the orphans' court is authorized, in all cases in which it may appoint a guardian, to make the appointment until the full age of the infant. This power is directly repugnant to those parts of the former acts of Maryland, which authorize the infant to choose his guardian, and consequently repeals them. Guardianship in socage, and guardianship for nurture, which were the only two cases in which the infant had, by the common law, a right to choose his guardian, seem to have been virtually abolished by Act 1765, c. 39, which gave the power to the county courts to appoint guardians to all orphans entitled to a distributive share. The right of election, which they afterwards had, depended upon the statutes which were repealed by that of 1798 (chapter 101). The case of an orphan who has acquired property by deed of gift, or by purchase other than devise, is not provided for by that statute. There is no court competent to appoint a guardian for him, nor do we think he can constitute one by his own act. Indeed, we think he has not, in any case, a right to choose his guardian. And it was not without reason, that the legislature thought proper to transfer the right of election from the infant to the orphans' court. At the age of fourteen, the infant begins to be restless and ungovernable, and the salu-

tary restraints of the guardian are irksome. The infant is apt to think his guardian penurious and tyrannical. He wants greater indulgences; and there are always artful and insinuating men enough, who are eager to grasp all the property they can lay hold of; and who, taking advantage of these dispositions in the infant, will stimulate his restlessness, excite his suspicions, undermine the authority of the guardian, and finally prevail on the infant, in his simplicity, to place his property in their hands. The chance of evil resulting from the infant's right of election, seems greater than the chance of good; and the choice of the court is more likely to be judicious than that of the infant.

The third error assigned, is that the infant was not brought into court to choose his guardian. This appears to us also to be a fatal error; especially as the infant was not out of the jurisdiction of the court at the time. In the case of Loyd v. Carew, in 1699, 1 Eq. Cas. Abr. 260, pl. 2, it is said, that "if a person, appointed a guardian pursuant to the statute (12 Car. II. c. 24), dies, or refuses to take upon himself the guardianship, my lord chancellor may appoint a guardian; but a guardian cannot otherwise be appointed, than by bringing the infant into court, or his praying a commission to have a guardian assigned him." 2 Fonbl. Bankr. Cas. bk. 2, pt. 2, c. 2, § 2, p. 236. In an anonymous case, in the upper bench, in 1655: "The court was moved in behalf of an infant to discharge a guardian assigned by the court, with an intent to make Richard Somers, attorney of this court, guardian in his room, and that the former inspection may be discharged, and that the infant may now be inspected again, because when the former inspection was, and the guardian assigned, there was no action depending in court against the infant. Glyn, C. J. Let it be so, for the cause you have alleged, and give notice of it to the former guardian." Style, 456. 1 Newl. Ch. Prac. 105. If the infant reside within twenty miles of London, the guardian is appointed by the court, for which purpose the infant, and the person intended to be appointed guardian, personally attend in court. If the infant reside above twenty miles from London, the guardian is appointed by commission, and the infant must be personally before the commissioners. 14 Ves. 172; 2 Newl. Ch. Prac. 151; 1 Har. Ch. Prac. 711, 712; 2 Mad. Ch. Prac. 279 The Maryland act of 1715 (chapter 39, § 7), which allowed an infant of the age of fourteen to choose his guardian, required the infant to be called to court, and then and there to choose his guardian; and Act 1798, cc. 101, 12, § 2, says, "The said court shall have power to call, or have brought before them, any orphan as aforesaid, for the purpose of appointing a guardian." If, as we have supposed, the only right which the infant had, in Maryland, to choose his guardian, be given by the statute, it must be exercised in the manner prescribed by the statute. We think, therefore, that if the infant had a right to choose his guardian, it could only be done personally, and in open court, and not having been so done, the election and appointment were void.

The fourth error assigned is, that the petitioners were not cited to show cause why they should not be removed. That the petitioners, who were the actual guardians, and who had a right to continue such until the full age of their ward, unless lawfully removed, should have had notice of his application, and an opportunity to show cause against it, seems to have been a course dictated by a common sense of justice. They had a power coupled with an interest, which they had a right, and perhaps, were bound to defend. But, as we think the orphan had no right to elect a guardian, and if he had, he could not exercise it out of court, we think the want of notice is a fatal error. The fifth error assigned is in substance only a repetition of the fourth.

Upon the whole, we are of opinion, that the orphans' court, having appointed Mr. Forrest and Mr. Mauro guardians of the infant until his age of twenty-one years, had no jurisdiction or authority to appoint Mr. Ritchie, and that his appointment is not merely voidable, but absolutely void; that Mr. Forrest and Mr. Mauro have never ceased to be guardians; and are now entitled to all the rights and powers of guardians; and that the sentence of the orphans' court, dismissing the bill of review, be reversed, with costs; and that this court, proceeding to pass such sentence, as the orphans' court ought to have passed upon the hearing of the bill of review, should order and decree that the order of the orphans' court, appointing John T. Ritchie guardian to the infant John W. Ott be reversed, with costs.

An appeal to the supreme court of the United States was dismissed for want of jurisdiction, the matter in dispute not being of the value of $1000. 2 Pet. [27 U. S.] 243.

Case No. 9,313.

MAURO v. ST. JOHN'S PARISH.

[4 Cranch, C. C. 116.] [1]

Circuit Court, District of Columbia. Dec. Term, 1830.

CONTRACTS—CHURCHES—VESTRY—PEW TAXES—OWNER.

Quaere, whether the owner of a pew in the Protestant Episcopal Church in St. John's parish, in the city of Washington, is personally liable for the taxes assessed upon such pew by the vestry of that parish; the owner not being a member of that church?

Appeal from the judgment of a justice of the peace for $38.50 for taxes upon a pew in St. John's Church owned by the appellant [Philip Mauro], who was not a member of the Episcopal Church, and who had taken an as-

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

signment of the pew in payment of a debt due to him by Mr. W. Lee.

Mr. Wallach, for appellant, denied, 1st. That the vestry was competent to sue; and 2d. That there was no personal obligation upon the appellant to pay; the only remedy being a sale of the pew.

Mr. Coxe, for appellees, cited Act Md. 1798, c. 24, §§ 2, 32, 33; the Proceedings of the State Convention in 1816 and 1824; erecting St. John's Parish; Vestry-Book 17, February 16, 1818, December 7, 1817; as to sale and rent of pews, November 1, 8, 1819; letter to pew-holders, November, 1819, April 26, 1826, March 22, 1819, November 1, 1819.

CRANCH, Chief Judge (THRUSTON, Circuit Judge, absent, and MORSELL, Circuit Judge, doubting). This is an appeal from the judgment of a justice of the peace, against the appellant, for $38.50 debt, and fifty-eight cents costs, rendered on the 17th of October, 1829, being the amount of taxes assessed on a pew in St. John's Church, which the appellant received by assignment from William Lee in payment of a debt; the appellant not being a member of that church.

It is contended by the appellant that he is not personally liable for such taxes; but that the only remedy for the non-payment thereof is a sale of the pew according to the terms contained in the certificate of ownership issued by the register of that parish, which is in these words: "I certify that Philip Mauro is the owner of pew numbered 35, of St. John's church in Washington City, valued at $200, subject to such annual tax as is, or shall hereafter, be fixed by the vestry of said church, and to be sold at auction for arrearages of such taxes due six months or upwards after due notice has been given of the time and place of such sale; the said pew to be transferable only on the books of the register of this church, and the delivery of this certificate. In testimony whereof I have hereunto signed my name and affixed the seal of the said church, this —— day of —— in the year ——. ——, Register." This certificate was issued and received by the appellant on the 25th of November, 1824.

The parish of St. John, although the church had been built in 1816, and the congregation had worshipped there ever since, was not erected until the 18th of June, 1824, and no legitimate vestry was elected until Easter Monday in 1825; so that in November, 1824, there was no vestry of St. John's parish, constituting a body corporate according to the act of assembly of Maryland of November, 1798, c. 24, competent to contract in that name, or in behalf of, or for the benefit of the future vestry. The giving and receiving of the certificate of ownership, therefore, did not constitute a contract binding on the vestry, or upon the appellant; for it was no contract unless both were bound. Whatever, therefore, might have been the construction or effect of that certificate, it conferred no right of action upon the subsequent legitimate vestry. Mr. Mauro, however, although he denied his personal liability before the magistrate, admitted himself to be the owner of the pew. This subsequent assent may, perhaps, give validity to the sale and to the contract, whatever it might be, which is contained in the certificate of sale. But that certificate does not purport to be a personal obligation, or to create any implied personal liability on the part of Mr. Mauro, to pay the taxes which might be fixed by the vestry. It expressly states that the pew is "subject to such annual tax," &c., "and to be sold at auction for arrearages of such taxes."

By the 2d section of the act of 1798, c. 24, the vestry cannot lay any personal tax exceeding $2 a year; and that only upon "a free white male citizen of the state, above twenty-one years of age, resident of the parish," and "who shall have been entered on the books of the said parish," "as a member of the Protestant Episcopal Church," and this tax must be made known and declared in writing within ten days after the election of the vestry. No express power is given to the vestry to tax pews which have been sold, and have become the private property of individuals. By the 31st section it is enacted that nothing therein before contained shall be construed to prevent the vestry from selling or renting the pews of their churches, provided that in so doing they shall not interfere with any existing right or title in any person to any pew or pews; but it gives no power to tax. The power to tax the pews is only given by the contract of sale; and cannot be extended beyond the terms of the contract. The person who purchases a pew, purchases it subject to the incumbrance of the tax liable to be collected by the sale of the pew; but he does not thereby assume any personal liability. The vestry may rent the unsold pews, and the amount of the rent will be determined by the terms of the lease; which may create a personal obligation. The certificate of sale, by providing one mode of collecting the tax, virtually excludes all others. I am, therefore, of opinion, that the vestry have no personal remedy against Mr. Mauro, for the tax on the pew, but may resort to a sale of it according to the terms of the contract.

At a subsequent term the matter was settled by the parties.

MAURO (VARNUM v.). See Case No. 16,889.

Case No. 9,314.

MAURY v. MASON.

[1 Hayw. & H. 400.] [1]

Circuit Court, District of Columbia. Dec. 3, 1849.

NOTES—ENDORSER—PAYMENT—MISTAKE IN DELIVERY.

Two notes drawn by the same party and for the same amount, one on which the defendant was endorser, were held by the Bank of Washington. Before the note on which the defendant was endorser was due the agent of the defendant paid the amount, but through mistake on the part of the bank the note on which the defendant was not liable was handed to the agent of the defendant instead of the note on which he was liable. *Held*, that on a suit against the defendant on the note on which he was an endorser, that the payment made was a payment on said note, and the plaintiff can not recover in this action.

At law. Suit against an endorser on a promissory note.

This suit was on the following note: "Washington, Nov. 4th, 1848. Two months after date I promise to pay to the order of Hon. John Y. Mason two hundred dollars for value received. Jno. E. Addison." Endorsed by J. Y. Mason, Seymour R. Bonner, John V. Wright and the plaintiff, Jourdan W. Maury.

The note was protested for non-payment. On the trial of this case the following testimony was read to the jury: The witness being more than 100 miles from Washington, a commission was appointed to take his testimony. His name is John Y. Mason, Jr.; that he is the son of the defendant; that on or about the 21st or 22d of December last he was requested by the defendant to go to the Bank of Washington and take up a promissory note drawn by John E. Addison and endorsed by the defendant; that the defendant gave witness $200 for that purpose; that witness went to the bank and asked at the counter for a note for $200, drawn by John E. Addison and endorsed by John Y. Mason; that the clerk in attendance handed him a note for two hundred dollars drawn by the said Addison. That he paid to him the $200 received by him as above stated, from the defendant, and took the note without looking at the endorsement, and handed it to the defendant on the same day; that subsequently the defendant showed him the note which witness had received at the bank; that he then discovered that it was not the note which he had asked for at the bank, but was one drawn by the said Addison and endorsed by Lewis C. Levin for the same amount.

Christopher Grammer, for plaintiff.

P. Barton Key, for defendant.

After the evidence was in, the following instructions were given by THE COURT:

If the jury believe from the evidence aforesaid that the defendant, on or about the 23d day of December, 1848, sent the sum of $200 to the Bank of Washington to pay the note of J. E. Addison for $200, endorsed by the defendant, and on which the suit is brought; and that the agent of the defendant accordingly went to the said bank and demanded the note aforesaid of which the said bank was then the holder and owner; and that the said agent then and there paid to the said bank the said sum of $200, and the officer of the bank delivered to him, and he received through mistake, another note of said Addison for $200, on which the defendant was not liable or endorser, instead of the note on which the said suit is brought; and that upon discovering the mistake the defendant offered to return the said last mentioned note to said bank, which the said bank refused, then the said payment of $200 was a payment and satisfaction of the note on which this suit is brought, and the plaintiff cannot recover in this action. But if from the evidence aforesaid the jury shall find that when the said agent of defendant demanded the said note as set out in said defendant's prayer he did not describe it in a voice so loud that the officer of the bank to whom the application was made heard or ought to have heard the said description, that there was a note of said Addison for the same amount due on the said 23d December, and the note endorsed by defendant was not due until the 7th of January next, and the agent of the bank understood the said agent of the defendant to apply for the note of said Addison due on the 23d December, and received the money from him, and applied to that note, and gave that note to said agent, and the said agent on the same day delivered the said note to said defendant, and defendant did not offer to return the same until after the 7th of January, 1849, then said payment of $200 is not to be applied by the jury to the note now in suit, and plaintiff is entitled to recover.

Verdict for defendant.

[1] [Reported by John A. Hayward, Esq., and Geo. C. Hazleton, Esq.]

Case No. 9,315.

MAURY v. TALMADGE.

[2 McLean, 157.] [1]

Circuit Court, D. Ohio. July Term, 1840.

CARRIERS—STAGE—PASSENGERS—CONTRACT AS TO NUMBER—CUSTOM—DRIVER—NEGLIGENCE—ACCIDENT—INJURY.

1. A contract, made by stage passengers with the agent of the line as to the number of passengers, can not be proved by a passenger, who, at another part of the route, took his seat, in a suit by him against the proprietor.

2. Being no party to the contract, and, in fact, having no notice of it, it afforded no inducement to him to become a passenger.

3. A general custom, as to the number of passengers conveyed, may be proved, but not the practice established on the route.

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

4. The declarations of a driver, whose conduct is not implicated, that the stage was topheavy, and overloaded, not evidence.

[Approved in Franklin Bank v. Stewart, 37 Me. 532.]

5. The words of the agent, to be evidence, to charge the principal, must be a part of the res gestae.

6. Stage proprietors are bound to use the greatest care for the safety of passengers. The least neglect by the driver, or want of skill, makes them liable.

[Cited in Treadwell v. Whittier, 80 Cal. 589, 22 Pac. 271; Sanderson v. Frazier, 8 Colo. 79, 5 Pac. 632. Approved in Frink v. Potter, 17 Ill. 410. Cited in Taylor v. Grand Trunk Ry. Co., 48 N. H. 316; Budd v. United Carriage Co. (Or.) 35 Pac. 663; Farish v. Reigle, 11 Grat. 712.]

7. The proprietors are responsible if the coach is driven out of the usual track, and an injury is, consequently, done.

8. It is the duty of a driver to caution the passengers when he is about to pass over a piece of road, bridge, &c., attended with danger.

[Cited in Terre Haute & I. R. Co. v. Buck, 96 Ind. 357.]

[This was an action for damages for personal injury by M. T. Maury against Talmadge.]

Messrs. Ewing and Stanbery, for plaintiff.

Messrs. Wright and Hunter, for defendant.

OPINION OF THE COURT. This action was brought to recover damages for the upsetting of the defendant's stage, in 1839, in which the plaintiff, being a passenger, was much injured. The upset was near Somerset, on the route from Chillicothe to Zanesville; and is charged to have been caused by the want of skill, and negligence in the driver, overloading the stage, and want of lights. Plea, not guilty. The plaintiff offered evidence to prove that, at Maysville, in Kentucky, the southern terminus of the route, a special contract was made with the agent of the defendant, by the passengers, that not more than six passengers should be admitted inside the stage, and one on the outside. The plaintiff took his seat at Portsmouth, in a line of the defendant's, which connected with the Maysville and Zanesville line, at Chillicothe. The above evidence was overruled by the court, on the ground, that the plaintiff was not a party to the contract, and could claim no benefit under it. There is no proof that he had any knowledge of the contract; and, of course, it could have formed no inducement with him to travel in the line. He took his seat with no other pledge or guaranty from the proprietor, than that which the law implies.

On the part of the defendant, the driver was examined as a witness, there being no objection to his competency by the plaintiff. The defendant offered evidence to prove that it was the custom on that route to carry as great a number of passengers as were in, and on, the stage. This was objected to by the plaintiff, and the court sustained the objection. The defendant can not give, in evidence, a custom or practice established by himself, in his own justification, or in extenuation of the damages. The practice may be such as the law does not warrant, and, in that case, it should operate against the defendant. A general custom, as to the number of passengers conveyed by a coach of the same size, on other routes, may be proved; but this, in each case, must be regulated by the kind of road over which the stage is to pass. A number of passengers may be conveyed, by what is called a nine-passenger coach, on a level and paved road, with safety, which would be extremely hazardous on a road unpaved, and hilly. In a case of this kind, therefore, there can be no unvarying custom, as to the number of passengers. The number must be regulated by the character of the road; and the ordinary danger of stage travel must not, in any degree, be increased by overloading the stage. The question may be asked of drivers, acquainted with the road, what number of passengers could be safely conveyed by a nine-passenger coach, in the state the road was at the time of the upset. By way of rebutting evidence, the plaintiff offered to prove the declarations of the driver, who preceded the one implicated, that the stage was topheavy, and overloaded. To this evidence the defendant objected, and the court sustained the objection.

In favor of the admission of the evidence, it was insisted, that it was proper to be received, in proof of a fact connected with the cause. That, in the case of Saltonstall v. Stokes, 13 Pet. [38 U. S.] 181, the circuit court not only permitted the declarations of the driver to be given in evidence, but, also, the declarations of passengers, made in the hearing of the agent, and to him; that, in the case of McKinney v. Neil [Case No. 8,865], at the present term, the declarations of the passengers to the driver, and, also, among themselves, when the coach was about to upset, were proved; that every driver, being an agent of the defendant, and being a competent judge whether the stage was overloaded or not, his declarations on the subject, while driving, are evidence. But the court remarked, that the declarations of an agent are made evidence against his principal only, when they are part of the res gestae. While making the contract, or performing any act in his capacity as agent, he acts in the place of the principal, and what he says respecting the thing then being done, is evidence. But, afterwards, his account of the transaction, though given immediately, is not evidence. Now, if the driver, whose declarations are offered in proof, were the agent of the defendant to load the stage, still, his declarations could not be evidence, as he spoke of a past transaction. He said the stage was topheavy, and overloaded. This referred to the loading of the stage, and not to any act then being done. But the driver was not the agent for this purpose. The agent was the keeper of the stage office at Lancaster, who admitted two additional passengers. What he said, at

the time of making up the load, would be evidence against the defendant. In the case of Saltonstall v. Stokes [supra], the declarations of the driver, at the time of the upset, were proved as a part of the res gestae. And the remonstrances of the passengers to the agent, against the driver, were proper, as notice to him that the driver was not in a state to be trusted. This should have led the agent to a strict examination of the condition of the driver, and was evidence, the same as if the remonstrances had been made to the proprietor of the line. Remonstrances of the passengers, to the driver, are also evidence, as going to warn him of danger, which should increase his vigilance. And so, as evidence of a fact, tending to show that the stage was not suddenly upset, the remark of a passenger, that the stage was going over, was proved. If the driver, implicated in this case, at the time of the upset, had assigned, as the cause of it, the overloading of the stage, the declaration would have been so connected with the disaster, and explanatory of it, as to be admissible in evidence; it would have been a part of the res gestae.

The main question in the case, is, whether the stage was overloaded. And, to prove this fact, the declarations of a driver, who is a competent witness, and whose conduct is, in no respect, implicated in the case, are offered in evidence; for this can be the only ground of admitting them. The counsel say, they wish these declarations to be received merely as a fact—not to prove the truth of the fact. But how can they be admitted on this ground? Neither the proprietor of the line, nor the driver, who is charged with negligence and want of skill, was present. The declaration, then, can not operate as notice to any one, so as to have the least bearing in the case. And, if the declarations be admissible, it must be with the view of establishing the fact, that the stage was overloaded. The court, therefore, overrule the evidence.

LEAVITT, District Judge (charging jury). The law relative to the liability of stage proprietors has been so fully expounded in another case submitted to, and passed upon, by this jury at the present term, that it will be unnecessary, on this occasion, to enter at large upon the consideration of that subject. As the present case, however, differs from the one referred to, in the facts connected with it, and the ground on which a recovery is sought for, it may not be amiss to call your attention, very briefly, to some general principles that may serve to guide you in your deliberations. It is a principle which commends itself to the reason and common sense of every man, that he who engages in the business of conveying passengers, by stage-coaches, or otherwise, for a reward, takes upon himself certain legal responsibilities, which the law will recognize and enforce. In the absence of an express contract to that effect, the law implies an undertaking to convey his passengers with safety, so far as human foresight and care can accomplish that object. And, it is well settled that, if an injury happen, which is fairly chargeable to the least negligence or want of skill, or prudence, on the part of the proprietor or his agents, he is answerable for it. Judge Story, in his treatise on Bailments, lays down the law as follows: "If he (the driver) is guilty of any rashness, negligence or misconduct, or is unskillful, or deviates from the acknowledged custom of the road, the proprietors will be responsible for any injuries resulting from his acts. Thus, if the driver drives with reins so loose, that he can not govern his horses, the proprietors of the coach will be answerable. So, if there is danger in a part of the road, or in a particular passage, and he omits to give due warning to the passengers. So, if he takes the wrong side of the road, and an accident happens from want of proper room. So, if by incaution, he comes in collision with another carriage." On the other hand, it is equally well settled, that coach owners do not guaranty the safety of their passengers, at all events, and against all hazards. They are not liable for injuries which result from accident or misfortune, where there has been no negligence or default. Keeping these general principles in view, it will be the duty of the jury to make the application of them to the case now under consideration.

The grounds on which it is insisted the defendant is responsible for the injury, which the plaintiff has suffered, are the overloading of the coach, and the negligence and carelessness of the driver. As it relates to the allegation in the declaration, that the accident happened from the want of lights upon the coach, it is presumed the jury will find no difficulty in arriving at the conclusion, from the evidence, that the moon was shining when the upset happened; and that there was no necessity for lights; and that no negligence is imputable to the defendant, on this ground. In this view of the case, the inquiries of the jury will, in the first place, be directed to the two points indicated, namely, the overloading of the stage, and the carelessness and negligence of the driver.

Without attempting to present, in detail, the evidence of the several witnesses who have testified in the case, it will be sufficient for the court to give a concise view of the material facts, as they are understood to be established. In October last the plaintiff, a lieutenant in the navy of the United States, at Chillicothe, in the state of Ohio, took a seat in one of the defendant's coaches, for Wheeling. On its arrival at Lancaster, the coach contained nine passengers. At that place the defendant's agent, contrary to the remonstrances of some of the passengers, consented to take three others; two of whom took their seats with the driver, and the third one, then in a state of intoxication, was placed on the top of the coach. They

arrived at the town of Somerset about 12 o'clock at night, which place they left, after changing horses, with the same passengers, namely—nine inside, and three outside, making, with the driver, thirteen persons, and without an unusual quantity of baggage. Owing to an obstruction, occasioned by the construction of a turnpike, on the route of the old road, a new road, for some distance from Somerset, had been completed a few days before, along which the stage had passed several times. For the distance of about one hundred yards, the new road was made along the side of a slope, by digging down the higher portion of the route of the road, and placing the excavated earth on the lower side, so as to produce a level surface. The width of this part of the road was eight or nine feet, and the track, passed over by carriages, was settled, and tolerably firm; but the part next to the descent of the slope, being made of removed earth, recently placed there, was unsettled and soft. In passing over this part of the new road, at a very slow rate, and when it was slightly ascending, the right wheels of the coach left the beaten track, and, for a distance of twenty-five feet, departed gradually from the track, until they were from two to four feet away from it; the right wheels, in the mean time, sinking deeper and deeper in the soft earth, till the coach upset. Two witnesses stated that the driver, at the time the wheels left the track, was attending to a conversation going on between some of the passengers. One witness testified, that he thought the driver made an effort to turn the horses on to the track, when he discovered the coach had left it. It appeared that it was perfectly in the power of the driver to have stopped the coach, and to have given the passengers an opportunity to get out, after leaving the track, and before the upset. It was also proved, that the driver said, shortly after leaving Somerset, that the coach was too heavily laden; and, as a witness at the stand, he stated that he considered the load dangerous for that part of the road. The plaintiff, in conversation with Dr. Stone, after the accident, said he did not blame the driver; but that the agent was censurable, for overloading the coach. It was conceded, that the general character and habits of the driver were good, and that he was a man of experience and skill in his calling.

At the time of the upset, the plaintiff was sitting with the driver, and at his right hand side. The plaintiff was thrown several feet from the stage. The physicians who saw, and attended him at Somerset, testified that one of his knees was dislocated, upward and downward; the ligaments of the kneepan torn asunder, leaving the kneepan an inch out of its natural position; and, also, that there was a longitudinal fracture of the thigh bone. Two eminent surgeons of Philadelphia, who examined the plaintiff's knee some months after the accident, testified that, in addition to the injuries above stated, there was a vertical fracture of the patella, or kneepan. They also state that the joint is greatly deformed, and the injury so great and permanent in its character, as to disable the plaintiff, for life, from the performance of his duties as a lieutenant in the navy. He was, previously to the accident, possessed of a robust constitution, and enjoyed excellent health. He was detained at Somerset 70 days, in the hands of surgeons, confined generally to his room, and suffering a good deal of pain. At the expiration of that period, he was able to move about, with the aid of crutches, and set off, by private conveyance, for his residence in Eastern Virginia. The expenses of plaintiff, during his detention at Somerset, for medical attendance, boarding, nurses, &c., amounted to about $250.

On this state of facts in relation to the upset, it is insisted by the plaintiff's counsel, that the disaster is attributable to the excessive weight upon, and especially the top-heaviness, of the coach; or, if not fairly chargeable to this cause, it is to be imputed to the carelessness and negligence of the driver, or to a combination of both these causes; and that, in either case, the defendant is responsible for the consequences. Whether the coach was, in fact, overloaded, must be decided by the jury from the evidence, and with reference to the particular circumstances connected with the case. It is impossible to lay down any general rule, by which the inquiry, whether a coach is excessively laden, can be satisfactorily tested. The character and condition of the road, over which a vehicle is to pass, will be the main consideration in such an inquiry. It will be obvious to the jury that, upon a properly graded and well-finished turnpike, there will be no great danger of the upsetting of a carriage, from any weight that may be put on it; while upon one of the common roads of the country, especially over a hilly region, there might be very great danger in conveying a weight, which, under other circumstances, could not be regarded as excessive. It will, therefore, be the duty of the jury, in coming to a conclusion on this point, to take into consideration the number of passengers, the weight of baggage, the general character of the road along which the defendant's stages run, and, especially, the portion of it over which the coach was passing, when this accident occurred. And, if the jury believe it can be fairly referred to the improper loading of the coach, there can be no question but what the defendant is legally answerable for the consequences. It is clearly the duty of a stage proprietor to see that the safety of his passengers is not put at hazard by an excessive load; and, if he disregards or violates his duty in this respect, he is liable for any injury that may follow. Nor can it be regarded as a legal excuse for such misconduct, that loads of the same, or even greater weight, have

been previously transported, with safety, upon the same road.

As to the other position taken by the counsel for the plaintiff, namely, that there is proof of carelessness and inattention on the part of the driver, in this particular case, and that this may be regarded as the cause of the overturn, it is only necessary to remark that, if the jury believe this point to be established by the proof, then, on the principles already laid down by the court, they will be justified in returning a verdict for the plaintiff. On this point, it is insisted that the driver, without any necessity or excuse for so doing, permitted the coach, while proceeding at a slow rate, and upon ground slightly ascending, to depart from the track, till the right wheels sunk so deep into the earth as to cause the upset. The jury will observe, that the law holds a driver to the observance of the strictest care, and the most unremitting vigilance. And, however unexceptionable may be his general character as a driver, if, in a particular instance, he is guilty of carelessness or negligence, whereby an injury occurs to a passenger, his employer, whose agent he is, is accountable.

If, therefore, the jury should come to the conclusion, after a deliberate examination of the testimony, that the coach, owing to the excessive weight put upon it, was unmanageable, in the circumstances in which it was placed, by any power or skill which could be applied or used by the driver, and was, therefore, upset; or, if they should believe that the driver, even from a temporary inattention or neglect, permitted the coach to get into a predicament, from which an upset was the inevitable result; or, if they believe that the disaster, in the present case, is referable to these two causes combined, they will find for the plaintiff. If, on the other hand, from an attentive consideration of the facts of the case, as exhibited by the evidence, the jury should be of the opinion that the accident, in question, is not imputable to any impropriety of conduct on the part of the defendant's agent, in loading the stage, or to any negligence or carelessness on the part of the driver, but was, as contended for by the defendant's counsel, the result of mere accident or misfortune, which no human foresight, care or attention could have prevented, the defendant can not be held legally answerable.

On the subject of damages, it is only necessary to remark that, if the jury should come to the conclusion that the plaintiff has made out his case, in accordance with the principles indicated by the court, it will be competent for them to return a verdict for any amount they may think just, within the limit of the sum laid in the declaration. In the assessment of damages, the jury is not restricted to the actual expenditures of the plaintiff, in consequence of the injury received, and compensation for the loss of time; but may properly take into consideration the nature and extent of the injury, and its probable bearing and effect upon his prospects in life, in reference to the profession which he has adopted. The subject of damages, however, belongs so exclusively to the jury, that it would not be proper for the court to enlarge upon it. The case is committed to the jury, with the fullest confidence that they will give it the most mature consideration, and return such a verdict as will acquit themselves, satisfactorily to their own consciences, of the solemn responsibility resting upon them.

The jury returned a verdict for the plaintiff, and assessed his damages at $2,325.

MAUSSEAUX (GAINES v.). See Case No. 5,176.

Case No. 9,316.

The MAVERICK.

HARDING v. The MAVERICK.

[1 Spr. 23; [1] 5 Law Rep. 106].

District Court, D. Massachusetts. March Term, 1842.

FERRY—LICENSE TO KEEP—ASSIGNMENT — COLLISION—UNLAWFUL USE OF WATERS—USAGE.

1. A license to keep a ferry, under the statutes of Massachusetts, is not assignable.

[Cited in The Leopard, Case No. 8,264.]

2. The charter of the Eastern Railroad Corporation does not authorize the company to maintain a ferry between Boston and East Boston, and take toll for travel and purposes not connected with their road.

3. A steamer used as a ferry-boat, and in the act of transporting passengers in the harbor of Boston in violation of law, came, by accident, in collision with a vessel which was in the lawful use of the waters of the harbor: *Held*, that the steamer was liable for the damage done by such collision.

[Cited in The Morning Star, Case No. 9,817; Todd v. The Tulchen, 2 Fed. 603.]

4. A usage for vessels to let go their warps, upon the approach of the steamer, must be presumed to be founded on the supposition that the steamer was in the rightful use of the waters of the harbor. A usage which would require those who are in the legal use of the waters as a highway, to yield to others who are using them for an unlawful purpose, will not be upheld.

[5. Cited in The Willard Saulsbury, Case No. 17,681, to the point that this court has jurisdiction of an action in rem brought by a person injured on board a vessel against the vessel causing the collision.]

This was a libel for a tort. The Maverick, a steamboat, was plying as a ferry-boat between one part of Boston, and another part called East Boston. The brig Southern, of which the libellant was mate, had run a warp across the usual track of the steamer, and near the head of the dock. In her passage, the steamer ran against the warp, and, by

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

means thereof, broke the leg of the libellant, and inflicted other injuries. The claimants [Fettyplace and Lamson] produced in evidence a license to keep a ferry, granted by the proper authorities, in the year 1832, to William H. Sumner, Stephen White, and Francis J. Oliver, and several instruments by which the said Sumner, White and Oliver, subsequently conveyed to the claimants all the steamboats and other boats and vessels used in said ferry, including the Maverick by name, and also all the rights and privileges which had been granted to the said Sumner, White and Oliver, by the said license, and constituted the claimants their attorneys irrevocable, with power of substitution, to keep and maintain said ferry, and to do all other acts, matters and things, which said attorneys, their successors, representatives or assigns, should deem needful or expedient for the support and management of the ferry, and to receive the tolls to their own use.

B. R. Curtis, for libellant.
S. Bartlett, for respondents.

SPRAGUE, District Judge. It is contended, in the first place, that the claimants had no right to keep a ferry, and that the Maverick was used for that purpose in violation of law. The instruments which have been put in evidence, constitute an assignment of the ferry, and divested the licentiates of all power and control over it. They go beyond the case of Gerrish v. Sweetser, 4 Pick. 374, in which it is said, that an irrevocable power to receive a sum of money, to the attorney's own use, is prima facie an assignment. Here is an express conveyance, to which the power of attorney is only auxiliary.

[They have produced a license granted by the proper authorities in the year 1832, to William H. Sumner, Stephen White, and Francis J. Oliver, and an instrument bearing date the 9th of December, 1839, by which the said Sumner, White, and Oliver, conveyed to the claimants, and one John Binney, who is since deceased, all the steamboats and other boats and vessels used in said ferry, including the Maverick by name, and also all tolls, ferriage and profits and income which had been received or which should thereafter be received from the ferry, and all profits and advantages whatever, which could or should be derived therefrom. All which the claimants and said Binney, and their executors, administrators, and assigns, were to hold as trustees for a certain voluntary association, called the East Boston Company. By the same instrument, the said Sumner, White and Oliver constituted the claimants and said Binney and their successors in said trusts, representatives, and assigns, their attorneys irrevocable to keep and maintain said ferry, and to do all other acts, matters, and things, which said attorneys, their successors, representatives, or assigns, should deem needful or expedient for the support and prudent management of the ferry; and also to establish, regulate, and change the rates of toll or ferriage, and to demand and receive said tolls and ferriage, and dispose thereof, and also full power to substitute any agent or agents under said attorneys, and their powers at pleasure to revoke. And said Sumner, White, and Oliver covenanted that they would not "in any manner obstruct, hinder, defeat, or interfere with the claimants and said Binney, their successors, representatives, or assigns, or any of them, in the conducting and management of said ferry." The same instrument also contained a covenant for further assurance and a declaration by said Sumner, White, and Oliver, of their "free consent for the city of Boston, or the government, to revoke the license granted to them, and to grant the same to said claimants and Binney, in their said capacity of trustees, or their successors or representatives in said trusts," &c. The claimants also gave in evidence another instrument bearing date the same 9th of December, 1839, by which they and said Binney covenanted with said Sumner, White, and Oliver, and others, members of said East Boston Company, to hold the said property and the ferry as trustees, and subject to the control of said association. They also produced another instrument, bearing date the 19th of December, 1836, being an indenture of three parts, between the said trustees, said East Boston Company, and the Eastern Railroad Company; by which the latter is substituted in the place of East Boston Company, so far as relates to the ferry and the property connected therewith. These instruments constitute an assignment of the ferry, and divested the licentiates of all power and control of it. They go beyond the case cited from 4 Pick. 374, in which it is said that an irrevocable power to receive a sum of money to the attorney's own use is prima facie an assignment. Here is an express conveyance, to which the power of attorney is only auxiliary.] [2]

Was this ferry assignable? This question must be answered by referring to the Massachusetts statute of 1796, c. 42, to which it owed its existence. The first section provides, "that no person or persons whatever shall keep a ferry in this commonwealth, so as to demand or receive pay, without a special license first had and obtained from the court of general sessions of the peace of the county wherein such ferry may be; and the said court is hereby empowered to grant such licenses to such person or persons, as shall be judged suitable for such service, by the same court." By the third section it is enacted, "that if any person or persons shall keep a ferry, or transport passengers over or across any stated ferry, so as to demand or receive pay, having no right or au-

[2] [From 5 Law Rep. 107.]

thority so to do, he shall forfeit and pay for every such offence, four dollars." The Revised Statutes which went into operation in 1836, have substantially re-enacted the same provisions. Chapter 26, §§ 1–6.

At the time of the passing of the statute, ferries constituted indispensable links in the chain of communication between different parts of the commonwealth; and so important was it deemed to secure fit persons as ferrymen, that it was provided by law, that no one should keep a ferry unless previously judged suitable, and specially licensed therefor by an established tribunal. It was a personal trust, to be reposed in those only whose qualifications had previously been considered and approved by the court, and is no more transferable than the office of a guardian, or the power of a master over his apprentice. If the licentiate can, by means of an assignment, appoint his successor, then a person becomes a ferryman, whom the court have never licensed, and of whose fitness they have had no opportunity to judge. It is not necessary to decide how far the person appointed must devote his personal attention to the management of the ferry; it is sufficient to say, that he must at least have a control over it, and that those who are engaged in its management must be not merely in name, but really, his agents or servants.

It has been contended, that this ferry was, in truth, kept by the Eastern Railroad Company, and that they are authorized to maintain it by the first section of their charter. Its language is as follows: "And said corporation is hereby authorized and empowered to locate, construct, and finally complete a railroad from the city of Boston to the boundary line between the commonwealth of Massachusetts and the state of New Hampshire; on or near the line next hereinafter described, beginning at or near the land or wharf of the Lewis Wharf Company; thence by steamboats, or other boats, over and across the ferry, to East Boston, so called; thence," &c., locating the road to the boundary of the commonwealth. This is merely descriptive of the line of the road. It was to run from a point at or near Lewis' wharf, over and across the ferry to East Boston. The ferry is mentioned only to designate the route over which the corporation were to pass by steamboats, or other boats, for the purposes of a railroad. It certainly is not to be understood that this railroad corporation was authorized to establish and maintain a ferry and take toll for all travel, and for purposes in nowise connected with their road. The route of the road passes over the Merrimack river, and across the site of a bridge. Could the corporation, there, establish a general toll bridge, independent of the railroad? But further, this charter was granted on the 14th of April, 1836. The ferry had been established, and Sumner, White and Oliver appointed ferrymen, in 1832. The second section of the charter declares, that "nothing herein contained shall be construed to confirm, interrupt or impair, the existing rights of any corporation, person or persons, owning or interested in any ferry already established or licensed." This removes all pretence for saying, that the pre-existing ferry was intended to be merged in the railroad. It is preserved distinct and independent, and in nowise to be interrupted or impaired.

I am constrained, therefore, to say, that neither under the license to Sumner, White and Oliver, nor under the charter of the Eastern Railroad, do the claimants derive any legal right to maintain this ferry; and that in doing so they are contravening the express provisions of the statute.

But it is contended that the injury to the libellant arose from the misconduct or negligence of those on board the brig, and this on several grounds.

[In the first place, it is said, that the hawser was run for the purpose of obstructing the ferry-boat. In support of this, the claimants rely upon the previous occurrences in the morning, and upon the testimony of Keen, Douglas, Jolliffe, and Porter; and to repel it, the libellants refer to the testimony of Eldridge, Rider, Green, and Stetson. I do not propose to detail the very voluminous and contradictory evidence in relation to this and other matters of fact, which have been in contestation. To do so would answer no purpose, except perhaps to satisfy the counsel that the court had taken into view all the evidence upon which they relied. The brig lay at Lewis's wharf; there was a bona fide intention to remove her to the northward, for the purpose of taking her to Pratt & Cushing's ways. To carry this into effect, the captain gave orders to take the hawser out of coil and run it to the wharf south of the ferry-way, preparatory to removing the vessel. Considering the improbability that the captain would designedly bring a valuable vessel, of which he was part owner, with a cargo on board, and without cables and anchors, in collision with a steamboat, that all those engaged in this service, with the exception of Jolliffe, had given testimony going to negative such a design, and that the running the hawser may well be attributed to another and a legitimate purpose, and that the hawser was slacked up immediately on the approach of the boat, I am of opinion that this allegation of an attempt purposely to obstruct the steamboat, is not maintained. It is further contended, that, as the brig had no cables and anchors, it was negligence to attempt to remove her without having a stern line, so as to be prepared to let go the warps at the bow on the approach of the steamer. Whether such a line ought to have been previously run, is a question which nautical men, or those practically acquainted with moving vessels in harbors, are most competent to decide. Many such have given their depositions in this case, and their opinions have been extracted on various points. But to no one of them has

this question been propounded. The mate, who made these arrangements, is proved to have been experienced and skilful in his profession. He had a warp and a hawser ahead. I cannot undertake to say that it was a want of ordinary care not also to have had a stern line. It is further contended, that there was want of due care in several particulars: 1st, in making fast the hawser to the windlass bitts, so as not to be cast off readily. 2d, in not hailing the steamer earlier, in order to give notice not to approach. 3d, in not having slacked up the warp and hawser earlier. 4th, that the warp was full of kinks, and should not, therefore, have been permitted to run out through the chocks, as it was liable thereby to bring her up. But whatever kinks there may have been, they did not catch in the chock, and in no way contributed to the disaster. As to making fast the hawser to the windlass bitts, no witness testifies that this was improper, or that there was any better manner of securing it. I do not see how an earlier hail from on board of the brig could have been of any utility. The wind was strong from a northeast direction, and, with the noise of the paddles and machinery, must have prevented any hail being heard by those on board the boat until after they must have seen the hawser and warp. They knew that a prior attempt had been made to haul the brig, and it is in proof, that they were on the look-out, and saw the warp, and hailed the brig to have it slackened. A main ground of the defence is, that such were the wind, currents and obstructions, that it was impossible for the boat, after she passed the ship, to stop or retreat, or to have taken any other course than directly across the wharf. No hail could possibly have been heard by the steamer before she passed the ship; how then could it have been of any utility? With regard to the objection that the warp and hawser ought to have been slackened earlier, although there is a conflict of testimony as to the time when this was done, or how soon after the first hail from the boat, there is no doubt that they were slackened some time before the boat came up to them. The damage was occasioned by the boat's taking the warp, which, being a new manilla rope, did not sink. If it had been cast off at the instant of the first hail, or at any time after those on board the brig had reason to apprehend that the boat would cross it, it would still have floated upon the surface and obstructed the boat. But there is another and broader answer to this objection, which reaches also to the allegation of negligence in not having a stern line, so as to be prepared to let go the warp, and in making fast the hawser to the windlass bitts.][2]

These complaints of negligence all rest upon the assumption that it was the duty of the brig to let go her warps on the approach of the steamer. There is much conflicting testimony, as to the usage in such cases, but I think the preponderance is in favor of the ferry boats; and that it is proved to have been the general practice for other vessels to yield to them, on their approach, and to slacken their warps to permit them to pass. I am not so well satisfied that the same usage prevails with respect to the approach of sailing vessels.

Without pausing to inquire how far a special usage, as to this ferry, ought to be brought home to the knowledge of those on board the brig, in order to be binding upon them, it is sufficient to say, that it must have been founded upon the supposition that this ferry was legally maintained, and that these boats were in the rightful use of the waters, for that purpose. But we have seen that this was not the fact, and any usage founded upon it must therefore fall. Indeed, the law would not uphold a usage, by which those who were in the legal use of these waters as a highway, should be bound to yield to others who were in the act of using it for an unlawful purpose.

It is further insisted that the libellant was negligent of his own personal safety. On the approach of the steamer, he let go his fasts which crossed her track, and ran aft for the purpose of having a stern line made fast to the steamer North America, and while doing this, his leg was caught in the warp, as it was running out, and he received the injury complained of. It is said that the warp was lying near to the libellant; that he was warned of his danger, and that he was unnecessarily taking another turn of the rope which led to the North America, around the cleat where it was fastened on board the brig. It is not denied that the line to the North America was necessary. The warp and the hawser had both been let go. There was nothing then to hold her, and she was without cables and anchors. There was no time for deliberation; the line must be made fast, and done instantly. The evidence of his being warned is, that one of the witnesses called out to him that he had better take care of his legs, as the steamer was going to take the lines; that he got tangled in the coil, and then jumped clear of it, and soon afterwards, while making fast the rope, he got caught again. It does not appear in what manner he could have avoided the danger; he was not at liberty to leave the place, and was performing an indispensable duty, which demanded his attention at the instant. To obviate the pressure of this fact, it is indeed said, that the rope had been already sufficiently made fast, and that the turn he was then taking was unnecessary. That rests entirely upon the opinion of Jolliffe; who says, that he thinks she was sufficiently fast before; but the libellant thought otherwise, and from the testimony in the cause, his experience and skill would entitle his judgment to a preference over that of Jolliffe. He was in command of the brig; upon him rested the responsibility of her safety; this was the only line by which

[2] [From 5 Law Rep. 109.]

she was to be held, and it would be harsh and presumptuous to condemn him upon the critical suggestion, that the last turn of the rope was unnecessary, and this, too, merely upon the opinion of a witness who was less skilled and who felt no such responsibility.

What then is the posture of this case? The brig Southern being in the legitimate use of these waters as a highway, for a lawful purpose and in a proper manner, comes in collision with the steamer Maverick, which, at the time, is using them in transporting passengers, as a ferry boat, in direct violation of law. Supposing the collision to have been accidental, which shall bear the loss occasioned thereby? Authorities upon this point have been cited at the bar. In the cases of Leame v. Bray, 3 East, 593, and Bullock v. Babcock, 3 Wend. 391, which were actions of trespass, the lawfulness of the purpose is adverted to as a material circumstance. In the former, Lord Ellenborough, alluding to another case, says: "Where one shooting at butts for a trial of skill, with the bow and arrow, the weapon then in use, in itself a lawful act, and no unlawful purpose in view, yet having accidentally wounded a man, it was holden to be a trespass. * * * Such, also, was the case of Weaver v. Ward, Hob. 134, where a like unfortunate accident happened, whilst persons were lawfully exercising themselves in arms." In Hammond's note (d) to Comyn's Digest, "Battery," A, it is said: "In order to render a trespass excusable, not alone must the act itself have been inevitable, the party must be altogether blameless with regard to the circumstances which led to it; for if the defendant has wrongfully placed himself in a situation whereby he becomes the instrument of mischief to another, he cannot excuse himself by saying that the accident happened without the possibility of his preventing it at the time." Davis v. Saunders, 2 Chit. 639, was a case of collision. The plaintiff's sloop had made fast to a raft of brandy which had been sunk by smugglers, and was endeavoring to secure it. The defendant's sloop came up and attempted to obtain the brandy, and the two sloops, by the force of the sea, were thrown against each other. The case turned on the question, whether the defendants were doing a lawful act; and the court decided in their favor, solely on the ground that their "original act was not unlawful." It was formerly contended, that, if a person injure another by violence, he is responsible in damages although it was accidental. But, it is now settled, that he is not liable for a mere accident, although accompanied by force, provided he is not engaged in an unlawful act. This limitation upon the immunity for accidents is frequently mentioned in the books, and I am not aware that it is anywhere denied.

It is insisted by the counsel for the claimants, that if these principles are anywhere recognized by the law, it is only when the act done is contra bonos mores, or an offence at common law; and that a violation of a statute provision secured by penalties, is not within the alleged principle.

In the case cited by him, of Atkinson v. Abbott, 11 East, 135, Lord Ellenborough remarks, that the statute of Charles II., by which a penalty is imposed for taking out a false clearance, does not make the voyage illegal. But our statute does make the voyage, if it may be so called, illegal. It prohibits the keeping a ferry, or transporting passengers over any stated ferry. Every trip, therefore, was a violation of the statute. The cases of Rex v. Dickenson, 1 Saund. 135; Anonymous, 3 Salk. 25; Rex v. Buck, 2 Strange, 679, merely go to establish the well known doctrine, that where an act allowed by the common law is prohibited by statute, and the mode of prosecution is prescribed by the statute, that mode must be pursued, and not the common law method by indictment. But the case now before the court is not a prosecution against the claimants for keeping a ferry, but a suit for running forcibly against a warp, by which the libellant was injured. The respondents, to justify this act of force, say, in substance, that they were duly licensed to keep a ferry, and were running the Maverick as a ferry boat, as they lawfully might. The reply is, that they were not licensed to keep a ferry, and in doing so were violating the law; and, therefore, are not entitled to the immunity which they claim. The libellant rests on the principle that if one, while doing an unlawful act, comes in contact or competition with another, who is pursuing his lawful occupations, the law gives a preference to the latter, and inclines the balance against the former.

The ground assumed by the respondents is, that the only inconvenience to which the party who violates a statute is subjected is the penalty which it prescribes. But I apprehend that this is not well founded. There are disabilities or liabilities to which the law subjects him, as consequent upon his unlawful act, wholly distinct from the penalties of the statute. Thus, in Wheeler v. Russell, 17 Mass. 278, the plaintiff had sold and delivered to the defendant a quantity of shingles, and taken his note for the price agreed. The action was upon the note. The defence was, that the plaintiff in selling the shingles, had violated a statute. The court sustained the defence, and refused to enforce the note, although the price agreed was no more than the fair value of the property which the plaintiff had parted with. In that case the authorities were collected with great diligence and ably and elaborately examined at the bar. The chief justice, in delivering the opinion of the court, says: "No principle of law is better settled than that no action will lie upon a contract made in violation of a statute, or of a principle of the common law," thus in terms rejecting the distinction now set up. In Moody v. Ward, 13 Mass. 299, the defend-

ant, a colonel in the militia, had mustered his regiment in the highway. After he had dismissed the regiment and retired from the field, the plaintiff's horse in passing along the highway, was frightened by the firing of the soldiers, who were remaining there, ran against a shaft and was killed. It was contended, in behalf of the plaintiff, that the defendant was liable, because mustering his regiment in the highway was prohibited by statute. The court said, that it did not appear that the defendant was to blame, unless the mustering there was unlawful, and as that point was not made out, they therefore decided in favor of the defendant.

The distinction contended for does not seem to be established, at least in civil cases, by authority; and I see no ground on principle for introducing it. The common law is said to be founded upon immemorial customs, which are supposed to embrace acts of the legislature, the records of which have been lost by lapse of time. But why should these be more efficacious in any respect, or their inviolability be more sedulously guarded by consequential liabilities, than acts of the legislature, the records of which are preserved?

The view which I have taken of the case renders it unnecessary to consider whether there was any negligence in the manner in which the steamer was conducted, or not. As the libellant was engaged in a lawful occupation, and the Maverick, when she ran against his warp, was running as a ferry boat, and in the act of transporting passengers, in violation of law, I am of opinion that she must be responsible, even for accidental damages occasioned thereby.

Decree for the libellant for $1400 damages and costs.

MAVURKA, The (BEANE v.). See Case No. 1,175.

Case No. 9,317.

In re MAWSON.

[2 Ben. 122;[1] 1 N. B. R. 265 (Quarto, 33).]

District Court, S. D. New York. Jan. 24, 1868.

BANKRUPTCY—PRACTICE—OBJECTING TO DISCHARGE.

Where an opposing creditor, deeming that it appeared, from the examination of the bankrupt, that he was not entitled to his discharge, desired the opinion of the judge on the point, on a certificate of the register: *held*, that the question was not one on which the opinion of the court, under section six of the act, could be taken, at that stage of the case.

[Cited in Re Frizelle, Case No. 5,132; Re Graves, 24 Fed. 552.]

[2] [The above named bankrupt [George S. Mawson] filed his petition herein on the 11th day of July, 1867, and a warrant in bankruptcy was issued out of this court and a meeting of the creditors of said bankrupt was ordered for the 19th day of August, 1867, on which day the firm of Arnold, Neusbaum & Nordlinger of Philadelphia, creditors, proved their claim and appeared by their solicitor to oppose the discharge of said bankrupt. Their solicitor afterwards obtained an order for the examination of said bankrupt. Before the return of said order, or the examination of said bankrupt, said Arnold, Neusbaum & Nordlinger withdrew their opposition. Other creditors proved their claims; one of them, Felix L. Bauer, obtained an order from the register for the examination of the bankrupt, and the said bankrupt was sworn and examined before the register on the 23d day of January, 1868.

[Upon said examination the bankrupt testified as follows: "Question by solicitor of opposing creditors: How much do you owe the firm of Arnold, Neusbaum & Nordlinger of Philadelphia? Answer by the bankrupt: I owe Arnold, Neusbaum & Nordlinger of Philadelphia about $2,326.18. Q. Have you called upon that firm, or sent any person to them with reference to their withdrawing their objection to your discharge since your petition was filed? If so, state what you promised them, if anything. A. Yes; I have seen them in consequence of having heard that Mr. Solis, the opposing creditor, had misrepresented the facts of my case to them. I called upon them to disabuse their minds that I was no partner in the house of George King, but was there merely on salary; I made them no promise, directly or indirectly, nor any one for me. Q. Did they not agree to withdraw their opposition if you would pay the expenses they had incurred in your bankruptcy proceeding? A. They stated that they had been to some trifling expense in the matter, and they supposed I would pay that. I said I would have no objections to pay that expense. Q. To whom did you pay that sum? and how much was it? A. To Mr. Jacobs of this city; it was twenty dollars. Q. And they have withdrawn their opposition? A. They had withdrawn it before I paid the money."

[The said Felix L. Bauer, one of the opposing creditors, now claims that the said bankrupt should not be discharged, for the reason that he has in violation of section 29 of the "act to establish a uniform system of bankruptcy throughout the United States," [14 Stat. 531], &c., procured the assent of said creditors, Arnold, Neusbaum & Nordlinger, to his discharge, and has influenced the action of said creditors pending these proceedings by a pecuniary consideration or obligation, and said opposing creditor desires the opinion of the district judge upon the question above stated.

[J. Solis Ritterband,
[Counsel for Opposing Creditors.][2]

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

[2] [From 1 N. B. R. 265 (Quarto, 33).]

[2] [From 1 N. B. R. 265 (Quarto, 33).]

By the Register:

[2] [I, John Fitch, the register in the above entitled cause, do certify to the court:

[First. That this is one of the cases provided for in section 6 of the bankrupt act, and that at this stage of the proceedings the creditors had a right to ask the opinion of the district judge as to the matter raised by the testimony of George S. Mawson, the petitioner, as to the effect of the payment of $20 to Mr. Jacobs of New York, for Arnold, Neusbaum & Nordlinger of Philadelphia, as set forth in the said testimony.

[Second. That by the 29th section of the bankrupt act, "or if he or any person in his behalf, has procured the assent of any creditor to the discharge, or influenced the action of any creditor at any stage of the proceedings by any pecuniary consideration or obligation, then no discharge shall be granted."

[Third. The claim of the creditors as proven, namely, Arnold, Neusbaum & Nordlinger, was, as stated by the petitioner, about $2,326.18. The sum paid to Mr. Jacobs was $20, which was the amount of expenses they had incurred in the matter. The sum paid was small; yet small as it was, it may have caused them to cease opposing, or rather they did not oppose the discharge of the bankrupt on the 24th day of January, 1868, the day the order to show cause was returnable; the hearing was adjourned to the 31st of January, 1868.

[Fourth. I feel compelled to certify that from the petitioner's testimony, the action of the creditors was influenced in some degree by the payment of the $20 to Jacobs, and small as it was, it may bring this case within the 29th section of the bankrupt act, although Mr. Jacobs is a lawyer, and it was probably his legal charge that was paid, and none of the $20 ever went to the hands of the creditors, and was not a payment of any part of the creditor's claim.

[Fifth. Upon a thorough examination of the testimony and the law applicable thereunto, I cannot say that the $20 so paid to Mr. Jacobs was any part of it paid to the creditors, and certify to the court, that upon a fair and just construction of the act, I do not think the payment of the $20 to the creditors' lawyer should deprive the petitioner of his discharge, which, as the case now stands, he would otherwise be entitled to. I feel that the courts should give a fair, just, and liberal construction to the act, and not rigidly construe its provisions against the bankrupt, as the whole scope of the act is liberal and not oppressive.] [2]

BLATCHFORD, District Judge. I do not think that the question certified, as to whether the bankrupt is or is not entitled to his discharge, is one on which the opposing creditor is at liberty, at this stage of the case, to take the opinion of the district judge, under section six of the act [Act 1867, 14 Stat. 520]. The question is not one which has arisen or can arise in the course of the proceedings before the register, for the reason that, by section four of the act, the register is forbidden to hear any question as to the allowance of an order of discharge. Nor is it a question which has arisen upon the result of any proceedings before the register, because no such question can arise, upon the result of any such proceedings, until the opposing creditor has filed, under general order No. 24, a specification of the grounds of his opposition to a discharge; and, when that is done, the case is then, ipso facto, removed from before the register and taken into court, under section thirty-one of the act, and general order No. 24, and rule 16 of this court.

[For subsequent proceedings in this litigation, see Cases Nos. 9,318–9,320.]

[2] [From 1 N. B. R. 265 (Quarto, 33).]

Case No. 9,318.

In re MAWSON.

[2 Ben. 332; [1] 1 N. B. R. 437 (Quarto, 115); 1 Am. Law T. Rep. Bankr. 122.]

District Court, S. D. New York. April, 1868.

BANKRUPTCY — VAGUE SPECIFICATIONS OF OPPOSITION TO DISCHARGE.

1. Specifications of opposition to a bankrupt's discharge were filed, which stated that he had concealed part of his estate, and had not delivered all his property to the assignee, and had made a transfer of part of his property to prevent its coming into the hands of the assignee: *Held*, that they were too vague, and should have specified the property.

2. A specification stated that the bankrupt had procured the assent of certain named creditors to his discharge, but did not state that such assent was procured by a pecuniary consideration or obligation: *Held*, that it was insufficient.

3. The same specification stated that the bankrupt had influenced the action of "the said creditors," since the filing of his petition, by a pecuniary consideration and obligation: *Held*, that it was sufficient.

[In the matter of George S. Mawson, a bankrupt.]

In this case, a creditor filed specifications of objection to the bankrupt's discharge as follows: First. That the bankrupt has concealed part of his estate, and has been guilty of fraud in not delivering to the assignee all of the property belonging to him at the time of the presentation of his petition and inventory. Second. That the bankrupt has procured the assent of Arnold, Nusbaum and Nordlinger, creditors, to his discharge; and that he has influenced the action of the said creditors, since the filing of his petition, by a pecuniary consideration and obligation. Third. That, in contemplation of becoming bankrupt, he has made a transfer or conveyance of part of his property, for the purpose of preventing the same from coming into the hands of the assignee, and of being

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

distributed according to law in satisfaction of his debts.

[For prior proceedings in this litigation, see Cases Nos. 9,317 and 9,320.]

F. C. Nye, for bankrupt.

J. Solis Ritterband, for creditor.

BLATCHFORD, District Judge. The first and third specifications of the grounds of opposition to the discharge are altogether too vague and general. [The first is that the bankrupt has concealed part of his estate, and has been guilty of fraud in not delivering to the assignee all of the property belonging to him at the time of the presentation of his petition and inventory.][2] The first ought to specify, with some particularity at least, what part of his estate he has concealed, and what property he has fraudulently failed to deliver. [The third specification is, that in contemplation of becoming bankrupt he has made a transfer or conveyance of part of his property for the purpose of preventing the same from coming into the hands of the assignee, and of being distributed according to law in satisfaction of his debts.][2] The third specification should state what part of his property he has so transferred.

[The second specification is, that he has procured the assent of Arnold, Nusbaum & Nordlinger, creditors, to his discharge; and that he has influenced the action of the said creditors since the filing of his petition by a pecuniary consideration and obligation.][2]

As to the second specification, a bankrupt is not forbidden, by the twenty-ninth section of the act [of 1867 (14 Stat. 531)], to procure the assent of a creditor to his discharge, nor is he forbidden to influence the action of a creditor. The prohibition is against procuring such assent by any pecuniary consideration or obligation, and against influencing such action by any pecuniary consideration or obligation. The second specification in this case only avers, in regard to procuring the assent of the creditors to the discharge, that the bankrupt procured such assent, and does not aver that he procured it by any pecuniary consideration or obligation. It is, therefore, insufficient in that respect. In regard to influencing the action of the creditors, the specification names the creditors, and states that the influencing took place after the filing of the petition, and was by a pecuniary consideration and obligation. It does not state what the influencing consisted in, but it may, perhaps, fairly be inferred, that the specification means that it consisted in procuring the assent of the creditors named to the discharge. No other influencing can be given in evidence under the specification. The time is, perhaps, sufficiently averred, and, although the amount of the pecuniary consideration or obligation is not stated, I am inclined, on the whole, though with considerable hesitation, to hold the specification sufficient in its averment in regard to influencing the action of the creditors named, in the respect above defined. It borders very much, however, on a fishing specification, as, if the party had any facts within his knowledge or information, it is to be supposed he would have specified them.

[This decision must not be regarded as a precedent except for a case identically like it in all respects. The rule in regard to specifications has been so often heretofore defined by this court that it ought by this time to be well understood.][2]

The case will stand for hearing on so much of the second specification as is so held to be sufficient, and will be heard whenever the parties have taken all the testimony they desire to present on the point. A reference may be had to the register in charge to take testimony on either side.

[For subsequent proceedings in this litigation, see Case No. 9,319.]

[2] [From 1 N. B. R. 437 (Quarto, 115).]

Case No. 9,319.

In re MAWSON.

[2 Ben. 412;[1] 1 N. B. R. 548 (Quarto, 153).]

District Court, S. D. New York. May 12, 1868.

BANKRUPTCY — PROCURING CREDITORS' ASSENT TO DISCHARGE—AGREEMENT TO PAY COUNSEL FEES—BURDEN OF PROOF.

Where creditors opposed the discharge of a bankrupt, on the ground that he had procured the assent of certain creditors to his discharge by a pecuniary obligation, and the evidence showed that he had paid to the counsel for those creditors, their fees, for services rendered in the matter, amounting to $20, but it also appeared that those creditors had announced that they would not oppose the discharge, before anything whatever was said about his paying their counsel fees, and that such payment was not made a condition of their withdrawing further opposition: *Held*, that the burden of proof was upon the opposing creditors, and the proof did not sustain the specification.

Two creditors opposed the discharge of the bankrupt [George S. Mawson] in this case, on like specifications, which were, in substance, that the bankrupt had influenced the action of Arnold, Nusbaum, and Nordlinger, creditors of his, by procuring their assent to his discharge, since the filing of his petition, by a pecuniary consideration and obligation.

[For prior proceedings in this litigation, see Cases Nos. 9,317, 9,318, and 9,320.]

F. C. Nye, for bankrupt.

E. James and J. S. Ritterband, for creditors.

BLATCHFORD, District Judge. I do not think that the evidence sustains this specification, or that the bankrupt has, either in

[2] [From 1 N. B. R. 437 (Quarto, 115).]

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

letter or in spirit, violated any of the provisions of the bankruptcy act, or been guilty of any thing which is made a ground, by the 29th section of the act [of 1867 (14 Stat. 531)], for withholding his discharge. The testimony given by the bankrupt, on the 23d of January, 1868, on his direct examination, unexplained, seemed to support the averment, that he had influenced the action of the creditors named by a pecuniary consideration, by procuring them to agree not to further oppose his discharge, if he would pay their counsel the amount of his charge, already then incurred, for services in the matter, and which amount the bankrupt subsequently paid, it being twenty dollars. But on his cross-examination, on the 13th of March, 1868, the bankrupt explained the whole matter satisfactorily; and his testimony shows, that the announcement by the creditors to him, that they would not oppose his discharge, was made before any thing was said between them and him as to paying their counsel, and at a prior interview, and was not induced by any promise on his part to pay the counsel, and was entirely independent of any such promise, and it does not appear that the suggestion of the creditors to him, at a subsequent interview, that it was right and proper that he should pay their counsel, was coupled with any intimation to him that his agreement to pay the counsel must be a condition of, or a consideration for, or a precedent obligation to, their agreement not to oppose his discharge. It is not pretended that any thing was paid, or agreed to be paid, by the bankrupt, to, or for the benefit of, these creditors, except the twenty dollars. The affirmative is on the opposing creditors to support the allegation of the specification. It was open to them to do so by the testimony of that member of the firm, alleged to have been influenced in its action by the pecuniary consideration, with whom the transaction took place. They have not adduced such testimony, and they have failed to sustain the allegation. I see nothing in the evidence to impeach the honesty and fair dealing of the bankrupt in all respects, and a discharge will be granted to him.

Case No. 9,320.

In re MAWSON.

[1 N. B. R. 271 (Quarto, 41); 1 Am. Law T. Rep. Bankr. 46.] [1]

District Court, S. D. New York. Feb. 5, 1868.

BANKRUPTCY—PROCEEDINGS FOR DISCHARGE—ADJOURNMENT.

Proceedings on the return day of an order to show cause why the discharge should not be granted, can be adjourned by reason of the adjournment of the examination of the bankrupt.

[Cited in Re Seabury, Case No. 12,573.]

[In the matter of George S. Mawson, a bankrupt.]

The above named bankrupt, by Mr. Nye, his counsel, requests the opinion of his honor the district judge, upon the point whether the proceedings, upon the order to show cause why the discharge should not be granted, can be, on the return day of said order, adjourned by reason of the adjournment of the examination of the bankrupt, and also upon the point whether the examination of the bankrupt can be adjourned, beyond the return day of the order to show cause why the discharge should not be granted, without an enlargement of the time for the examination of the bankrupt for cause shown; and the bankrupt states that the petition to be adjudged bankrupt was filed in this matter on the 11th day of July, 1867, the first meeting of creditors was held on the 19th day of August, 1867, and the order to show cause why the discharge should not be granted was returnable December 20th, 1867, and said return day adjourned for the purpose of the examination of the bankrupt by the counsel now applying for another adjournment of said return day, and successively adjourned to the 27th of December, 30th December, 31st December, 4th January, 9th January, and 24th January, and no examinaton was had on the said return days except the 27th December, and 9th of January; and that the counsel for the bankrupt on said 9th of January, tendered him to said opposing counsel for examination continuously until the said 24th day of January, and now again tenders him for examination, but the said counsel declines to examine said bankrupt. And in regard to the certificate, filed by said opposing counsel for the opinion of this court, said bankrupt claims that the question therein stated is not the proper subject matter for a certificate, because the act has provided another particular way for determining whether the bankrupt shall have his discharge or not.

Francis C. Nye, Counsel for Bankrupt.

By JOHN FITCH, Register:

To His Honor Judge Blatchford:

First. The register certifies, that the proceedings upon the order to show cause why the discharge should not be granted, &c., can the same as any other proceedings, be adjourned upon proper reasons shown therefor, and continued by adjournment until the order is either granted or the cause be sent to the district judge, upon the filing of the objections by the creditor as provided for by section 31 of the act [of 1867 (14 Stat. 532)]. Such adjournments are necessitated from the fact that the necessary papers are not often ready for the register to act upon. The examination of the petitioner by a creditor or assignee is the equivalent to the examination

[1] [Reprinted from 1 N. B. R. 271 (Quarto, 41) by permission. 1 Am. Law T. Rep. Bankr. 46, contains only a partial report.]

of a witness at the circuit, and is, by the effect of the bankrupt law, in the nature of a cross-examination. The same rule should apply to the examination of the bankrupt before the register as at the circuit. The examination should proceed regularly with such adjournments as the circumstances of the case require. The register should use a proper discretion in the case before him, and not allow any unnecessary or unreasonable adjournments.

Second. The register would certify to his honor, the district judge, that the lawyers consult their own convenience as to the time of the examination of the bankrupt, and select their own hours to do it in, when they are not otherwise engaged, and in this way make their cases in bankruptcy subservient to their other cases in the state courts. This practice impedes, delays, and hinders the proper proceedings in causes, and most unnecessarily occupies the time of the register, for which he does not often receive any pay. The register certifies, that the statement as set out in the request of the attorney for the petitioner, does not fairly present this case, for the reasons, that almost all the adjournments were by consent of the parties, for their own convenience, or by the neglect of the respective attorneys to attend to their duties in this cause, owing to their other professional engagements. That the adjournments were almost all had on the examination of the petitioner by a creditor whose claim was barred by the two-third act, as was shown by the examination of the petitioner, and the discharge papers; that another creditor procured an order for the examination of the petitioner, and the adjournment on the day of the order to show cause, &c., was had to give time for the judge to pass upon the certificate of the register, as requested by the attorney for the creditor, which the court has done; the register had the power to grant it.

Third. The court having disposed of the question as certified to the court by the register, on the application of the attorney for the creditor as to his rights at this stage of the cause to set up the question of fraud, no question now arises on question 1st.

[For prior proceedings in this litigation, see Case No. 9,317.]

BLATCHFORD, District Judge. In answer to the question as certified in this case, I reply:

First. The proceedings upon the order to show cause why the discharge should not be granted, can be, on the return day of said order, adjourned, by reason of the adjournment of the examination of the bankrupt.

Second. The second question certified is not clearly stated, and I am not sure I understand it. The examination of the bankrupt can be adjourned beyond the return day of the order to show cause why the discharge should not be granted. Such adjournment necessarily operates as an enlargement of the time for the examination of the bankrupt. The presumption is that the register will not grant such adjournment except for good cause shown. The clerk will certify this decision to the register, John Fitch, Esq.

[For subsequent proceedings in this litigation, see Cases Nos. 9,318 and 9,319.]

MAXCY (MARKOE v.). See Case No. 9,093.

Case No. 9,321.

MAXFIELD v. LEVY (two cases).

[4 Dall. 330; 2 Dall. 381.]

Circuit Court, D. Pennsylvania. April Term, 1797.

PRACTICE AT LAW—CITIZENSHIP—JURISDICTION—MOTION TO DISMISS—CONSTITUTIONAL LAW—FRAUD ON COURT.

[1. In an action at law it appeared that the parties are citizens of different states, and therefore within the jurisdiction of the court, but by subsequently discovered evidence it was shown that the real plaintiff was a citizen of the same state as defendant. *Held*, that a motion to dismiss was the proper remedy in order to dispose of the case.]

[2. M., a citizen of Delaware, claiming title under conveyance from W., a citizen of Pennsylvania, brought ejectment against L., a citizen of Pennsylvania, for lands lying in the latter state. It appeared by answer to bill of discovery subsequently filed in equity by L. against M., that M. had paid no consideration to W. for the lands in question, nor had he ever exercised any act of ownership thereover, and that the most he claimed was the bare legal title in trust for W., the equitable owner. Upon this answer as evidence, L. moved in the ejectment case that the action be dismissed for the reason that the real plaintiff for whose benefit the case was brought was a citizen of Pennsylvania, and therefore of the same state as defendant, that the conveyance from W. to M. was for the purpose of enabling W. to maintain the case in the federal court. *Held*, that the whole proceeding shows itself to be an attempt to defraud the court into acquiring jurisdiction not properly belonging to it, and therefore the case must be dismissed.]

[Disapproved in Briggs v. French, Case No. 1,871. Cited in Smith v. Kernochen, 7 How. (48 U. S.) 216; Richardson v. Mattison, Case No. 11,790; Barney v. Baltimore, 6 Wall. (73 U. S.) 288.]

In equity.

IREDELL, Circuit Justice. A motion was made for a rule to show cause why these ejectments should not be dismissed, upon an allegation that it appeared, by an answer to a bill in equity, for a discovery in this court, brought by the defendants in these ejectments, against the lessor of the plaintiff, that they are in reality the suits of a citizen of this state, (viz. Samuel Wallis) though under the name of a citizen of another state, to whom, it is alleged, conveyances were made without any consideration, for the sole purpose of making him a nominal lessor of the plaintiff in these ejectments. A rule to show

cause was granted, and, upon the day appointed, the case was fully heard and argued on both sides, the proceedings in equity on the bill for a discovery having been exhibited to the court and read.

The importance of the present question is evident, because it concerns the constitution and laws of the United States, in a point highly essential to their welfare, to wit, the proper boundaries between the authority of a single state, and that of the United States. This, not only the constitution itself has been anxious to ascertain by precise and particular definitions, but the congress, in carrying into effect that part of the constitution which concerns the judiciary, has been solicitous to preserve with the greatest caution. The strong instance of this is a provision in the judicial act, to the following effect: "That no district or circuit court shall have cognizance of any suit to recover the contents of any promissory note, or other chose in action, in favour of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange." 1 [Story's Laws] 55, § 11 [1 Stat. 79]. This I adduce as a strong instance to show the solicitude of congress on this subject, for the regulation extends to a bona fide assignment in the instances specified, as well as to one mala fide: but the provision goes to all, more effectually to prevent any practices of deception by means of the latter.

Nothing is more evident than that if this be a controversy between citizens of different states, it is a controversy determinable in this court, and of which, therefore, the court must sustain jurisdiction. On the other hand, if it be not a controversy between citizens of different states, but between citizens of the same state, it not being one of those cases which entitle citizens of the same state to any exercise of jurisdiction by this court, it ought not to be determined here. But if it shall appear, from a consideration of the facts, that this is not a case which the lessor of the plaintiff was entitled to bring into this court, it will still remain to be inquired, whether the remedy pursued on the present occasion is proper.

The first question, therefore, is, whether it sufficiently appears to the court, that this is a controversy subsisting between citizens of different states, so as to authorize a dismission of the suit, in case the remedy be in point of law a proper one? The evidence, upon which the charge is alleged, is an answer to a bill filed in the equity side of this court by the defendants in the ejectments, in order to obtain a discovery by the oath of the lessor of the plaintiff. This is admitted to be competent evidence on a question at law, and therefore (supposing the method of proceeding in other respects proper) I am only to consider, if it affords satisfactory evidence of the facts suggested:

The facts admitted by the answer, in substance, are these: That there were certain applications to the land-office of this state for 64 tracts of land, in the county of Luzerne, containing 27,400 acres; that the applications were made (as the respondent has been informed and believes) by and for the use of Samuel Wallis of the county of Northumberland in this state; that in April, 1784, conveyances were executed to Maxfield the present lessor of the plaintiff, by which the legal title to the lands therein described was conveyed and assigned to Maxfield, as he apprehends and believes; that Maxfield paid no consideration, either pecuniary, or of any other nature, for the lands, and, therefore, he apprehends and believes, that the equitable title is in Samuel Wallis; that Maxfield consented to stand the trustee of the lands, for the use and benefit of Wallis, and left the management, direction, and prosecution, of the business to Wallis, by whose direction Maxfield apprehends and believes, that the caveats mentioned in the complainant's bill were filed, and all subsequent proceedings had. In comparing the facts thus admitted with the bill he was called upon to answer, it is very remarkable, that the last interrogatory was expressed in such particular and pointed terms, that if it had been directly and positively answered, it would have been decisive one way or the other. But it is not so answered, and his own counsel now object, that he did not answer directly to the question, and, therefore, the only remedy was to except to the answer for insufficiency, and compel a better answer.

This objection, I think, may be easily obviated by the following considerations. 1st. If the question had been an improper one, it might have been demurred to. By that not being done, it is confessed that the question was proper, and of course it ought to have been answered. And it is little short of an insult on the court now to tell it, that the lessor of the plaintiff purposely declined answering a question fairly put to him, which he might and ought to have answered, but by his not doing it he now sets the court at defiance. 2d. If for want of a fuller answer, no evidence was before the court, the objection might possibly be of weight. But all the other facts admitted by the answer, are open to all proper inferences, as well such as arise from this wilful and insolent omission, as from any other part of the case. The object was to effect a discovery, whether certain conveyances were actually given for the sole purpose of evading the constitutional limits, as to jurisdiction, prescribed to this court. Such a design could be expected only to be disclosed by direct confession, or a number of concurring circumstances. 3d. It does not appear that he will ever give a better answer. He may chuse to go through all the processes of contempt for not answering sufficiently, as he appears already to have done for not answering at all. He may even submit to perpetual imprisonment. Is the case

never to be decided, until he thinks fit to consent it shall be? 4th. The jurisdiction of this court is not prima facie general, but special. A man must assign a good reason for coming here. If the fact is denied, upon which he grounds his right to come here, he must prove it. He, therefore, is the actor in the proof; and, consequently, he has no right, where the point is contested, to throw the onus probandi on the defendant. As this undoubtedly is the general principle, I see no reason to depart from it on the present occasion, when the knowledge of all the circumstances of the case is fully possessed by the lessor of the plaintiff, and he is regularly called upon to disclose them.

For these reasons, I am clearly of opinion, that Maxfield's forbearing to give a fuller answer, is no reason for my not weighing the amount of the answer, which he has thought proper to give; and considering whether it sufficiently establishes the allegations of the defendants in these causes. But it is objected, that Maxfield's answer, though evidence against him, is no evidence against Wallis, who is said to be the cestui que trust, and Maxfield a bare trustee. Answer: Upon the face of these ejectments Wallis's name nowhere appears. Maxfield, therefore, is the only person to be considered here. If a cestui que trust has a right to support an ejectment, but is forced, upon legal principles, to use the name of his trustee, he must take the consequences. This court, as a court of law, cannot punish the trustee for a breach of trust, though in another capacity it may. But if it had been material to have made Wallis a party, a great, if not an insuperable, difficulty has been alleged in doing it. Wallis and the defendants being citizens of the same state, it is very doubtful whether a bill in equity would have lain against Wallis in this court, though it was merely incidental to the suit at law. But, it is clear, that the objection in this case is merely frivolous, because upon the return of the rule to show cause, an ex parte affidavit might be produced. Wallis's affidavit undoubtedly might have been, as well as any others. Why has it not been? No reason has been assigned to show it could not be done, or that he desired, or that his counsel wished, he should do it. Nor has time been solicited for his putting in such an affidavit, though it is so seriously alleged, that it was highly important to him to have had an opportunity of answering this charge.

It is alleged, that Maxfield was a trustee, and as such authorized to come into this court. A trustee for what purpose? There is not the least shadow of evidence, that he was a trustee for any other purpose, than that Wallis should have a colour for suing in this court, in his name. The deed is not even stated to have been delivered. No fair object of the trust is specified. Wallis lived in Pennsylvania; the land lies in Pennsylvania; Maxfield lived in Delaware. What was he to do? It appears, from his own acknowledgment, that he has done nothing hitherto, nor does he state he was to do any thing. But, it is said, a man is not obliged to specify any object of a trust. He may create a trust from mere whim. Admitted. But the law cannot, without absurdity, permit a man to create a trust, for the purpose of defeating a solemn provision of its own. Nothing could be more ridiculous than such a principle. When the constitution has guarded, with the utmost solicitude, against the exercise of a particular authority, so as that, under certain circumstances, one man shall not sue another in a court created under it, can such a court for a moment support a doctrine, that it shall be in the power of such a man, by any contrivance expressly calculated to defeat this object, to render it wholly nugatory? This, indeed, would be to render the laws of our country a farce; to make the constitution a mere shadow; and deservedly to draw upon those entrusted with its execution, an odium which has been industriously, but, I hope, will ever be in vain attempted. But it is said, the system of fictions is not new; and an attempt has been gravely made to induce this court, by flattering expressions, to add to the list of fictions in being, one of its own, in the face of the constitution we are sworn to support, and by every sacred tie bound to maintain inviolate.

It is true, the courts of law in England have countenanced and supported some fictions. Such (for instance) as a fine and recovery, and an ejectment; and, still more exceptionably, fictions to give a jurisdiction, which otherwise could not be maintained. It is sufficient to say of all these, that they originally took place, when very dark notions of law and liberty were entertained; that they are supported now solely on the authority of long usage; and that no court would now dare to set up a new one. No court in America ever yet thought, nor, I hope, ever will, of acquiring jurisdiction by a fiction. And the only fiction ever in general use in America (perhaps with a few exceptions as to fines and recoveries) I believe, has been that of proceeding by ejectment, which is a mere form of action, and so modified as to do no possible injury. It cannot substantially affect any man's right whatever. In order to encourage the court to countenance this scheme, it is said that no injury can arise from this practice, because the decision in this court will be on the same principles, and, it is to be presumed, with an equal regard to justice, in this court, as in a state court. If a serious answer to such an observation is required, it is surely evident, that we are not to assume a voluntary jurisdiction, because, we think, or any others may think, it may be exercised innocently, or even wisely. The court is not to fix the bounds of its own jurisdiction, according to his own discretion. A jurisdiction assumed without authority, would be equally an usurpation, whether exercised wisely, or unwisely. But the fact assumed cannot be

admitted to be true. If this court exercise a jurisdiction in such a case, it may do so after all avenues to a state jurisdiction are for ever closed. That is alleged to be the fact in the present instance. There are, also, other differences, such as regard the place of trial, the venue of the jurors, and other circumstances omitted to be mentioned, because this part of the case is too plain to require any formal discussion.

On this occasion, it may be material to consider whether, on the facts now apparent to the court, Maxfield has any title, either in equity, or at law; because, if he has not, it is evident, the title to be contested must be Wallis's, and not his; and, of course, the subject matter to be decided, is a title in question between two citizens of the same state. 1st. As to equity: He has none by his own acknowledgment. He paid no consideration. He is to perform no duty. He only permits his name to be used, for the support of a fraud on the jurisdiction of the court; a purpose which a court of equity would reject with the highest disdain. 2d. As little, in my opinion, can he support any title at law. 1st. Consider this as a mere bargain and sale. A bargain and sale is of no validity, where no money has been paid. Nothing gives a legal title under the act of H. 8. (concerning uses) which was not an equitable one before that statute. At that time no bargainee could have compelled a bargainor to convey, who had received no money. Therefore, since the statute, no use can arise on such a deed, without some money to support it. 2d. Allowing the highest efficacy to this deed under the act of assembly. This can only mean, that what a man can lawfully grant by any form of conveyance, shall be sufficiently granted in this form. Of course, if under any other form of conveyance, owing to technical difficulties, such a purpose could succeed without redress, a deed, professedly a bargain and sale, is not to have its influence extended, merely that an illegal purpose should take effect, under colour of form. The intent of the act certainly was, that the want of form should not defeat the intention of an honest, but unskilful conveyance; but surely not to smooth the path of injustice, by converting a rightful estate into a wrongful one. 3d. But admitting it to be any form of conveyance you please, then I say, that a court of law will not, any more than a court of equity, support a deed formally good, but substantially fraudulent. And whether the fraud be of a moral nature, for the purpose of doing a wilful injustice, or the act be, as the lawyers term it, in fraudem legis (that is, to evade some law) the law will equally interpose, to prevent its own principles from being made mere instruments, to defeat its own purposes.

There is no act in law, within my recollection, which fraud will not vitiate. It will not vitiate a feoffment, which is a very strict conveyance, requiring no consideration, and passes by an actual livery. It will vitiate a fine, though a solemn transaction in a court of justice, and peculiarly favored. It will even deprive a party of the benefit of a judgment deliberately given. Conveyances to defeat creditors (however formally agreeable to law) are held absolutely void, at least as against them. So, also, in the common case of usury, for which so many contrivances have been devised. No contrivance, no colour, no form whatever, can protect any transaction, which really appears to have been usurious, from being declared so. The application of these principles is obvious. If (as I observed before) the deed in question is to be considered as a mere bargain and sale, it is absolutely void for want of legal consideration (which must be money alone) to support it. If it is to be considered as any other kind of conveyance, it having no consideration whatever but an illegal one (that of defeating the constitution and laws of the United States in a most essential point) it is at least void as to that purpose, and, therefore, does not authorize Maxfield to come into this court. I, therefore, conclude with difficulty, that Maxfield has neither a legal, nor an equitable, title to authorize him to come into this court.

The only remaining consideration is, as to the remedy, which, from the first, was the only difficulty I found. I will venture to lay it down as an unquestionable principle, that no grievance can arise in the law, but some remedy may be applied to it. The present grievance, therefore (which, if unredresssed, will, in any case like the present, enable two persons, at their pleasure, to do injustice to a third, and force this court to exercise a jurisdiction never delegated to it) must admit of some remedy. Only three have been suggested, in the present stage of the proceedings. 1st. The method now under consideration. 2d. A plea to the jurisdiction. 3d. An injunction in equity. I will consider the two last first; for, if they are removed out of the way (as I think they must be) it will facilitate our consideration of the first. As to a plea to the jurisdiction. This can be of no avail, unless not only the fact, at the proper time of pleading, be known to the defendant, but that he has disinterested proof of it. This, in a thousand instances, would be impossible; and in no instance can be expected. To insist on this, therefore, as the only method, would leave the constitution, and the law, in almost every instance, open to certain evasion. It consequently cannot be admitted, that this is the only method of redress. With regard to a bill in equity. I will not say, equity ought not to interpose a remedy in any case. But it seems most proper, that a court of law should support its own jurisdiction, on its own principles, and, if proof can be obtained, I conceive it is necessarily incident to every court to take care, that its jurisdiction be not encroached upon, or in other words, that the court be not made either voluntarily, or involuntarily (if it can prevent it) an usurper of jurisdiction not belonging to it. In this case, the aid of equity

may be useful (as it has been on the present occasion) in compelling a discovery; but there, I think, its interference ought to stop, unless the power of the law court over the action has entirely ceased; as for instance, after a judgment, in which case (but in which, perhaps, alone) equity might properly grant an injunction, to prevent a party availing himself of his own fraud.

The only remaining remedy suggested (or which occurs to me) in the present stage of the proceeding, is that now under consideration; and, of course, this must be adopted, if an interference by the court in the present stage of the cause is proper. It is, however, objected, that the court ought not to interfere at present, but to permit the case to go before the jury, who may find for the defendants, if they believe the facts suggested, and apply the law accordingly. If this case had, indeed, gone before the jury, I should have had no difficulty in telling them, that admitting the truth of the facts as stated, the lessor of the plaintiff had, in my opinion, no title; and, if the jury had found accordingly, redress (though late) could be obtained.

But, at present, I do not think myself at liberty to submit the case to the jury, for the following reasons: 1st. The court is the proper guardian of its own jurisdiction. It is alone responsible for it, and must, therefore, take care that it neither abandons a jurisdiction rightfully belonging to it, nor usurps that which does not. 2d. Admitting that a plea to the jurisdiction is not the only remedy, for the reasons I have given, upon complaint made of any fraud on the jurisdiction having been practised, if the complaint is supported on good grounds, it is just that an immediate inquiry should be made into it, in order that if any injury to a party has been hitherto unavoidably sustained by any such fraud, it may be put a stop to, as soon as possible. To compel a party, in such a case, to stay in court, until a jury shall be summoned and convened, to try a general issue, would be a voluntary exercise of jurisdiction, after the court entertained reason to doubt, at least whether they had any. 3d. To swear a jury is an exercise of jurisdiction. With what propriety can I order that, after being fully convinced from evidence, admitted to be competent, that the court hath no jurisdiction at all? 4th. Suppose the jury in this case should find for the plaintiff, when the court was thoroughly convinced it had no jurisdiction of the cause? Can the court give judgment for the plaintiff in such a case? Surely not. If, therefore, a verdict to that effect, could produce no good, why should a verdict be required of them? Because this would not be an ordinary case concerning a new trial; in which case, after two or three verdicts the same way, a court might be compelled to stop, and proceed no further. But if there were a hundred verdicts in a case, in their opinion, not within their jurisdiction, they could not give judgment without voluntarily usurping a power not belonging to them. 5th. In this case there is no occasion for a jury to try the facts, because the facts are not denied, and the court surely will not call a jury to decide a question of law, and a question which, as I have just observed, they could not decide finally.

Maxfield's allegations, in this case, are either a direct confession, or as to some points (if the expression is proper) a nil dicit. In neither case is a jury wanting. A complete denial can alone entitle a party to have facts tried by a jury. There is no denial in this case but of the merits, upon which a jury can be sworn; which certainly would be premature when facts had already been confessed sufficient to oust the jurisdiction. Had he positively denied, indeed, the allegations of the bill in equity, the jury must have been sworn; for, as a judge, I certainly could not, in any shape, determine on an issue of fact. But as he had not thought proper to deny them, but, in my opinion, substantially confessed every thing, to show that the court had no jurisdiction of the cause; I consider myself bound to order these ejectments to be dismissed, and do accordingly order them to be dismissed with costs.

Mr. William Tilghman, one of the counsel for the defendants, quoted a case in Saviry's Reports (page 12), which Judge Iredell thought much in point, and meant to have declared so, in delivering his opinion, but inadvertently omitted it.

See Worlay v. Harrison, Dyer, 249; 2 Inst. 215; 21 Viner, 535, 536, tit. "Vacat."

Here one of the counsel interfered, and asked the judge whether he would order costs in a case where he declared the court had no jurisdiction.

The judge answered, that that circumstance did not occur to him; he acknowledged he had committed a mistake in that part of the order. But, if it was in his power, he would order double costs.

NOTE. In the case of Brown v. Arbunkle [Case No. 1,990], in the circuit court, at October term, 1806, it appeared, upon bill and answer on the equity side of the court, that the lessor of the plaintiff was a citizen of the state of New York, and the defendant was a citizen of Pennsylvania; that the former was a member of the population company, who had purchased extensive tracts of land, on the northwestern boundary of Pennsylvania; that the land, so purchased, was held by trustees (all citizens of Pennsylvania) for the use of the company; that the trustees had conveyed to the lessor of the plaintiff his portion of the land (including the premises mentioned in the declaration) in severalty; and that the present ejectment was founded upon that conveyance.

The defendant, upon these facts, and upon the authority of Maxfield v. Levy, and Hurst v. Hurst [Case No. 6,929], moved to strike from the record this ejectment, and others in the same predicament. But the motion was overruled by the court; and this distinction taken:

Washington, Justice. In the cases cited, the deeds were executed, with a collusive intention, to give a jurisdiction to the court, which the court could not possess without them. The objection proceeded on two grounds: 1st. On the equity of the statute provision, which declares, that a suit shall not be maintained in a federal court, by the assignee of a promissory note, or other chose in action (with the single exception of foreign bills of exchange) unless it could have been brought there by the original party. And,

2d. On the manifest attempt, by a fraud, to create jurisdiction. But in the case now under consideration, the lessor of the plaintiff would have had a right, as a citizen of New York, to apply to the equity side of the court, to compel the trustees to convey his share of the trust estate to him: and if the trustees have only voluntarily made a conveyance, which the court would have decreed, surely we cannot call it a fraudulent deed, or refuse to take cognizance of a suit founded upon it, between a citizen of New York, and a citizen of Pennsylvania.

MAXON (UNITED STATES v.). See Case No. 15,748.

MAXWELL (AGUIRRE v.). See Case No. 101.

MAXWELL (ALSOP v.). See Cases Nos. 263 and 264.

MAXWELL (BANGS v.). See Case No. 841.

MAXWELL (BAXTER v.). See Case No. 1,126.

MAXWELL (BISCHOFF v.). See Case No. 1,438.

Case No. 9,322.

MAXWELL et al. v. The BROTHERS and The LADY FRANKLIN.

[1 Chi. Leg. News, 73.]

Circuit Court, N. D. Illinois. 1869.[1]

COLLISION—STEAM VESSEL — CROWDED HARBOR—DUTY TO SLOW DOWN—BOTH IN FAULT.

[It is the duty of all vessels, and especially such as are propelled by steam, on entering a narrow and crowded harbor, to slow down. A steam vessel violating this rule will not be exonerated from blame in case of collision, although the colliding vessel was also in fault in taking the wrong course, and for not signaling.]

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

[This was a libel in admiralty by John C. Maxwell and others, owners of the schooner Supply, against the steamtug Brothers and the propeller the Lady Franklin, for damages resulting from a collision. From a decree of the district court in favor of libellants (Case No. 1,969), the owners of the propeller appeal.]

Miller, Van Arman & Lewis, for libellants.
Rae & Mitchell, for the Lady Franklin.
H. F. White, for the Brothers.

DAVIS, Circuit Justice. This was a cause of collision in the Chicago harbor, and near its entrance. The district court found the tug, schooner, and propeller were each in fault, and decreed that each should pay one-third of the loss. The schooner and tug were satisfied with the decree, but the propeller took an appeal; and the sole question is whether the decision against her is correct.

The tug was proceeding with the schooner towards the lake, and, after passing through Rush Street bridge, crossed to the north side of the river without signaling the propeller, (which was then entering the harbor,) or obtaining her permission to do so. In the absence of this signal or permission, the tug should have kept to the starboard side of the river; and because she did not, was in fault.

It is insisted on the part of the propeller, as she kept her own side of the river, she was free from blame. This position is not well taken. It is the duty of all vessels, especially those propelled by steam, in entering a narrow harbor like the Chicago river, where the dangers of navigation are much greater than in the open lake, to use great caution. The interests of commerce, as well as the safety of life and property, imperatively require that courts should enforce this duty. No steamboat should enter a harbor like this, where different kinds of vessels are constantly passing, without checking down her speed to a point that would allow only a proper steerage way, and at the same time leave the boat under easy control. The master of the Franklin failed to check the speed of his boat down to this point, although the tug and tow were in plain sight, descending the river. If this plain duty had been performed, this collision would not have occurred; or had it occurred, would not have been so disastrous.

The fault of the tug in taking the wrong side of the river did not excuse or palliate the fault of the Franklin. The Franklin was bound to reduce her speed, in proper season, to the necessary rate, regardless of the conduct of the tug in violating the ordinary rules of navigation. In no other way, in case of collision, could she be freed from responsibility.

But, it is said, if the Franklin was in fault, the court erred in the rule of assessment of damages. This may, or may not, be true; but, if true, the error is in favor of the Franklin, of which she cannot complain.

The only serious question in this case is, whether the Franklin should not have been made to pay one-half of the loss.

The decree of the district court is affirmed.

[1][Affirming Case No. 1,969.]

MAXWELL v. The BROTHERS and The LADY FRANKLIN. See Case No. 1,969.

Case No. 9,323.

MAXWELL et al. v. CALL et al.

[2 Brock, 119.][1]

Circuit Court, D. Virginia. Nov. Term, 1823.

REAL PROPERTY—DEVISE—ISSUE—RULE OF PERPETUITIES.

A testator devises his estate to his four brothers and sisters, and to their children; but if "they should all die without leaving any issue of the body of either of them alive at the

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

time of the death of the survivor of them; or if such issue should all die before attaining the age of twenty-one years aforesaid, then I desire, &c." The term "issue" comprehends as well the more remote descendants as the children of the devisees, and, consequently, the remainder over is too remote, being limited to take effect on a contingency which may not happen during a life in being, and twenty-one years afterwards.

[This was a bill in equity by Maxwell and others against Call, executor of Means, and others.]

MARSHALL, Circuit Justice. This suit is brought on the chancery side of this court, for one moiety of the residuary estate of Robert Means, deceased, which the plaintiffs claim under his will. The testator directs his whole estate to be sold, and the proceeds to be invested in stock, at the discretion of his executors. After several legacies, he directs the residue to be divided into four equal parts, and gives the dividends or interest of one of the said parts to his sister, Nancy Maxwell, during her life, and after her death, he gives the principal of the said fourth part to all and every of the children of the said Nancy Maxwell who may attain to the age of twenty-one years. In case of infancy, the children to be maintained on the dividends; but if the said Nancy Maxwell should die without leaving any issue of her body alive at the time of her death, or all such issue of her body should die before attaining to the age of twenty-one years, then he gives the principal of the said fourth part in the same manner, and to the same persons, as the other three-fourths are given. The other three-fourths are given—one to his brother, William Means, for life, and afterwards to his children; one to his brother, George Means, for life, and afterwards to his children; and the other to his sister, Elizabeth Means, for life, and afterwards to her children, in the same words as are used in the bequest to Nancy Maxwell and to her children. Then comes the following clause: "But if the said Nancy Maxwell, William Means, George Means, and Elizabeth Means, should all die without leaving any issue of the body of either of them, alive at the time of the death of the survivor of them, or if such issue should all die before attaining the age of twenty-one years, as aforesaid, then I desire the said stock to be divided into three equal parts, to be disposed of as follows, &c."

Nancy Maxwell, in the will mentioned, is dead, leaving the complainant, W. M. Maxwell, her only child, who has attained his age of twenty-one years. George and William Means died intestate, and without issue, in the lifetime of Nancy Maxwell. Elizabeth Means intermarried with William Ker, who is since dead. She is a plaintiff in the bill, and the infant plaintiff, Robert Ker, is her only child. The complainant, William M. Maxwell, claims two-fourths of the said stock, and prays that a moiety of the lands may be conveyed to him, instead of its remaining in the hands of the executor, to be sold as directed in the will. He contends that, on his attaining his age of twenty-one years, and the death of his mother, his rights became absolute by the happening of the contingency on which the legacy was to vest, and that he is also entitled to one moiety of the shares of George and William Means immediately, and to the whole property, should Elizabeth then die without leaving any child alive, or should that child die before attaining his age of twenty-one years. If this be not the proper construction of the will, he insists that the limitation over is too remote, and therefore void. The executor resists this claim, and contends that the limitation over is not too remote, and that nothing vests absolutely in the legatees until the death of Elizabeth Ker, who is the survivor of the four legatees for life.

Considering the bequests to the children of each of the testator's brothers and sisters separately, without taking into view the effect which the ultimate limitation in remainder may have on them, it is very clear that the portion allotted to the children of Nancy Maxwell, would vest absolutely in the plaintiff, William M. Maxwell. His mother is dead; he is her only child; and he has attained his age of twenty-one years. The contingencies mentioned in this part of the will have all happened, and the title of William M. Maxwell to one-fourth of the fund is complete, so far as it depends on this part of the will.

The legacies to the children of George and William Means can never take effect, they having both died without issue. It becomes, therefore, necessary to inquire, whether the two-fourths devised to the children of these two brothers be disposed of during the life of the survivor of the testator's sisters, in the clause which gives the whole property over, if there be no issue of any of the brothers and sisters living when that event takes place, or whether there be an intestacy for that time. And in making this inquiry, the court will also consider the influence which this clause may have on the preceding bequests. The words are: "But if the said Nancy Maxwell, George Means, William Means, and Elizabeth Means, should all die without leaving any issue of the body of either of them alive at the time of the death of the survivor of them, or if such issue should all die before attaining the age of twenty-one years, as aforesaid, then I give the said stock, &c." It is very clear, that this limitation over must take effect with respect to the whole property at the same time, and on the happening of the same event. No interest can vest in the remainderman under this clause, in the stock devised to the children of George and William, until it also vests in the stock devised to Nancy Maxwell and Elizabeth Means. It is entirely unimportant whether these words

create cross remainders among the four families of the legatees until the death of the survivor, and the happening of the contingency on which the ultimate limitation is made to depend, or the testator is intestate until that contingency happens, with respect to those two-fourths, because the property passes for that time to the plaintiffs, under either construction. The real and only inquiry is, as to the effect of the last clause on the whole of the property in any event which can now happen.

The interest is given to Nancy Maxwell for her life; the principal is given to such of her children as may attain to the age of twenty-one years. If the clause stopped here, the remainder would vest in any child who should attain the age of twenty-one, to open and let in others who should afterwards attain that age. The will proceeds: "But if the said Nancy Maxwell should die without leaving any issue of her body alive at the time of her death, or all such issue of her body should die before attaining to the age of twenty-one years," then the property is given over. The word "issue" is known to comprehend, in its usual sense, all issue to the latest time. Nancy Maxwell is not dead without issue of her body, although she may have no child living, so long as any of her descendants in the direct line remain. Is there any thing in this will to confine the meaning of the term to children? I think there is nothing. The will is penned with great attention to technical language, and it is not to be presumed that technical terms are used without a knowledge of their meaning, and an intention to use them in their legal sense. The term "children" is abandoned in this part of the will for "issue," because the latter word conveyed the meaning of the testator. If he intended that, if Nancy Maxwell should have children who should die under twenty-one, leaving children, those last mentioned children should represent their parent, and take the property given to her, he has used the very words which would produce that effect. No intent is discovered by the words of the will, or in the relations of the parties, to alter the legal construction of these words.

I proceed next to consider the last clause. "But if the said Nancy Maxwell, George Means, William Means, and Elizabeth Means, should all die without leaving any issue of the body of either of them alive at the time of the death of the survivor of them, or if such issue should all die before attaining the age of twenty-one years, as aforesaid, then I desire, &c." The word "issue" is unquestionably used in this clause in the same sense in which it is used in the particular bequests to the children and families of each of his brothers and children. If, on the death of the survivor of his brothers and sisters, there should be no child of either of them living, but should be grandchildren, they would not all be dead without issue, and the remainder would not take effect. The only difficulty I have ever felt in the case remains to be considered. It depends on the meaning of the words, "if such issue should all die before attaining the age of twenty-one years." Does the word "such" restrict the issue which may take to those which are living at the death of the survivor, or may the issue of such issue take? If, for example, on the death of Elizabeth Ker, the survivor of the testator's brothers and sisters, the issue of all of them should be under the age of twenty-one years; if no one of the issue then living should attain the age of twenty-one, but should leave issue that do attain that age, would such issue take? Or would the property pass to those in remainder? According to a literal interpretation of the words, it would pass to those in remainder; but I think the will discloses enough to show that this was not the intent of the testator. Three of his brothers and sisters had no children, certainly, at the date of the will. The testator, therefore, could have no affection for them, but as the descendants of his brothers and sisters. In this view, his desire to provide for them would extend to the whole family, and not be limited to their children, or to such issue as might happen to be living at the death of the survivor, to the exclusion of those who might be born afterwards. He obviously prefers all the descendants of his brothers and sisters to the more remote relations who are the remaindermen. To provide for those descendants, per stirpes, is his primary object. The provision for the more remote relations, is postponed till the extinction of the issue of his brothers and sisters. This primary intent, I think, though with some doubt, must prevail, and if all the issue alive at the death of the survivor should be under age, and should die under age, leaving that issue, I think such issue would take. If I am correct in this, the remainder is too remote, because it is limited to take effect on a contingency which may not happen during a life in being, or twenty-one years afterwards.

If I am correct in this, the plaintiffs are entitled, and I perceive no objection to directing a conveyance of the lands, instead of leaving them to be sold by the executor, it being understood, that the terms on which such conveyance shall be made, are adjusted between the parties.

MAXWELL (CARNES v.). See Case No. 2,417.

MAXWELL (CHRIST v.). See Case No. 2,698.

MAXWELL (CORKLE v.). See Case No. 3,231.

MAXWELL (CRAIG v.). See Case No. 3,334.

MAXWELL (CROOKE v.). See Case No. 3,413.

MAXWELL (CROOKES v.). See Case No. 3,415.

MAXWELL (CROWLEY v.). See Cases Nos. 3,448 and 3,449.

MAXWELL (DUTILH v.). See Cases Nos. 4,207 and 4,208.

MAXWELL (FIEDLER v.). See Case No. 4,760.

MAXWELL (GODDARD v.). See Case No. 5,492.

MAXWELL (GRANT v.). See Case No. 5,699.

MAXWELL (GRISWOLD v.). See Case No. 5,838.

MAXWELL (HARRIMAN v.). See Case No. 6,105.

MAXWELL (HERTZ v.). See Case No. 6,432.

MAXWELL (HOWLAND v.). See Case No. 6,799.

MAXWELL v. The LADY FRANKLIN. See Cases Nos. 7,982–7,984.

MAXWELL (LENNIG v.). See Case No. 8,243.

MAXWELL v. LEVY. See Case No. 9,321.

MAXWELL (LOEWENSTEIN v.). See Case No. 8,462.

MAXWELL (MANHATTAN GASLIGHT CO. v.). See Case No. 9,023.

MAXWELL (MASSETT v.). See Case No. 9,261.

MAXWELL (MORRIS v.). See Case No. 9,834.

MAXWELL (MUNSELL v.). See Case No. 9,932.

MAXWELL (OGDEN v.). See Case No. 10,458.

MAXWELL (PIERSON v.). See Case No. 11,159.

MAXWELL (PONSOT v.). See Case No. 11,267.

Case No. 9,324.

MAXWELL v. The POWELL.

[1 Woods, 99.] [1]

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

CARRIERS — FAILURE TO DELIVER GOODS — CONNECTING LINES—OFFSET OF FREIGHT—SHIPPING —GENERAL CREDITOR—COMMON LAW ACTION—MARITIME LIENS.

1. It is no reason way a libellant should not recover for the failure of the defendant to deliver goods according to contract, that no credit is given for the freight earned by defendant in carrying other goods. Such claim should be set up by cross libel.

2. Goods were shipped at New Orleans on the Caddo for Jefferson, Texas, and a through bill of lading given. At Shreveport the trip of the Caddo terminated, and all the goods with the bill of lading were transferred to the Powell. She delivered a part of the goods and demanded freight from the owner. In a suit to recover the value of a portion of the goods which was not delivered by the Powell, *held*, that she was liable for the goods lost and could not turn the libellant over to the Caddo for his remedy.

3. A general creditor of a ship has no lien on the vessel.

4. When she is attached by process from a common law court, nothing is or can be seized but the interest of the owner remaining after the maritime liens are satisfied.

5. A sale under such seizure conveys only the title of the owners subject to the maritime liens.

6. The fact that the proceeds of the sale were absorbed in the payment of certain preferred maritime liens, and were not sufficient to pay them in full, so that the attaching creditors received nothing, does not relieve the vessel from other maritime liens. A common law court is without power to divest maritime liens except by payment.

[Cited in Crosby v. The Lillie, 40 Fed. 368.]

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

In admiralty.

Wm. M. Randolph, for libellant.

Gustavus Schmidt, for claimant.

WOODS, Circuit Judge. The libellant claims to recover the sum of three hundred and twenty-five dollars and seventeen cents, by reason of the failure of defendant to deliver goods of that value, the property of libellant, which the defendant received at Shreveport, Louisiana, and undertook to transport to Jefferson, Texas. One Nicholas Quizzaro, claimant, intervenes and defends upon the following grounds: 1. Because the libellant has failed to establish his demand by proof. 2. Because he refuses to do justice by giving credit for the freight earned by the steamer in transporting the goods of libellant. 3. Because libellant should have proceeded against the steamer Caddo, with which the contract of affreightment was made, and by whose master the bill of lading was signed. 4. Because the claimant purchased the steamer Powell at a judicial sale made by order of the 4th district court of the parish of Orleans, in the state of Louisiana, in an action of foreign attachment against the owners. 5. Because the proceeds of said judicial sale were absorbed by the claims of privileged creditors, so that the attaching creditors received nothing, and if libellant had intervened in the case he would have received nothing. 6. And, finally, because the libellant has slept upon his claim and is not entitled to the aid of this court.

Of these defenses in their order:

(1) I am satisfied, from a careful scrutiny of the testimony, that the claim of libellant is established. The captain of the Powell admitted in substance the receipt of the goods for carriage from Shreveport to Jefferson. He admitted the failure to deliver the goods at Jefferson; promised to bring them up on his next trip and failed to do so. He agreed to pay their value, and said he had paid it to Phelps & Co., correspondents of libellant in Shreveport, which was false. The value of the goods is sufficiently established by the testimony of libellant and of his clerk.

(2) If the defendant has any claim against libellant for freight it should have been set

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

up by cross libel, and the failure of defendant or claimant to do this cannot be alleged as a reason why libellant should not recover.

(3) It appears from the evidence that the goods of libellant were shipped at New Orleans on board the steamer Caddo, and a through bill of lading given by the Caddo. At Shreveport the trip of the Caddo terminated, and the goods with the bill of lading were transferred to the Thomas Powell. She carried the larger part of the goods to Jefferson, but failed to deliver the portion sued for in this action. Her master presented the bill of lading issued by the Caddo and demanded freight of the libellant. In undertaking to carry the goods from Shreveport to Jefferson, under the Caddo's bill of lading, she assumed the duties and responsibilities of a common carrier, and after delivering a portion of the goods and demanding freight, it is too late for her to claim exemption from liability and to turn the libellant over to the Caddo for his remedy.

(4) The main and interesting question in the case is, whether the sale of the Powell, in a proceeding by foreign attachment in the state court of Louisiana, divests the lien of the libellant?

The record of the state court, which has been submitted to us, shows that the suit in attachment was brought by the plaintiffs in attachment to recover the amount of a debt due generally from the owners of the Powell to the plaintiff; that the owners were nonresidents of the state of Louisiana, but that they had property, to-wit, the steamer Thomas Powell, situate in the parish of Orleans in said state. The steamer was seized by virtue of the writ of attachment, and was sold. Certain seamen and material men intervened, and their claims exceeded the amount for which the steamer sold. A general creditor of a shipowner has no lien on the vessel. When she is attached by process from a common law court, nothing is taken or can be taken, but the interest of the owner remaining after the maritime liens are satisfied. The seizure does not reach them. The thing taken is not the whole interest in the ship, and the only interest which this process can seize is a secondary and subordinate interest, subject to superior and paramount claims of lien holders.' Under the attachment process from the state court, nothing was legally in the custody of the sheriff but the interest of the owner, whatever it might prove to be after the liens were adjusted. The common law process was not a proceeding in rem to charge the vessel with the debt, for the creditor had no lien upon her, and the court no jurisdiction over anything but the owner's residuum. The whole ship could not be sold so as to convey an absolute right of property to the purchaser.

The constitution and laws of the United States confer the entire admiralty and maritime jurisdiction expressly upon the national courts, and admiralty and maritime liens are therefore outside of the line which marks the authority of a common law court of a state and excluded from its jurisdiction. And if a common law court sells the vessel to which the lien has attached upon condemnation to pay the debt, or on account of its perishable condition, it must sell subject to the maritime liens, and they will adhere to the vessel in the hands of the purchaser and of those claiming under him. Certain Logs of Mahogany [Case No. 2,559]; Poland v. The Spartan [Id. 11,246]; The Bolivar [Id. 1,610]. While, therefore, we hold that the judicial sale by order of the state court conveyed the title of the owners to the purchasers, it did not divest the maritime liens, but the purchaser took subject to those liens. The defense, that the proceeds of the vessel under the sale in the state court, were not sufficient to pay preferred liens, it seems to me is not tenable. Non constat, that the vessel would have brought sufficient to pay all liens, if sold by an order of a court of admiralty, by which the title to the steamer itself would have been conveyed. The purchase price at the sheriff's sale may have been insufficient to pay the claims of intervening lien holders because the purchaser knew that he was not receiving an unincumbered title.

It only remains to consider whether the libellant has lost his lien by delay. An examination of the testimony satisfies me that he has been quite vigilant in the assertion of his claim. It is not pretended that he had any actual notice of the proceedings in the state court. He endeavored to have the Powell seized both at Jefferson, Texas, and at Shreveport, and failing in these attempts, he, without unreasonable delay, commenced this proceeding. I am of opinion, therefore, that there should be a decree in favor of libellant against the Thomas Powell for the value of the goods not delivered. Decree accordingly.

[See Case No. 1,573.]

MAXWELL (REYNOLDS v.). See Case No. 11,731.

MAXWELL (RHEIMER v.). See Case No. 11,738.

MAXWELL (RICH v.). See Case No. 11,759.

MAXWELL (RILEY v.). See Case No. 11,838.

MAXWELL (ROCKVILLE & WASHINGTON TURNPIKE ROAD v.). See Case No. 11,985.

MAXWELL (ROLLER v.). See Case No. 12,025.

MAXWELL (ROOSEVELT v.). See Case No. 12,034.

MAXWELL (SADLER v.). See Case No. 12,207.

MAXWELL (SCHMAIRE v.). See Case No. 12,460.

MAXWELL (STALKER v.). See Case No. 13,283.

MAXWELL (STEEGMAN v.). See Case No. 13,344.

MAXWELL (THOMSON v.). See Case No. 13,983.

MAXWELL (TUCKER v.). See Case No. 14,224.

MAXWELL (UNITED STATES v.). See Cases Nos. 15,749 and 15,750.

MAXWELL (VACCARI v.). See Case No. 16,810.

MAXWELL (VAN ZANDT v.). See Case No. 16,884.

MAXWELL (WARBURG v.). See Case No. 17,142.

MAXWELL (WELD v.). See Case No. 17,374.

Case No. 9,324a.

MAXWELL v. WILLIAMS.

[Hempst. 172.] [1]

Superior Court, Territory of Arkansas. Jan., 1832.

DISMISSAL OF APPEAL—RELEASE OF BAIL.

1. After the dismissal of an appeal, the appellate court has nothing further to do with the case.

2. Delay in suing out execution releases bail under the statute.

Appeal from Arkansas circuit court.

Before JOHNSON, ESKRIDGE, and CROSS, JJ.

OPINION OF THE COURT. The record in this case shows the following state of facts: [Arden] Williams, the appellee, obtained a judgment before a justice of the peace, against Walter Tucker and James Bennett, on the 13th of March, 1830; and on the same day [John] Maxwell, the appellant, became bound as special bail for the stay of execution, which expired on the 13th of July, 1830. On the 17th of August, upwards of a month after the expiration of the stay, an execution was issued on the judgment, and returned the 7th of September, indorsed "No property found." A scire facias was sued out on the 9th of December following, requiring Maxwell to show cause why an execution should not issue against him, jointly with Tucker and Bennett, and upon the same day an execution was awarded by the justice. Maxwell appealed to the circuit court, and at the first term thereafter, on the motion of Williams, by his attorney, the appeal was dismissed, and the judgment of the justice confirmed. From this decision Maxwell prayed an appeal to this court.

Two points are relied on to reverse the judgment: First, it is contended that the circuit court erred in confirming the judgment of the justice, after dismissing the appeal; and, second, that Williams, by failing to issue execution on his judgment for upwards of thirty days after the expiration of the stay, released the special bail. It will be necessary only to notice the first objection. After dismissing the appeal, it is very clear that the circuit court had nothing further to do with the case. It then stood before the justice of the peace in the same situation it did before the appeal was prayed. If the appeal had been entertained Maxwell undoubtedly had the right to show cause why an execution should not issue against him in the same manner he could have done upon the return of the scire facias before the justice. Upon the second point, were it necessary to decide, there would be a unanimity of opinion, that the delay to sue out execution released the bail. Execution must be issued against the principal immediately on the expiration of the stay. Ter. Dig. 392. Judgment reversed.

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

MAXWELL (WILSON v.). See Case No. 17,824.

MAXWELL (WINSLOW v.). See Case No. 17,882.

Case No. 9,325.

In re MAY et al.

[7 Ben. 238; [1] 9 N. B. R. 419.]

District Court, S. D. New York. March 28, 1874.

BANKRUPTCY—PROVABLE DEBT—RENT—MONTHLY INSTALMENTS—TIME OF BANKRUPTCY.

1. Premises were leased by C. to M. & B., by lease dated February 17th, 1871, and expiring May 1st, 1873. The rent was payable monthly, the rent for January, 1873, becoming due February 1st, 1873. On the 28th of December, 1872, a petition in bankruptcy was filed against M. & B., and the adjudication was made before February 1st, 1873. C. filed a proof of debt for the rent from January 1st, 1873, to May 1st, 1873, to which the assignee objected: *Held*, that, under the 19th section of the bankruptcy act [of 1867 (14 Stat. 525)], the rent for that period was not provable.

[Cited in Bailey v. Loeb, Case No. 739; Re Hufnagel, Id. 6,837.]

2. The words "time of the bankruptcy," in that section, mean the time of the filing of the petition.

[In the matter of August May and Aaron Berwin, bankrupts.]

By the register:

[I, the undersigned register in charge of the above entitled matter, do hereby certify that the firm of T. H. & T. W. Conkling have proved a claim before me against the said estate, of one thousand one hundred and one dollars and sixty-four cents, for rent of premises leased by them to the bankrupts from the 1st day of May, 1871, to the 1st day of May, 1873, at a rental of three thousand five hundred dollars, payable monthly on the first day of each and every

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

month, beginning with the first day of June, 1871, claiming the sum aforesaid as and for the rent due under the said lease, from January 1st, 1873, to May 1st of the same year, after crediting the sum of sixty-five dollars, paid them by the assignee for the use of said premises after the bankruptcy. The petition in bankruptcy was filed on the 28th day of December, 1872, the rent of said premises having been paid up to the 1st of January, 1873. The assignee objects to the proof on the grounds: (1) That after the bankruptcy he surrendered the premises to the landlords by delivering the keys to their agents. (2) That he hired the premises from the agent of the landlords, during the month of January, 1873, at a stipulated price of five dollars a day, and paid for the days he used and occupied the same, the sum of sixty-five dollars. (3) The assignee claims that the claim is not of the character specified in section nineteen, and cannot, therefore, under the last clause of that section, be allowed against the estate; that the language of the seventh clause of section nineteen, providing that, "where the bankrupt is liable to pay rent, which rent falls due at fixed or stated periods, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy," followed by the words in the last clause of the section, "no debt, other than those above specified, shall be proved or allowed against the estate," in effect forbids the proving of a claim for rent which accrued subsequently to the bankruptcy, and the parties desire said issue to be certified to the court for decision. Respectfully submitted.][2]

Brewster & Crowell, for lessors.
T. Saunders, for assignee.

BLATCHFORD, District Judge. T. H. & T. W. Conkling have proved a claim against the bankrupts for $1,101 64 and interest from May 1st, 1873, "being a balance for rent of premises" let to the bankrupts by T. H. & T. W. Conkling, by a lease bearing date February 17th, 1871, and expiring May 1st, 1873. The rent claimed in the proof is for the four months from January 1st, 1873, to May 1st, 1873, at the rate of $291 66 per month, less a credit of $65 00 as paid. The assignee of the bankrupts has filed with the register an objection to such claim and proof of debt, on the ground that the alleged debt or claim is not provable against the said estate under the bankruptcy act, "for the reason that the said debt or claim, or any part thereof, did not exist at the time of the filing of the petition for the adjudication of bankruptcy herein, to wit, the 28th day of December, 1872." The register has taken testimony in the premises, not under an order made by him, in pursuance of general order No. 34, on a petition to him for the re-examination of the claim, but apparently by the consent of the parties. Thereupon the register has certified to the court, under section 4 of the act, the question or issue as to whether the claim should be allowed. He also has certified the testimony and the proof of claim. The lease forms a part of the testimony.

The petition in bankruptcy was filed on the 28th of December, 1872. The rent under the lease was fully paid up to the 1st of January, 1873, before the petition in bankruptcy was filed. The rent reserved by the lease was payable monthly, on the first day of each month, at the rate of $3,500 per year. The lease was for two years from the 1st of May, 1871. The first rent became payable on the 1st of June, 1871. The rent for the month from January 1st, 1873, to February 1st, 1873, did not become payable till February 1st, 1873. The adjudication of bankruptcy was made before February 1st, 1873.

The 19th section of the act provides, "that all debts due and payable from the bankrupt at the time of the adjudication of bankruptcy, and all debts then existing but not payable until a future day, a rebate of interest being made when no interest is payable by the terms of contract, may be proved against the estate of the bankrupt. * * * Where the bankrupt is liable to pay rent or other debts falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods. If any bankrupt shall be liable for unliquidated damages arising out of any contract or promise, * * * the court may cause such damages to be assessed in such mode as it may deem best, and the sum so assessed may be proved against the estate. No debts other than those above specified shall be proved or allowed against the estate."

It is contended, for the lessors, that this claim for rent was, under the 19th section, a debt existing at the time of the adjudication of bankruptcy, but not payable until a future day, and that, therefore, it may, by the terms of that section, be proved against the estate. The case is sought to be likened to that where an article is purchased to be paid for in instalments, at fixed periods, and only part of the instalments are paid before an adjudication of bankruptcy, in which case, it is contended, the vendor can prove his debt for the remaining instalments, a rebate of interest being made if no interest is payable by the terms of the contract. This might be so if there were not a special provision for the case of rent falling due at fixed and stated periods. And there seems to be a reason for such special provision in regard to rent, in the fact that, where an article is purchased, the consideration is, or is assumed to be, executed, while, in the case of rent, the consideration is as-

[2] [From 9 N. B. R. 419.]

sumed to be not executed, but executory, the use and occupation being in futuro. But, whatever the terms of payment of rent may be, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at the periods fixed by the contract of letting. The provision in regard to rent not yet due, and to proving for a proportionate part of it, with the further provision that no other than the specified debts shall be proved, makes it entirely plain that this debt, as proved, cannot be allowed. Whatever is not provable will not be discharged. The provisions in regard to what debts may be proved are arbitrary, but such provisions do not affect the existence or validity of such debts as are not provable, nor does a discharge release them. If the debt is provable, it comes in for a dividend, and can, unless it is an excepted debt, be discharged. If it is not provable, it does not come in for a dividend, but it will not be discharged.

The words "the time of the bankruptcy" mean the time when the petition was filed, to which time the adjudication relates. The rent to that time has been paid. The objection of the assignee to the proof of debt, as made, is sustained, and the claim set forth in the proof of debt is disallowed.

[For subsequent proceedings in this litigation, see Case No. 9,328.]

Case No. 9,326.

In re MAY.

[2 Cin. Law Bul. (1877) 152.]

District Court, S. D. Ohio.

BANKRUPTCY—HOMESTEAD — EXEMPTION — MORTGAGED PROPERTY—PROCEEDS FROM SALE.

1. The head of the family, owning but a single piece of real estate, upon which he resided with his family, but which was mortgaged by himself and wife for more than its value, after condition broken, under the exemption laws of Ohio, is not the owner of a homestead.

2. Such head of family is entitled to hold exempt from execution and sale personal property, to be selected by him, not exceeding in value five hundred dollars.

3. Where all the personal property owned by him at the commencement of the proceedings in bankruptcy was covered by a chattel mortgage, he could make no such selection, and the assignee had no authority to set off the property to him.

4. Under such circumstances, the bankrupt would be entitled to the exemption out of the proceeds of such personal property; and, upon his application, the court would direct its payment by the assignee.

[In the matter of Henry May, a bankrupt.]

E. Devor, for bankrupt.

M. Kary and Howard Douglass, for assignee and general creditors.

SWING, District Judge. This case comes before me upon the application of the bankrupt for the allowance of five hundred dollars in lieu of a homestead. The facts upon which the application is based are as follows: The bankrupt is the head of a family, and, at the time of filing his petition in bankruptcy, was the owner of a house and lot in the town of Piqua, Ohio, and which was then, and now is, occupied by him as the residence of himself and family, and was not the owner of any other real estate. That there are valid mortgages upon said property, in whose execution the wife of the bankrupt joined, and which, the bankrupt claims, amount to more than the value of the property. The personal property of the bankrupt consisted of a stock of drugs, upon which there was a chattel mortgage of one thousand dollars. This property was sold, and realized to the assignee about fifteen hundred dollars after the payment of the mortgage, and which remains in his hands for distribution.

Among other provisions of the bankrupt law [of 1867 (14 Stat. 517)] relating to exemptions is the following: "And such other property not included in the foregoing exceptions as is exempted from levy and sale on execution, or other process or order of any court, by the laws of the state in which the bankrupt has his domicil at the time of the commencement of the proceedings in bankruptcy, to an amount not exceeding that allowed by such state exemption laws in force in the year eighteen hundred and seventy-one." By the laws of Ohio, the head of each family is entitled to hold exempt from sale on execution a homestead, not exceeding in value the sum of one thousand dollars; and, if he be not the owner of a homestead, he is entitled to hold exempt from execution and sale personal property to be selected by him, not exceeding in value five hundred dollars. It is further provided by the laws of Ohio that when a homestead shall be charged with liens, some of which shall preclude the allowance of a homestead to either the head of a family, or the wife, and others of the liens do not preclude the allowance of such homestead, and a sale of such homestead is had, then, of the proceeds of such sale, after the payment of the liens which preclude the allowance of a homestead, the balance, not exceeding five hundred dollars, shall be awarded in lieu of such homestead.

It is objected that the bankrupt is not entitled to the allowance prayed for, because he is the owner of a homestead. If the bankrupt, within the spirit and meaning of the Ohio law, is the owner of a homestead, the allowance must be refused. In a general sense, the bankrupt may be said to be the owner of a homestead; he is in the possession of a house and lot, and holds a deed therefor; but he has executed mortgages upon it for a greater amount than the value thereof, and these mortgages are overdue.

The doctrine of the supreme court of Ohio is, that as between the parties to a mortgage and those claiming under them, the legal

title to the mortgaged premises, is vested in the mortgagee. Rands v. Kendall, 15 Ohio, 671; Allen v. Everly, 24 Ohio St. 97. And this is in accordance with the decision of the supreme court of the United States in the case of Probst v. Beach, 10 Wall. [77 U. S.] 519. It can make no difference that the mortgagee held the legal title for the mortgagor. He could not be divested of it until payment in full of the amount due upon the mortgage, and he could commence proceedings at once to obtain possession of the premises. Giving to these laws that liberal construction to which exemption laws are entitled, I am of the opinion that the bankrupt was not the owner of a homestead within their spirit and meaning.

It is further objected that the exemption in lieu of a homestead can only exist as to personal property, and that to be selected by the bankrupt; that no demand was made by him before the sale of the property; and that there is now no personal property belonging to the estate which can be selected. It must be kept in mind that the entire personal property from which a selection could have been made had been mortgaged by the bankrupt, and as against the mortgagee he had no right to exemption. Although the amount of the mortgage was less than the value of the property, its lien and title extended to each and every part thereof, and even if demand had been made, the assignee had no right to permit him to take any portion thereof, or to set off to him any part of it. To have required of him, therefore, to have made a demand upon the assignee for this exemption, would have been requiring of him what the law never does, to do a vain thing. It was the duty of the assignee to proceed and sell the property, and pay the amount of the mortgage upon it, and distribute the balance according to law under the order of the court. This he is ready to do, and I think the bankrupt is entitled to receive from the fund in lieu of a homestead the sum of five hundred dollars.

It having been suggested that the mortgaged property might bring more than the amount of mortgage liens thereon, the order is suspended until that fact shall be ascertained.

Case No. 9,327.

In re MAY et al.

Ex parte MASSACHUSETTS HOSPITAL LIFE INS. CO.

[17 N. B. R. 192.] [1]

District Court, D. Massachusetts. Feb. 6, 1878.

BANKRUPTCY — PARTNERSHIP — JOINT AND SEPARATE CREDITORS—PRINCIPAL AND SURETY —EQUITABLE RIGHTS.

1. Where the individual property of one of the members of a firm is pledged for a debt of the firm, the creditor may, and indeed is bound to prove at the request of the separate creditors, his whole debt without deduction against the joint assets; but can only prove the deficiency, after disposing of the security, against the separate assets of such partner.

2. Evidence is always admissible between principal and surety to show what their equitable rights towards each other are.

This case came up on the certificate of the register, the parties agreeing that the facts were truly set forth in the affidavit of the actuary of the Life Insurance Company in support of the proof. The company lent sixty thousand dollars upon this note:

"No. 5724. $60,000. Boston, July 10, 1875. For value received we promise to pay to the Massachusetts Hospital Life Insurance Company, or order, in Boston, the sum of

——Sixty thousand dollars——

in three years, with interest to be paid half yearly at the office of the said company in Boston, at the rate of six and one half per cent. per annum until this note is paid in full. (Signed) May & Co., John J. May."

At the foot is the memorandum:

"Secured by mortgage of real estate in Boston on Pleasant & Pond Sts., Dorchester Av., & Romsey, Ct., duly recorded with Suffolk Deeds."

John J. May was a member of the firm of May & Company, and the money was borrowed for and used by the firm; but the land mortgaged was the separate property of John J. May. The question certified was whether the amount of the note could be proved against the joint assets, without deduction.

L. S. Dabney, for Life Ins. Co.

D. McClure, for an objecting creditor.

LOWELL, District Judge. I have been asked to revise the decision given in Re Holbrook [Case No. 6,588]. The argument has been ably presented, but the law is too well settled to be changed. Our statute has borrowed and put into the act itself the practice of the courts of bankruptcy, by which a creditor having security upon the bankrupt's estate is to give credit for its value before proving his debt. There was no such general rule in equity in England, and in settling the estates of insolvents deceased, or in winding up insolvent corporations, or limited companies as they are called in England, a secured creditor could prove for his whole debt and retain his security besides, until he received full payment. By a late statute the proceedings in winding up cases are put on the footing of bankruptcy in this respect. In this country the rule in bankruptcy has been adopted in some of the states, and in others rejected, when no statute governed the point. But whenever there has been a statute upon the subject, it has followed the practice in bankruptcy, so far as I am informed.

The insolvent law of Massachusetts contained a provision very much like that in our present statute, and, under it, the courts held that where two or more persons had given

[1] [Reprinted by permission.]

their joint and several promissory notes, and all, or even one of them had given security for its payment, the value must be deducted, before proof was made against either. Richardson v. Wyman, 4 Gray, 553; Lanckton v. Wolcott, 6 Metc. [Mass.] 305, as explained in Bank v. Bodman, 11 Gray, 134, in which the decision was that a creditor may prove in full against a corporation, although he holds security on the property of a shareholder. It is not too much to say that Lanckton v. Wolcott, even as explained, has not met with approval. The general rule, both here and in England, is that the security which is to be valued and accounted for is that of the bankrupt against whose estate the proof is offered. Take the case of a surety pledging his own property for the debt of the principal; if this is to be applied before proof is made against the estate of the principal, the debt is cut in two and the surety proves for what he has paid or what his property has paid, while the creditor can only prove for what is left unpaid. This is unjust, both to the creditor and the surety, though the gain to the bankrupt's estate would be nothing. The equity rests on the sole ground that the secured creditor has something in his hands which the general creditors would have had but for the mortgage or pledge to him. Without this, they have no interest in the property, and no right to diminish his proof. This is admitted in the later cases in Massachusetts, as well as in all the cases decided under the bankrupt act [of 1867 (14 Stat. 517)]. Ex parte Cram [Case No. 3,343]; In re Dunkerson [Id. 4,157]; In re Anderson [Id. 350]; Ex parte Parr, 1 Rose, 76; Ex parte Hedderly, 2 Mont. D. & D. 487; Ex parte Jones, 2 De Gex, F. & J. 554; Ex parte Turney, 3 Mont. D. & D. 576; Ex parte English & American Bank, 4 Ch. App. 49; Ex parte Peacock, 2 Glyn & J. 27; Ex parte Bowden, 1 Deac. & C. 135; Ex parte Manchester & Liverpool Dist. Banking Co., L. R. 18 Eq. 249, 3 Ch. Div. 481; Rolfe v. Flower, L. R. 1 P. C. 27; Ex parte Connell, 3 Deac. 201; Re Chaffey, 30 U. C. Q. B. 64. But this is now changed by statute in Canada. Clarke, Insolv. 1875, p. 255. Partners and their estates come under the rule for the reason that in bankruptcy the estates are settled separately; the joint creditors are to have the joint assets, and vice versa; and although there is no contribution between joint and separate estates, unless there should be a surplus of one or the other, yet when the property of one is pledged for the debt of the other, a court of equity will apply the right of subrogation precisely as it would if the contracting parties were not partners, and thus do justice to the different sets of creditors. Many of the cases above cited are cases of partners.

It is true, as was argued, that there is nothing on the face of this note to prove that John J. May was the surety, and the firm the principals; but evidence is always admissible between principal and surety to show what their equitable rights towards each other are. Indeed, it would be admissible against the creditor, if he was aware of the fact; so, of course, with the other fact that the land was the separate property of John J. May, the surety. It was argued that there was something to be found in the examination of one of the bankrupts, tending to show that this land should be treated as firm property by virtue of some sort of estoppel. It was not said to have been bought with the money or used in the business of the firm in fact, or to have been dedicated to the firm in any way, but to have been held out as part of the resources of the firm. It strikes me as improbable that such an estoppel could be made out in any case. If it is so, the assignees must look to it, and have the property distributed to the joint creditors. On this certificate I have no right to look at the evidence, but must take the fact to be that it was the separate property of one partner. It follows, that the creditor may prove, and indeed is bound to prove at the request of the separate creditors, his whole debt without deduction, against the joint assets; but only the deficiency, after disposing of the security, against the separate assets of J. J. May. Proof to stand, in full, against the estate of the firm.

Case No. 9,328.

In re MAY et al.

[19 N. B. R. 101.] [1]

District Court, S. D. New York. March 15. 1879.

BANKRUPTCY — PARTNERSHIP — WITHDRAWAL OF MONEY BY PARTNER—FRAUDULENT INTENT—KNOWLEDGE OF INSOLVENCY.

Where one of the members of a firm has withdrawn moneys therefrom with intent to use them for his private purposes, but such withdrawal was not fraudulent as against his copartners, the assignee of the firm cannot prove therefor against the separate estate of such partner, even if the firm estate was known to be insolvent at the time, and the withdrawal was made with knowledge of the insolvency.

[Cited in Re Lloyd, 22 Fed. 91.]

[In bankruptcy. See Case No. 9,325.]

C. W. Bangs, for motion.

T. Saunders, contra.

CHOATE, District Judge. This is a motion to expunge a proof of debt filed by the assignee of the two bankrupts against the individual estate of Berwin, one of the bankrupts. The deposition of the assignee avers "that the said Aaron Berwin, one of the said bankrupts, and a member of the firm composed of them, and called May & Berwin, in and before the filing of said petition (for adjudication) was, and still is, justly and truly

[1] [Reprinted by permission.]

indebted to deponent, as assignee of said bankrupts, in the sum of thirteen thousand six hundred and fifty dollars, and interest, as hereinafter stated. That such indebtedness has for consideration, and arose in the following manner: At the times hereinafter mentioned, said Aaron Berwin, being a copartner in said firm, composed of himself and August May, both above named, and being then insolvent, did fraudulently and with a view to benefit his separate estate and creditors, if any, at the expense of the creditors of said firm, draw out of and receive of the firm bank account and assets the following sums of money, to wit: July 11, 1872, five thousand dollars; July 15, 1872, one thousand five hundred dollars; August 2, 1872, one thousand five hundred dollars; November 26, 1872, five thousand six hundred dollars; altogether, thirteen thousand six hundred and fifty dollars, and thereupon paid twelve thousand eight hundred dollars of the same to George King, his brother-in-law, upon an alleged individual debt; that said money had been returned to the individual estate of said Berwin." The executors of one King, who proved a debt against the individual estate of Berwin, have taken these proceedings for the examination of this proof of debt, and now move that it be examined. Some technical and formal objections are made to the proof filed, which it is unnecessary to discuss, as they are susceptible of amendment if the assignee of the joint estate has the right to make proof of this claim against the separate estate of Berwin.

The facts shown in the case are that May and Berwin entered into copartnership in or about the year 1864, that Berwin put in sixteen thousand dollars as capital. The amount that May was to put in does not certainly appear, but it was less than Berwin was to put in. Both were to give their time and services in the business, and they were to share equally in the profits. They began under written articles, which appear to have been lost; and after the term ran out, they continued the business without articles or definite agreement as to the term of the partnership. Interest was not allowed or paid on their capital accounts. The firm did business on credit, and at all times had occasion to borrow money to carry it on. In or about the year 1869, Mr. Berwin drew out funds which before that he had had invested in some other business, and he paid these moneys, to the amount of about forty-six thousand dollars, into the firm of May & Berwin. This money stood on the books of the firm to the credit of an account opened under the name of P. Berwin & Bro.; but it was understood by both parties to be, and was in fact when paid in, the money of Berwin. It was treated in all respects by the firm as money loaned by Berwin to the firm. Interest was allowed on it, and credited in the account. At the several times stated in the proof of debt, Berwin drew out of the firm's bank account the several sums therein specified, and these payments were debited to this account on the books of the firm. There was no agreement whatever at the time the money was paid in, nor afterward, between May and Berwin as to the length of time that the firm should have the use of it. There was no agreement between them that it was, or was to be treated, as capital. While it was in the firm, the firm had the use of it, as of any other moneys borrowed. When Berwin drew out the sums above referred to, amounting in all to thirteen thousand six hundred and fifty dollars, or at some of the times when he drew out parts of it, May objected to his doing so; but there is no evidence that he put his objection on the ground that in drawing it out Berwin had violated any partnership obligation towards him or any agreement between them. He testifies indeed that he did not suppose Berwin had a right to draw it out, but he states no fact whatever tending to show that any agreement or obligation was violated in his doing so. The firm continued to do business, borrowing money, getting discounts, paying its notes and other obligations, buying and selling goods, and enjoying a large credit, until the 13th of December, 1872, when it suspended payment, and on the 20th of the same month was put by its creditors into bankruptcy. At the time Berwin drew out these sums he had overdrawn his personal account with the firm about nineteen thousand dollars, and May had overdrawn his about twenty-two thousand dollars. A critical examination of the assets and liabilities of the firm would probably have disclosed that as early as July, 1872, when the first of these sums mentioned in the proof of debt was drawn out, the capital of the firm was gone, and that when the last of them was drawn out the firm was insolvent; but the evidence does not warrant the conclusion that any of this money was drawn out when Berwin contemplated insolvency or bankruptcy, or with intent on his part to withdraw it from the firm creditors for the purpose of giving a preference in the distribution of the assets to his individual over his firm creditors. For aught that appears, he may then have believed that the firm would go on and all its obligations be paid.

The testimony of the assignee that some time in the year 1870 the partners both told him that Mr. Berwin had put more money into the firm, and that of another witness who had dealings with the firm, that in 1872 they told him that Berwin had put more capital into the concern, is not sufficient to impress on this money, as held by the firm, the character of capital rather than money loaned, which the evidence shows it clearly to have been. As to the language used, these witnesses are to some extent contradicted, and even if their recollection as to the words used were accepted as wholly trustworthy, they testify to nothing which impairs the right of

Berwin to draw this money out when he pleased as between him and his partner May.

The general rule that for moneys drawn out by a partner the joint estate cannot prove against the individual estate, is admitted by the counsel for the assignee; but it is claimed that where the firm were insolvent at the time the money was drawn out with the intention to give a preference to individual creditors over firm creditors, by using it in the payment of individual debts, then the withdrawal of it is fraudulent against the firm creditors, and the assignee of the firm can make proof against the individual estate. The authorities, however, do not sustain the claim of the assignee as applied to the present case. The right of the firm estate to prove a debt in bankruptcy against the separate estate of one of the partners has been much discussed in England. In the case of Ex parte Harris, 2 Ves. & B. 212, Lord Eldon thus states the rule and the history of it: "There has long been an end of the law, which prevailed in the time of Lord Hardwicke; whose opinion appears to have been, that, if the joint estate lent money to the separate estate of one partner, or if one partner lent to the joint estate, proof might be made by the one or the other in each case. That has been put an end to, among other principles, upon this certainly, that a partner cannot come in competition with separate creditors of his own, nor, as to the joint estate, with the joint creditors. The consequence is, that if one partner lends one thousand pounds to the partnership, and they become insolvent in a week, he cannot be a creditor of the partnership, though the money was supplied to the joint estate; so if the partnership lends to an individual partner, there can be no proof for the joint against the separate estate; that is, in each case, no proof to affect the creditors, though the individuals may certainly have the right against each other. The opinion of Lord Talbot seems also to have been in favor of this proof. But in and previously to the year 1790 great discussion took place at this bar, the result of which, according to Lord Thurlow's opinion, was expressed particularly in the case of Dr. Fendal and Lodge. The former, a physician, embarked a very large property, his whole fortune, in a partnership with Lodge, whom he permitted to have the whole management, and a bankruptcy ensuing, Lord Thurlow held that, as it was with knowledge and permission of Fendal that the whole management of the property was with Lodge, he was authorized to do as he thought fit with the partnership property, and Fendal must therefore abide the consequences of what had been done most improperly, but under his own authority, most imprudently given, and there could therefore be no proof. The law has been clear from that time that to make out the right to prove by one estate or the other, it must be established that the effects joint or separate, have been acquired by the one or the other improperly and fraudulently, in the sense that they have been acquired under circumstances from which the law implies fraud, or in the sense to increase his own means out of the partnership estate. Lord Thurlow, by 'fraud,' intended to express what he thought necessary to distinguish that from taking by contract or loan, or without the express or implied authority of the other partner, and that such act must amount to fraud. Upon this case I formerly expressed my opinion, and I now lay down, that if in either the expressed or implied terms of an agreement for a partnership there is a prohibition of the act, and it is done without the knowledge, consent, privity, or subsequent approbation of the other partner before the bankruptcy, and to the intent to apply partnership funds to private purposes, that is prima facie a fraud upon the partnership. To illustrate this, I will put the simple case of a partnership between two, and by the articles all the money is to be paid into their joint names at a particular bank, and they are prohibited from drawing out more than fifty pounds a month each for individual purposes; that during the month of January they mutually observed these articles by paying in, and on the 1st of February, one, instead of fifty pounds, draws out five hundred and fifty pounds, and upon the next day a bankruptcy happens; if it is made out that this overdrawing was for private purposes, and without the knowledge, consent, privity, or subsequent approbation of the other, as it was for private purposes, and therefore must be for the increase of the individual's estate, and as it was against the covenanted rights, or rather the prohibitions affecting both, and without the knowledge, consent, privity, or subsequent approbation of the copartner, it is as much a fraud within Lord Thurlow's rule as if, according to the expression I am informed I formerly used, he had stolen the property." This rule is again applied and illustrated in the cases of Ex parte Yonge, 3 Ves. & B. 31, and Ex parte Turner, 4 Deac. & C. 169. In the case of In re Lane [Case No. 8,044], Lowell, J., says: "The general rule in bankruptcy is that there can be no proof between the joint and separate estate of partners, unless there is a surplus of the joint estate to be divided. This rule was adopted partly as being upon the whole equitable, on the supposition that the joint creditors had given credit to the joint estate, and the separate creditors to the separate estate, respectively, and partly, I apprehend, upon the consideration that there is no such thing as a debt between partners or between a partner and his firm, in respect to partnership matters, excepting upon a winding up of all the affairs, and it was found to be very expensive and inconvenient to go into a general accounting in bankruptcy, and it was thought more expedient as well as more just to take the estates as the parties left

them." To the same effect is the opinion of Hopkins, J., in Re McEwen [Id. 8,783]. See, also, In re Cooke [Id. 3,170].

Without calling in question the exceptions established by these English cases, which appear to be recognized in the cases last cited, as applicable under our bankrupt law [of 1867 (14 Stat. 517)], it is evident that the fraudulent withdrawal of funds from the firm assets, upon which the exception rests, is a withdrawal fraudulent as against the firm or the other copartners. It is not enough, if the partner withdrawing the money violated no duty towards his copartners in withdrawing it, that he did so with an intent to use it for his private purposes, nor does there seem to be any authority for proof by the firm against the separate estate, when there is no such fraud as against the copartner, even if the firm estate is known to be insolvent at the time and the act is done with knowledge of the insolvency.

In the present case, Berwin had a perfect right, as between himself and May, to withdraw this money. He had not agreed to leave it in the business of the firm for any definite time. It was a loan payable on demand. More than all that he had contracted to leave in the business was left there still. He was the general financial manager of the concern, and had undoubted authority to contract for and to pay off loans to the firm. May's objection merely expressed his displeasure at the act. He had no right to object to the act as in violation of any expressed or implied contract between himself and his partner. Moreover, if it would aid the assignee to show that, when the moneys were withdrawn, Berwin contemplated the winding up of the firm business in bankruptcy or insolvency, or that they must stop, the proof on that point is deficient.

The counsel for the assignee has cited, in support of his claim to prove this debt, certain cases in which the transfer of the partnership assets by the firm to one of the partners when the firm was insolvent, and with design to interfere with the proper and equitable distribution of the assets, as between firm and individual creditors, has been set aside as fraudulent against the firm creditors: Collins v. Hunt [Case No. 3,015]; In re Cook [Id. 3,150]. These cases have no application to the present. They are cases respecting the marshalling of assets as between the joint and separate estates, and not cases touching the right to prove debts as between the joint and separate estates. The principles governing the two classes of cases are distinct, and if the assignee's claim were good under these authorities, it would be not for a dividend as a creditor, but for certain money or property in specie as belonging to the joint estate. But even those cases of marshalling assets, if they afforded an analogy, would not aid the assignee in this case, since the transfer of the firm assets to one of the copartners, where the firm is known to be insolvent, is not held to be void if made in good faith, though the necessary result of it will be, if the firm's affairs have to be wound up in bankruptcy, that the relative interests of the different classes of creditors will be thereby seriously altered. In re Long [Id. 8,476]; In re Tomes [Id. 14,084]. The assignee has been held estopped by a stipulation entered into by him with this very creditor, George King, and under which stipulation King repaid to him, as asignee of Berwin, certain money which he still retains, from claiming that money as belonging to the joint estate. Whether that stipulation and the proceedings had in this and other courts, since it was given, would also prevent him from proving a dividend against the separate estate of Berwin, thereby taking a part of the money for the joint estate, as is claimed by the counsel for King's executors, is a question that is not be determined, since upon the facts shown the joint estate is not entitled in any event to prove against the separate estate of Berwin for these moneys withdrawn by Berwin, and used by him in paying his own debts. Motion to expunge granted.

Case No. 9,329.

The MAY.

[5 Biss. 449.] [1]

District Court, E. D. Wisconsin. Oct., 1873.[2]

PENALTIES—STEAM VESSEL—INSPECTION—SEIZURE OF VESSEL.

A libel of information against a steam vessel, to recover the penalty for not being inspected according to the act of congress to provide for the better security of life on board of vessels propelled in whole or in part by steam, cannot be sustained, if a subsisting seizure of the vessel at the time the libel is brought is not alleged, and which is to be proven at the hearing.

[Cited in The Paolina S., 11 Fed. 173.]

The libel of information, brought by the district attorney in this case, charges that the steam tug May had been employed in towing lumber on the Oconto river into Green Bay in this state, without having been inspected in conformity with the eleventh section of the act of congress, entitled, "An act to provide for the better security of life on board of vessels propelled in whole or in part by steam, and for other purposes," (16 Stat. 440, approved Feb. 28, 1871), and that by reason thereof the owner or owners and master of said steam tug became liable to pay to the United States the sum of five hundred dollars; that for the payment of said sum of five hundred dollars, the said steam tug be-

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

[2] [Affirmed in Case No. 9,330.]

came liable to be seized and proceeded against summarily by way of libel, and for the recovery of which this civil and maritime action is instituted. The objection to the prosecution of this libel of information was the omission of an allegation of a seizure. The first section of the act under which the libel of information is brought provides, that "if any such vessel, 'propelled in whole or in part by steam,' shall be navigated without complying with the terms of the act, the owner or owners thereof shall forfeit and pay to the United States the sum of five hundred dollars for each offense, one half for the use of the informer, and for which sum the steamboat or vessel so engaged shall be liable and may be seized and proceeded against by way of libel."

Levi Hubbell, U. S. Dist. Atty., for United States.

Finches, Lynde & Miller, for respondents.

MILLER, District Judge. By a long course of judicial decisions, it must be regarded as definitely settled that there must be in all cases under the revenue and navigation laws a subsisting seizure at the time the libel or information is brought. See Conk. 252–255, and cases cited, and many others. See Conk. Prac. (4th Ed.) 231. These decisions are pursuant to section 9 of the act to establish the judicial courts of the United States, approved September 24, 1789 (1 Stat. 73, 76), investing the district courts with exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade of the United States, where seizures are made on waters navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas. By the section under which this libel is brought it will be observed that the owner of the vessel shall forfeit and pay the penalty, and for the recovery thereof the vessel shall be liable and may be seized and proceeded against by way of libel. The remedy here prescribed for a breach of the law is by seizure and libel.

This libel of information cannot be further prosecuted unless it be amended by alleging a seizure by the proper officer, and which must be proven as alleged.

NOTE. On appeal to the circuit court, Judge Drummond affirmed the above case. Opinion delivered October term, 1874 [Case No. 9,330]. The present statute for the regulation of steam vessels comprises title 52 of the Revision of 1874, p. 857. The section of that act providing for the penalty is as follows (section 4499): "If any vessel, propelled in whole or in part by steam, be navigated without complying with the terms of this title, the owner shall be liable to the United States in a penalty of five hundred dollars for each offense, one-half for the use of the informer, for which sum the vessel so navigated shall be liable, and may be seized and proceeded against by way of libel in any district court of the United States having jurisdiction of the offense."

Case No. 9,330.

The MAY.

The OCONTO.

[6 Biss. 243; [1] 7 Chi. Leg. News, 137.]

Circuit Court, E. D. Wisconsin. Nov., 1874.[2]

PENALTIES—INFORMATION—SEIZURE ESSENTIAL TO JURISDICTION—WHO SHOULD MAKE.

1. In cases of information an actual seizure of the res, prior to the filing of the libel, is essential to the jurisdiction of the federal courts.

[Criticised in The Joshua Leviness, Case No. 7,549. Cited in U. S. v. The Frank Silvia, 45 Fed. 642.]

2. United States Statutes and decisions of the supreme court commented upon.

3. The secretary of the treasury may authorize any United States officer to make the seizure; and in the absence of such authority, it is the duty of the customs officers.

[These were two appeals from decrees of the district court of the United States for the Eastern district of Wisconsin refusing to entertain jurisdiction of libels of information filed by the United States. The opinions of Judge Miller will be found in Cases Nos. 9,329 and 10,421.]

Levi Hubbell, U. S. Dist. Atty.

Wm. P. Lynde, for claimants.

DRUMMOND, Circuit Judge. These are appeals from the district court, and I have, after some hesitation, come to the conclusion that these proceedings were irregular, for the reason that the res was not in either case seized before the libel was filed. The objection taken to the jurisdiction of the court is technical, and my own judgment is opposed to sustaining it; but I think that the decisions of the supreme court have substantially held that there should be in such cases as this, before the libel is filed, a seizure made by the proper officer, and I will state why I have come to the conclusion that these decisions must control in these cases.

The act of 1789 gave exclusive jurisdiction to the district court in all cases of seizure. The language is: "All seizures under laws of imposts, navigation or trade of the United States, where the seizures are made on waters which are navigable * * * within their respective districts as well as upon the high seas." 1 Stat. 77.

It will be observed it refers to all cases of seizure under the laws of navigation or trade, as well as of imposts. The principle is stated, and the authorities cited in section 301 of Benedict's Admiralty, in which it is said that "an open, visible seizure by an officer of the government authorized by law to seize, must precede the commencement of judicial proceedings. The seizures are usually made by the revenue officers, or by the commanders of armed vessels on the high seas." The lead-

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

[2] [Affirming Cases Nos. 9,329 and 10,421.]

ing case upon the subject is The Ann, 9 Cranch [13 U. S.] 289.

In conformity with this view is the 22nd rule in admiralty adopted by the supreme court of the United States, in which it is said: "All informations and libels of information upon seizure for any breach of the revenue or navigation or other laws of the United States, shall state the place of seizure, whether it be on the land or on the high seas, or on navigable waters within the admiralty or maritime jurisdiction of the United States, and the district within which the property is brought, and where it then is." Ben. Adm. p. 371.

The theory upon which this doctrine is maintained is this, that it is the place of seizure that gives jurisdiction to the court. Where there is a forfeiture or liability to seizure for an offense against the laws of the United States, of course the res can be seized anywhere, as authorized by law, and may be brought within a district, and when it is thus seized, or is brought within a district, then the jurisdiction of the district court of that district is said to attach, and the libel must state that it is seized, and is there, in order that the court may judicially know that it has jurisdiction of the case.

And therefore it is, that this rule requires that the libel should state the place of seizure. This seems to be the theory upon which these adjudications and this rule are made. On principle I confess I do not see any material distinction between cases of that sort and the ordinary cases of libels in admiralty by individuals, which are called cases of seizure, because the res is seized. But in all such cases the res is taken, not in the first instance, before the libel is filed, but after, and because the libel states a case in admiralty, the monition issues, and upon that monition the seizure takes place.

Now, it is not easy to comprehend why, in the one case as well as in the other, the seizure may not be made by the monition after the libel is filed. If the res is not taken, then the court has no jurisdiction of the case, and the proceedings must be dismissed. The only distinction is, that in the one case it is seized before, and in the other after the libel is filed.

And in either case, nothing could be done against the res by way of forfeiture or enforcement of a penalty or decree, unless there was an actual seizure. In the one instance the seizure is by the ordinary officers of the customs, and in the other, by the marshal of the court.

But, however this may be, whether the distinction is well founded in principle or not, it seems to be the rule adopted by the supreme court of the United States, and whatever view this court may entertain of the decisions, if such is the law as adjudicated by that court, we must follow it. And it must be confessed that this view is strengthened somewhat by the language of the first section of the act of congress of February 28, 1871 (16 Stat. 440). That act consolidated all previous acts and amendments upon the subject of the regulation of vessels propelled in whole or in part by steam, from 1838 down to that time.

It is for a penalty for non-compliance with this act that these proceedings are instituted. And the first section of that act says: "And if any such vessel shall be navigated without complying with the terms of this act, the owner or owners shall forfeit and pay to the United States the sum of five hundred dollars for each offense, one-half for the use of the informer; and for which sum the steamboat, or the vessel so engaged, shall be liable, and may be seized and proceeded against by way of libel in any district court of the United States having jurisdiction of the offense."

There is some force in the argument derived from the peculiar collocation of this phraseology, the act of seizing being first mentioned, and then the proceedings by libel in the district court of the United States. Whether that is accidental or otherwise, is not apparent, but such is the language and the order in which it is stated.

It has been contended that this act does not provide for any special officers whose duty it is to make the seizure, and it is said that there is a controversy upon the subject, the marshal declining to make the seizure, and the officers of the customs doubting their authority.

The act of 1799 provided that the officers of the customs should "make seizure of and secure any ship, vessel, goods, wares or merchandise, which shall be liable to seizure by virtue of this or any other act of the United States respecting revenue, which is now or may hereafter be enacted, as well without as within their respective districts." 1 Stat. 678. It is true that this section speaks of revenue alone, but it may be said that all laws connected with navigation are in a sense revenue laws. The terms are used sometimes indiscriminately.

The act of 1871 is a navigation law, and for the protection of lives and property, and is declared to be "for the better security of life on board of vessels propelled in whole or in part by steam, and for other purposes." It is clearly, then, a navigation law, and I understand it is so conceded by counsel.

I admit that there is nothing in the act of 1871 which prescribes it as a special duty upon any of the officers of the United States to make the seizures referred to in the first section, and it is only by analogy that we can hold that the officers of the customs are authorized to make the seizure under that act.

But, taking the whole scope of the decisions of the supreme court upon the subject, together with the 22nd rule, and the general tenor and effect of the act of 1871, I have no doubt that it is competent for the secretary of the treasury to authorize any officer of

the United States to make the seizure; and that in the absence of any direction by him, it is the duty of the officers of the customs.

Mr. Lynde.—Has your honor considered the 30th section of the act of 1871, where it is made the duty of the officer of the customs to see that the act is enforced?

The Court.—I have not particularly, and I state this without reference to the 30th section of the act of 1871, which, possibly, may be broad enough to cover the case. The forms in Benedict, to which the district attorney has referred the court, in several instances, seem to indicate that the filing of the libel precedes the seizure, and perhaps it is not an unfair inference from that circumstance that there may have been cases of that kind in the Southern district of New York, under similar laws to that of 1871.

But it does not seem that the question ever came up before the federal courts in the Southern district of New York, and we cannot, therefore, give those forms the effect of an adjudication. In the case of The Fideliter [Case No. 4,755], the appeal in the circuit court was dismissed [and so as to dismiss also the case in the district court] [3] for the reason that there was no allegation in the libel that there had been a seizure, and the circuit court held that that must appear, citing various authorities.

It does not distinctly appear, by the report of the case, what particular law was violated in that instance, but merely that it was a proceeding in admiralty to condemn the steamship Fideliter for violation of the laws of the United States.

Mr. Hubbell.—Condemnation follows fraud, and seizure a violation of the laws of navigation.

The Court.—One may be said to be a case of forfeiture, and the other a case simply of penalty, and to enforce the one or the other, seizure is the remedy, expressly so made by the act of 1871, and this court in the one instance decrees a forfeiture, and in the other that the res shall be sold to enforce the penalty. But I hardly think there is any just distinction growing out of that view of the case. I regret that I am obliged, in obedience to what I consider the decisions of the supreme court, to make the order which I shall have to make in these cases. And I would like, if the district attorney feels so inclined, that the supreme court should have an opportunity of re-considering its decisions upon this point. It may be that they can find a distinction between this case and the others which they have decided. I would hope it may so prove, because I think that there ought not to be so much distinction between the cases of seizure before and after the filing of the libel. But they have taken that distinction. These libels were dismissed in the court below.

[Mr. Lynde: Yes, sir. There was one judgment upon the merits, and the other dismissed on my application on terms.] [3]

The decrees of the court below may be affirmed, and the libels dismissed by the order of this court for want of jurisdiction.

NOTE. That in cases of information an actual seizure of the res, prior to the filing of the libel, is essential to the jurisdiction of the court, and that such precedent seizure must be alleged in the libel, see The Lewellen [Cases Nos. 8,307 and 8,308]. But in that case it was also held that the act of the owners in executing delivery bonds under the act of congress, and thus regaining possession of the property, was a waiver of the objection of the want of a prior seizure.

The following are some of the decisions of the supreme court referred to in the above opinion: In order to give jurisdiction in rem, there must have been a valid seizure of the res by the marshal. Taylor v. Carryl, 20 How. [61 U. S.] 584. And the seizure must be actual, and not afterwards abandoned. The Josefa Segunda, 10 Wheat. [23 U. S.] 312. As to what constitutes a seizure, consult, also, Pelham v. Rose, 9 Wall. [76 U. S.] 103.

The district court where the seizure is made has exclusive jurisdiction. The Little Ann [Case No. 8,397]; U. S. v. The Betsey, 4 Cranch [8 U. S.] 452; Keene v. U. S., 5 Cranch [9 U. S.] 310; The Merino, 9 Wheat. [22 U. S.] 402. The law now provides (Rev. St. 1874, § 3072): "It shall be the duty of the several officers of the customs to seize and secure any vessel or merchandise which shall become liable to seizure by virtue of any law respecting the revenue, as well without as within their respective districts."

MAY (ALBEE v.). See Case No. 134.

Case No. 9,331.

MAY v. BAYNE.

[3 Cranch, C. C. 335.] [1]

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

APPRENTICES—HOW BOUND—JUSTICE OF PEACE—ORPHANS' COURT.

Two justices of the peace cannot bind out an apprentice while the orphans' court is in session.

[Action by Thompson May against Henry T. Bayne.] Petition by an apprentice to be discharged.

Mr. Ashton, for petitioner.

The justices had no right to bind him out. The father was a resident of Alexandria county, and not poor or indigent. He might, under the 3d section of the Maryland act of 1793, c. 45, have bound out his son, but he has not done so. His assent was not absolute; but on condition that he could agree with the master as to the terms. Besides, the orphans' court was in session on that day, and the justices had no jurisdiction. See the Maryland law of 1794, c. 47, § 1. The indentures are dated June 7th, 1826, and were on the same day recorded in the or-

[3] [From 7 Chi. Leg. News, 138.]

[3] [From 7 Chi. Leg. News, 138.]

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

phans' court, but there is no evidence that the court saw or approved them.

R. S. Coxe, contrà.

It is not necessary that the orphans' court should not be in session, although that court should have been in session on that day, yet it does not appear that it was in session at the very time the indentures were executed. As the father did not reside in the county, his assent was not necessary.

THE COURT (nem. con.) was of opinion that as the orphans' court was in session on the 6th, and adjourned to, and actually sat on the 7th of June, the justices of the peace had no jurisdiction. The petitioner was discharged.

Case No. 9,332.

MAY et al. v. CHAFFEE et al.

[2 Dill. 385; 5 Fish. Pat. Cas. 160; 4 Chi. Leg. News, 9.] [1]

Circuit Court, D. Minnesota. Oct. 1871.

PATENTS — ASSIGNMENT BY ONE JOINT OWNER — GRANT BY PATENTEE — PURCHASER FROM GRANTEE — EVIDENCE — PAROL — TO EXPLAIN PATENT GRANT.

1. One joint owner of a patent for an invention may sell and assign his own share or right in the patent.

[Cited in Washburn & M. Manuf'g Co. v. Chicago Galvanized Wire Fence Co., 109 Ill. 74.]

2. A grant by a patentee of "the sole and exclusive right to manufacture and sell machines of the patented invention" in a specified city, gives by implication to a purchaser from such manufacturer, the right to use the machine until it is worn out, wherever he pleases.

[Cited in Webster v. Ellsworth, 36 Fed. 328.]

3. To what extent and for what purposes parol testimony is admissible in the construction of a grant by a patentee, considered by Nelson J.

[2] [Final hearing upon pleadings and proofs. Suit brought upon letters patent [No. 33,370] for an "improvement in stave machines," granted to William Sisson, September 24, 1861.

[Two defenses were set up in the answer of the defendants [Henry Chaffee and others]: (1) That Sisson was not the first and original inventor. (2) That Fuller & Ford, of the city of Chicago and state of Illinois, obtained a license from the owners of the patent to manufacture and sell in the city of Chicago, but not elsewhere, the patented machines, and a sale by them to the defendants at Chicago, of a machine which they were using in Rice county. The first defense was abandoned, and the defendants relied upon the license of Fuller & Ford for their authority to use the machine.

[A statement of the facts, as they appear from the pleadings and testimony, is as follows:

[Complainants' title: William Sisson, of Fulton, New York, obtained, on September 24, 1861, letters patent for a new and useful improvement in stave machines, for the term of seventeen years, giving him the exclusive right and liberty of making, constructing, using, and vending to others to be used, the said improvement. Sisson, on December 12, 1861, conveyed by deed an undivided half of the said letters patent and invention to Clinton H. Sage, of Fulton, New York, reserving certain interests and rights relating to certain places in the state of New York, and not elsewhere, to be held and enjoyed for the full residue of said term for which letters patent were granted. A power of attorney from Sisson & Sage was executed on June 22, 1865, to G. W. Clason, of Milwaukee, to sell rights to use the patented machines in the state of Wisconsin. A sale by G. W. Clason, as attorney of Sisson & Sage, to the complainants [Charles May and others], of the exclusive right to use, and to sell to others to use, the invention in certain counties in the state of Minnesota, including the county of Rice. A ratification and confirmation in writing of this sale by Sisson & Sage, dated July 7, 1868.

[Defendants' title: Sisson & Sage, by deed of assignment, properly executed, on March 15, 1862, sold to A. A. Jones, of Fulton, New York, the exclusive right, under the patent, for certain counties in the state of Michigan; and, on August 17, 1864, A. A. Jones joins Sisson & Sage in appointing, by a proper instrument in writing, F. E. Jones, of Chicago, Illinois, attorney and agent to use, and sell, and dispose of the right to "use and sell," the patented improvement, and also the right "to sell any territory which has not heretofore been disposed of, in any place or places whatever, and also the right to use the said invention, as to said F. E. Jones shall seem expedient, giving and granting unto said attorney full power and authority to do and perform all and every act and thing requisite and necessary to be done in and about the premises," etc. By virtue of the authority conferred by this instrument, F. E. Jones, as attorney for Sisson & Sage, granted the sole and exclusive right to Willard M. Fuller and David M. Ford to manufacture and sell the patent stave machines in Chicago, Illinois, and the machine now in use in Faribault, Rice county, Minnesota, was purchased of Fuller & Ford, in the city of Chicago.][2]

Brisbin & Palmer, for complainants.
Gordon E. Cole, for defendants.

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

NELSON, District Judge. The whole controversy turns upon the construction and ex-

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 2 Dill. 385, and the statement is from 5 Fish. Pat. Cas. 160.]

[2] [From 5 Fish. Pat. Cas. 160.]

tent of the grant to Fuller & Ford, executed by Jones, as attorney of Sisson & Sage. Before considering this instrument with reference to its language, and the rights conferred by it, we will notice an objection made by the complainants' counsel to the power of attorney to F. E. Jones, to wit: that A. A. Jones, who, it is alleged, was an assignee of a portion of the patent and invention, did not execute the grant to Fuller & Ford. It is claimed that A. A. Jones having signed the instrument, in connection with Sisson & Sage, creating F. E. Jones attorney of all the parties, for certain purposes therein expressed, F. E. Jones could not execute an instrument conferring any rights under that power with reference to the patent, without signing the name of A. A. Jones to it. In other words, Fuller & Ford's license can not properly be received in evidence, because it is not executed pursuant to the power of attorney to F. E. Jones, in that it is only the act of Sisson & Sage, not of the three persons executing the power. Upon what principle this objection is urged does not appear, except as stated in the objection. The power of attorney recites the separate interest in the patent of the parties who executed it, and conferred upon F. E. Jones the authority to act for each of them, jointly or severally. In my opinion, then, a sufficient answer to this objection is, that A. A. Jones is, at the most, a grantee of an exclusive sectional interest, and one or two joint owners can legally grant, assign, license, or sell their own share or right in the patent. Pitts v. Hall [Case No. 11,193]. The power of attorney signed by Jones, Sisson & Sage gave F. E. Jones full power and authority to control any disposition of territorial rights under the patent, and to use the invention as to him might seem expedient. He had the authority from all the parties in interest, and inasmuch as A. A. Jones had no interest in the patent outside of the state of Michigan, he could grant nothing to Fuller & Ford, and it was not necessary for him to execute the assignment to them.

This grant to Fuller & Ford is in the following words: "* * * Now, this indenture witnesseth that for a valuable consideration, viz., five hundred (500) dollars, to us in hand paid, the receipt of which is hereby acknowledged, we, William Sisson and Clinton H. Sage, aforesaid, have assigned, sold, and set over, and by these presents do assign, sell, and set over unto the said Willard M. Fuller and David M. Ford, the sole and exclusive right to manufacture and sell machines of the said invention as secured to us by the said letters patent and assignment, in the city of Chicago, county of Cook, state of Illinois, and in no other place, or places, the same to be held and enjoyed by the said Willard M. Fuller and David M. Ford, for their own use and behoof, and their legal representatives, to the full end of the term for which such letters patent have been granted, as fully and entirely as the same would have been held and enjoyed by us had this assignment and sale not been made."

Now the patentee, before the execution of this grant, would, without doubt, by the unrestricted sale of a single machine in Chicago, confer by implication upon the purchaser the right to use it until worn out, wherever he pleased. Chaffee v. Belting Co., 22 How. [63 U. S.] 217. The sale would have transferred the machine outside of the limits of the monopoly. The right to any exclusive privilege under the patent to the machine thus sold would have been gone, and the purchaser, by the tradition of the vendor, would obtain the absolute ownership of it, and it would become his private property.

The complainants insist that this may be true, so far as the patentee is concerned, but no such power is given Fuller & Ford by the assignment, and no legal authority to use the monopoly could be conferred upon a purchaser from them, at least to use outside the city of Chicago. The language of the grant to them, it seems to us, clearly gives such authority. The contract entered into by Jones, the attorney, and Fuller & Ford, operated as an assignment of an exclusive right, secured by the letters patent, to manufacture and sell, limiting them, so far as the monopoly was concerned, to the city of Chicago. The assignment was absolute, so far as the specified locality, of the exclusive right to manufacture and sell. No restriction of those rights was intended. On the contrary, Fuller & Ford and their representatives were to hold and enjoy them, "as fully and entirely as the same would have been held and enjoyed by Sisson & Sage had this assignment not been made." It seems to us that language could not have been used which would more certainly have given the authority.

Although the subject matter of this contract between Sisson & Sage and Fuller & Ford was a patent, the rule of construction of contracts generally is not thereby altered. An owner of a patent can make an assignment in regard to it the same as he may make in regard to any other species of personal property. Says the court, in Morse v. O'Reilly [Case No. 9,858]: "While the exclusive rights of a patentee are specially guarded from intrusion, the contracts which he makes to share them with third parties are interpreted and enforced in the same manner as other legal engagements."

Applying the usual rules of interpretation to this contract, there can be no doubt about the rights of Fuller & Ford under the patent. They not only had the right to establish a manufactory of machines in Chicago, but they had the exclusive right to sell machines to any and every one who might choose to purchase the same, the

vendee taking all of the rights appertaining to their title as vendors.

If there were any doubts about this view or construction of the instrument, the condition in which we find it dispels them. The original grant to Fuller & Ford is full of interlineations and erasures, and in order to arrive at the true intent of the parties to this grant, these acts of the parties are to be considered. "Words struck out of an instrument, may be looked at to ascertain the intention of the parties to it." 3 Metc. [Mass.] 93; 3 Walton, 689.

Parol testimony to show all of the circumstances is also admissible when the language may be susceptible of more than one meaning, such as their knowledge of the subject matter of the contract, and all other facts that would throw light upon the intention of the parties. Phelps v. Clasen [Case No. 11,074].

In the testimony of Jones and Ford we find that the right to use the machine in Chicago was of no particular value. Jones had to abandon the only machines that were in use then, because they did not pay. Fuller & Ford had already manufactured machines for Jones; and persons outside, from other states, were applying to them for machines. In the light of these circumstances, it could not have been the intention of the parties to confer only the exclusive right to manufacture machines, and to sell them for use in Chicago, which all parties agree was of no value. Now, there being no restriction in the grant upon the rights thereby conferred, it must be construed in its terms favorable to the grantee and against the grantor. The grant carried with it by implication everything necessary and incident to its due enjoyment, and the defendants, when they purchased the machine from Fuller & Ford had the right to use it without reference to locality, except so far as F. E. Jones was restricted in authority under the power of attorney to him. In arriving at this conclusion, we have sustained the complainants' counsel in all of their objections, except to the admissibility of the record evidence, and overruled the defendants' counsel in his objections to testimony. A decree will be entered dismissing the bill.

[For another case involving this patent, see Sisson v. Gilbert, Case No. 12,912.]

Case No. 9,333.

MAY v. HARPER et al.

[4 N. B. R. 478 (Quarto, 156);[1] 18 Pittsb. Leg. J. 105; 2 Leg. Gaz. 381; 4 Brewst. 253.]

Circuit Court, W. D. Pennsylvania. 1871.

BANKRUPTCY—PETITION—DEPOSITION—AMENDMENT THERETO.

The deposition of a witness to acts of bankruptcy in an involuntary proceeding cannot be amended, because it is the prooof upon which the rule to show cause issues, and without which the whole proceeding is defective.

[Cited in Re Hanibel, Case No. 6,023.]

[Action by May against W. L. Harper & Atherton.] This was a hearing sur motion to dismiss creditors' petition.

McCANDLESS, District Judge. A jury being called, and before they were sworn, attorney for creditors asks and has leave to amend the petition which is allowed because the creditors' petition is a part of the pleadings in the case. He further asks leave to amend the deposition of the witness as to the acts of bankruptcy, which is refused, because it is the proof upon which the rule to show cause why he should not be declared a bankrupt issues, and without which the whole proceeding is defective. This deposition of W. L. Harper proves no act of bankruptcy, and the proceedings are dismissed at the cost of the petitioning creditor.

MAY (JOHNSON v.). See Case No. 7,397.

Case No. 9,334.

MAY v. JOHNSON COUNTY.[1]

Circuit Court, D. Indiana. June 1, 1872.

PATENTS—MECHANICAL EQUIVALENT—MODE OF OPERATION—RESULT IN KIND.

[1. Substantial use of a mechanical equivalent to accomplish the same result as a patented article, constitutes infringement.]

[Cited in May v. Mercer Co., 30 Fed. 249.]

[2. A mechanical equivalent is where one means may be adopted instead of the other to accomplish the same result by a skilled mechanic accustomed to machinery, and with a competent knowledge of mechanical powers.]

[Followed in May v. Fond du Lac Co., 27 Fed. 695.]

[3. To constitute infringement, the thing used must be such as substantially to embody the patentee's mode of operation, and thereby attain the same result in kind.]

[Action at law by Edwin May against the board of commissioners of Johnson county for infringement of patent No. 110,483, to fasten cell doors in a prison simultaneously.]

Nichol & Jordan and McDonald & Butler, for plaintiff.

Hendricks, Hood & Hendricks and Martin M. Ray, for defendant.

DAVIS, Circuit Justice. The laws of congress secure to a party for a limited term of years a property right in a new and useful improvement. If the subject-matter of a patent possesses the requisites of novelty and utility, it is protected against the encroachments of society, and no one has the right to use it without paying for it. By a natural law, the creations of a man's genius

[1] [Reprinted from 4 N. B. R. 478 (Quarto, 156), by permission.]

[1] [Not previously reported.]

are as much his own property as the horse or land he may purchase with money which he has earned. And the patent law [5 Stat. 117], in order to encourage the inventive faculty, recognizes as patentable an improvement in any art which is useful to the public and not before known, although the result is produced by a mechanism which combines old mechanical power without the use of any new element.

The true question in such a case is whether the combination of materials by the patentee is new. If they have never been combined together in the manner stated in the patent, but the combination is new, then the invention of the combination is patentable. So far as the evidence goes, it does not appear that any such combination was known or in use before May's invention. The jury, therefore, have only to consider whether Hodson's structure is an infringement on May's. Hodson's structure seeks to accomplish the same result as May's. Both construct prisons so as to avoid necessity of actual contact with the prisoners while the keeper can observe their movements and control them. The utility of such an invention commends itself to the common mind, and does not need to be enlarged upon. To construct a jail, so that prisoners can be safely kept and their movements controlled, and the jailer secure from violence, is a beneficial object. Does Hodson's structure infringe on May's? In their scope and object they are alike, and evidently intended to secure the same result. Do they differ essentially in their organization or mode of operation? The one is evidently equivalent to the other, as producing the same result, but in this sense it is not material to consider the subject.

The main question is, whether Hodson has used substantially the same means, or, mechanically speaking, equivalent means, to accomplish the same result. If he has, he is an infringer, otherwise not, and whether he has or not is a question for the jury to determine. A mechanical equivalent, as generally understood, is where one may be adopted instead of the other, by a skilled mechanic accustomed to machinery, and with a competent knowledge of mechanical powers. If such a man, seeing a new machine, and having a full description of the thing invented, can, by sitting down and examining it with care, see that the required thing can be done in a different mode, and it is done in that different mode by the knowledge which he has of his business, he has not produced a new invention, nor one substantially differing from the original. But, if the inventive faculties are exercised to produce the change, then he has a right to the benefits of whatever he thus invents. There must be mind and inventive genius involved in the change, and not the mere skill of the workman to avoid the consequences of an infringement. To constitute an infringement, the thing used by the defendant must be such as substantially to embody the plaintiff's mode of operation, and thereby attain the same kind of result as was reached by his invention. It is not necessary that the result should be precisely the same in degree, but it must be the same in kind. For instance, the shutting one dorr, instead of two is a difference in degree, but not in kind. The same function is performed.

Keeping these general principles in mind, I hope you will find no difficulty in applying them to the present case. May's patent is really for a method, unknown before, of bolting prison doors, without coming in contact with prisoners. The mechanical arrangement to do this was patentable, and he is to be considered as the original combiner of this mechanical arrangement so as to produce the intended result. In doing this he has used nothing new, nor was he required to do it. Bolts, bars, locks, levers, and pulleys are all old, but May has used them in such a way that the jailer can control the prisoners by working the doors while remaining away from the prisoners. It is the working the doors so as to avoid the necessity of actual contact with the prisoners which is the thing invented by May. This is his idea, and as he has carried it into successful practice, he is protected by law, and should be. If it were otherwise, there would be no encouragement to inventive genius.

Keeping in mind that May's invention is the ability of the jailer, from the moment he enters the outer door, to control the prisoners by bolting the doors while separated from him, the question arises, does Hodson's apparatus infringe it? The difference between the two machines, which it is important for you to notice, consists in the different means used to fasten the doors. In both machines the apparatus used is to fasten the doors, so as to control the prisoners, without being under any apprehension from them. May complains that Hodson has appropriated his purpose, and arranged his machine on the same principle although the form of it has varied. The question of infringement is one for the jury. The true point is, have the defendants used the invention of the plaintiff, or something substantially like it? Do the two structures operate upon the same principle? Are they substantially the same? Did it require any invention to substitute the pulley for the lever, or to fasten the first door horizontally instead of perpendicularly? If it did not, they are mere changes of forms, to produce the same result, and the party using them in this way is an infringer. The operation of pulleys and levers is as old as society. Suppose a skilled mechanic should see May's invention; would he not at once know that the lever power in the pulley could serve the same purpose as the lever power in the lever and endless chain? This is a question for your determination. May's invention secures to him, not only the means he used, but all other mechanical contrivances which

are equivalent. It is well known to all intelligent men that the pulley and weight can be used to produce the same effect as the lever and bar. Did it require any exercise of invention to substitute the pulley for the lever, or the bolt horizontally for the bolt perpendicularly. Would or not any good mechanic at once see that these substitutes could be used to produce the same effect. If so, Hodson has pirated May's invention, and must respond in damages. It is for you, from the evidence, to say whether he has or not. You have heard the evidence, and must decide what witnesses to believe or disbelieve. I regret that the witnesses in this case have not, by their superior intelligence on this subject, been able to lighten your labors. But I think, after all, that the case will not give you a great deal of trouble. If you find for the plaintiff, you will find $400.

The jury returned a verdict for plaintiff and assessed his damages at $400, as instructed.

Case No. 9,335.

MAY et al. v. SHEEHY.

[4 Cranch, C. C. 135.] [1]

Circuit Court, District of Columbia. April Term, 1831.

LANDLORD AND TENANT — ASSIGNEE OF LESSEE — ACTION AGAINST — COVENANTS OF LEASE — WHOLE ESTATE.

1. In an action of covenant by the assignee of the lessor against the assignee of the lessee, the plaintiff may give parol evidence of an assignment by the lessee to the defendant.

2. An assignee of the lessee is not liable to the lessor upon the covenants in the lease, unless he is assignee of the whose estate of the original lessee.

This was an action of covenant, by [John E. May and others] the assignees of the lessor against [Edward Sheehy] the assignee of the lessee.

The defendant pleaded that he was not assignee of the lessee.

The plaintiffs offered parol evidence of possession by the defendant, and his payment of rent to the plaintiffs, as evidence of an assignment. 2 Phil. Ev. 88, 89; Derisley v. Custance, 4 Term R. 75.

Mr. Hewitt, for defendant, contends that the assignment can only be proved by deed, and the deed must be produced.

Mr. Taylor, contra. The assignment from the lessee to the defendant is a matter not within the knowledge of the plaintiffs. They are no party to it. As to them, it is res inter alios acta. They have no power, at common law, to call upon the defendant to produce the deed of assignment, if there was one.

THE COURT (nem con.) permitted the parol evidence to be given; but instructed the jury that the plaintiffs were not entitled to recover in this action unless they should be satisfied that the defendant was assignee of the whole estate of the original lessee.

Verdict for defendant.

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

Case No. 9,336.

MAY et al. v. SLACK.

[16 Int Rev. Rec. 134.]

Circuit Court, D. Massachusetts. May 7, 1872.

TAXATION — LEGACY TAX — WHEN IT ACCRUES.

M. died February 23, 1870, testate, and bequeathed certain pecuniary legacies, which were paid by his executors in April, 1871; the act of July 14, 1870, repealed taxes on legacies on and after October 1, 1870, saving taxes already accrued. *Held*, that a tax was properly assessed as "accrued" upon said legacies under the saving clause contained in section 17, Act July 14, 1870, c. 255 (16 Stat. 261).

[Cited in Mason v. Clapp, Case No. 9,233; Clapp v. Mason, 94 U. S. 593; U. S. v. New York Life Ins. & Trust Co., Case No. 15,873; U. S. v. Townsend, 8 Fed. 307. Distinguished in U. S. v. Rankin, Id. 875.]

Samuel May died February 23, 1870, testate, and by will, dated February 15, 1862, and by codicil, dated February 15, 1870, bequeathed certain pecuniary legacies. Said will and codicil was admitted to probate March 28, 1870, and the plaintiffs [John J. May and others] duly appointed executors. In September, 1870, the plaintiffs made a partial payment of some of the legacies upon which a legacy tax was paid, respecting which no question is raised. In April, 1871, the plaintiffs paid all said legacies in full, and the United States assessor assessed upon the sums so paid in April, 1871, certain legacy taxes, which were paid under protest, and this action brought against collector to recover back said taxes.

S. E. Sewall, for plaintiff.

F. W. Hurd, for defendant.

Before CLIFFORD, Circuit Justice, and LOWELL, District Judge.

LOWELL, District Judge. This is an action to recover back the legacy duties assessed upon certain bequests made by the late Mr. May, who died February 23, 1870, before, but less than one year before, the repeal of the duty. The act of July 14, 1870, repealed the tax on legacies and successions on and after the first day of October, then next, section 17 saving "all taxes properly assessed or liable to be assessed, or accruing under the provisions of former acts or drawbacks, the right to which has already accrued or which may hereafter accrue under said acts." The plaintiff's position is: That legacies are payable at the earliest in a year after the death of the testator, and that by statute of July 13, 1866, § 9 (14 Stat. 140), the legacy duties are payable when the legacy is payable; that the United States had no right or interest in the tax until it became payable, and thus the saving clause of the repealing act is intended

only to preserve those taxes, which either were assessed, or at any rate might have been assessed before the first day of October. The defendant, on the other hand, contends that the legacy taxes "accrue" in the sense of the law upon the death of the testator, though they are not payable until afterwards, so that the saving is intended to cover all these cases where there was an inchoate right, so to speak, to the tax, whenever it might be thereafter properly assessable. This single point of construction on which the case turns is one of no inconsiderable nicety, and none the less so that it requires the intent of congress to be ascertained from general expressions, which were in all probability adopted without any view to the particular point under consideration. Upon the whole, we are of opinion that by the internal revenue law the tax is to be taken to accrue upon a pecuniary legacy immediately on the death of the testator, though not payable until the legacy is payable. Though it is true, in general, that a legacy is not payable until a year, yet this is an equitable rule adopted only for convenience. "There is no doubt," said Lord Eldon, "that the property is vested at the death of the party; and if a case was produced in which it was quite clear that there were no debts, the court would give the funds to the party, notwithstanding there had not been a lapse of twelve months." Garthshore v. Chalie, 10 Ves. 13. Although the executor is not bound to pay within the time, yet he may do so, as indeed in this case the executors did pay a certain part of each legacy. The legacy is vested, and if the legatee should die within the year it would go to his personal representative, but the latter would take it subject to the tax, which is made a lien from the death of the testator. Section 125, 13 Stat. 286. If the executor should become bankrupt within the year I have no doubt that the amount of the legacy could be proved against his estate as debitum in praesenti, solvendum in futuro; and the language of the tax act, which makes the legacy liable to a duty payable only when the legacy is payable, may well be taken to express a similar liability,—that is, one that is vested, though not payable. In the case cited by the defendant (Meredith v. U. S., 13 Pet. [38 U. S.] 494), Mr. Justice Story says that duties accrue in the fiscal sense as soon as goods are imported, though they are not payable until after entry, valuation, and assessment; and he cites several cases to show that this is the established doctrine. If, then, a customs act were passed abolishing certain tariff duties on and after a certain day, and saving such as had accrued before the day, it is plain that "accrued" would not mean payable, but only vested.

There is another cause of inquiry which strengthens this argument. The statute applies to successions as well as legacies; and many successions vest not only in right, but in possession immediately on the death of the ancestor. Thus real estate descends at once to the heir; and there is no doubt that the succession duty may be assessed at once, because there is the express provision of section 137, 13 Stat. 289; and section 141 carefully provides that, if the succession shall be reduced by the payment of debts or otherwise, the tax, or a proportionate part thereof, shall be refunded; or, by section 143, 13 Stat. 290, the commissioner may arrange the duty by compromise in cases of doubt or difficulty. Then take the case of a specific bequest to the executor himself, or a specific devise of lands, or the case where the executor is himself the residuary legatee, and gives bond under our statute to pay debts and legacies, in all these cases it seems to me the duty not only accrues, but is or may be assessable within the year. Considering, therefore, that the statute was intended to be uniform, and that the construction contended for by the plaintiffs will make its application vary with the nature of the property and other circumstances, and for the other reasons above given, we think the better opinion is that these duties were rightly assessed, and that the judgment must be for the defendant.

MAY (UNITED STATES v.). See Cases Nos. 15,751 and 15,752.

MAY (WOOD v.). See Case No. 17,956.

MAYBERRY (FALES v.). See Case No. 4,622.

MAYBEY, The R. L. See Cases Nos. 6,333–6,335.

MAYBEY, The R. L. See Cases Nos. 11,870 and 11,871.

Case No. 9,337.

In re MAYBIN.

[15 N. B. R. 468.][1]

District Court, N. D. Mississippi. Nov., 1876.

BANKRUPTCY—JUDGMENT RECOVERED AFTER PROCEEDINGS IN BANKRUPTCY — GUARDIAN AND WARD—LIMITATIONS—DISTRIBUTIVE FUND.

1. A claim founded upon a judgment or decree recovered after the commencement of the proceedings in bankruptcy, without leave of the bankrupt court, cannot be proved.

2. The liability of a guardian to his ward is not affected by his discharge in bankruptcy.

3. Proof of claims may be filed after an order discharging the assignee has been set aside, and the assignee ordered to proceed.

4. The filing of the petition arrests the running of the statute of limitations.

5. So long as there is a fund to distribute, all those who had valid, subsisting claims existing at the time of the commencement of the proceedings, upon making proof, will be permitted to participate in it.

[In the matter of J. W. Maybin, a bankrupt. See Case No. 9,338.]

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[1] [Reprinted by permission.]

HILL, District Judge. The questions now presented for decision arise upon exceptions filed by the bankrupt to the claims filed against said estate, and in which Garrett, one of the creditors, has joined as against the other creditors in a portion of these exceptions. These exceptions are limited to alleged defenses, appearing upon the face of the claims, and matters appearing in the record, and will be considered as applied to the claims stated as follows: First, as to the claim of Mary L. Bourne, for the sum of twenty thousand six hundred and nine dollars and fifty-three cents, with interest at 6 per cent. per annum, from October 31st, 1872, to April 22d, 1873, alleged to be the amount of a decree rendered by the chancery court of Warren county, on the last mentioned day, in favor of the said Mary L. Bourne, against the said bankrupt as the balance then due as her guardian, and which it is alleged remains due and unpaid. To the allowance and payment out of the estate of the bankrupt, both he and said Garrett except, and state seven different grounds of exception.

Only the fifth ground stated need be considered in this case, as that must be decisive against its admissibility as at present presented, and applies alone to this claim; other grounds stated apply to other claims, and will be considered in connection with them. All demands provable against a bankrupt's estate, whether then matured and due or not, must have an existence at the time of filing the petition of adjudication, which in this case was on the 30th day of December, 1868. The claim as now filed is a decree rendered on the 22d day of April, 1873.

To avoid this objection, it is insisted that an amended proof has been filed, making the bill and answer, as well as a copy of the decree, an exhibit which discloses the claim upon which the decree was based. Whilst this is so, it is the decree and not the accounts between the parties that constitutes the debt asked to be allowed and paid. At the time the petition of Maybin asking to be declared a bankrupt was filed, no adjustment of the accounts between Mrs. Bourne and her father and guardian, had been made, showing any indebtedness against him. The claim was then an unadjudicated equitable demand growing out of these relations as trustee and cestui que trust, which could only be ascertained upon an account based upon proof, to be ascertained by this court by such proceedings as it might direct, or if a bill or suit had then been pending to settle the liability, upon application to this court an order might have been made directing the assignee to be made a party to that suit, and represent the interests of the estate until its conclusion, so as to ascertain the true amount to be allowed as a claim against the bankrupt estate. But the court did not then have, nor has it now, power to direct the institution of a suit in a state court after bankrupt proceedings are commenced, only for the collection of debts not exceeding five hundred dollars. So that the only mode by which an adjustment could be had between the claimant and the defendant which then could or now be had, is by proceedings in this court. This did not, however, prevent Mrs. Bourne from instituting and conducting proceedings in the chancery court to a personal decree against her father as her trustee, it being a fiduciary demand, and not one from which he was entitled to be discharged by the order and decree of this court under the bankrupt proceedings. The decree against him personally is not affected by the proceedings in this court, further than he will be entitled to a credit for whatever sum Mrs. Bourne may receive from the assets in bankruptcy. The claim as presented being rejected, Mrs. Bourne and her husband will be allowed to present it in such form as she may be advised, when the court will make such order in relation to it, as in its judgment will best facilitate the ascertainment of such amount as may properly be made payable out of the assets for distribution. This disposes of this claim.

The next claim for consideration is that of E. F. Brown, for two thousand dollars and interest from November 10, 1868, evidenced by two promissory notes for one thousand dollars each, dated on that day and payable on the first day of January, 1869, and the other payable on the first day of January, 1870, each bearing interest from date.

Three grounds of objection are taken to this claim: 1st, because the proof was not filed until the 24th day of July, 1873, after an order had been made by the register, discharging the assignee. 2d, because the original proof did not have the notes or copy attached, and were therefore utterly void. 3d, because said notes were barred by the statutes of limitations before the amended proof was filed.

To the first ground of exception it is only necessary to state that the order discharging the assignee was by the order of this court held to have been improperly made, and the assignee directed to proceed with the administration of the estate. Therefore this ground of exception cannot be sustained. To the second ground stated, it is only necessary to state that the proof may in all cases be amended, if application be made in proper time; and when amended so as to comply with the law, it will relate back to the original filing, unless the rights of others have in the meantime intervened, which in this case did not occur. Therefore this ground of exception is not maintainable. The third and last ground stated is that the notes were barred before the amended proof was filed. The original proof was filed on the 24th day of July, 1873; the note first due was not payable until the 1st of January, 1869; from that time until the 24th of July, 1873, was four years, six months and twenty-three days.

As we have seen the amendment to the proof related back to the filing of the original proof, consequently neither of these notes were barred. Therefore the exceptions to these debts must be overruled and the debts allowed to be paid out of the assets.

The next claim for consideration is an open account for goods and merchandise filed by J. J. Garrad & Co., for the sum of two thousand five hundred and twenty-nine dollars and thirty-three cents. Two grounds of exceptions are insisted upon to this claim: 1st, Because it was not filed until the 20th of August, 1875, after it is alleged the bankrupt was discharged. 2d, That it is barred by the statute of limitations.

The first exception must be overruled for reasons heretofore stated. The second exception raises a question of more difficulty, and one which has been very ably argued by counsel for the exception. The account upon its face shows that the goods were all sold and delivered during the years 1867 and 1868, the account being closed February 1st, 1868, and was therefore not barred when Maybin filed his petition to be declared a bankrupt. The filing of the petition certainly arrested the running of the statute of limitations; the question is, was there any period after that time when it again commenced running. The bankrupt act [of 1867 (14 Stat. 517)] makes no provision for such a period. It provides for notice both special and general to all the creditors to come forward and prove their claims at the first meeting of creditors, and at each subsequent meeting provides for special notice to those who have proved, and a general notice to all to attend such meeting and take part in the proceedings, and it further provides, that upon the first distribution of the assets a sufficient amount shall be reserved to make those who had not proved equal to the pro rata shares then declared, and that upon the next distribution those participating in the first shall receive nothing until all are made equal. I am of opinion that the law contemplates that so long as there is a fund to distribute, all those who had a valid subsisting claim existing at the time the bankrupt proceedings commenced, upon making proof, shall be permitted to participate in it.

But admitting what is insisted upon by Maybin's counsel, that the statute commenced running at the expiration of the injunction created by the statute as a general rule, yet the facts shown by the record in this case upon well settled rules of equity, estop Maybin from setting up the bar. The claim out of which the fund for distribution was realized was in existence when Maybin filed his petition to be declared a bankrupt; this claim he did not place upon his schedule, so as to give his creditors an opportunity to pursue it. It may be, and I am inclined to the opinion he thought it worthless, yet the effect so far as the creditors are concerned is the same. Nothing being shown on his schedules for the payment of debts, there was no inducement to prove them. It may be that creditors might then have thought this claim worthless, yet they should have had an opportunity through the assignee, their agent, to test it. The failure to afford that opportunity, certainly in equity, and this is a court of equity, with the most extensive powers, Maybin is estopped from interposing this objection. For the reasons stated, the exceptions to this claim must be overruled, and the claim allowed.

The next claim for consideration is an open account filed by James Murray, for five hundred and sixty nine dollars and eighteen cents, for goods sold and delivered between the 7th of April and the 12th of December, 1866. The same grounds of exception are stated against the debt with the last mentioned debt, and the same reasons operate against their maintenance. Therefore the exceptions must be overruled and the debt allowed.

The last claim excepted to is one filed by Robert Wilson for four hundred and forty dollars, founded upon a judgment rendered by the circuit court of Warren county against said Maybin on the 11th day of February, 1869.

The second ground of exception is all that need be considered and that is decisive against its allowance, and that is that the judgment was obtained after the commencement of proceedings in bankruptcy, without leave of this court and in violation of the bankrupt law. The bankrupt not having suggested, as I take it, the pendency of the bankrupt proceedings, and having taken no steps to arrest it, it remains a personal judgment against him, but is not a charge upon the fund in court. The exception must therefore be sustained, and the claim disallowed.

MAYBIN (BOURNE v.). See Case No. 1,700.

Case No. 9,338.

MAYBIN v. RAYMOND.

RAYMOND v. HARRIS et al.

[15 N. B. R. 353;[1] 4 Am. Law T. Rep. (N. S.) 21.]

Circuit Court, S. D. Mississippi. 1877.

BANKRUPTCY—CLAIM OF BANKRUPT—EMPLOYMENT OF COUNSEL—SUBSTITUTION OF ASSIGNEE—OTHER COUNSEL EMPLOYED—CONSENT OF COURT.

1. Where counsel, employed by the bankrupt before the commencement of the proceedings in bankruptcy to carry on a suit at their own cost and retain as compensation one-half of the amount recovered, recover a large fund in such suit after the bankrupt is discharged, they are entitled to the one-half of such recovery, notwithstanding such bankruptcy and discharge.

2. A petition filed by the bankrupt after his discharge, praying that the share of the counsel be

[1] [Reprinted from 15 N. B. R. 353, by permission.]

paid to them, and the balance, after paying debts and costs of the bankruptcy, be paid to him, is one in the ordinary course of a bankrupt proceeding and not a bill in equity, nor is a decree of the bankrupt court directing such payment the allowance of a claim against the bankrupt's estate. The proper method of reviewing such a decree is by petition.

3. The discharge of a bankrupt does not bar the right of his assignee to recover property afterwards discovered, which the bankrupt had failed to put in his schedules.

4. Where it appears that the discharge of the assignee has inadvertently found its way among the files of the court, the court has power to set it aside and direct the assignee to proceed with his duties.

5. Where the assignee was substituted as plaintiff, more than two years after his appointment, in a suit which was commenced in the name of the bankrupt, and recovers therein, the bankrupt cannot claim the amount of such recovery from him on the ground that the limitation provided in the bankrupt law [of 1867 (14 Stat. 517)] barred his remedy at the time of his substitution.

6. Where the assignee, in obtaining authority from the court to make a contract with counsel to prosecute a claim and to pay them for their services one-half the gross amount when recovered, suppresses facts which if known to the court would have induced it to withhold such authority, the contract is not binding on the court or the parties, especially where such facts were known to the attorneys themselves. But a reasonable sum for services actually performed will be allowed.

[In review of the action of the district court of the United States for the Southern district of Mississippi.]

On the 3d of June, 1876, the district court of the United States for the Southern district of Mississippi, sitting in bankruptcy, made a decree, to revise certain portions of which these petitions were filed. This decree was made under the following circumstances: Raymond, the assignee of Maybin, had recovered in the court of claims a judgment against the United States for seventy-one thousand and twenty dollars, which sum had been drawn from the treasury of the United States, and at the date of the decree of the district court was in the registry of the court subject to distribution by its order. In anticipation of this state of facts, Maybin, the bankrupt, had filed, on January 26, 1876, a petition in the district court, in which he set forth that Messrs. Harris & Harris, a firm of solicitors in Vicksburg, were entitled to one-half the amount so recovered from the United States, by reason of a contract entered into in 1866 with them by him before his bankruptcy, by which he agreed that, in consideration of their prosecuting said claim and paying all expenses incident to such prosecution, they were to have and retain one-half the amount they might recover from the United States. That Harris & Harris had associated with themselves in the contract Messrs. Bartley & Casey, solicitors in Washington city, and that by the united services of all his said counsel on May 25th, 1875, a judgment was recovered in favor of petitioner and against the United States, in the court of claims, for seventy-one thousand and twenty dollars. His petition further states that in July, 1873, and more than three years after the discharge of the petitioner in the bankrupt court, John B. Raymond, his assignee, had procured himself to be substituted for the petitioner as plaintiff in the said suit in the court of claims; that but one debt had been proved against the estate of the petitioner, and that for the sum of two thousand dollars only; and that said assignee intended to collect said judgment and hold said money, and refused to recognize the compensation due to the said counsel of petitioner. The petition prayed that the counsel of petitioner should be paid their said fees out of the fund when recovered, and that petitioner should be allowed to deposit in the registry of the court a sufficient sum to cover all claims against him and all costs and commissions of the assignee, and that the remainder of the proceeds of said judgment should be paid to petitioner. After the filing of this petition and before a decree was made thereon, the judgment of the court of claims had been affirmed by the supreme court of the United States, and the amount of the judgment was drawn from the treasury of the United States and was in the custody of the bankrupt court. Before the decree was made upon said petition, other proofs of debt had been filed against the estate of said Maybin, in addition to said claim of two thousand dollars, so that the debts filed against the said estate amounted to about twenty-six thousand dollars. These debts, however, it was claimed by Maybin, were not valid claims against his estate. Raymond, the assignee of Maybin, filed an answer to this petition in which, besides denying many of the averments of the petition, he alleged that Maybin had fraudulently neglected to place the said claim against the United States upon his bankrupt schedules. That in March, 1873, he discovered that the said Maybin was then prosecuting said claim in the court of claims, and thereupon he, the assignee, filed his petition in the district court setting forth that said claim had come to his knowledge, that it would be necessary to employ an attorney to prosecute the same, that he had no funds for that purpose, and that it had been customary for such claimants to employ an attorney at a compensation of one-half the amount recovered, and praying for authority to make a contract with an attorney for the collection of said claim on those terms; that the authority was given, and he made a contract with Messrs. Adam & Speed, attorneys, dated March 22d, 1873, by which he employed them to prosecute said claim, and agreed to pay them for their services one-half the gross proceeds of said claim when recovered. Adam & Speed, who had associated with themselves in the prosecution of this suit Mr. S. E. Jenner, of Washington city, filed on October 2, 1875, a proof of their

claim against the bankrupt's estate, in which they claimed that there was due them and said Jenner, from the bankrupt's estate, the sum of thirty-five thousand five hundred and ten dollars, by reason of their services under the contract aforesaid, and that they held an attorney's lien upon the judgment for seventy-one thousand and twenty dollars, which had been recovered in May, 1875, in the court of claims, in favor of said assignee. After due notice to all the parties in interest, and the taking of much testimony on both sides, the petition of Maybin came on for hearing before the district judge sitting in bankruptcy, on the 3d of June, 1876, and he made a decree. [Case unreported.] The decree found that there was on deposit in the Valley Bank of Vicksburg, the proceeds of said suit in the court of claims, the sum of seventy-one thousand and twenty dollars, subject to the order of the court in the cause, and directed its distribution as follows: To Raymond, the assignee, for his commissions on receiving and paying over said moneys, the sum of eight hundred and ten dollars; to S. E. Jenner, or Adam & Speed, his associates, five hundred and seventy-nine dollars and forty-six cents, being an amount paid by Jenner to Bartley & Casey, the attorneys for Maybin, and which sum was properly chargeable to the attorneys of said Maybin; to Harris & Harris, and Bartley & Casey, their associates, thirty-four thousand five hundred and twenty-six dollars and fifty-four cents; to Adam & Speed and S. E. Jenner, seventeen thousand five hundred and fifty-two dollars and fifty cents; and the court decreed that the remainder of the fund be held by the said Valley Bank until the further order of the court. Maybin, the bankrupt, has filed a petition to review this decree, in which his main ground of complaint is the allowance made to Adam & Speed and Jenner. And Raymond, the assignee, has also filed a petition of review in which he complains of so much of the decree as allows to Harris & Harris and Bartley & Casey the said sum of thirty-four thousand five hundred and twenty-six dollars and fifty-four cents. The other facts necessary to an understanding of the controversy are stated in the opinion of the court.

W. B. Pittman, A. B. Pittman, T. W. Bartley, and Joseph Casey, for Harris & Harris and Bartley & Casey.

W. B. Pittman, for Maybin.

G. Gordon Adam and Dickey, for Adam & Speed and Jenner, and for Raymond, assignee.

WOODS, Circuit Judge. The respondents to the supervisory petition of review filed by Raymond, the assignee, have entered a motion which raises a preliminary question that first requires the attention of the court. The motion is to dismiss the petition because this court is without jurisdiction to entertain the same, the decree sought to be reviewed being either a decree in equity or the allowance of the claim of creditors, and therefore not reviewable by supervisory petition. I do not think this motion ought to prevail. The petition of Maybin was in the ordinary course of a bankrupt proceeding. Its main purpose was to secure to himself any surplus that might remain of his estate after paying all the claims upon the fund, and all debts due from him. It certainly was not necessary to present such a prayer by a regular bill in equity. The fund, at the time of the decree, was in the registry of the court, and Maybin's petition amounted simply to a motion to distribute the fund to those having claims against it and to pay him the residue. Nor does the decree appear to be the allowance of a claim in favor of Harris & Harris and Bartley & Casey. They were the owners by equitable assignment of one-half the fund, if what they alleged about their contract with Maybin was true. They did not set up a debt due to them against the bankrupt estate, but a title to one-half the fund. The decree that they be paid out of the fund was not the allowance of a claim against the estate from which, by the provisions of original section 8 of the bankrupt act (Rev. St. 4980), an appeal might be taken. "The assignee of a bankrupt is not the assignee of his creditor, nor of all the judgments, executions, liens, and mortgages outstanding against his property. He takes only the bankrupt's interest in the property; he has no right or title to the interest which others have therein, nor any control over it further than is expressly given by the bankrupt act as auxiliary to the preservation of the bankrupt's interest for the benefit of his general creditors." Goddard v. Weaver [Case No. 5,495].

In the district court the petition of Maybin was treated both by the parties and the court as an informal petition in the course of bankrupt proceedings; and I am disposed to treat it in the same way in this court, and think it was not a bill in equity; nor was the decree of the court the allowance of a claim against the bankrupt's estate. The motion to dismiss the revisory petition of Raymond, the assignee, is therefore overruled.

As to the merits of the revisory petition of Raymond, the questions are, what contract did Harris & Harris make with Maybin for the prosecution of his claim against the United States, and what were their rights under that contract? In my judgment the proof is clear and conclusive that one or two years before Maybin filed his petition to be adjudicated a bankrupt, he entered into a written contract with Harris & Harris, by which the latter agreed to prosecute said claim against the United States, and pay all costs and expenses of said prosecution, and for their said services they were to have one-half the net proceeds of the claim, and the other half was to be paid to said Maybin; that Harris & Harris, by themselves and those whom they

associated with themselves, did prosecute said claim in the court of claims, and in the supreme court of the United States, and did recover therein final judgment for seventy-one thousand and twenty dollars, which amount is now in the registry of the district court.

Under this state of facts there can be no doubt of the right of Harris & Harris and their associates to one-half the net proceeds of the fund, notwithstanding the fact that, during the pendency of the cause in the court of claims, Maybin had been adjudicated a bankrupt, and before the recovery of the judgment in that court Raymond, his assignee, had been made a party plaintiff to the suit. Harris & Harris and their colleagues were not only willing to prosecute the suit after the bankruptcy and after the assignee was made party, but actually did prosecute it to a successful final judgment and recovery of the money. These services were accepted by the assignee, and he now enjoys their fruits. When their services had been rendered according to their contract, and the money recovered, they had a title to one-half the amount. When Raymond was appointed assignee the claim of Maybin vested in him, subject to the rights of Harris & Harris under their contract, which were in no way affected by the bankruptcy. As long as they were willing to perform their part of the contract, they were entitled to insist upon their rights under it. These rights of Harris & Harris and their associates were recognized not only by the district court, but also by the court of claims. The district court, in an order dated November 28, 1873, directed Raymond, as assignee, to prosecute said claim in the court of claims, and declared that all costs and expenses incurred by said bankrupt, including his counsel fees for the prosecution of said claim before the substitution of said assignee, should be paid out of the amount which might be paid into court to be thereafter determined by the court. And in the order of the court of claims, made on February 23, 1874, by which S. E. Jenner was made attorney of record for said Raymond as assignee of Maybin, instead of Bartley & Casey, it was provided that Bartley & Casey should have and retain a lien upon the cause of action, and upon the papers and effects of the said Maybin, and upon any judgment which might be recovered in the case, to the amount of such contingent fees and costs as it was agreed by or on behalf of said Maybin that his original attorney should receive for professional services for prosecuting the case. The order of the district court authorizes the assignee to prosecute the claim in the court of claims, and the order of the court of claims substituting the attorney of the assignee as attorney of record, both took care to preserve the rights of Maybin's attorneys under their original contract for fees. It is objected that the contract made between Maybin and Harris & Harris is champertous, and therefore void. "Champerty," says Blackstone, "is a species of maintenance, being a bargain with the plaintiff or defendant campum partire if they prevail at law; whereupon the champertor is to carry on the party's suit at his own expense." The common-law notions of champerty and maintenance have never fully obtained in this country, because the reason upon which they were founded in England did not exist here.

In the case of Slywright v. Pages, 1 Leon. 167, it was said by the whole court of common pleas that the meaning of the statute of 32 Hen. VIII., concerning maintenance, was "to repress the practices of many who, when they thought they had title or right to any land, for the furtherance of their pretended right conveyed their interest in some part thereof to great persons, and with their countenance did oppress the possessors." Blackstone speaks of the offense of champerty as "perverting the process of law into an engine of oppression." The same reasons were given for the rule of the common law that a chose in action could not be assigned. "Nothing," says Coke, "in action, entry, and re-entry can be granted over, for or under color thereof pretended titles might be granted to great men whereby right might be trodden down and the weak oppressed." Co. Litt. 14a. It has been well remarked that feeble, partial, and corrupt must have been the administration of justice when such a reason could have force. Thallhimer v. Brinckerhoff, 3 Cow. 643. The rule that a chose in action cannot be assigned has long since been exploded, because the reason upon which it rested has ceased to exist. And the ideas of the guilt of champerty and maintenance have measurably disappeared, and generally it is not now considered in this country a crime to aid the lawful suit of another with money and services, in consideration of a share in the recovery. Thallhimer v. Brinckerhoff, supra; Lytle v. State, 17 Ark. 608; Bayard v. McLane, 3 Har. (Del.) 139.

Where the government is defendant, the grounds upon which the offense of champerty were supposed to rest cannot, in the nature of the case, exist. In such cases as the one under consideration, the government invites the suits of her citizens having lawful claims, and is in no danger of suffering injustice, no matter how great and influential those are who are aiding in their prosecution. The objection that the contract under consideration is champertous cannot therefore prevail. It seems to me clear that the district court, in making the decree now under review, did right in directing the payment of the compensation of Harris & Harris and Bartley & Casey out of the fund. Maybin, when competent to contract, had agreed to pay them this compensation, and they had, without objection by the assignee, rendered the services and accomplished the object for which the allowance was made. Therefore, unless some obstacle appears in the consideration of other questions raised in the case, that part of the

decree of the district court under consideration ought to be affirmed, and the petition of review filed by Raymond dismissed.

The questions referred to are made by the counsel for Maybin upon his petition to review so much of the decree of the district court as allowed Adam & Speed and Jenner the sum of seventeen thousand five hundred and fifty-two dollars. The objections upon which the counsel for Maybin rely reach to the entire decree of the district court. They assert that the district court had no jurisdiction to make the decree. They claim this on several grounds: First. Because the proceeding in bankruptcy was completed and concluded before Raymond was authorized to prosecute the claim in the court of claims, and that the court had therefore no authority to make that order or any subsequent order in the bankruptcy. This view is based on the alleged fact that the bankrupt Maybin, having been discharged about the 25th of January, 1870, Raymond, his assignee, was subsequently, but soon after, also discharged, and that this ended and closed the bankruptcy proceedings, and all proceedings thereafter in said bankruptcy were without jurisdiction and void. If the facts as claimed were borne out by the record, I should feel inclined to hold on this point with the attorneys for Maybin. But as I read the record, Raymond never was discharged as assignee. It is true a discharge written upon a printed blank, without date and signed by the register, is found among the files of the bankruptcy of Maybin, and doubtless this discharge was signed by the register soon after the date of the discharge of the bankrupt himself. But it appears farther from the record that on April 10, 1873, Raymond filed a petition in the district court, in which he represented that he was embarrassed, in the performance of his duty as assignee, by the said paper purporting to be his discharge as assignee; that said paper was signed without being applied for; that the date was purposely omitted, and that it was inadvertently put by the register among the papers in the cause, when they were returned into court.

Upon this petition the court acted, and found that said discharge was inadvertently made and filed in said cause, and ordered it to be annulled. The mere inadvertent filing of a discharge among the records of a cause does not paralyze a court and put an end to the case. A court at any time, on the truth being made to appear, would have the power to order such a paper to be stricken from the files. "A court has power at a subsequent term to set right mere forms in its judgments, to correct misprisions of its clerks, and to correct any mere clerical errors so as to conform the record to the truth." Bank v. Labitut [Case No. 842]. When, therefore, it was made to appear that the discharge of an assignee had inadvertently found its way among the files of the court, the court had power to order the paper to stand for naught, and the assignee to proceed in the discharge of his duties; and this the court did. The assignee was, therefore, in fact never discharged.

Second. It is further claimed, that the discharge of the bankrupt on January 25, 1870, was an adjudication that he had surrendered all his property for the benefit of his creditors, and that the assignee had no right, although he might afterwards discover property of the bankrupt which the bankrupt had failed to put upon his schedules, to bring it into the bankruptcy without first setting aside the discharge of the bankrupt; that this had never been done, and that the time within which it could be done had elapsed. I do not think that the discharge of a bankrupt was intended to have the effect claimed. Generally, a bankrupt may apply for his discharge at any time after the expiration of six months, and if no debts have been proved and no assets have come to the hands of the assignee, he may apply after the expiration of sixty days from the adjudication. A discharge once granted can only be annulled on the ground of fraud. Rev. St. §§ 5110, 5120. So that if the theory under consideration is correct, where a bankrupt inadvertently omits property from his schedule and gets his discharge fairly, newly-discovered assets can never be reached by the assignee, because the discharge can never be set aside. An interpretation of the law which leads to such results must surely be unsound. The fact is, that the adjudication of bankruptcy vests in the assignee the title to all property of the bankrupt not exempt, whether the same is placed on the schedules or not; and, without reference to the discharge of the bankrupt, it is the duty of the assignee to collect the assets, and apply them to the payment of the debts, and the discharge of the bankrupt interposes no obstacle to the performance of this duty.

Third. It is claimed that if the assignee acquired any right to the claim of Maybin against the United States, he is barred of that right because he did not prosecute it within two years; that is to say, because he did not have himself substituted for Maybin as plaintiff in the suit pending in the court of claims until after the expiration of two years from his appointment as assignee. Rev. St. § 5057. If it be conceded that under the circumstances the assignee was barred, it seems clear that Maybin cannot now avail himself of that fact. The limitation is for the benefit of defendants in the actions prosecuted by the assignee. If the limitation of the statute was effectual to bar the assignee, the United States might have set up the bar. But that was not done; after the suit of the assignee has been allowed to progress to judgment, and the money has been collected by him, it seems to be too late for the bankrupt to intervene and set up the bar of the statute. I am of opinion, therefore, that none of the grounds relied on by counsel for Maybin, to

show that the district court had no jurisdiction to make the decree complained of, are well taken.

This brings up the merits of the revisory petition filed by Maybin. The petition claims that the allowance by the district court to Adam & Speed and Jenner of seventeen thousand five hundred and fifty-two dollars and fifty cents was not justified, and I think the objection to this allowance is sustained by the facts of the case. It is made perfectly clear by the record that the court, when it authorized Raymond, the assignee, to employ an attorney to prosecute the claim of the bankrupt against the United States, for the compensation of one-half the amount recovered, did so in ignorance of the facts of the case; and that this ignorance resulted from the suppression by the assignee of facts which must have been known to him, and the fact of such suppression was known to the attorneys with whom he subsequently contracted. It is not to be supposed that if the court had been advised that the claim of Maybin was already in course of prosecution in the court of claims, and almost ready for judgment, and that the attorneys prosecuting the claim had a contract with Maybin for one-half the amount to be recovered for their compensation, that under these circumstances the court would have authorized the employment of other counsel for the assignee, who was to receive the other half of the money for their services. The petition filed by the assignee for authority to employ counsel left the court in the dark as to the real state of the case; and the order of the court allowing the assignee to employ counsel who were to receive one-half the recovery for their services was not binding upon the court or the parties.

But aside from this, the services which Adam & Speed contracted to render, and for which they were to receive one-half the amount recovered by them, were never rendered. What were the services they agreed to perform? The petition of the assignee for authority to employ counsel represented that among the assets of the bankrupt there was a claim against the United States for cotton taken from bankrupt's plantation; that in the prosecution of said claim it would be necessary to employ counsel; that it was customary in such cases for the claimant to enter into contract with the attorney to pay him for his services in the collection of the same fifty per centum of the amount recovered, the claimant to be at no further expense in making said collection; and the petition prayed that the petitioner be authorized to employ counsel to prosecute the claim on the said terms, and the court authorized the contract to be made as prayed for in the petition. In pursuance of this authority the assignee, on the same day the authority was given, entered into a contract in writing with Adam & Speed and Jenner, by which they agreed "to prosecute and recover a certain claim or debt due and owing to the estate of said bankrupt by and from the United States, for and on account of cotton taken from bankrupt's plantation during the Rebellion." And the assignee agreed to pay them one-half the amount recovered for their services.

From all this it appears that what Adam & Speed and Jenner were employed to do, and what they agreed to do, and for the doing of which they were to receive one-half the amount recovered, was to prosecute and recover the claim against the United States. This they did not do, nor did they assist in doing. The record shows that the suit against the United States was prosecuted solely by Harris & Harris and their associates, and it fails to show any service performed by Adam & Speed and Jenner, or either of them, toward the recovery of the judgment against the United States. Adam & Speed and Jenner did perform services for the assignee about the claim, but they were not the services contemplated by the order of the court or by the contract between the assignee and them. These services were the procuring the substitution of the assignee as plaintiff in the court of claims in place of the bankrupt, and having Jenner substituted as attorney of record for plaintiff in place of Bartley & Casey. Doubtless these services were valuable to the estate of the bankrupt. They prevented the fund when recovered from going into the hands of Maybin, the bankrupt, and secured the possession of it to Raymond, the assignee. But the prosecution of the claim and the recovery of the money from the United States, by the final judgment of the supreme court, was done by Harris & Harris and their associates, and not by Adam & Speed and Jenner. It never entered into the contemplation of the court that Adam & Speed and Jenner were to be paid fifty per cent. of the recovery for preventing the fund from going into the possession of the bankrupt, and that the other fifty per cent. was to be paid to the attorneys of the bankrupt for their services in recovering the fund as against the United States.

In my opinion Adam & Speed and Jenner cannot claim under said contract: (1) Because the authority to make it was conferred by the court without a knowledge of the facts which the assignee must have known, and was bound to communicate; and (2) because none of the services contemplated by the order of the court and the contract between Adam & Speed and Jenner were performed. The services actually rendered were not those for which the assignee was authorized by the court to pay fifty per cent. of the recovery. But nevertheless Adam & Speed and Jenner have performed a valuable service to the bankrupt's estate, and they should be paid for such services what they are reasonably worth.

The result of my views is, that the petition of review filed by John B. Raymond, assignee, must be dismissed at the costs of the

bankrupt estate, and that so much of the decree as directs the payment to Harris & Harris and Bartley & Casey of thirty-four thousand five hundred and twenty-five dollars and fifty-four cents must be affirmed. That so much of the revisory petition filed by J. W. Maybin as complains of the order directing the payment to Adam & Speed and Jenner of seventeen thousand five hundred and fifty-two dollars and fifty cents by said assignee be sustained, and so much of said decree as directs the payment to said attorneys of said sum be reversed; and that the district court be required to ascertain in such manner as shall seem to it most proper what sum of money is due to Adam & Speed and Jenner for their services in the premises, and to direct the payment to them of such sum out of the fund.

[For subsequent proceedings in this litigation, see Cases Nos. 9,337 and 1,700.]

Case No. 9,339.

MAYE v. CARBERY.

[2 Cranch, C. C. 336.] [1]

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

TRIAL—NOTICE TO PRODUCE PAPERS — JUDGMENT BY DEFAULT—EVIDENCE—WRITTEN INSTRUMENT—SECONDARY AFFIDAVIT.

1. Judgment by default, for not producing at the trial a paper which the defendant has been notified to produce, cannot be rendered unless there is a previous order of the court to produce it, founded upon a motion and notice.

[Cited in Gregory v. Chicago, M. & St. P. R. Co., 10 Fed. 530.]

[See Bank of U. S. v. Kurtz, Case No. 920; Bas v. Steele, Id. 1,088.]

2. Before secondary evidence of a written instrument can be given, the court must be satisfied by the affidavit of the party offering it, or otherwise, that the supposed original paper did once exist, and that it is not in his power to produce it.

Replevin. Rent arrear, and issue.

The plaintiff, having given notice to the defendant to produce the original, offered to read in evidence to the jury, a copy of a paper in the handwriting of the deceased subscribing witness.

Mr. Taney, for defendant, objected; stating that his client had not the original.

THE COURT (nem. con.) decided that the plaintiff was not entitled to judgment by default, under the 15th section of the judiciary act of 1789 (1 Stat. 73), because he had not given notice of a motion to the court for an order to compel the defendant to produce the paper. And that the plaintiff must lay the foundation for his secondary evidence, by satisfying the court by his own affidavit, or otherwise, that the original once existed, and that it was not in his power to produce it.

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

MAYER, Ex parte. See Cases Nos. 14,245 and 14,246.

Case No. 9,340.

MAYER v. CAHALIN.

[5 Sawy. 355; 7 Reporter, 327; 11 Chi. Leg. News, 176.] [1]

Circuit Court, D. Oregon. Jan. 7, 1879.

STATUTES—TITLE—ATTACHMENTS—BODY OF ACT—REPEAL BY IMPLICATION.

1. The subject of an act is expressed in the title thereof, although the provisions in the act concerning the subject may be different from what may be inferred from or suggested by such title.

2. A provision in an act concerning the dissolution of attachments is a matter properly connected with the "subject" of disposing of an insolvent debtor's property.

[Cited in Hahn v. Salmon, 20 Fed. 810.]

3. Where the title of an act states that it is to provide a just disposition of an insolvent debtor's property, it cannot be maintained that the "subject" of the act is not expressed in the title, because the disposition of such property provided for in the body of the act is, in the opinion of the court, not just.

4. A repeal by implication is as much within the purview of section 22 of article 4 of the constitution of Oregon, and the mischief intended to be prevented by it, as an amendment in terms; but it appearing that the supreme court of the state has decided otherwise, this court follows such decision.

[Cited in The Glaramara, 10 Fed. 681.]

Action [by Daniel Mayer against E. Cahalin] to recover money.

John W. Whalley and M. W. Fechheimer, for plaintiff.

Joseph N. Dolph and Raleigh Stott, for defendant.

DEADY, District Judge. This action is brought by the plaintiff, a citizen of California, against the defendant, to recover the sum of seven thousand nine hundred and sixty-seven dollars and ninety-three cents, the balance due upon certain goods, wares and merchandise theretofore sold and delivered to him. On December 23, 1878, the plaintiff sued out an attachment, upon which the marshal took the defendant's stock in trade into his possession.

The defendant now moves to dissolve the attachment, upon the ground that on December 30, 1878, he made an assignment of all his property, of the value of twelve thousand nine hundred and seventy-nine dollars and fifty-five cents, to an assignee for the benefit of all his creditors, in proportion to the amount of their several claims amounting in the aggregate to twenty-one thousand three hundred and thirty-eight dollars and fifty-two cents, in accordance with the provisions of the act entitled "An act to secure creditors a just division of the estates of debtors who convey to assignees for the

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 7 Reporter, 327, contains only a partial report.]

benefit of creditors," approved October 18, 1878; and that on January 7, 1879, the assignee aforesaid demanded of the marshal the property taken on said attachment, which he refused to surrender.

This act (Sess. Laws 1878, p. 36) provides that no general assignment for the benefit of creditors shall be valid unless made for the benefit of all the creditors pro rata; and that "such assignments shall have the effect to discharge any and all attachments on which judgment shall not have been taken at the date of such assignment." It may be remarked, in passing, that judgments are not taken on attachments, but are given in actions wherein attachments may be or have been issued.

By section 933 of the Revised Statutes an attachment of property in the national courts to satisfy any judgment that may be recovered therein, "shall be dissolved when any contingency occurs by which, according to the laws of the state where said court is held, such attachment would be dissolved upon like process in the courts of the state."

Upon this section counsel for the plaintiff admits that if the act of October 18, 1878, aforesaid, is valid, this motion must prevail; but maintains that this act is unconstitutional and void because (1) it was passed in contravention of section 20 of article 4 of the constitution—the subject thereof not being expressed in the title; and (2) it was passed in contravention of section 22 of said article—certain sections of the Code on the subject of attachments being thereby amended without being set forth and published at full length.

The first objection is sought to be maintained by showing that while the "subject" expressed in the title of the act is the just division of a debtor's property among his creditors—in effect, the body of the act provides for or permits a very unjust distribution of said property. For instance, while it provides that an assignment shall dissolve an attachment, it leaves judgments by confession, which may have been made in the mean time, or at any time, for the very purpose of preventing a just distribution of the property, in full force. Upon these judgments, executions may issue and be levied upon all the property of a debtor, and leave nothing for the assignment to operate on—its only effect in such case being to dissolve the attachment for the benefit of the creditors who have, with the assistance of the debtor, obtained judgments by confession. Besides, it provides that the assignment shall not pass any property not mentioned in the inventory, thus leaving such property liable to be taken on attachment by any creditor after the assignment. The effect of this is practically to invite and legalize a partial and fraudulent compliance with the act itself.

Evidently the object of the act was to prohibit insolvent debtors from preferring one creditor to another, and so far it is not obnoxious to the charge that its subject is not expressed in its title. But it must be admitted that in practice it will not accomplish such purpose, and that most probably it will operate as counsel contend—to secure an unequal, and, therefore, an unjust, distribution of a debtor's property.

But I do not think that a court can say that the "subject" of an act is not expressed in its title because it may appear that, owing to unintentional errors and imperfections in its composition, its practical operation may be somewhat or altogether different from what was expressed or intended. Besides, what constitutes a just distribution of a debtor's property is a subject about which a variety of opinions may be entertained, and as to which there is no absolute or fixed standard to which we may refer as authority.

The "subject" of this act is the distribution of an insolvent debtor's property among his creditors in a certain contingency, and beyond a doubt so much is expressed in the title. It also purports that such distribution is just—that is, according to the understanding of the legislative assembly—which I do not think is subject to judicial review.

It is also urged against the act under this head, that the "subject" of attachments is not expressed in the title, though embraced in the body of the act, and, therefore, it is so far void. But I think the dissolution of attachments is certainly a "matter properly connected" with the "subject" of the distribution of an insolvent debtor's property—particularly in a country where such property may be liable to attachment at the suit of a creditor—and, therefore, need not be otherwise expressed in the title.

As to the second objection: Section 22, aforesaid, provides that "no act shall ever be revised or amended by mere reference to its title, but the act revised, or section amended, shall be set forth and published at full length." In answer to this objection, counsel for the defendant insist (1) that the act in question does not amend any existing act; and (2) that if it does, it is only by implication, and such an amendment is not within the purview of this provision of the constitution as construed by the supreme court of this state; citing Fleischner v. Chadwick, 5 Or. 153; Grant Co. v. Sels, Id. 243; Hurst v. Hawn, Id. 279.

I think the act does amend the Code as to the effect and discharge of attachments. It is not merely cumulative, as was the case in State v. Berry, 12 Iowa, 59, cited by counsel for defendant. It changes, limits and restrains the operation of section 142 of the Code so that the property taken on an attachment is no longer held as an absolute "security for the satisfaction of such judgment" as the plaintiff may obtain, but only upon condition the defendant in the meantime does not make an assignment, which he is almost certain to do, unless he is in collusion or friendly co-operation with the attaching creditor. The same is true of section

159. In effect this section by a reference to sections 128, 129, provides that an attachment shall not be discharged or dissolved unless it satisfactorily appears that there was not sufficient cause for its allowance—that it was issued wrongfully. But this act provides that it shall be discharged if the debtor makes an assignment before judgment.

In short, the provisions of the Code in relation to the effect of an attachment upon property taken thereon as security for a judgment and the dissolution thereof prior to judgment and the provisions of the act cannot co-exist. The application of one to the subject necessarily excludes the other. They are plainly repugnant to one another. The provisions of the Code are by this act rendered null and of no effect whenever the defendant wills it to be so.

Upon the question of whether the act was passed contrary to section 20 aforesaid, counsel for the plaintiff insist that the decisions of the supreme court of the state cited from 5 Or., supra, are not in point; that they only decide that a statute may be repealed by implication, but not that it may be so amended. But in Grant Co. v. Sels, which is the case most relied on, while the court speaks of a repeal by implication, and not an amendment, the facts of the case, by the light of which the language of the court is always to be read, show that it was a case of an amendment of a section, and not the repeal of a statute.

In City of Portland v. Stock, 2 Or. 70, and Dolan v. Barnard, 5 Or. 391, the court held the amending act void. But in each of these cases the act purported to be an amendatory one. Yet in City of Portland v. Stock no weight is attached to that fact, and the supposed difference between repeals in terms and by implication is not even noticed. Neither is any significance attached to the fact in Dolan v. Barnard, where the act under consideration is said to be "not only amendatory in terms," but so "in its nature and effect."

For myself, I have a decided conviction upon the question. I agree heartily with the able dissenting opinion of Chief Justice Bonham in Grant Co. v. Sels, and especially when he says: "It is, in my judgment, wholly immaterial whether the act is eo nomine amendatory or not; the evil against which the constitutional provision in question was directed, is amendments which are such in effect, and is not limited to those which are so named in the title or preamble of the act."

It is said that the constitution is silent upon the subject of implied repeals. But it is no more silent upon that subject than upon repeal in terms. The fact is it speaks specifically of neither, but uses the term "amend" without qualification or limitation, and thereby includes both modes of amendment or repeal, and one just as much as the other. As I read it, the constitution does not contemplate any such immaterial distinctions as amendments in terms and by implication. In effect it says that an amendment of a statute shall not be valid unless the section amended is set forth and published at length. The evil intended to be prevented by this section of the constitution is a very serious one, and unless amendments by implication, which are more mischievous than those in terms, are held to be within its purview, the provision is practically nullified. The average legislator will never take the risk or trouble of amending a statute by name, when he can avoid both by doing it by implication—without professing to do so.

But while I have felt at liberty to throw out these suggestions on the subject, my duty is to follow the ruling of the supreme court of the state upon a question involving the construction of the constitution of the state. And while there may be some ground for the argument, that as the last case on this subject decided by the supreme court—Dolan v. Barnard, supra—ignores the distinction between repeals in terms and by implication, yet, I think, that that being a case in which the act purported to be amendatory, I am not at liberty to assume that the case of Grant Co. v. Sels, supra, is thereby overruled, and must, therefore, hold upon the authority of that decision that this act is valid. This being so, the attachment is dissolved; and it is so ordered.

MAYER (DEPOSIT SAVINGS ASS'N v.). See Case No. 3,813.

Case No. 9,341.

MAYER v. FOULKROD et al.

[4 Wash. C. C. 349.] [1]

Circuit Court, E. D. Pennsylvania. April Term, 1823.

ADMINISTRATOR—EQUITY—REMEDY AT LAW—ADEQUATE AND COMPLETE—JUDICIARY ACT—PRACTICE IN EQUITY—TITLES TO LAND.

1. An executor or administrator is not an assignee, within the meaning of the eleventh section of the judiciary act of 1789 [1 Stat. 78].

2. It is not sufficient to oust the jurisdiction of the equity side of the court, that the plaintiff has a remedy on the common law side; unless it appear that such remedy be adequate and complete to the object of the suit.

[Cited in Baker v. Biddle, Case No. 764.]

3. Although a legatee has a remedy at common law, by the law of Pennsylvania; this does not oust the equity jurisdiction of the circuit courts of the United States; to effect that, the common law side of those courts must be able to afford full, complete, and adequate remedy.

[Cited in Domestic & Foreign Missionary Soc. v. Gaither, 62 Fed. 423.]

4. The thirty-fourth section of the judiciary act applies only to the rights of persons and of

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

property, and in those cases the state laws furnish rules of decision, which the federal courts must observe. But as to remedies and modes of proceeding at common law, they are fixed by the act of the 8th of May, 1792, c. 137 [2 Bior. & D. Laws, 299; 1 Stat. 275, c. 36] to be such as were then used in those courts, in conformity with the act of the 29th of September 1789 [1 Stat. 93].

[Cited in U. S. v. Wonson, Case No. 16,750.]

5. But the equity practice and mode of proceeding was fixed by the act of 1792, subject only to be changed by rules of those courts, or of the supreme court, and cannot be affected by state laws, either prior or subsequent to the act of 1792.

6. If a state law shall declare that to be a legal title, which without such a declaration would be considered only an equivalent one, the federal courts may afford a common law remedy to enforce it, but without excluding the equitable jurisdiction of the court in a case proper for it.

Bill on the equity side of the court, setting forth that John A. Holt, by his last will, devised to his wife all his real estate during her life, and after her death, he directs that the said real estate shall be let out for a yearly rent, to be paid to his daughter during her life, and after her decease, that the said estate should be sold at public auction by his executors, and that the proceeds thereof should be divided amongst his grandchildren, share and share alike, except that his grandson Michael Cooper should have two shares. That after the death of the widow and daughter, George Foulkrod, the surviving executor, sold a certain tract of land, part of the testator's estate, for the sum of $12,000. That the said Lewis Benner, a citizen of the state of Maryland, previous to the death of the widow of the testator, purchased from four of the grandsons, (of whom M. Cooper was one) five eighths of the real estate of the testator, or the proceeds thereof, which was duly assigned, transferred, and set over to him; that the plaintiff, who is the administrator of the said Benner, is a citizen of the said state of Maryland, and the defendants are citizens of this state. The prayer of the bill is, that the defendants [Jacob Foulkrod and others], who are administrators of George Foulkrod, the surviving executor of Holt, may discover which real estates of Holt had been sold, and to what amount, and may pay to the plaintiff five eighth parts of the proceeds of such sales. The bill does not state that the legatees from whom Benner bought were citizens of a state other than Pennsylvania. To this bill the defendants demurred for want of equity, and that all the matters stated in the bill are properly triable at law, where full, adequate, and complete remedy may be had.

Mr. Rawle, in support of the demurrer, contended:

1. That, upon general principles, a court of law can afford a remedy for the recovery of a pecuniary legacy, and consequently a court of equity cannot entertain jurisdiction in such cases by the express prohibition contained in the sixteenth section of the judiciary law.

2. That admitting the law to be otherwise, still the plaintiff has a full, adequate, and complete remedy at law, under the provisions of an act of assembly of this state, passed in the year 1772. See 1 Smith's Laws, 383. This act declares that it shall be lawful for a person to whom any bequest of money or other goods and chattels shall be made by will, to prosecute an action upon the case, debt, detinue, or account render, as the case may require, for such legacy, after it becomes due, in any of the county courts for holding pleas in any county of the province; and if it shall appear that the legacy is due, and that there are assets sufficient in the hands of the executor, &c. to discharge the debts of the testator, and the legacy so bequeathed, the plaintiff shall recover, &c. The law then provides for abatement in cases where there are not assets sufficient to pay all the legacies; and in case the defendant should plead a want of assets, the court is directed to appoint auditors to examine the accounts of the executors, and to report thereon, and also the proportion of the assets remaining, after payment of the debts, to which the plaintiff is entitled, for which judgment is to be rendered. But to enable the plaintiff to maintain such action, he must have first made a reasonable demand of the executor, accompanied by an offer of two sufficient sureties to be bound to the executor, in double the sum claimed, to refund in case a deficiency of assets to pay debts and other legacies should afterwards appear, which refunding bond, if the executor refuse to receive, the plaintiff is to file with the clerk of the court. It was contended that not only is the plaintiff's remedy under this law complete and adequate, but it guards the executor against future responsibility, by requiring a refunding bond to be given by the plaintiff, and that the plaintiff ought therefore to have pursued his remedy under this law. The courts of the United States take notice of the laws of the states, and shape the remedies in those courts accordingly; as was done in the case of Sims v. Irvine [3 Dall. (3 U. S.) 425], and is the daily practice in this court where suits are entertained in the name of the assignee of a bond, on the ground that bonds are made assignable by the laws of this state.

It was denied that the ground of jurisdiction is rendered stronger by the circumstance that the suit is brought by the administrator of an assignee of a chose in action, as courts of law entertain suits by such assignees, in the name of the assignor, and take notice of, and guard the interest of such assignees with the same care they would do could the suit be maintained in his own name.

3. That this court is precluded from taking cognizance of this cause by the eleventh section of the judiciary act; the legatees, by whom the assignment was made, being citizens of this state, or not stated to be citizens of a state other than this, are consequently disqualified to sue in this court. Sere v. Pitot, 6 Cranch [10 U. S.] 332; Chappedelaine v. Dechenaux, 4 Cranch [8 U. S.] 306.

4. Another objection was made to the form of the bill, in not stating that the defendant had refused, or neglected to settle his accounts, or, if rendered, that they were untruly or fraudulently settled.

In answer to the first and second objections, the plaintiff's counsel relied upon 2 Fonbl. 321; Deeks v. Strutt, 5 Term R. 690; Robinson v. Campbell, 3 Wheat. [16 U. S.] 321; U. S. v. Howland, 4 Wheat. [17 U. S.] 108; Campbell v. Claudius, 1 Pet. [26 U. S.] 494; U. S. v. Wonson [Case No. 16,750]; 1 Call, 391; Telfair v. Stead, 2 Cranch [6 U. S.] 409.

To the third objection it was answered that the administrator is not an assignee within the meaning of the eleventh section of the judiciary law, and that upon this point the cases of Sere v. Pitot, and Chappedelaine v Dechenaux, are conclusive.

Condy & Dundass, for plaintiff.

Before WASHINGTON, Circuit Justice, and PETERS, District Judge.

WASHINGTON, Circuit Justice. The objections to the jurisdiction are: (1) To the general jurisdiction of the circuit courts of the United States in cases like the present, on the ground that the plaintiff, claiming as assignee of the legacies in dispute, the jurisdiction of the courts of the United States is excluded by the eleventh section of the judiciary law, unless it appear upon the face of the proceedings that the court could have taken cognizance of the cause in case no assignment had been made, and the assignor had brought the suit. (2) To the jurisdiction of the equity side of this court, upon the ground that the plaintiff has an adequate and complete remedy at law in respect to the matter in dispute.

1. The objection to the general jurisdiction of the court was considered so clearly untenable by the supreme court in Chappedelaine v. Dechenaux, 4 Cranch [8 U. S.] 306, that the counsel, when proceeding to discuss it, were stopped by the court. This decision came afterwards under the notice of the court in Sere v. Pitot, 6 Cranch [10 U. S.] 332, and was then more deliberately considered. The opinion there given was, that the eleventh section of the judiciary law, which was relied upon, does not apply to the case of an executor or administrator who is an alien, or citizen of another state than that in which the suit is brought, because "they are not usually designated by the term assignees, and are therefore not within the words of the act." These cases so entirely refute the objection under consideration, that a further examination of it is rendered altogether unnecessary.

2. The grounds of the objection to the jurisdiction of the equity side of the court are: (1) That, upon general principles, a court of law can afford to a legatee a remedy is for the recovery of his legacy; but if not, still, under the act of assembly of this state, which was referred to, a legislative remedy is expressly provided, full, adequate, and complete.

1. In support of the first ground upon which this objection is rested, the learned counsel cited no case upon which he ventured to reply. Could it even be made to appear that courts of law have afforded a remedy in cases of this kind, it would not follow that the jurisdiction of the equity side of this court is excluded, either by the general principles which regulate the jurisdiction of a court of chancery, or by the positive provision contained in the sixteenth section of the judiciary law, which does no more than affirm the general principle. It is not sufficient to show that the plaintiff in equity has a remedy at law, in order to turn him out of that court, unless the defendant can go further, and prove that that remedy is complete, and fully adequate to the object of the suit. Upon what other ground is it that the jurisdiction of the chancery court stands undisputed by all other courts, in cases of account, dower, partition, rents and profits, lost deeds, and a variety of others, in which the courts of law afford a remedy, but that the remedy falls short of that which a court of equity can grant? Amongst the numerous cases which might be cited in affirmance of the jurisdiction of courts of equity over the particular subject of this suit, it may be sufficient to refer to that of Atkins v. Hill, Cowp. 284, for the purpose of seeing the opinion of Lord Mansfield, who, it is well known, was disposed to go to the very verge of the common law jurisdiction, if not beyond the mark which separated it from the ancient and well established jurisdiction of the courts of equity. He observes that "the discovery and account given in a court of equity is so preferable a remedy, that it has drawn all such suitors (legatees) thither; and therefore, in fact, there is scarce an instance of a legatee attempting to sue at law." "The relief given by a court of equity, is easier and better." See, also, 2 Madd. 2; 2 Fonbl. 321; Herbert v. Wren, 7 Cranch [11 U. S.] 370, 376.

But it is not true that courts of law do afford a remedy for the recovery of a legacy, unless in a case where the executor, under certain circumstances, assumes to pay it. In the case above referred to of Atkins v. Hill, the declaration set forth a promise by the executor to pay the legacy, in consideration of assets having come to his hands, more than sufficient to pay all the just debts and legacies of the testator; and the opinion of the court, in support of the action, proceeded upon the ground of this promise, made, as the court decided, upon a sufficient consideration. The case of Hawkes v. Saunders, which followed immediately after the above, Cowp. 289, is precisely like it, as are indeed the more ancient cases referred to by Mr. J. Butler. But it will be observed, that, in all these

cases, the nature of the demand was changed, on account of the promise, from what it would have been, had the action been founded merely upon the bequest in the will; the judgment in the former, being de bonis propriis; whereas in the latter, it must have been de bonis testatoris, in case such an action could be supported. The general question, whether an action at law will lie for a legacy, came to be afterwards considered when Lord Kenyon was chief justice, in the case of Deeks v. Strutt, 5 Term R. 690, in which the court decided that the action would not lie; and the superiority of the remedy in equity was much relied upon by the judges, as a reason for not sustaining an action, which they considered to be without a precedent, except one which was decided in the time of the commonwealth, and which could only be justified by the circumstance that, at that time, no remedy existed in any other court. Although the declaration in Deeks v. Strutt, stated a promise by the executor, yet none was proved at the trial, and the court was of opinion that, from the mere circumstance of the executor having a sufficiency of assets, a promise to pay the legacy could not be implied by law. In the case now before the court, it is not stated in the bill that the executor had, at any time, promised to pay to the plaintiff the legacies demanded, but the reverse; nor even that the defendant has assets sufficient to pay all the debts and legacies of the testator. In respect to the amount to which the plaintiff may be entitled, the bill seeks a discovery, and prays for an account, those incidents (as Lord Mansfield observes in the case of Atkins v. Hill) to the equity jurisprudence, upon which the court of chancery claimed to hold plea of legacies. But even if a promise in consideration of assets were stated to have been made, still the equity jurisdiction of this court would not be excluded, as we believe has been abundantly shown by what has already been said. See, also, Blount v. Bestland, 5 Ves. 516.

2. The next reason relied upon for excluding this case from the equity jurisdiction of the court is the act of assembly of this state, before referred to. Let it be admitted, for the present, that, under this act, an action at law may be maintained in this court for the recovery of a legacy; still it would not follow that the equity jurisdiction of the court would be excluded, since the remedy, provided by the act, is not complete or adequate. For where, let us ask, could this court, in such an action, find the power to compel the executor to discover the amount of the assets which came to his hands?—The disposition which he had made of them?—The title papers of the real estate of the testator which he was empowered to sell?—The particular tracts of land sold by him under the power, and the amount for which they were sold? Where would we find the authority to impose upon the parties such equitable terms as the court might deem proper for the safety of the parties, and for the due administration of justice? It is obvious, in short, that the legal remedy contemplated by this act, although as complete, perhaps, as could well be exercised by a court of law, falls far short of that full, complete, and adequate remedy, which the legislature of the Union intended should oust the equity jurisdiction of the courts of the United States. As to the refunding bond for the security of the executor, equity always decrees it to be given.

If the counsel for the defendant meant to argue that, because the plaintiff might have maintained an action in the state court for the recovery of this legacy, therefore the equity jurisdiction of this court is ousted, we must protest against the doctrine. This case is clearly within the jurisdiction of this court. No objection can be made to the jurisdiction of the equity side of it, but that there is complete and adequate remedy on the other side of this court. It is no argument to say that the plaintiff may have such a remedy, (could it even be truly said,) in the state court. The conclusive answer is, that the plaintiff is under no obligation to resort to that jurisdiction. But we cannot admit (which has been conceded merely for the purpose of the argument just disposed of) that the common law and equity jurisdiction of the courts of the United States may be affected by state laws, which provide remedies for the state courts; or which prescribe their practice. The thirty-fourth section of the judiciary law of 1789, is very correctly stated by the court in the case of U. S. v. Wonson [Case No. 16,750], to apply only to the rights of persons and of property. In relation to these subjects, the courts of the United States are bound to consider them as rules for their decision, in cases where they apply; except where the constitution, treaties, or statutes of the United States may otherwise require or provide. As to the modes of process in suits at common law, the act of the 29th of September 1789, declared that they should be the same in each state respectively, as were then used, or allowed in the supreme courts of the same. And by the act of the 8th of May, 1792, c. 137, it is provided, that the forms and modes of proceeding in suits, in those of common law, shall be the same as were then used in the courts of the United States respectively, in pursuance of the above act; in those of equity, according to the principles, rules and usages which belong to courts of equity, as distinguished from courts of common law, subject to such alterations and additions as the said courts should deem expedient, or to such regulations as the supreme court might prescribe.

From these acts it results, that state laws, respecting rights, are to be considered by the courts of the United States as rules of decision; and that the modes and forms of proceeding at common law, as used by those courts in 1792, could not be altered, or in any

manner affected by state laws regulating the course of proceedings and practice of the state courts, unless they should be adopted by the courts of the United States. But as to suits in equity, state laws, in respect to remedies, whether prior or subsequent to the act of 1792, could have no effect whatever on the jurisdiction of the court, the act having prescribed a rule, by which the line of partition between the law and the equity jurisdiction of those courts is distinctly marked. It follows therefore, that if a state law should declare that to be a legal title, which, upon general principles recognized by courts of equity, would be considered as an equitable one, the courts of the United States would afford a legal remedy, suited to the case, to enforce it, without excluding at the same time the concurrent jurisdiction of the equity side of the court; if such a jurisdiction could be asserted as belonging to that side of the court. It was upon this ground that the supreme court sustained the legal remedy by ejectment in the case of Sims v. Irvine [supra]; the common law of this state being, that a warrant, survey, and purchase money paid, constitutes a legal right of entry. Upon the same ground it is, that this court entertains actions by assignees of choses of action, which the laws of the state permit to be assigned. But because the state courts, from a necessity, which the want of a court of chancery induces, entertain actions at law upon equitable rights; or because a statute of the state shall authorise such suits, it does not follow that such practice or such laws, can affect the marked distinction between legal and equitable remedies in the courts of the United States. The only inquiry here must be, what are the principles, usages, and rules of courts of equity, as distinguished from courts of common law, and (to borrow the expressions of the supreme court in the case of Robinson v. Campbell, 3 Wheat. [16 U. S.] 212) "defined in that country, from which we derive our knowledge of those principles." The case just referred to, is indeed an authority which so completely covers the present subject of inquiry, as to render the further investigation of it superfluous, and we shall merely add to that authority, the decision of the supreme court in the case of U. S. v. Howland, 4 Wheat. [17 U. S.] 108; which is conclusive, not only of this particular point, but of the question respecting the general jurisdiction of a court of equity, in a case where there is a remedy at law, though not as complete as that which a court of equity can offer. We think it unnecessary to prolong this opinion by noticing the alleged defects in the bill, being clearly of opinion that they do not deserve to be so called. The demurrer must be overruled, and the defendant ordered to answer.

[The defendants answered the bill, and the cause was subsequently heard upon bill and answer. The bill was dismissed. Case No. 9,342.]

Case No. 9,342.

MAYER v. FOULKROD et al.

[4 Wash. C. C. 503.] [1]

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

JUDGMENT—RES JUDICATA—BAR — PARTIES — ATTORNEY AND CLIENT—COMPROMISE.

1. If a defendant, acting bona fide, and without connivance with the plaintiff to enable him to obtain a judgment, is compelled by the judgment to pay what another, and not that plaintiff is entitled to, he may, in an action by that other against him to recover the money a second time, plead the former judgment in bar for his own protection. The money so recovered by the first judgment, is to be considered as recovered to the use of the real owner, who may maintain assumpsit against him for money had and received.

[Cited in Vasse v. Comegys, Case No. 16,893.]

[Cited in Tarleton v. Johnson, 25 Ala. 300; Deysher v. Triebel, 64 Pa. St. 385; Whipple v. Whitman, 13 R. I. 516; Spencer v. Dearth, 43 Vt. 107.]

2. In what cases a compromise made by an attorney at law, will or will not bind a client.

[In this case a demurrer to the bill was overruled in Case No. 9,341.]

Condy & Dundas, for plaintiff.
Mr. Rowle, for defendant.

WASHINGTON, Circuit Justice. The bill states that John A. Holt, by his last will, devised all his real estate to his wife during her life, and after her decease, that the profits of the same should be enjoyed by his daughter, Catherine Sheneck, during her life; and after her death the said real estate to be sold by his executors, and the money thence arising to be equally divided amongst the grandchildren of the testator then living, share and share alike, except his grandson, Michael Cooper, who was to have two shares. That the testator died in the year 1788, and his will was proved by his executors therein named, (of whom George Foulkrod was one,) who took upon themselves the burthen of executing the same. That Catherine Sheneck, the daughter, died in the year 1808, and the widow of the testator in the year 1792. That at the time of the death of the widow and the daughter, the following grandchildren of the testator were living: that is to say, Mary C. Sheneck who intermarried with Lewis Benner, the plaintiff's intestate, Elizabeth Sheneck who intermarried with John Darr, Michael Cooper, Adam Sheneck, Jacob Sheneck, Sophia Sheneck who intermarried with Jacob Luntz, and Barbara Sheneck who intermarried with Michael Knurr. That on the 4th of April, 1809, George Foulkrod, the surviving executor, sold the real estate of the testator pur-

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

suant to his will, for the sum of $12,000, which he received. In the years 1799 and 1801, Cooper, Adam and Jacob Sheneck severally assigned their shares of the estate of said Holt to Lewis Benner, for a valuable consideration; and that, previous to the bankruptcy of the said Benner, he agreed with Darr and his wife for the purchase of their share, for which he paid a part of the consideration. That by these transfers, and the purchases, the said Benner became entitled to five eighths of the estate of said Holt, in addition to the share to which he was entitled in right of his wife. That George Foulkrod died in the year 1811, and the defendants are his administrators. The prayer of the bill is for an account and payment of the shares to which Benner was thus entitled.

The answer admits all the material allegations in the bill, but alleges that after the assignments to Benner by Cooper and the two Sheneck's, and the purchase from Darr, he, Benner, was duly declared a bankrupt under the bankrupt law of the United States, and the whole of his estate was assigned to A. Burt and J. C. Seton, by virtue of which all his right to the estate of said Holt became vested in his assignees under the commission. That, notwithstanding this, Benner afterwards assigned all the said shares, as well as the one to which he was entitled in right of his wife, to Frederick, and Henry Amelong, merchants of New Orleans, who assigned the same to L. Krumbhaar, of Philadelphia, or by some instrument empowered him to receive the amount of the said shares. That Burt and Seton as assignees, commenced a suit in this court against Foulkrod, in April, 1809, to recover the amount of the said shares, and on the 6th of November, in the same year, a verdict and judgment were rendered in their favour for the sum of $7072.25 cents, including Darr's share. That Krumbhaar had full notice of these proceedings and acquiesced therein, contending only for the share of Mrs. Benner. That, for the purpose of obtaining the opinion of this court, whether he, or the assignees under the commission, were entitled to that share, an amicable suit was entered in the name of Krumbhaar v. Burt [Case No. 7,944], and that the decision of the court was in favor of the plaintiff in that suit. The answer then alleges that the above judgments have been fully paid and satisfied, and the executor's accounts of George Foulkrod settled and passed by the orphan's court; and finally, that the verdict and judgment obtained by the assignees of Benner under the commission, is a bar to the present suit.

The question which arises upon the facts stated in the bill and answer, and which the latter relies upon as a bar to this suit is, whether the plaintiff is entitled to a decree to compel the defendants to pay over again the money which was recovered against their intestate by the judgment of this court, at the suit of the assignees of Benner, and which was paid to them accordingly. If, upon the stern principles of law, which the more benign principles of a court of equity cannot control, he is so liable, it will be in vain to call his case a hard one. Justice must be administered, be the consequences what they may. There is, nevertheless, something in the proposition that he is so liable, which so outrages all our notions of justice, that we must hesitate to adopt it as law, unless it could be demonstrated to be such by unquestionable authority. No case to sanction this doctrine was read, or referred to by the counsel for the plaintiff; nor have we been able to find one which comes up to the point. We have examined the cases which are cited in the books to establish the general principle, that a verdict and judgment cannot be given in evidence, or be pleaded, except between the same parties or privies; but none of them, in our judgment, touch the question which is proposed to be decided. They are, in general, cases respecting land titles, or the admissibility of a verdict and judgment as evidence, or as a bar to affect the rights of those who are neither parties nor privies to that suit, or to fix a responsibility upon them. They prove nothing further than that the right of him who was not party or privy to the suit, is not affected by the judgment. The present is altogether a different question; it is this—can a person be legally called upon to pay to one man a sum of money which, by the judgment of a court of competent jurisdiction, he had been compelled to pay to another; his conduct in defending the latter suit having been in all respects fair and honest? If he can be so called upon, and compelled to pay the money over again to the plaintiff in the second suit, it seems at least to be a reproach upon the law, that it should not protect a man against the consequences of an act which itself compelled him to perform.

It may possibly be said that this view of the question is altogether on one side, and that the hardship to which the creditor would be exposed by losing his remedy against his original debtor, in consequence of a judgment in a suit in which he was neither party nor privy, is equal to that of which the debtor complains by being twice charged. It is possible, we admit, that in some instances, this may be true. But grant, for the sake of the argument, that the equity of these parties to disregard the judgment on the one side, or to be protected by it on the other, is equal; why, it may be asked, should the rule of law operate against the defendant rather than against the plaintiff? We think it will not be easy to answer this question satisfactorily. May not the defendant fairly claim the protection of the rule of law which in cases of equal hardship, and of equal equity, where a loss is to

be avoided, declares, melior est conditio defendentis? We see no reason why he may not.

But let us examine more particularly, whether the equity, and the claim to indulgence are equal between these parties. A lis pendens is constructive notice to all persons; independent of which it is quite improbable that a suit can be carried on in a court of justice between two persons, which involves the interest of a third party, and that such third party should be ignorant of the fact. It can seldom happen therefore that he can excuse himself from the charge of culpable negligence, in not interposing his claim to prevent the injury of which he complains. Supposing the equity of these parties then to be in all other respects equal, it must cease to be so in consequence of the laches of the one who has occasioned the loss.

But again. The doctrine insisted upon in this opinion is, not that the right of the real creditor, or person entitled to the money or thing recovered in the first action, is concluded, or in any manner affected by the judgment, but that his remedy against the same defendant is barred by the judgment against him. Had the judgment been in his favour, he clearly could not plead it in bar of the action as he might do to a second action brought by the same plaintiff. The money which the latter paid to the plaintiff in that action, not voluntarily, but by compulsion of law, is still the property of the party really entitled to it, notwithstanding the judgment; because the suit by which it was recovered, being res inter alios acta, his right cannot be affected by it. The money to which the plaintiff is entitled, has only changed hands by force of a legal and compulsory sentence of a competent tribunal, and upon every principle of justice and of law, it is money received by the plaintiff in the first suit to the use of the real owner of it. His right of action to recover it remains unimpaired and unchanged by the judgment, except that the plaintiff in that action, instead of the defendant is made the debtor. It is possible; and in this event only can the real owner be injured; that this receiver of the plaintiff's money may be a less responsible man than the original debtor. Yet he is certainly enriched by all that he has recovered, and therefore it can seldom happen that a loss will be sustained unless it should arise from the negligence of the real owner in asserting, in time, his right to the money. But on the other hand, if the original defendant should be compelled to pay over again the money to the real owner, he would be entirely without remedy, since the judgment would, beyond all question, be a bar to any suit in law or equity which he could bring against the plaintiff in the original action to recover back the money. The doctrine, that a man who, acting bona fide, and above all just suspicion of having connived with the original plaintiff to enable him to obtain the judgment, is compelled by that judgment to pay what a third person, and not that plaintiff was entitled to; is protected by that judgment against the claim of the real owner, and that the remedy of the latter is only against the person who has unjustly received it, is not unsupported by authority. In the case of Le Chevalier v. Lynch, 1 Doug. 170, it was decided, that if a bankrupt has money owing to him out of England, the assignment under the bankrupt laws so far vests the right to the money in the assignees, that the debtor shall be answerable to them, and shall not turn them round by saying that he is accountable only to the bankrupt. But if, in the mean time, after the bankruptcy, and before payment to the assignees, money owing to the bankrupt out of England is attached, bona fide, by regular process, according to the law of the place, the assignee in such case cannot recover the debt. In this case, the suit was brought against the debtor of the bankrupt in whose hands the money had been attached, and the decision of course was, that it could not be recovered by the assignees against him.

The case of Phillips v. Hunter, 2 H. Bl. 402, was that of a debt recovered in the United States by attachment, by a creditor of the English bankrupt, against one of his debtors, after the commission; and the creditor who recovered the money, having come into England, an action for money had and received was brought against him by the assignees, and a judgment was rendered in their favour. Upon a writ of error to the court of exchequer chamber, all the judges, Eyre, chief justice, excepted, concurred in opinion that the assignees were entitled to recover the money from the attaching creditor, as money received to their use. In giving their opinion, those judges say, that the cases of Le Chevalier v. Lynch, Allen v. Dundas, 3 Term R. 125, and Clerc v. Mills, Cooke, Bankr. Law, 370, only prove that where a debtor has paid money under due process of local law, he shall not be compelled to pay it over again; that the recovery, although conclusive between the parties, is to be considered as being for the use of the assignees. And in answer to the objection that the assignees ought to have stated their claim in the attachment suit, the court say, "that it does not appear that they had notice of it. As to the defendant, the judgment is conclusive." The chief justice, whose opinion was that the action could not be supported even against the attaching creditor, lays it down, nevertheless, that if a creditor of the bankrupt, from any cause, say defect of evidence, or error in the judge, should, after the bankruptcy, recover from a debtor of the bankrupt, he would be entitled to hold and pursue it to all its consequences, until the judgment is impeached in a due course of law. So that this distinguished judge, though he differed from the rest of the court as to the liability of the at-

taching creditor, concurs nevertheless in the doctrine that the defendant, who had been compelled by the judgment of the court, although an erroneous one, to pay the money, could not be called upon to pay it over again. This case appears to us to go the whole length of deciding all the doctrine insisted upon in the opinion. It was decided originally in the court of king's bench, without argument, the case being considered as decided by that of Hunter v. Potts, 4 Term R. 182. It may further be observed, in passing, that Law, who argued the latter case for the assignees, admitted "that nothing could be more clear than that a person who had been compelled by a competent jurisdiction to pay the debt once, should not be compelled to pay it over again." The last case which we think it necessary to refer to, is that of Embree v. Hanna, 5 Johns. 101, in which the broad doctrine before stated is asserted, and ably reasoned upon by Kent, chief justice, who delivered the opinion of the court. Were this then an action at law, we should consider ourselves fully warranted in deciding that it could not be maintained. But since it is possible that others may not view the subject in the same light that we do, we shall proceed to consider the precise case before the court. It is a bill filed on the equity side of the court, not by Foulkrod to be relieved against the claims of the administrator of Benner, for money which his intestate had once been compelled to pay to Benner's assignees, but by that administrator, for the purpose of enforcing such double payment. He ought, therefore, to make out a strong case of equity to entitle him to a decree. But what is the case?

The assignment of all the estate and effects of Benner which were assignable under the bankrupt law of the United States, was duly made in April, 1802. A part of the estate of the bankrupt consisted of certain legacies which he claimed in right of his wife, and as assignee, of other legatees, his right to which depended upon a contingency which did not happen until some years after the bankruptcy and assignment. After the contingency had happened, Benner made absolute assignments of the above legacies to F. and A. Amelong, for a valuable consideration stated in the deeds, and, on the same day, the Amelongs gave a general power of attorney to L. Krumbhaar, to demand, sue for, and recover from the executors of Holt, the legacies so assigned to them by Benner. On the 24th of March, 1809, the assignees of Benner under the commission, and Lewis Krumbhaar in behalf of the Amelongs, each notified the executor of Holt of their respective claims to these legacies, and warned him not to pay them to any person save to themselves respectively. Immediately after this, the assignees commenced an action against the executor in this court, and on the 6th of November, 1809, after a trial, in which the counsel for the executor has sworn that the cause was defended to the utmost, a verdict and judgment were rendered for the amount claimed by those plaintiffs. The executor, aware of the delicate situation in which he was placed by these conflicting claims, filed, at the first term, a bill of interpleader against all the parties, praying that they might be compelled to interplead, and for an injunction to stay proceedings in the suit of the assignees. The injunction was denied upon the ground of a want of jurisdiction, in consequence of which, this remedy became of no avail to the executor. Soon after Krumbhaar received his power of attorney from the Amelongs, he took the opinion of his counsel, a distinguished member of the bar, as to the title of his constituents to the legacies assigned to them by Benner. The opinion of that gentleman was, that the Amelongs were entitled to claim only the legacy of Mrs. Benner, and that the other legacies which had been assigned to Benner, passed under the commission and assignment to his assignees. This opinion was immediately forwarded by Krumbhaar to his constituents, from whom nothing, so far as the evidence goes, was afterwards heard indicative of the effect which that opinion had upon them in respect to their claim of the other legacies. But their conduct spoke all that their language could have expressed. For just previous to, or on the day when the above judgment was rendered at the suit of the assignees, an agreement was entered into, signed by the counsel for Krumbhaar and the assignees, to enter an amicable action in the name of Krumbhaar against the assignees, and that a case should be stated for the purpose of taking the opinion of the court upon the question, which of them was entitled to Mrs. Benner's legacy. The case was accordingly made, stating only such facts as were necessary to raise that question. It is not unworthy of remark, that the agreement above referred to was not entered in the amicable suit, but in that of the assignees against Foulkrod. The case, after stating the facts relating to Mrs. Benner's legacy, concluded with an agreement, that the rights of the two parties are the same as if the question was raised in a suit by either party against the executor, or as if a bill of interpleader had been filed by the executor. The opinion of the court in the amicable suit was pronounced on the 15th of November, 1809, in favour of Krumbhaar, upon the ground, that the legacy of Mrs. Benner depending upon the contingency whether she should be living at the time when it should happen, which was some years after the bankruptcy and assignment, it did not pass to the assignees under the commission, upon a correct construction of the bankrupt law of the United States. On the 18th of the same month, the assignees filed a refunding bond in the penalty of $12,000, and Krumbhaar another, in the penalty of $2828, being about double the amount of Mrs. Benner's legacy, for which the judg-

ment in the amicable suit was rendered. On the 22d of the same month, the assignees received from the executor the sum of $6353, to which they were entitled under their judgment; and Krumbhaar also received the sum of $1413, to which the Amelongs were entitled, for which sums, the plaintiffs in the two suits indorsed receipts on their respective refunding bonds.

It appears by the deposition of Frederick Amelong, taken in this cause, that the assignments by Benner to the Amelongs, although absolute in their terms, were intended to be for the use of Benner, and that the amount received of the executor by Krumbhaar, having been in due time remitted to the Amelongs, was with interest, after deducting commissions and expenses, paid over by them to Benner in August, 1810. This then is the case of an executor, who has once been compelled, by the judgment of a competent tribunal, after an honest and bona fide defence, with full notice to the counsel and attorney in fact of the adverse claimant, to pay the very money which is now demanded in this suit by the legal representatives of that adverse claimant. This is not all. That attorney, after claiming the sum now sought to be recovered, so far from interfering with the suit of the assignees by claiming to join in the defence of it, or by asserting in any other way the claim of his constituents, which at one time was set up, commenced a suit for only one of the legacies, and this too under an agreement with the adverse claimant, and a case stated between them, which was industriously confined to the share which the Amelongs had been informed by their counsel he was alone entitled to claim. And we find these two friendly adversaries marching side by side throughout the whole of these proceedings, giving refunding bonds on the same day for the legacies which they respectively claimed, and on the same day receiving satisfaction of those claims from the executor; each conusant (how is it possible they should not be so?) of what the other was doing, and of what the deluded executor, acting on the faith of a compromise agreed to by those who were originally adversaries in their claims, was doing. That he was paying away to the assignees the money once claimed by the Amelongs, but afterwards relinquished by their attorney, could not but have been known to that attorney. The receipt given to the executor by the counsel of the Amelongs, affords an additional, and almost conclusive proof of that fact; for in that he states, that the $1413 is the share of Mrs. Benner "of the balance of the executor's account as settled in the register's office, as referred to in the foregoing (the refunding) bond." Upon referring to this settlement, it appears that on the 22d of November, 1809, the executor credits himself with $6353 paid the attorney of the assignees, $713 paid the attorney of Darr, and $1413, the balance, paid to the attorney of the Amelongs. What more could the executor have required, than that he should be placed in the same state of security in which the bill of the interpleader of which he had vainly endeavoured to avail himself, would have left him? But the adverse claimants did agree that the rights of the two parties were the same as though the question was raised in a suit by either party against the executor, or as if a bill of interpleader had been filed by the executor. Now, will any person contend that, if the rights of those parties had been decided either way, that the executor could afterwards have been called upon by the unsuccessful party to pay the money over again? We think it could not be so contended. Now, if it were admitted that this sum could be recovered again by the administrator of Benner at law, where is the plaintiff's case in equity? It is that of a man who, after abandoning, by a compromise, his claim to the money now sought to be recovered; then standing by and seeing a trustee innocently pay away that very money to the person with whom the compromise was made, and finally acquiescing in all these proceedings for ten or twelve years; asks a court of equity for a decree to compel this trustee to pay the money over again to him.

We think it quite unnecessary to pursue this inquiry further, and we shall therefore conclude this opinion by noticing some of the arguments which were relied upon in support of the relief prayed for by this bill.

1. It was contended, that Benner, not the Amelongs, was entitled to these legacies, as is proved by the deposition of one of the partners taken in this cause. If the inference intended to be deduced from this fact was, that Benner was not bound by what the Amelongs did, it is unfounded in law. The assignment to the Amelongs was absolute in form, and therefore put it in their power to appear, as in fact they did, as the real owner of the shares so assigned. If by doing so, a loss must be sustained by one of two persons, even allowing them to be equally innocent, he who occasioned the loss should bear it.

2. An attorney at law, it is said, cannot make a compromise to bind his client, and the case of Holker v. Parker, 7 Cranch [11 U. S.] 436, was relied upon for this doctrine. But upon examining the opinion delivered by the chief justice in that case, we find him saying, "that though an attorney at law, merely as such, has, strictly speaking, no right to make a compromise, yet a court would be disinclined to disturb one which was not so unreasonable in itself as to be exclaimed against by all, and to create an impression that the attorney's judgment had been imposed upon, or not fairly exercised." "Though it may assume the form of an

award or judgment at law, the injured party, if his own conduct has been perfectly blameless, ought to be relieved against it." What that court would have said in applying these principles to the case of a compromise made by an attorney in fact, as well as the attorney at law, fully and promptly communicated to his principal, who afterwards received the fruits of it, and who acquiesced for ten or twelve years in what had been done, we need be at no loss to conjecture. We say acquiesced in by his principal; for even if Benner, quoad the defendant, is to be considered as the real owner of those legacies, he received from the Amelongs the fruit of the compromise, nearly twelve years before this suit was brought. Upon the subject of acquiescence, see Pickering v. Lord Stamford, 2 Ves. Jr. 582; 1 P. Wms. 355.

3. It was contended that the defendant's intestate was guilty of laches, sufficient to charge him in equity, in not notifying the Amelongs of the action brought against him by the assignees. We by no means admit that, in a case like the present, notice was necessary, as it might be in a case of warranty, where the defendant intends, or has a right to look to a third person for compensation in case of a recovery against him. But if notice were necessary in this case to protect the executor, it was clearly dispensed with by the attorney of the Amelongs, who, being conusant of the adverse claim, at first opposed it, and afterwards withdrew from the contest, except as to the share which he sued for and recovered.

4. It was in the last place insisted, that after the opinion of the court was given in the amicable suit, by which the right of the Amelongs to the shares purchased by Benner was established, equally with their right to Mrs. Benner's share, it was the duty of the defendant's executor to have applied to the court for a new trial in the suit of the assignees, or if too late for that, for an injunction, or to have sued out a writ of error to the judgment. But had the Amelongs no remedy to prevent the assignees from receiving the fruit of their judgment? Could they not have filed a bill against the assignees and the executor to enjoin the judgment, and to obtain a decree for the amount of it to be paid over to them? No person will question the fitness of this remedy, unless indeed they had, by the compromise, defeated their own equity. Upon what pretence then can the plaintiff, who, or whose trustee, has been guilty of laches, attempt to build up an equity against the executor, by charging him with a similar fault? But why should the executor have attempted to set aside the judgment for the benefit of a party who had relinquished his claim to the subject in controversy, and who still declined to take any step to re-assert it? We think it will not be an easy matter to answer this question.

We are upon the whole of opinion that this bill ought to be dismissed.

Case No. 9,343.

MAYER v. GIMBEL.

[A state case. See 30 Leg. Int. 5.]

Case No. 9,344.

MAYER v. HERMANN.

[10 Blatchf. 256.] [1]

Circuit Court, S. D. New York. Dec. 12, 1872.

BANKRUPTCY — WHAT CONSTITUTES INSOLVENCY — SUBMISSION TO SUIT—EXECUTION THEREON —ATTORNEY AND CLIENT—NOTICE.

1. The inability of a merchant to meet his engagements, in the usual course of business, constitutes insolvency, within the meaning of the bankruptcy act [of 1867 (14 Stat. 517)].

2. The fact, that a merchant, in a mercantile community, who has no defence to debts maturing in his current business, submits to be sued, to compel payment of such debts, is very high evidence of inability to pay them.

3. The sale of the debtor's property, on an execution issued in such a suit, is a disposition of the debtor's property, for the benefit of the creditor, out of the usual course of business, and is evidence that the creditor has reasonable cause to believe in the debtor's insolvency, and contemplates a preference.

4. Although a debtor is not known to have yet committed an act of bankruptcy, his creditor, although he has reasonable cause to believe, or even knows, the debtor to be insolvent, may sue him, and proceed to judgment, execution and levy, for the purpose of proceeding against him in involuntary bankruptcy.

[Cited in Anderson v. Strassburger, Case No. 364.]

5. A creditor employed an attorney to collect his debt by suit. All the facts made necessary by the bankruptcy act to invalidate a preference gained by such suit, were made known to such attorney after he entered on such employment, and while engaged in collecting such debt by suit. The suit proceeded to execution and levy: *Held*, that the knowledge of the attorney was the knowledge of the creditor.

[Cited in Wight v. Muxlow, Case No. 17,629.]

[Cited in Mathews v. Riggs, 80 Me. 110, 13 Atl. 49; Shattuck v. Bill, 142 Mass. 64, 7 N. E. 39.]

6. It made no difference, that the information was received by the attorney after he had been retained by the debtor, and while he was advising the debtor what course to pursue, such retainer by the debtor being after the employment by the creditor and before the recovery of judgment.

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

[This was a proceeding by Ferdinand Mayer against Moses Hermann, assignee in bankruptcy of Maurice Bendix and others, bankrupts, to have his lien against the bankrupts' property established, and praying that two judgments recovered by him in the state court be paid out of the proceeds of the property. From a decree of the district court dismissing the bill, plaintiff appealed.]

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

Samuel Boardman, for plaintiff.
Charles H. Smith, for defendant.

WOODRUFF, Circuit Judge. On the 2d of March, 1868, the plaintiff recovered two judgments, in a state court, against the above named bankrupts, one for $388 46, and the other for $320 44. Executions were, on the same day, issued to the sheriff thereon, and levied on personal property belonging to the bankrupts. On a petition filed March 6th, 1868, the bankrupts were adjudicated such, and the defendant was appointed their assignee, and an assignment was duly executed to him. Thereafter, under an arrangement between the plaintiff and the defendant, the property levied on was delivered by the sheriff to the defendant, to be held subject to a determination by the district court as to the validity of the lien of the plaintiff upon it. The plaintiff then filed his bill in the district court, praying that his lien might be established, and the judgments be paid out of the proceeds of the property. The defendant answered the bill, setting up that the executions and levies were void as against him, for the reason that, the bankrupts, being insolvent, did, within four months before the filing of the petition, with a view to give a preference to the plaintiff for the debts set forth in the judgments, procure their property to be seized by said executions, and thereby made a transfer of the property levied on; that the plaintiff then and there had reasonable cause to believe the bankrupts to be insolvent; and that the executions were issued in fraud of the provisions of the bankrupt act; that the attorneys for the plaintiff in recovering the judgments and issuing the executions, were the attorneys for the bankrupts in their petition in bankruptcy, and, at the time of recovering the judgments and issuing and levying the executions, had reasonable cause to believe the bankrupts to be insolvent; and that the transactions were in fraud of the provisions of said act. Proofs were taken, and, on a hearing, the district court dismissed the bill. From such decree the plaintiff appealed to this court. The attorneys for the plaintiff in the judgments were the attorneys for the bankrupts in the bankruptcy proceedings. One of such attorneys was called as a witness by the defendant, in this suit, and testified, that they had not been attorneys for the bankrupts prior to the bankruptcy proceedings; that he first saw the bankrupts in regard to their affairs just before the judgments were obtained, and after the suits were brought; that Bendix then came to his house and stated to him that the firm (Reichman & Co.) had sufficient assets to pay its debts, but his suspicions had been excited by the actions of the husband of Caroline M. Reichman, (one of the firm,) and that goods had been taken out of the store, which could not be traced, and he feared, that, unless some steps were taken in the matter, they would not be able to pay their creditors, and the goods would disappear; that his (the attorney's) advice to him was, to immediately take possession of the store, and lock it up, and call a meeting of the creditors of the firm, and do something to secure them, by appropriating the goods to their benefit; that this was after the summonses in the suits had been served on at least two of the three defendants in it, Bendix being, at the time, aware of the summonses, although not served with them until two days after Mrs. Reichman was served, and five days after the remaining defendant was served; that Bendix, accordingly, locked up the store, and a meeting of the creditors was held, at which he (the attorney) attended, at the request of Bendix, and at which propositions were made and discussed to turn over the property to the creditors in full payment of their debts; that a majority of the creditors were in favor of that course, and a committee was appointed to investigate the affairs of the firm, and, at his (the attorney's) suggestion, the committee was empowered to take possession of the goods; that he (the attorney) heard nothing more of the matter until after the judgments; that then Bendix informed him that the proposition to take the property in payment of the debts had fallen through; that he then advised Bendix to go into bankruptcy; that he did not communicate with the plaintiff in regard to the matter, nor know personally on what day the summonses were returnable, or that the judgments had been obtained, until after they had been obtained; that he attended the meeting of creditors on behalf of Bendix; and that the plaintiff was not present at the meeting, and did not know of it.

The plaintiff was called as a witness by the defendant, and testified, that the debts for which the judgments were recovered were open accounts, for goods sold to the firm; that one account was due twelve days before the suit on it was commenced (both suits having been commenced February 21st); that he had sent for the money on it, and they had put him off, sending word that they would come in and pay; that he did not know that the meeting of creditors was to be held, nor learn of it after it had been held; that, when he directed suit to be brought against the firm, he had no idea that it was in a failing condition; that, when the executions were issued, he had no reason to believe that the firm was insolvent; that it was not proposed to him by the attorney to share ratably with the other creditors; and that, after he placed the claims in the attorney's hands, and swore to the complaints, he had no knowledge as to what was done in the suits.

The attorney also testified, that he stated, at the meeting of creditors, and that such was his opinion, that, if the stock of goods was fairly sold, and not sacrificed, and the debts were collected, there would be enough to pay seventy-five cents on the dollar, but that, if the goods were sold at auction, or by

an assignee, he did not believe they would realize more than forty or fifty cents on the dollar; and that such statement was made before the executions were issued.

The debts proved against the bankrupts are $11,021 32. The assets realized by the assignee are $2,961 82, in which sum is included $2,680 72, realized from the sale of the goods levied on.

1. The plaintiff had reasonable cause to believe that the firm was insolvent, before his executions were levied upon their goods, and that the collection of the judgments would operate to give him a preference. The parties, debtors and creditors, were both merchants. Inability to meet their engagements in the usual course of business has been again and again adjudged to constitute insolvency, within the meaning of the bankrupt law. When, therefore, a merchant fails to pay his notes, or other mercantile obligations, as they become payable, the immediate presumption of inability to pay arises. This is according to the universal sense of the mercantile world. When a merchant does not so pay, he is at once, and everywhere, assumed, in the common language applied to the subject, to have "failed." Quite true, there may be reasons, in any particular case, why payment at maturity is not made. There may be a defence to the apparent debt; the non-payment may be caused by accident, or carelessness and inattention; or it may be the result of some other special temporary cause, entirely consistent with amplest solvency. Nevertheless, where no such cause exists, non-payment, prima facie, imports inability to pay in due course of business, and creditors everywhere, in commercial communities, proceed on that presumption. True, also, mere non-payment of an account for goods sold is not declared to be an act of bankruptcy; but this proves nothing upon the question of probable cause to believe that the debtor, in such case, is unable to pay in due course of business.

In the present case, the debts were mercantile debts. They were not paid at maturity. The plaintiff knew it, and, on repeated applications for payment, he was put off by the debtors, their promises to pay were broken, and he was obliged to sue. It was manifest to him that his debtors did not pay in the usual course of business. There was no suggestion of any defence or other special, temporary, or accidental cause of delay; nor was there apparent to him, nor is there proved now, any circumstance warranting any other inference than that they could not pay, for want of means. The circumstances within his actual knowledge indicated insolvency, in the sense of the statute; and such insolvency existed in fact, as was reasonably to be inferred.

2. This reasonable cause to believe that the debtors were insolvent becomes greatly increased, when, besides failure to pay in due course of business, the debtor submits to be sued, and the creditor commences suit. That, in a mercantile community, a merchant debtor is so straitened, that, without pretence of any defence, he is under the pressure of suits to compel payment of debts maturing in his current business, is very high evidence of inability to pay. The unquestionable fact, that such pressure would be utterly destructive of his commercial credit, clearly shows that it is and must be deemed abundant cause of belief in his insolvency; and the pursuit of a debtor by such suit is a plain attempt to drive him either into a preferential payment, or to lay the foundation for a very proper proceeding in bankruptcy against him. Following such suit to judgment, execution, sale of his goods, and appropriation of the proceeds by the creditor, is not only accumulating evidence of the debtor's insolvency, at every step, but, when consummated by the actual sale of the debtor's goods for the payment of the execution, another ground of impeachment of the transaction arises. It is a disposition of the debtor's property, for the benefit of the creditor, out of the usual course of business. It is a case, if not within the letter, plainly within the spirit and analogy of "sales, assignments, transfers, or conveyances to a creditor, not made in the usual and ordinary course of business of the debtor," which, by section 35 of the bankrupt act, is declared "prima facie evidence of fraud," that is, is to be taken as prima facie evidence of actual fraud, or, at least, of a design to prevent the property from being distributed under the bankrupt act, or to defeat its object, or impair, hinder, or delay its operation and effect, or evade its provisions. It would be little short of absurdity, to say, that, when, under the circumstances of a case like this, the creditor has pursued his debtor down to an actual levy, he has not reasonable cause to believe that his debtor is insolvent, or that he can then proceed to a sale, for his own benefit, without contemplating the necessary result, if such insolvency exist, namely, a preference.

I have heretofore taken occasion to say—Coxe v. Hale [Case No. 3,310]—that this view of the rights and risks of creditors does not prevent, and need not discourage, suits against debtors who, not being known to have yet committed any act of bankruptcy, do not pay. The creditor, whether he has or has not reasonable cause to believe his debtor to be insolvent, has a right to bring suit. If a defence is interposed, he may go to trial and judgment. If no defence is interposed, he may take judgment by default. Nothing in the bankrupt law, and nothing above suggested, forbids this. I think, also, he may cause the goods of the debtor to be seized on execution. But, if he then knows, or has reasonable cause to believe, that the debtor is insolvent, and, therefore, knows, or has like cause to believe, that the appropriation of the property to paying his debts will operate to give him a preference, he must beware how he proceeds. An act of bankruptcy, the

debtor being insolvent, has now been committed. A suit, judgment, and levy, procured in good faith, for the purpose of forcing an insolvent debtor into bankruptcy, is not illegal. It may often be a proper, and, in short, the only present means of compelling an unwilling debtor to submit his property to the just distribution among his creditors, for which the law provides.

3. The plaintiff had reasonable cause to believe that the debtors were insolvent, and that his proceedings against them were taking or securing a preference, because, his attorney knew it, and the plaintiff, under the circumstances of this case, is chargeable with that knowledge. Such attorney was employed by the plaintiff to bring the suits, obtain the judgments, and collect the debts. All the facts made necessary by the statute to invalidate any preference thereby gained, were made known to such attorney after he entered upon that employment, and while in the prosecution thereof for the purpose of making the collection. In the actual endeavor to collect the debt, and by reason of that endeavor, the attorney was brought into contact with the debtor, and learned the condition of his affairs. If information of the debtor's insolvency, so acquired, is no impediment to securing a preference, by seizing and appropriating the debtor's effects, there would be little effective vitality in the provisions of the bankrupt law, and the just remedial enactments of the 35th and 39th sections, to secure equality among creditors, would be easily evaded. All that it would be necessary for the creditor to do would be, to put his claim into the hands of an attorney, perhaps one in a distant place, near the residence of the debtor, and abstain from asking or receiving thereafter any information as to the condition of the debtor, or the progress made in collecting the claim, until the money was actually realized and sent to him. He could then say, what is alleged in this case, that what his attorney might have learned was not to be imputed to him, as knowledge or reasonable cause to believe, and was, therefore, of no avail to defeat the actual preference obtained. It seems hardly necessary to enlarge upon these suggestions, The consequences which would result from sustaining preferences thus gained are too obvious. The knowledge acquired by an agent in the conduct of his employer's business is knowledge of his principal.

It is sought to withdraw this case from the operation of that rule, by insisting, that here the information was gained after a retainer by the debtor, and while advising the debtor what course to pursue in his condition of embarrassment, though before the recovery of judgment by the creditor. I do not assert a broad rule, that all the knowledge which an attorney or counsel receives from his clients, in their confidential relation, is to be deemed the knowledge of all his other clients, or to charge them with notice. No such broad proposition is necessary to the ruling in this case. I do say, that, where the attorney of a creditor is prosecuting a debtor, to enforce payment of a debt, and, by reason thereof, the debtor discloses to him that he is insolvent, and asks his advice, and he assumes to give it, he may possibly find himself involved in some conflict of duty, for he certainly has no right to accept, in confidence, from the adverse party, information which his client ought to know, and which he ought not to conceal from him; but he cannot, by accepting such retainer, evade the operation of the rule. In every step of the prosecution of the claim to collection, he is the agent of the creditor, the performance of his duty to that creditor involves the gaining of knowledge of the debtor's insolvency, and no proffered confidence, put in him by the adverse party, can make that information less his client's property, or less information acquired in his agency, and imputable to such client.

The decree below must be affirmed.

MAYER (JENKINS v.). See Case No. 7,272.

MAYER (UNITED STATES v.). See Case No. 15,753.

MAYER (WARNER v.). See Case No. 17,185.

MAYERS (FARRELL v.). See Case No. 4,685.

MAYFIELD (CLARKE v.). See Case No. 2,858.

Case No. 9,345.

The MAYFLOWER.

[1 Brown, Adm. 376; 5 Am. Law T. Rep. U. S. Cts. 367.] [1]

District Court, E. D. Michigan. April, 1872.

COLLISION — DAMAGES — DEMURRAGE BASED UPON PROBABLE EARNINGS.

1. In the absence of a market value for the use of vessels, the value of such use to the owner, in the business in which she was engaged at the time of the collision, is a proper basis for estimating damages for detention.

[Cited in The Belgenland, 36 Fed. 505; The Margaret J. Sanford, 37 Fed. 152.]

2. The books of the owner, showing previous and subsequent earnings, are competent evidence of the probable earnings during the detention.

[Cited in The Margaret J. Sanford, 37 Fed. 152.]

3. The party in fault should bear whatever inconvenience or hardship there may be in proving the exact amount of damages sustained.

4. In cases of conflicting testimony as to amounts, where the preponderance is not palpable, the finding of the commissioner will not be disturbed.

5. The services of an agent employed in settling and paying bills is not a proper item of damages.

6. Estimates of the cost of repairs, though competent in absence of better evidence, are not so where the repairs have been actually made.

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[1] [Reported by Hon. Henry B. Brown, District Judge, and here reprinted by permission. 5 Am. Law T. Rep. U. S. Cts. 367, contains only a partial report.]

On exceptions to commissioner's report of damages. The propeller Mayflower was adjudged to be in fault in a collision with the steamer Dove, and it was referred to a commissioner to ascertain the damages done to the Dove by the collision. [Case unreported.] The commissioner having made his report, both parties came in and excepted to it in several particulars.

H. B. Brown and W. A. Moore, for libellant.

The allowance of damages for detention is settled by repeated adjudications. 1 Pars. Shipp. 538; The Gazelle, 2 W. Rob. Adm. 279; Williamson v. Barrett, 13 How. [54 U. S.] 101; s. c., Barrett v. Williamson [Case No. 1,051]; Sturgis v. Clough, 1 Wall. [68 U. S.] 269; The Cayuga [Case No. 2,537]; Ralston v. The State Rights [Id. 11,540]; The Rhode Island [Id. 11,745]; Vantine v. The Lake [Id. 16,878]; Clarke v. The Fashion [Id. 2,851]; The Rhode Island [Id. 11,743]; The Narragansett [Id. 10,017]; The Apollon, 9 Wheat. [22 U. S.] 362, 377; McKnight v. Ratcliff, 44 Pa. St. 156; Jolly v. Terre Haute Co. [Case No. 7,441]; Lacour v. Mayor, etc., 3 Duer, 406; Marquart v. La Farge, 5 Duer, 559; St. John v. Mayor, etc., 6 Duer, 315; Borries v. Hutchinson, 18 C. B. (N. S.) 466a; Allison v. Chandler, 11 Mich. 542; Walter v. Post, 6 Duer, 363, 373; New Haven Steamboat & Transportation Co. v. Vanderbilt, 16 Conn. 420; Shelbyville, L. B. R. Co. v. Lewark, 4 Ind. 471; Sewall's Falls Bridge v. Fisk, 3 Fost. [N. H.] 171; Griffin v. Colver, 16 N. Y. 489; Wilkes v. Hungerford Market Co., 2 Bing. N. C. 287; The Empire State [Case No. 4,473]; The R. L. Mabey [Id. 11,871]; The Santee [Id. 12,329]. Although the amount paid the Eighth Ohio seems large, yet if ordinary prudence was exercised in hiring her at this price, and the money was actually paid by the insurance company, libellant is entitled to recover it. To prove that each bill was reasonable might be impossible, and involve an endless number of issues. We are simply required to prove that we paid them in good faith, in the exercise of ordinary prudence, and without fraud or collusion. The Nebraska [Id. 10,076]; The Thos. Kiley [Id. 13,924].

F. H. Canfield and G. V. N. Lothrop, for claimant.

The evidence does not justify the allowance of demurrage. No market value is shown for the use of such a vessel. The opinions of experts are not admissible, as they are based upon the probable earnings or profits. The Amiable Nancy, 3 Wheat. [16 U. S.] 546; Smyrna, L & P. Steamboat Co. v. Whilldin, 4 Har. [Del.] 228; The Clarence, 3 W. Rob. Adm. 283; Cummins v. Presley, 4 Har. [Del.] 315; Blanchard v. Ely, 21 Wend. 342; Boyd v. Brown, 17 Pick. 461; Benson v. Malden & M. Gaslight Co., 6 Allen, 149; Callaway Min. & Manuf'g Co. v. Clark, 32 Mo. 305; Taylor v. Maguire, 12 Mo. 317; The Lively [Case No. 8,405]. To estimate her rental value upon her probable profits would be, in effect, to allow the owners of the Dove to recover those profits as damages. The Granite State, 3 Wall. [70 U. S.] 310; The Baltimore, 8 Wall. [75 U. S.] 386; The Blossom [Case No. 1,564]. The facts in the case of The Cayuga [supra] are very different from those proven in this case, and, whether rightly decided or not, it is no authority here.

LONGYEAR, District Judge. The most important of the exceptions, as well in amount as in the principles involved, are respondent's ninth exception, which is to the item allowed by the commissioner for demurrage, 28 days at $100 per day, $2,800, and respondent's eleventh exception, which is to the item allowed for value of services of steamer Eighth Ohio, 11 days at $100 per day, $1,100; and libellant's third exception relating to the latter item, which is that the commissioners reduced the claim for services. for the steamer Eighth Ohio, it being claimed that a larger amount was actually paid. These exceptions will be first considered.

1. As to the item for demurrage. The River and Lake Shore Steamboat Line, the libellant corporation, was, among other things, running a line of steamboats between Detroit and Port Huron during the season of 1869, for carrying passengers and freight. The Dove was owned by libellant, and was running on that line, making daily trips from Detroit to Port Huron and back, at the time of the collision. The collision occurred on the night of the 31st day of May, 1869. The Dove was sunken by the collision, was raised and brought to Detroit, placed in dry dock and repaired, and resumed her place in the line and commenced running again on the 28th day of June, 1869. The time she was so detained from her regular trips was necessarily occupied in raising and repairing her. During her detention her place in the line was supplied by other boats belonging to libellant. Thus far there is no dispute as to the facts. Neither is it disputed as a proposition of law (and, in fact, the law in this regard is too well established to admit of question) that libellant is entitled to recover damages for the detention, or, as it is commonly called, demurrage. The question in dispute is as to the proper basis or measure of damages. On behalf of respondent it is contended that, in a case like the present, the rental or charter value alone is the proper basis, and because it appears by the evidence before the commissioner that at the port of Detroit, the home port of the Dove, there was no established rental or charter value of vessels like the Dove, and because it does not appear that she could have been chartered during the time of her detention, there is no basis for recovery of damages as demurrage;

and that the most that libellant can recover is interest on the value of the vessel during the detention.

On behalf of the libellants it is contended that, because there was no established rental or charter value by which to ascertain the damages for the detention, and, at all events, because libellant did not keep the Dove for hire, but for libellant's own use and service in the business and employment for which she was intended, and in which she was then engaged, the value of such use and service to libellant in that particular business and employment, under the maxim "Restitutio in integrum," always applied in such cases, is the proper basis and measure of damages for the detention; provided, of course, that such value is susceptible of proof, and is proven, to a reasonable certainty. In reply to this, it is contended, on behalf of respondent, that the proof of such value must of necessity be based, as it is in fact in this case, upon probable profits of such service during the detention; and that such basis is excluded by express authority.

To support the propositions contended for on behalf of respondent, the cases of Smith v. Condry, 1 How. [42 U. S.] 28, and Williamson v. Barrett, 13 How. 101, are cited. The first named case is cited as an express decision of the supreme court excluding future profits as a basis or measure of damages for demurrage, and the last named case as a like decision establishing and limiting the rule of damages in such cases to include the market rental or charter value only, and that where there is no such value established, there can be no damages for detention allowed. These cases have been sometimes misapprehended by learned commentators, and to some extent by the learned advocates on both sides in this case. Mr. Conkling (1 Adm. 384), and Mr. Parsons (1 Shipp. 540, note 1), both assume that Smith v. Condry (which was decided in 1843) decides that the probable profits of the earnings of the vessel during the detention are not allowable as demurrage; and that Williamson v. Barrett (which was decided in 1851) decides that such profits are allowable, and thus subverts the former decision and establishes a different rule. As we shall presently see, these are misapprehensions, and that in neither case was the decision what is thus assumed. The questions presented in the two cases were entirely different, and the decisions are in no manner in conflict with each other. What was decided in each case remains the law to-day, unimpaired and unqualified by any subsequent rulings of that court.

In Smith v. Condry, the vessel detained was laden with salt, and the damages claimed were for a loss or diminution of profits on the cargo, in consequence of a decline in the price of salt at the port of destination during the detention. The court held that such damages were not allowable, and that is all the court decided. Such damages were clearly speculative merely, and too remote. The decision of the court excluding such damages was in accordance with what I understand to have been the uniform course of decision of the courts in England and America, both before and since, and it is undoubtedly the law to-day. But the court made no decision in that case as to damages for the delay of the vessel—whether such damages are or are not allowable—nor whether the probable earnings of the vessel during her detention, by way of freights, hiring or otherwise, are or are not allowable. No such question was before the court, and no rule whatever was laid down as to it. All that the court decided was that probable profits on the cargo, which might have been made but for the delay, are not allowable. When the court say (chapter 35): "It is the actual damage sustained by the party at the time and place of the injury that is the measure of damages," they are speaking of the case before them—a claim for probable profits on the cargo—and not of the detention of the vessel and damages resulting from loss of her use and service as such. The case of Smith v. Condry [supra], therefore, does not reach the present question.

In Williamson v. Barrett [supra], the general question of damages for loss of the use of vessel during the detention, was directly before the court. That was an action at common law, for damages by collision on the Ohio river. On the trial in the circuit court the jury were instructed, among other things, to give damages for "the use of the boat during the time necessary to make the repairs and fit her for business." The evidence given to support this claim for damages is not stated, and it does not appear upon what basis the claim was made—whether for rental or charter value or otherwise. The supreme court, however, after reciting the instruction, say: "By the use of the boat, we understand what she would produce to the plaintiffs by the hiring or chartering of her to run upon the river in the business in which she had been usually engaged." The court then, after announcing the general rule regulating damages in cases of collision to be the allowance to the injured party of an indemnity to the extent of the loss sustained, and after some discussion in regard to the difficulty in stating the grounds upon which to arrive, in all cases, at the proper measure of that indemnity, and having arrived at the conclusion that the demand in the market for vessels of the description of the one disabled, and the price which the owner could obtain, or might have obtained, for her hire, are proper bases of compensation, proceed as follows: "If there is no demand for the employment, and of course no hire to be obtained, no compensation for the detention during the repairs will be allowed, as no loss would be sustained. But if it can be shown that the vessel might have been chartered during the

period of the repairs, it is impossible to deny that the owner has lost, in consequence of the damage, the amount which she might have thus earned. The market price, therefore, of the hire of the vessel, applied as a test of the value of the service will be, if not as certain as in the case where she is under a charter party, at least, so certain that, for all practical purposes in the administration of justice, no substantial distinction can be made." The point, and the only point actually decided in that case, is that damages for the detention are allowable, notwithstanding the vessel injured was not under a charter party at the time of the injury, provided it is shown that she might have been chartered during the detention. That is to say, that it is not indispensable to the recovery of damages for demurrage that the injured vessel should have been under a charter party at the time of the injury. What the court say in deciding this point, as to what is a proper measure or basis of damages in such a case, must be read and understood with reference to what they say they understood by the "use" of the boat, as that word was used in the charge to the jury, viz., "what she would produce to the plaintiffs by the hiring or chartering of her." What I understand the court to say is, that in that case, and under the general signification of the expression "use of the boat," as understood by them, a proper rule of damages is the rental or charter value of the vessel. I do not understand the court to lay this down as an inflexible and universal rule, applicable alike to all cases where the vessel injured is not actually under a charter party at the time of the collision. In fact, the contrary appears in the course of the opinion of the court. At page 111, the court cite approvingly the decision of Dr. Lushington in the case of The Gazelle, 2 W. Rob. Adm. 279, in which the freight the injured vessel was earning at the time of the collision, less the probable expenses in earning it, was adopted as the measure of damages for the detention. In citing this opinion, the supreme court remark: "This rule may afford a very fair indemnity in cases where the repairs are completed within the period usually occupied in the voyage in which the freight is to be earned. But if a longer period is required, it obviously falls short of an adequate allowance. Neither will it apply where the vessel is not engaged in earning freight at the time. The principle, however, governing the court in adopting the freight which the vessel was in the act of earning as a just measure of compensation in the case, is one of general application. It looks to the capacity of the vessel to earn freight for the benefit of the owner, and consequent loss sustained while deprived of her service. In other words, to the amount she would earn him on hire." And it was so understood (as not fixing an inflexible rule), by Mr. Justice Catron, in his dissenting opinion. On page 114, he says: "The supposition that the amount of damages can be easily fixed, by proof of what the injured boat could have been hired for on a charter party, during her detention, will turn out to be a barren theory, as no general practice of chartering steamboats is known on the Western rivers, nor can it ever exist; the nature of the vessels and the contingencies of navigation being opposed to it. In most cases," he says, "the proof will be that the boat could not have found any one to hire her; and then the contending parties will be thrown on the contingency, whether she could have earned something, or nothing, little or much, in the hands of her owner during the time she was necessarily detained." Here the learned judge describes exactly the contingency which exists in the present case; and it is because the decision of the majority of the court is, in his opinion, capable of being extended to cover such a contingency, that he dissents.

The rule that the party injured is entitled to an adequate compensation for any loss he may sustain for the detention of the vessel, is fully recognized and broadly stated in the opinion of the court. But what would be the proper mode of arriving at such compensation, in cases where the vessel at the time of the injury was not earning freight, not under a charter party, and no demand for the hiring of vessels, and no use for them, except by the owner, and therefore no market rental or charter value (as in the present case), is not discussed or decided. The principle upon which compensation is awarded for marine torts, enunciated in this case as well as in others, especially in The Gazelle, 2 W. Rob. Adm. 279, The Clarence, 3 W. Rob. Adm. 283, and other English cases, is broad enough to cover all such cases as those above enumerated, and they are clearly not excluded by any rule laid down in Williamson v. Barrett, nor in any other case I have examined, and I have examined all the numerous cases cited in the briefs of counsel, and some others. If actual loss on account of the detention is made to appear, the case is within the principle, and damages are recoverable. It then only remains to prove the amount. In The Clarence, 3 W. Rob. Adm. 283, the whole doctrine is very clearly stated. In that case there was no proof of any actual loss, and the court (page 286) says: "In order to entitle a party to be indemnified for what is termed in this court a consequential loss, being for the detention of his vessel, two things are absolutely necessary —actual loss and reasonable proof of the amount. Both must be proved," &c. And again: "It does not follow, as a matter of necessity, that anything is due for the detention of a vessel whilst under repair. Under some circumstances, undoubtedly, such a consequence will follow, as for example, where a fishing voyage is lost, or where the vessel would have been beneficially employed." And again: "The onus of proving her loss rests with the plaintiff, and this onus has not been

discharged upon the present occasion. Had the owners of the Clarence proved that the vessel would have earned freight, and that such freight was lost by the collision, the case would have fallen within the principle to which I have last adverted." Under that rule, I think that the loss of earnings during detention is clearly allowable; and this, although not actually earning freight at the time of the injury, nor kept for hire, nor under a charter party, nor any market rental or charter value of vessels of like character, nor any demand for the hire of such vessels, provided it is proven to a reasonable certainty that the vessel would have been actually employed by the owner during such detention, and that she would actually have earned the owner something over and above her expenses. What is meant by this is, that such facts are competent as a basis of damages for detention. The difficulty is in making the requisite proof, both as to the fact of actual loss and of the amount. But more of that hereafter.

That the supreme court so understood the rule, and that no ultimatum was laid down in the case of Williamson v. Barrett, 13 How. [54 U. S.] 101, I think, appears with reasonable certainty by the opinion of that court in Sturgis v. Clough, 1 Wall. [68 U. S.] 269, by Justice Grier, in 1863. That was a case of collision. The injured vessel was detained fourteen days while undergoing repairs. The commissioner allowed demurrage on the naked opinions of witnesses as to what the vessel might have earned per day if engaged, unsupported by the exhibit of the owner's books, to show what she had actually made previously or afterwards. The district court disallowed the demurrage, and the supreme court sustained the decision. The district court did, however, allow something in consideration of demurrage, by way of confirming the commissioner's report as to the amount allowed for repairs, which the court regarded as too much, saying: "The result would be about just between the parties on the whole case." It appears that the injured vessel was a tug-boat used by her owners in towing vessels to and from sea, about the harbor of New York. In deciding the case, the supreme court (page 272) say: "The court did not decide that demurrage was not a proper item to be allowed in the computation of damages, but that the amount of his decree was a just allowance for all damages sustained by libellant." The force of this language will be understood by reference to the facts of the case in regard to which it was used, as above stated. And again: "On reviewing the evidence, we are satisfied that the sum allowed in the decree was 'just between the parties.' The report of the commissioner, allowing the whole bill for repairs, was not just, because the repairs necessarily made were chargeable not wholly to the collision, but to the age and previous condition of the boat. The charge for demurrage allowed by him was not justified by the evidence, although there was testimony to support it such as can always be obtained when friendly experts are called to give opinions." Thus recognizing that even such testimony as the opinions of experts as to the probable daily earnings of the vessel, in her common employment by her owner, is competent testimony, although not sufficient alone to justify the allowance. The court then, in the same connection, proceeds: "Besides, the libellant withheld the best evidence of the profits made by his boat, which would be found in his own books, showing his receipts and expenditures before the collision." Now, while this can hardly be given the force of a direct ruling upon the question, yet it is not mere dictum; and I think it is not claiming too much for it to say that it is a clear recognition of the doctrine that the probable net earnings of a vessel during detention, under circumstances very much like those of the present case, constitute a proper basis of damages for demurrage, and that the books of the owner showing the receipts and expenditures of the vessel before the collision are not only competent testimony, but constitute the best evidence as to the amount of such probable net earnings.

In the present case, the commissioner had before him not only the opinions of several competent experts as to the value of the services of the Dove to her owner per day, but the owner's books, from which trip sheets were made out and attached to the report, showing her daily receipts and expenditures during the month immediately preceding the collision, and the month immediately following the resumption of her trips. Besides the inference above drawn from Sturgis v. Clough, 1 Wall. [68 U. S.] 269, that the supreme court regards probable future earnings allowable as damage for detention in cases of marine tort, like the present, we have the positive opinion of Judge Leavitt, late of the Southern district of Ohio, in his charge to the jury in Jolly v. Terre Haute Drawbridge Co. [Case No. 7,441], and Judge Benedict, of the Eastern district of New York, in The Cayuga [Id. 2,535], and of Woodruff, Circuit Judge, in the same case [Id. 2,537], that such earnings do constitute a proper basis of damages in such cases. See also opinion by Justice Nelson, in The R. L. Mabey [Id. 11,871]. Such is clearly the rule in England, as has already been shown. See, also, Lown. Col. 154–156, and Shear. & R. Neg. § 599.

The subject of future profits, as a basis of damages in cases of tort, has undergone a vast amount of judicial discussion and decision in the law courts. A broad, if not well defined, distinction between actions ex contractu and actions ex delicto, is recognized in this regard, wherever it has been drawn in question. In actions ex delicto it is the almost, if not quite the unanimous voice of those courts, that such profits are recoverable

as damages. Not speculative and merely possible profits. Those are never allowed. In order to be recoverable, "its source must be ascertained and its extent defined, and its realization must appear to have been reasonably certain." And I am willing to go further, and say its source must be the direct and immediate use or service of the thing injured, or the prosecution of the business interrupted.

The numerous cases cited by counsel from the law courts have been examined by me, so far as within my reach. It would be extending this opinion to too great length to notice them in detail. I shall, therefore, content myself with a simple citation of some of the leading and more prominent cases: Lacour v. Mayor, etc., 3 Duer, 406; St. John v. Mayor, etc., 6 Duer, 315; Walter v. Post, Id. 363; Allison v. Chandler, 11 Mich. 542; Sewall's Falls Bridge v. Fisk, 23 N. H. (3 Fost.) 171; Griffin v. Colver, 16 N. Y. 489.

The question in this class of cases is, has the owner lost anything by the delay, and, if so, how much? The answer to this question determines the right of the owner to recover damages for the detention. And in a case like the present, where the vessel was not kept for hire, but was kept for the owner's own use, and where there was, in fact, no market rental value of vessels, and no demand for employment in that way, the answer to be given depends upon the answer to certain other questions: First, had the owner use or employment for his vessel during the detention? And, second, how much would she have earned in such use or employment? Under the evidence in the present case, the answer to the first question is not difficult. The Dove constituted one of a line of steamers on a certain route, and upon which she was actually employed at the time of the collision. The libellant corporation continued to occupy that route during the entire time of the detention, and the Dove resumed her place upon it after the detention. At the time of the collision, and, in fact, during the detention, the libellant had virtually a monopoly of the route for both freight and passengers, and the earnings of the Dove upon the route were profitable. Of that use and employment, and of these earnings the libellant corporation was deprived by the collision. As to these conclusions from the evidence there is no contest or dispute. Clearly, then, libellant is entitled to recover something on account of the detention. How much depends upon the answer to be given to the second question. How much would the Dove have earned in such use and employment, but for the detention? The solution of this question presents some difficulty; it borders so closely upon the boundary line between that which is certain and that which is uncertain, shadowy, contingent and speculative. That the Dove would have earned something over and above her expenses we have already seen. The difficulty exists in determining how much. The certainty required is not absolute certainty, but reasonable certainty. In the first place, we have the opinions of several respectable boat and vessel owners, placing the value of the use of the Dove to her owner at sums varying from $110 to $130 per day. The opinions of witnesses, as we have seen in Sturgis v. Clough, supra, although competent testimony, are not sufficient alone to determine the amount.

But in the present case, the books of libellant were exhibited, showing the gross daily earnings of the Dove for the month of May immediately preceding, and for the month of July following the detention—testimony clearly recognized by the supreme court in Sturgis v. Clough, supra, as not only competent, but as the best evidence of the probable earnings of the vessel during the detention. And it is clearly the best evidence of which the case admits. In addition to this, the testimony shows that the month of June, during nearly the whole of which the Dove was detained, was the best month of the season. There is no conflicting testimony. It seems to me the testimony is sufficient from which the value of the use and services of the Dove, and the consequent damage to her owner by her detention, may be ascertained with reasonable certainty. I am free to admit, however, that the question is not free from difficulty, and some doubt. But the evidence given being the best the case affords, and being reasonably certain, I think strict justice requires that the party in fault should bear whatever inconvenience or hardship there may be arising out of the attendant difficulties and doubts. Dr. Lushington, in the case of The Gazelle, 2 W. Rob. Adm. 281, 284, in remarking upon the general question, with great clearness and justice, said: "The right against a wrong doer is for a restitutio in integrum, and this restitution he is bound to make without calling upon the party injured to assist him in any way whatsoever. If the settlement of the indemnification be attended with any difficulty (and in those cases difficulties must and will frequently occur), the party in fault must bear the inconvenience. He has no right to fix this inconvenience upon the injured party; and if that party derives incidentally a greater benefit than mere indemnification, it arises only from the impossibility of otherwise effecting such indemnification without exposing him to some loss or burden, which the law will not place upon him." It is true, this was said against a reduction of one-third new for old, as in insurance cases, in determining the amount due for repairs; but at page 284 the learned doctor expressly applies the same doctrine to demurrage.

The collision occurred on the night of the 31st day of May, and the Dove resumed her trips on the 28th day of June, 1869. The first nineteen days of May her trips were not daily, nor, in all cases, regular. She, in fact, made only five trips during that period. I think, therefore, that those trips must be ex-

cluded in arriving at her average daily earnings. During the last twelve days of May and the whole of July she made regular daily trips, except Sundays and the Fourth of July. She may have been, and probably was, employed on excursions on those days, but as nothing appears in the evidence with sufficient certainty to base any calculations upon as to these days, they must be treated as lay days, and excluded from the estimates. Excluding these lay days, then the Dove made eleven regular daily trips in May, and twenty-seven in July. Her gross earnings for the eleven days in May were $2,137.83, and her gross expenses for the period of time covered by these eleven days were $982.85, calculated on the basis of her gross expenses for the whole month, as proven. Her net earnings, therefore, for the eleven days in May were $1,154.98, and her average net earnings per day were $105. Her gross earnings for the twenty-seven days in July were $6,167.70, and her gross expenses for the whole month $3,179.88. Her net earnings, therefore, for the twenty-seven days in July were $2,987.82, and her average net earnings per day were $110.66. Looking at these results, and taking into consideration the opinions of the expert witnesses estimating the value of the use and services of the Dove to her owners at $110 to $130 per day, and the evidence that the period of her detention comprised a large portion of the most profitable part of the season, it clearly appears that the amount, $100 per day, fixed by the commissioner, is certainly not beyond, but, on the contrary, is entirely within the amount of the boat's probable net daily earnings during the time of her detention. I shall, therefore, not disturb his report in that respect.

But the able and usually accurate commissioner who made the report has committed two errors in regard to the number of days for which allowance for demurrage shall be made. In the first place, he has allowed for twenty-eight days when only twenty-seven intervened between the time of the collision and the resumption of her trips by the Dove; the collision having occurred on the night of May 31st, and the Dove having resumed on the 28th day of the following month. In the second place, no allowance was made for lay days. I think this allowance should be made, for the reason that the same proof upon which we base our conclusions as to the value of the boat's earnings, shows quite as clearly that Sundays were usually though not quite always, lay days. As four of these occurred during the twenty-seven days' detention, they must be deducted from the time. This is necessary to make the estimates as to time, and as to the amount of damages per day, consistent with the basis upon which both are established. And it is contrary to justice that the owner should receive pay for such days as it is reasonably certain, for anything the proofs show, the boat would have earned him nothing. Deducting the four days from the twenty-seven days, leaves twenty-three days, for which the allowance must be made at $100 per day, making in all $2,300, instead of $2,800, as found by the commissioner; and his report must be modified accordingly. The difference $500, together with interest thereon, at the same rate, and for the same time allowed by the commissioner on the whole amount, must be deducted from the gross amount of the commissioner's report.

2. As to the allowance made for the services of the steamer Eighth Ohio. Both parties except as to this item; respondent claiming it is too high, and libellant claiming it is too low. There is no dispute as to the fact of the service being rendered, its necessity, and as to the length of time. The only dispute is as to the amount. The steamer belonged to libellant. She was hired by the underwriters, and was used by them as a wrecking vessel in raising the Dove. She was so used in running of errands, boarding and lodging the men, and tugging. The price agreed to be paid was $140 per day, and that amount was paid, and allowed in the adjustment. Libellant claims that the price was agreed on and paid in good faith, and that the whole amount ought to be allowed. Respondent claims that a lower priced boat might have been obtained which would have answered just as well, by reasonable diligence; that the amount was unreasonable, because there was no crew hired with her, or if hired, it was unnecessary, as the crew of the Dove could have been used on her; and that at all events the crew of the Dove was in fact so used to some extent. The commissioner reduced the amount from $140 per day, as claimed, to $100 per day, and fixed the allowance on that basis. The testimony appears to be somewhat conflicting, and, as it comes to me, the preponderance is not palpable. The commissioner had the witnesses all before him, and heard their testimony, and no doubt gave it careful consideration. Under these circumstances, the safer rule appears to be, not to disturb the finding of the commissioner, and such I believe to be the usual practice. See Egbert v. Baltimore & O. R. Co. [Case No. 4,305]; Holmes v. Dodge [Id. 6,637]. The exceptions to this item are therefore overruled.

3. As to the remaining exceptions. * * * Libellant's second exception is to the disallowance of the sum of $100, paid Joseph Nicholson. However valuable Nicholson's aid may have been to libellant in the settlement and payment of bills—and I have no doubt it was valuable—I fail to see its necessity, and I think it is too remote to be charged as a necessary consequence of the collision. I therefore consider the disallowance correct. * * * Respondent's eighth exception is to damage to cornice, head lines and frescoes, $300. This allowance was made solely upon the estimate of Captain Sloan, master of the Dove, and who had charge of the repairs generally. Estimates of this kind are allowed and acted on in cases where the repairs have

not been made at the time of the assessment, but never, I believe, where the repairs have been actually made. Where the repairs have been made, I believe it to be the invariable rule—at all events, I am clear that it ought to be—to adopt the actual cost of the repairs as the measure of damages. The actual cost admits of certainty of proof, while estimates depend upon the mere opinions of witnesses which may or may not be correct. In this case, the cabin, in which this item of damage is alleged to have been done was repaired, and it does not appear what these particular repairs cost, separately from the general repairs. Under the rule above stated, there is therefore no basis on which to make the allowance.

The remaining exceptions involve merely questions of fact and are not reported.

[NOTE. From the decree of the district court an appeal was taken by the owners of the Mayflower to the circuit court, where the decree was affirmed (case unreported). Subsequently an appeal was taken to the supreme court, where the decree of the circuit court was affirmed. 91 U. S. 381.]

Case No. 9,346.

The MAY FLOWER.

[3 Ware, 300.] [1]

District Court, D. Maine. Aug., 1863.

SHIPPING—GOODS ON BOARD — BILL OF LADING—DUTY TO GIVE—PROVISIONS OF.

1. When goods are laden on board of a vessel, the master is bound by the contract to give a bill of lading of them. But a bill of lading, in its essence, only contains a receipt of the goods with a promise to carry and deliver them according to the terms of the contractor.

[Cited in Robinson v. Memphis & C. R. Co., 9 Fed. 139.]

2. The price of the carriage and delivery is no essential part of the instrument, and is inserted merely for the convenience of the parties. If it is not agreed upon, or there is a misunderstanding between the parties on this point, the master is not obliged to give a bill of lading determining the freight.

In admiralty.

Mr. Gilbert, for libellant.

Mr. Fox, for respondent

WARE, District Judge. Mr. Tiffany, a merchant of New York, wishing to ship a quantity of ice to New Orleans, for the purpose of obtaining a vessel for that use, visited the Kennebec and hired the lower hold of the May Flower, of Mr. Hagar, of Richmond. By the terms of the agreement, he was to have the whole of the lower hold but no other part of the ship. The freight which he was to pay for the exclusive use of that part of the vessel, is partially, but not fully agreed, and out of this difference of opinion the present controversy has arisen. The May Flower was a new ship, having never made a voyage. By the United States admeasurement, she measured 899 tons, but her real carrying capacity was supposed to be considerably greater. For the purpose of ascertaining nearly what that was, Mr. McCarting, an agent of Mr. Tiffany, together with Mr. Hagar, was deputed to make a rough admeasurement of the vessel. They reported that she could carry, in the lower hold, 1,200 tons or more. On this report Mr. Tiffany agreed to pay $10,000 for the lower hold. So far is agreed by the parties. But it is alleged in the answer that the whole agreement was, that $10,000, at least, as a gross sum, should be paid, but if the quantity actually laden should exceed that sum, calculated at $9.75 per ton, then for the use of that part of the ship, should be paid for every ton so laden at that rate, to wit, $9.75 per ton. The ship completed her lading at Bath, where she took, including what was laden at Richmond, 1,233 tons. The agent of the shipper, Mr. McCarting, then demanded a bill of lading in the common form, hiring the freight at $10,000 a gross sum. This the master refused by the direction of Mr. Hagar, but offered one in conformity with the agreement as understood by him, fixing the freight at $9.75 per ton. It does not appear, from the evidence, that a bill in any other form than that in which the freight was determined was mentioned on either side.

On this state of the case a question was raised by the counsel for the claimant, whether he was bound to give any bill of lading, the bargain being merely for the transportation and delivery of the goods, and nothing was said in the contract of a bill of lading. The want of a decision on this point may be accounted for in different ways. One mode is, that the delivery of a bill of lading is so much a matter of course that no master has ever refused it when demanded, or has thought it worth the expense to contest the legality of the demand. But there must always be a first case, and the true question is, whether he was bound by law to deliver one. My opinion is, that he was so bound. All contracts bind the parties according to their common intention, when that can be clearly ascertained, not that of one party or of the other, but of both; and this whether the intention is expressed by words or not. By a contract, generally, a party binds his heirs and personal representatives, though they are not commonly named, for he binds all his property for the performance of it. This addition is annexed by the law. But customs and usages may annex terms and conditions to a contract, as well as positive law, and even vary the meaning of words actually used. In the case of Smith v. Wilson, 3 Barn. & Adol. 728, custom was allowed to change the meaning of a word which has as definite a signification as any in the language. In that contract, which related to rabbits, one thousand was held, according to the common intention of the parties, to mean one hundred dozen or twelve hundred. And

[1] [Reported by George F. Emery, Esq.]

this decision is confirmed by others of a like character. This was a land contract, but mercantile contracts are almost always elliptical, leaving something to be understood which is not expressed, and custom and usage may add terms and conditions to a contract as well as law. Indeed, almost all our mercantile law is the mere adoption, by the courts, of the customs of merchants. Contracts are conventions, says Domat, Lois Civiles, liv. 1, tit. 1, § 3, No. 1, bind the parties, not only by their words, but to all which is demanded by the nature of the contract, by the law and by custom, unless these consequences are expressly excluded. When the owner agreed to carry the ice, he bound himself just as much to give a receipt for it, with a promise to deliver it in the usual terms, as he did to carry it. Such a receipt and promise is just as much expected by the master as the shipper. It is included, by the common understanding, in the general contract. My opinion, therefore, is, that a bill of lading to this effect, he was bound by the contract to give. It is of the essence of a bill of lading, that it contains a receipt for the goods with a promise to carry and deliver them, for this the master promises, and it necessarily contains nothing more. But, for convenience, it is usual to insert also the sum to be paid for their carriage. And if this is agreed, as is usually the case, it may, very suitably, be inserted. But this instrument is commonly given after the goods are received and stowed. It is given by the master. And if the freight is either not agreed, which is certainly uncommon, or there is a misunderstanding on this point between the shipper and the master, or owner, what is to be done? The giving of a bill of lading is the master's own act. It is a very ancient document, probably as old as maritime trade, and highly respected. And though not conclusive between the owner of the goods and the vessel, it is at least prima facie evidence, and if indorsed for a valuable consideration, it is conclusive between such purchasers and the ship owner or master. 5 Pars. Mar. Law, c. 7, § 2. The master is not obliged to furnish evidence against himself, especially when the truth of this he does not admit. He was thus justified in refusing such a bill of lading, and he is then standing only for his legal right in refusing one, stating the freight at a higher rate than what he understood it. And such a bill only was demanded. It does not appear that one in any other form was mentioned or thought of by either party, and such an one the master was not bound to give. The amount of the freight not being agreed upon between the parties, this might, perhaps, be determined by a libel for not giving a bill of lading framed for that purpose. But the libel is not framed with that view, and it may as well be determined in a libel for the freight, if the ship carries it in safety to its port of delivery. And as, by the contract, the freight is to be paid at New York and not New Orleans, it may be more conveniently settled there. In the mean time no wrong can be done, as the manifest shows the amount of ice laden. The libel is dismissed with costs.

MAY FLOWER, The. See Case No. 6,147.

Case No. 9,347.

MAYHEW v. DAVIS.

[4 McLean, 213;[1] 5 West. Law J. 304.]

Circuit Court, D. Illinois. Dec. Term, 1847.

TAXATION—TAX TITLE—REQUISITES — DEMAND BY COLLECTOR—JUDGMENT.

1. Under the revenue law of Illinois, passed February 26, 1839 [Laws 1839, p. 31], (the circuit court acting as a court of limited and special jurisdiction,) it is necessary to show that everything was done, and how done, that is required by law to be done, to give it jurisdiction.

[Cited in U. S. v. Pacific Railroad, 1 Fed. 102.]

[Cited in English v. People, 96 Ill. 567; Cooper v. Sunderland, 3 Iowa, 114; Chahoon v. Com., 20 Grat. 779; Barton v. Gilchrist, 19 W. Va. 234; Potts v. Cooley, 51 Wis. 355, 8 N. W. 154.]

2. A collector of taxes must make a demand for taxes upon the owner of land, before a judgment can properly be rendered against it.

This was an action of ejectment [by Eusebius Mayhew against Samuel H. Davis]. The defendant pleaded a special plea, setting up a tax title, acquired since the commencement of the action; in which plea he set out fully the record of the judgment of the Peoria circuit court against the land; the collector's report, on which judgment was rendered, together with notice and certificate of the publication thereof; the process or precept under which the land was sold by sheriff, and his deed from the sheriff to the land in controversy.

The collector's report was in the following form:

[State of Illinois v. Suit for Taxes. List of land and other real estate situated in the county of Peoria, and state of Illinois, on which taxes are due and remain unpaid, for the year 1842.][2]

Patentees.	Description.	No. of acres.	Valuation.	Taxes.
Henry Martin,	do 9 N 7 E N E 11 do do do	100 do do	do 960 do	do 4 32 do

The costs already accrued on each of the foregoing tracts of land and town lots, are twelve cents.

Then follows the notice and certificate of publication, signed by John S. Zeiber, and indorsed on the back was a certificate of the

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

[2] [From 5 West. Law J. 304.]

collector, that said lands, etc., were assessed for taxes for the year 1842, for state and county purposes; that the taxes and costs thereon remain due and unpaid, and that the owners had no goods and chattels in his county on which he could levy for the payment of the same. The judgment and precept were in the form prescribed in the statute.

To the defendant's plea, the plaintiff filed a demurrer, alleging for cause, the want of jurisdiction in the circuit court to render said judgment, upon the facts set out in said plea. It was further agreed by the counsel, for the purpose of trying the question fully and fairly before the court, that the same objections might be made upon the demurrer, that could have been made to the record, etc., if the same were offered in evidence.

The following were the points made by the counsel for the plaintiff: (1) The record does not show that any demand was ever made by the collector for the payment of taxes, etc. (2) The judgment is void, being for a greater amount of taxes than the court was authorized in rendering by the law, and by the facts before the court.

A. Williams and B. S. Edwards, for plaintiff.

O. Peters and E. N. Powell, for defendant.

POPE, District Judge. This is an action of ejectment—special plea, setting up a tax title, under the act of the legislature of Illinois, of the 26th February, 1839, "concerning the public revenue." The defendant exhibits the proceedings before the circuit court of Peoria county, the judgment, execution, sale and deed by the sheriff; also, the report of the collector, giving a list of the land; that the owner had no personal property out of which to levy the taxes, and notice that he would move for judgment against the land upon which the taxes were due and unpaid. To this plea the plaintiff demurred.

When I consider the vast amount of property depending upon the question involved in this suit, I can not but feel the immense responsibility I incur; and this feeling is increased by the fact that my construction of the law is in conflict with that of the supreme court of Illinois, to whose decisions it is my duty to conform. I shall not attempt to overturn any of its decisions; but I dissent from its reasoning. That court allows great latitude of presumption in favor of the acts of the officers and persons engaged in the collection of taxes; I, on the contrary, hold them bound to show that they have acted in strict compliance with the law from which they derive their power. That court holds that some of the requirements of the law are directory; while I hold them to be material and essential. The defendant claims to hold the land in controversy (valued by the assessor at nine hundred and sixty dollars) by virtue of a sale, at which he paid less than five dollars for it. This, then, is a claim of strict right, where a court would not grant a new trial; nor would a chancellor enforce such an unequal bargain. But it is said that the state must raise taxes; and that can not be done unless the courts give to the sales a liberal support. This has not been found necessary in other states, or by the general government, and yet their faith has not suffered. Purchases of tax titles have been esteemed a good investment; for if the land be redeemed, it must be on the payment of a hundred per cent., and if not, the owner of the land almost always is willing to extinguish the tax title by paying a premium upon the advance. By the 8th article of the constitution of Illinois (section 8) it is provided that no man's property shall be taken from him, but by the judgment of his peers, or the law of the land. The 20th section, same article, declares that "the mode of levying a tax shall be by valuation, so that every person shall pay a tax in proportion to the value of the property he or she has in his or her possession." What is a tax? It is not a debt. It is a contribution or contingent, which the citizen should pay to the support of the government under which he lives. It is the right and duty of the government to ascertain its amount, and make requisition therefor. This is done by making an estimate of the expenses of the government, the value of each one's property, and levying the tax accordingly. To accomplish this, legislation is necessary. So the people of Illinois, represented in general assembly, by the act of 26th February, 1839, consented to a tax of twenty cents on the one hundred dollars' valuation of their property, and also that the county commissioners' court might levy a tax for county purposes, not exceeding fifty cents on the hundred dollars, if the court should deem it necessary to defray the expenses of the county. The tax is to be collected. The legislature prescribes the modus operandi. One or more assessors for the county are to be appointed, whose duty it is to call upon each property holder for a list of his property—if not at home, a notice in writing must be left at his house, with some one over twelve years of age, notifying him to attend at some time and place specified in the notice, to give him a list of his taxable property. The list must be returned to the clerk of the county commissioners' court, and shall contain the names of the owners, with the valuation annexed to each piece of property. The next step is the appointment of a suitable person to act as collector; (this is the language of the law.) He is to call on the property holders for their taxes. If not paid, the tax payer is allowed twenty days to make payment, before the collector can employ coercion. This demand converts the tax into a debt, requiring the debtor to seek his creditor.

The tax payer could rest secure until the collector made the demand, which alone could put him in default. Without demand, and neglect or refusal to pay the taxes within twenty days, the collector could not proceed to levy on his goods and chattels, nor report him or his lands to the court as delinquent, When the tax payer shall have failed to pay on demand, or in twenty days thereafter, the collector may levy on his goods and chattels; and if he can find none, then he may return or report against the land to the court, and move for judgment.

It is here proper to pause on the inquiry, what is necessary to happen before the owner can be reported to the court as being in default, and the motion made for judgment against his land? I answer: First, the assessor must have listed his property for taxation; second, he must have valued it. These two facts are material and essential; because, without them, no tax could be levied, as no one but the assessor could take the list or value the property: without valuation no tax could be collected. In addition to this, two other facts are equally material and essential, viz: First, demand by the collector; and second, in default thereof, the collector must have levied on goods and chattels, if to be found. If all these things have been done, then the owner is in default. The collector is ready to bring his suit in the circuit court. The manner of doing this is to give notice of his intention to move for judgment for the sale of the delinquent property, and he is to make a report to the court. The 25th section gives the form of the list to be reported, but not of the facts to show to the court that the lands are subject to its jurisdiction. Those facts are to be found in the requirements of the law. Without the allegation of the necessary and material facts, to be set out in the report of the collector, the court can not render judgment. For the present, we will suppose that the collector reported to the court that the assessor listed and valued the property; that he (the collector) demanded the taxes, which were not paid; that he then sought in vain for goods and chattels of the owner—what faith and credit should the court bestow on the report? In other words, should the court require the facts to be proved, or receive them as true until the contrary is shown?

This is a grave question, upon which I do not feel myself called upon to express an opinion. When it becomes necessary for me to pass upon it, I hope my health will be better than it is now. It may not be out of place here to make some suggestions in regard to it. The faith and credit to be bestowed on the report of the collector, depend upon the character of this personage, who is appointed as a suitable person to act as collector. Is he a common law officer of any court? No. Does he form any part of the machinery of the common law? No. Are his duties general and permanent, or special and temporary? Special and temporary. Is his responsibility general or special? Special: this is to the state. His bond can only be sued for the use of the state. Is he not then an agent appointed by the state, for a particular object, and when that is accomplished, his agency ceases? Are not such agents bound to show that they have performed their duty, and how they have done it? But enough of this. These suggestions are thrown out only to awaken inquiry. I suppose the notice of the collector must be regarded as the process to bring parties before the court—the report of the collector, the declaration. Now, what must appear in a declaration? I answer, the facts essential to a recovery. It is impossible to presume that the court had proof before it, of any material fact not alleged in the declaration. Where the parties are properly before a court of common law jurisdiction, and the court is silent in regard to the evidence upon which it rendered its judgment, it will be presumed that the court had proof of the truth of all the allegations of the declaration, but none other. It will not be supposed that the court admitted, and acted on any matter de hors the declaration.

In the case at bar, the report of the collector avers the existence of only one of the material facts deemed by this court necessary to a recovery, namely, that he could find no goods and chattels upon which to levy—omitting to state, unless inferentially, that the assessor listed and valued the property, and omitting altogether any allegation of demand and refusal to pay the taxes. But the circuit court does not allow the presumption, that it received proof of the facts omitted in the report, because it expressly bases its judgment upon the report alone. It must be held, that the omission to state a fact material and essential to a recovery, is proof that it does not exist; therefore, no demand for the taxes was made by the collector. Hence, a judgment rendered upon that state of facts, is on an immaterial issue, and therefore inefficacious, even if rendered by a court of general common law jurisdiction. It is worthy of note, that the 43d section, which enumerates certain facts, some prima facie, and some conclusive, which are proved by the sheriff's deed, does not include in either class, demand by the collector. The existence of that fact, then, is not proved by the deed. That it is material and essential is too manifest to require proof. Indeed, it would be an insult to common sense to offer it. The court might here dismiss the subject, by deciding that the judgment and subsequent proceedings are void, because coram non judice, and therefore no defense to the action.

It was argued for the defendant, that this is an action in rem, not in personam. The court does not see what conclusion can be drawn from this position; for whether in rem or personam, the case must be brought legally before the court, before it can take jurisdiction, either of the thing, or person.

It was also urged, with an earnestness indicative of sincerity, that, admitting the judgment to be erroneous, it is still binding until reversed, and a sale on the execution will be sustained, and the purchaser hold the property, even if the judgment be afterward reversed. However this may be, where the court has jurisdiction by having the person or thing properly before it, it does not hold, where the court has not jurisdiction; a judgment in that case is void—a perfect nullity; and this is the case at bar. The circuit court had no jurisdiction. The 43d section gives a force to the sheriff's deed truly alarming. It takes from the man whose property has been sold, almost all defense. It matters not how corruptly or negligently the assessor and collector may have acted, he can not defend himself unless by making it appear that the land was not liable to taxation, that the taxes were paid, that the land was not listed and assessed for taxation, etc., etc. I advert to this section, to show how imperative it is on courts to exact of the ministerial officers, the greatest strictness in the performance of their duties, and require full proof that they have performed all the requirements of law, and how.

But, it is said that some of the requirements of the legislature are only directory, and may be dispensed with. Upon this, it may be remarked, that a judge should rarely (if ever) take upon himself to say that what the legislature required, is unnecessary. He may not see the necessity of it, still it is unsafe to assume that the legislature did not have a reason for it; perhaps it only aimed at uniformity. In that case, the judge can not interfere to defeat that object, however puerile it may appear. It is admitted that there are cases where the requirements may be deemed directory. But it may safely be affirmed that it can never be, where the act, or the omission of it, can by any possibility work advantage or injury (however slight) to any one affected by it. In such case it never can be committed. Does the circuit court, when executing the revenue law, act as a court of common law? It does not. It acts as a court of special and limited jurisdiction, and subject to the rules that govern courts of that character. The supreme court of the United States has so decided in the case of Thatcher v. Powell, 6 Wheat. [19 U. S.] 119. In that case, Chief Justice Marshall, in delivering the opinion of the court, says: "In summary proceedings, where the court exercises an extraordinary power under a special statute, prescribing a course, we think that course ought to be exactly observed, and those facts, especially, which give jurisdiction, ought to appear, in order to show that its proceedings are coram judice." "Previous to an order for the sale of lands for the non-payment of taxes, the sheriff is ordered to levy them by distress and sale of goods and chattels of the delinquent; and if there be no such goods and chattels, he is to report the same to the court, as the foundation of any proceedings against the lands. By this act no jurisdiction is given to the court over the lands of a person who has failed to pay his taxes, until the sheriff shall report that there were no goods and chattels out of which the taxes may be made." It was urged in that case, that although the judgment might be erroneous, yet it was binding until reversed; but the court held it void. The court held, also, that it must appear that due notice was given. That case arose in Tennessee. There the report was made by the sheriff, a common law officer, and an officer of the court. In the case at bar, the report was made by the collector, not an officer of the common law, or of the court. In that case, the sheriff was held to a strict performance of his duty, and to afford evidence that he had done so. In the case of Walker v. Turner, 9 Wheat. [22 U. S.] 541, the supreme court of the United States says, "if the judgment be void, an execution or order of sale founded on it, is also void." Again, the same court, in the case of Williams v. Peyton [4 Wheat. (17 U. S.) 77], says: "In a sale of land for non-payment of taxes, the marshal's deed is not even prima facie evidence that the pre-requisites required by law have been complied with, but the person claiming under it must show positively that they have been complied with." The same doctrine has been maintained in Missouri, Indiana, Ohio, Virginia, and most of the other states. Indeed, no departure from it, or conflict with, has been shown to this court in the argument, and none is supposed to exist.

It was contended at the bar that although the judgment is erroneous, still, until reversed, it will support the execution and sale. This is contradicted by the authorities just cited, and also by the case of Denning v. Corwin, 11 Wend. 648, 649, etc. In that case the supreme court of New York says that the court must have jurisdiction of the person and subject matter, or the proceedings will be void—this case was for partition of land; the judgment was held void because it did not appear that the requirements of the law were strictly pursued. The judgment was not erroneous, but void.

From the authorities here cited, and from numerous others, it appears that the circuit court, when executing the law of February 26th, 1839, concerning the revenue, acts as a court of limited and special jurisdiction, and therefore, bound to show that everything was done, and how done, that is required by law to be done, to give jurisdiction. That the legislature did not deem the circuit court, when executing the revenue laws, a court of common law, is manifested by the fact that it furnished to the court the forms for the judgment and final process, and further, denied to it the power to try the cases according to the course of the common law, but to "hear and determine them in a summary manner without pleading." And yet it is

said, that a court so trammeled and supplied with manufactured forms is a court of common law jurisdiction, and entitled to all presumption belonging to such courts. This is truly preposterous. For the reason that no demand was made by the collector for the taxes upon the owner, and no reason given for its omission, the judgment of the circuit court and other subsequent proceedings are void. Therefore, the law is with the demurrant. It does not appear that this point was presented to or considered by the supreme court of Illinois, either in the case of Atkins v. Hinman, 2 Gilman, 437, or Taylor v. People, Id. 349. Hence my opinion is not in conflict with those decisions.

Again there is another fatal defect in the defense. By the collector's report it appears that the land in controversy was valued by the assessor at $960 00; the judgment is for $4 44; the state tax amounts only to $1 92; I suppose the residue was for county purposes. But it no where appears that the county commissioners' court levied a tax at all; the power given to that court was discretionary, to levy a tax not exceeding fifty cents in the hundred dollars, or any less sum, or none at all. This point, also, does not seem to have been considered or decided by the supreme court of Illinois.

Case No. 9,348.

The MAY HOWLAND.

COLD et al. v. The MAY HOWLAND.

[2 Adm. Rec. 307-312.]

Superior Court, Florida. Nov. 19, 1839.

SALVAGE—DECREE—AMOUNT—ALLOWING EXTRA TIME FOR PAYMENT.

In admiralty.

Charles Walker, for libellants.
A. Gordon, for respondent.

MARVIN, J. It appearing that the libellants are entitled to salvage for their services in saving the cargo and materials, as by them alleged; and that the total value thereof in cash at this port is $23,651.85; and that the miscellaneous character and nature of said cargo is such that salvage cannot be awarded and paid in kind, or by a division of said cargo, as the rule and custom of this court requires when salvage can be paid in kind, and it is not otherwise adjusted by the parties, so that a sale becomes necessary, unless the same shall be advanced and paid by the underwriters or owners thereof; and it also appearing that if a sale of part of said cargo be had to pay salvage and expenses, the residue thereof cannot be transhipped to its port of original destination without incurring an expense far disproportioned to its value; so that it is most to the interest of whoever may be concerned, that the whole of said cargo be sold by order of this court, unless such salvage be advanced and paid by the owners or underwriters, as is shown by the petition of the master filed in this case; and it also appearing reasonable that further time should be given to the owners and underwriters to advance and pay said salvage, before resorting to a sale thereof: ordered, adjudged and decreed that the marshal advertise and sell at public auction on the 2nd day of December the cargo and materials of the ship May Howland which remain unsold, unless before that time the owners or underwriters thereof pay to him the salvage and expenses hereinafter decreed; and that from the moneys paid into court, if sale be had, the clerk pay first the taxable costs and expenses of this suit, including the marshal's, clerk's and witnesses' fees, wharfage, storage and bills for labor duly attested.

Second, if the whole cargo be sold and the proceeds brought into court, that then he pay from the residue of said money arising from the sale of cargo and materials saved by them, to David Cold, Samuel Sanderson, John Geiger, William H. Bethel or their respective agents, in full for their services, forty-three per cent. thereof. If the cargo be not sold, that then he pay them the sum of eight thousand one hundred and thirty-six dollars for their services as aforesaid.

Third, that the clerk, if sale be had of that part of the cargo and materials saved by Haley, Curry, and Roberts, pay to them or their respective agents, fifty per cent. of the proceeds of sale after paying as above directed the costs and expenses properly chargeable to the cargo and materials saved by them. If no sale be had, that then he pay to them the sum of eight hundred dollars in full for their services.

Fourth, if the owners or underwriters as above provided advance and pay the salvage and expenses, then the marshal is ordered to receive, and the clerk to pay, the salvage above specified, and the costs and expenses of this suit above specified, and thereupon discharge the said cargo.

Fifth, that all moneys remaining in the registry of the court, the clerk is directed to pay, to the master of the said ship, as the agent of all persons interested therein, and that Spanish doubloons be received, and paid at $17.00 each, and Mexican doubloons at $16.00 each, and all other questions be reserved.

Case No. 9,349.

MAYNADIER v. DUFF.

[4 Cranch, C. C. 4.] [1]

Circuit Court, District of Columbia. April Term, 1830.

DETINUE—EX CONTRACTU—JUSTICE OF PEACE.

1. Detinue is an action in form ex contractu and not ex delicto; and is not on that ground to be excluded from the jurisdiction of a justice of the peace.

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

2. The justices of the peace in Alexandria county, as single magistrates, have jurisdiction in cases of detinue.

This was an appeal from the judgment of a justice of the peace in the county of Alexandria, in an action of detinue brought by James Duff against William Maynadier, for nine silver spoons and a soup-ladle.

Mr. Taylor, for defendant, the appellant, contended, that a justice of the peace has not jurisdiction in detinue. In Virginia the jurisdiction was given by an act passed in December, 1806, since the separation of Alexandria county from that state. At common law there could be no execution in detinue but a distringas, and a justice of the peace, by the law of Virginia, could issue no execution but a fieri facias, and by that writ the alternative value in detinue could not be made. By the act of congress of 1823 (3 Stat. 743), enlarging the jurisdiction of justices of the peace, a fieri facias, and a ca. sa. only are given, so that a justice of the peace has no means of enforcing a judgment in detinue. None of the provisions of the act of congress apply to such an action. A justice of the peace has jurisdiction only of cases in form ex contractu; and detinue is in form ex delicto. 1 Tidd. Prac. 1.

Mr. Taylor cited Rob. Forms, 366, 367, and the case of Barnard v. Herbert [Case No. 1,347], in this court, July 28, 1829, as to the form of execution in detinue; also, Jordan v. Williams, 3 Rand. [Va.] 501.

Mr. Neale, contrà, submitted the case to the court without argument.

CRANCH, Chief Judge (MORSELL, Circuit Judge, dissenting). In this case it is contended by the appellant, that the justice of the peace had not jurisdiction of this suit because it was in the form of an action of detinue, of which the jurisdiction is not given to a justice of the peace, either by the laws of Virginia existing on the 27th of February, 1801, or by the act of congress of March 1, 1823 (3 Stat. 743), "to extend the jurisdiction of justices of the peace," &c. It is said that the justices have jurisdiction only in actions ex contractu, and that detinue is an action ex delicto. 1 Tidd, Prac. 1. Mr. Tidd, in page 1, says, "Actions upon contract are, account, assumpsit, covenant, debt, annuity, and scire facias;" and in page 5, "actions for wrongs are case, detinue, replevin, and trespass vi et armis." Yet in page 10, he says, "and there is a case where it was held that debt and detinue might be joined in the same action," and for this he cites Gilb. Com. Pl. 5, and 1 Bac. Abr. 30. And in page 93, he says, "Formerly it was not usual to proceed in the king's bench by original writ in debt, detinue, or other action of a mere civil nature." And in pages 95, 96, he says, "In actions of account, covenant, debt, annuity, and detinue, the original writ is called a 'praecipe,' by which the defendant has an option given him, either to do what he is required, or show cause to the contrary; but in assumpsit and actions for wrongs it is called a 'pone,' or 'si te fecerit securum,' by which the defendant is peremptorily required to show cause in the first instance. In point of form the original writ is special or general—'nominatum vel innominatum.' The former contains the time, place, and other circumstances of the demand very particularly; the latter only a general complaint without expressing the particulars, as the writ of trespass quare clausum fregit," &c. And in page 105, he says, "The first process or proceeding upon the original writ in actions of account, covenant, debt, annuity, and detinue, is a summons;" thereby classing detinue with the actions ex contractu. It appears therefore very clearly from Mr. Tidd's own book, that he committed a mistake in his first page in not classing detinue with the actions upon contract. Whether he also erred in page 5, by classing it with actions for wrongs, is not so clear, yet there is no more wrong in the unjustly detaining a chattel from a man to whom it belongs, than there is in unjustly detaining money which he owes and refuses to pay. When, in detinue, the cause of action is bailment of a thing to be redelivered, it is clearly an action ex contractu; when the cause of action is finding and refusing to deliver the thing to its owner it partakes of the nature of a tort; but still the form of action is ex contractu, and the plea is non detinet, and non culpabilis as in the action of trover and conversion, which, in form, is ex delicto. In detinue, the gist of the action is the unjust detainer; in trover, it is the unlawful conversion. In the former the grievance is temporary; in the latter the loss is total. Mr. Chitty seems to have fallen into the same mistake. In his first volume on Pleading (page 87), he classes detinue under both heads. He says, "Personal actions are in form, ex contractu, or ex delicto; or, in other words, are for breach of contract, or for wrongs unconnected with contract. Those upon contracts are, principally, assumpsit, debt, covenant, and detinue; and those for wrongs are case, trover, detinue, replevin, and trespass vi et armis." Yet in a note in page 117 he says, "as debt and detinue may be joined in the same action, though the judgment is different, (Brownlow, Redivivus, 186; Gilb. Ch. Prac. 5; 2 Saund. 117, b,) and as it has been stated that detinue is not sustainable when the goods come tortiously into the defendant's possession, (3 Bl. Comm. 152, post, 119,) I have therefore considered this action under the head of actions ex contractu." In pages 117, 118, he says, "It lies upon a contract for not delivering a specific chattel in pursuance of a bailment or other contract. But as, to support this action, the property in some particular chattel must be vested in the plaintiff, assumpsit, or debt in the detinet, is the only remedy for the non-delivery of corn, &c., sold, where no specific corn was contracted for." In page 121, he says: "This

action is, in most cases, still subject to wager of law; on which account it was not much in use till that mode of trial became obsolete, but now it is frequently adopted." In page 122, Mr. Chitty again says: "Personal actions, in form, ex delicto, and which are principally for the redress of wrongs unconnected with contract, are case, trover, detinue, replevin, and trespass vi et armis." And in a note to the word "detinue," in this passage, he says: "We have already considered this action, which, we have seen, lies for the non-delivery of goods according to a contract, and therefore it is unnecessary to give it further consideration." Mr. Chitty seems to have confounded two ideas which ought to have been kept distinct, namely, the cause and the form of action. The cause of action may really arise ex delicto, and yet the party may, perhaps, in some cases, by waiving the tort, have remedy by an action in form, ex contractu; and this may be the reason why Mr. Chitty has classed detinue under both heads. When the owner has lost his goods, and they are found by a stranger, who refuses to deliver them to the owner, detinue lies; and yet there was no contract unless the law, in civil cases, will imply that every man has contracted to do what, in law, he was civilly bound to do. The cause of action, if not exactly ex delicto, is quasi ex delicto; yet our ancestors, more than six hundred years ago, gave a remedy by a writ in form, ex contractu, and even gave the very writ of debt itself, as well as detinue, for goods unjustly detained. See the forms of writs of debt in Reg. Brevium, 139; 1 Bac. Abr. 30; 2 Bac. Abr. Debt, F, and the cases there cited; Rast. Ent. 150a, where there is the form of a declaration in debt for money, joined with detinue for goods, in the same count, and wager of law as to both causes of action. And in Rast. Ent. fol. 174a, is the form of the judgment, in a like case, for the plaintiff's debt and damages, and also for ten quarters of malt, or the value thereof, and a distringas awarded as to the malt, and a writ of inquiry of damages for the detention of the malt and of the value of the malt, in case it should not have been delivered to the plaintiff. And in Co. Ent. 158a, pl. 32, is an action of debt, for money, in the debet and detinet, and for goods in the detinet, in one count. See, also, Fitzh. Nat. Brev. 273, 274; Debt for Chattels; 3 Wood. Lect. 103; 1 Rolle, Abr. 604; Brooke, Abr. "Debt," pl. 211. "The judgment in debt," Mr. Woodeson says, "is for money or goods demanded, and if the goods cannot be had, then for the value, which, if not found by the original verdict, may be ascertained by a writ of inquiry and verdict thereon." Mr. Woodeson classes detinue under the head of personal actions founded on contract; and in page 104, he says: "Detinue has a very close affinity to the last species of debt, and is, indeed, hardly distinguishable from it, except, perhaps, that in detinue the property is supposed to be vested before action brought. When a plaintiff purposes to recover a specific chattel, this action may be sued, and it may arise either ex contractu, as bailment, or the accidental possession and wrongful detention of goods." Bacon (1 Bac. Abr. 28), who takes his language from Gilb. Com. Pl. p. 4, says: "Personal actions are ex contractu, or those founded on contract, as debt, which is to restore the thing in numero, or detinue, which is to restore the thing in specie, or damages, where it cannot be had; also, actions of covenant, assumpsit, quantum meruit, quantum valebat, covenant, and annuity; or, ex delicto, as trespasses founded upon force, which are trespasses vi et armis; or, upon fraud, which are actions upon the case." In the case of Kettle v. Bromsall, Willes, 120, Willes, C. J., took it for granted that trover and detinue could not be joined. See, also, Mr. Durnford's note to the same case.

Upon the whole, I am satisfied that detinue is an action in form ex contractu, and not ex delicto, and is not, on that account, to be excluded from the jurisdiction of a single justice of the peace. Let us now see whether it is given to a single magistrate, under the statutes of Virginia. By the act of 3d December, 1792, concerning the county and other inferior courts (Rev. Code 1802, p. 84, § 5), all causes of less value than five dollars, (or two hundred pounds of tobacco,) except prosecutions on penal statutes, are expressly excluded from the jurisdiction of the county courts. By the 6th section, "When the cause of action shall not exceed five dollars (or two hundred pounds of tobacco,) the same is hereby declared to be cognizable, and finally determinable by one justice of the peace who may give judgment and thereupon award execution against the goods and chattels of the debtor, or party against whom such judgment shall be given, which shall be executed and returned by the sheriff or constable to whom directed, in the same manner as other writs of fieri facias are to be executed and returned; but no execution shall be by him granted against the body of the defendant." By the 37th section of the same act, "Any debt or penalty amounting to more than five dollars, (or two hundred pounds of tobacco, and not exceeding twenty dollars, or eight hundred pounds of tobacco,) may be demanded, by petition to the court of a county, city, or borough." "And the defendant being summoned," "the court shall and may hear and determine the matter in dispute in a summary way," "and give such judgment as shall appear to be just." And by the 38th section, "Any person may, by petition, to be served and tried in like manner, demand and recover goods detained, or the value of them, and damages for the detention; or damages for goods found by the defendant, and converted to his use, where the goods, with the damages, are not of greater value than twenty dollars, (or eight hundred pounds of tobacco.)" And "Whosoever shall bring any other action than a petition, if it appear, either by his own

showing in the declaration, or by the verdict of a jury, that he might have brought a petition by this act, shall be nonsuit." It is evident, that, by the 5th section of this act, the county court has not jurisdiction of detinue in a cause of less value than five dollars; and that, by the 6th section, such a cause is cognizable and finally determinable by one justice of the peace, who has authority to award execution against the goods and chattels of the party against whom the judgment shall be given. The 37th and 38th sections, only authorize the county courts to exercise their jurisdiction in a summary way, in certain causes, and confine the jurisdiction of those causes to the county or corporation courts, and do not, in any manner, affect the jurisdiction given by the 6th section, to a single justice of the peace.

The act of the 16th of January, 1801, only extends the jurisdiction of a single justice of the peace to causes of ten dollars value, in cases where they had, before, jurisdiction to the value of five dollars. If a justice of the peace had not jurisdiction in detinue, in causes of five dollars value, no court had; for all causes of less value than five dollars were expressly excluded from the jurisdiction of the county courts by the 5th section of the act. Thus the law stood in Alexandria county on the 27th of February, 1801, when the laws of Virginia were adopted by the act of congress (1 Stat. 103), "concerning the District of Columbia," by which justices of the peace were to be appointed, who should, "in all matters, civil and criminal, and in whatever relates to the conservation of the peace, have all the powers vested in, and perform all the duties required of, justices of the peace as individual magistrates, by the laws thereinbefore continued in force in that part of the District, and should have cognizance in personal demands, to the value of twenty dollars, exclusive of costs." And thus their jurisdiction continued until the 1st of March, 1823, when the act of congress (3 Stat. 743), was passed, "to extend the jurisdiction of justices of the peace, in the recovery of debts in the District of Columbia." This act, it is said, contains provisions and terms inconsistent with the nature of the action of detinue, and with the process necessary to enforce the judgment; and, therefore, even if detinue to the value of five, or ten, or twenty dollars, could be maintained before a single justice, yet it cannot be maintained where the value is over twenty dollars.

The expressions and terms relied upon as designating the nature of the causes of action whereof jurisdiction is intended to be given to the justice of the peace, and to limit it to a certain species of personal actions, are the following, to wit: In the 1st section, the words, "debt and damages," "debtor," "creditor and debtor," "an interest thereon," that is, on the judgment; in the 6th section, the words "debt or damage;" in the 7th section, the words "debt or demand;" in the 9th section, the words "debtor and his sureties;" in the 10th section, the words "small debts;" and in the 15th section, the words "sum demanded." An argument is also drawn from the circumstance, that the only kinds of execution, mentioned in the act, are ca. sa. and fi. fa.; and that no provision is made for a distringas, which is the proper process to enforce the judgment in detinue. But the 3d section, which authorizes the justice to issue execution, does not designate the kind of execution. The words are, "authorized to issue execution or fieri facias, in the same manner as executions are now issued by the clerk of the circuit court of the District of Columbia." Whatever execution the clerk could issue, the justice may issue. It is true that the only executions named in the 9th section, are ca. sa. and fi. fa.; but that section is only applicable to executions upon supersedeas. The 13th section, also speaks only of ca. sa. and fi. fa., but it has no negative words to control the general authority given by the 3d section, or to exclude a distringas, or such an execution as was issued by this court, in the case of Barnard v. Herbert [Case No. 1,347], in July, 1829. If a justice of the peace has jurisdiction in debt, or detinue, for goods, I see nothing in the act to prevent his issuing a proper execution. The argument drawn from the words "debt" and "debtor," &c., is answered, by showing, that, at common law, an action of debt will lie as well for a specific chattel as for a sum of money; and that by the civil law, a man is said to be debtor for a specific article, as well as for the performance of a specific duty. I mention the civil law, because the original jurisdiction of a justice of the peace, in civil cases, and the manner of trial and appeal, are all analogous to the rules of that law, and seem to me to be founded thereon.

Upon the whole, I am satisfied that the justices of the peace in Alexandria county have jurisdiction in cases of detinue. I am also satisfied by the evidence, that Mr. Maynadier had no authority to sell the spoons at private sale, and that the judgment ought to be affirmed. Judgment affirmed. MORSELL, Circuit Judge, dissenting.

Case No. 9,350.

MAYNADIER v. TENNEY et al.

[2 Ban. & A. 615.] [1]

Circuit Court, D. Massachusetts. May, 1877.

PATENTS—INFRINGEMENT—MACHINE FOR CUTTING SOLES—MECHANICAL EQUIVALENT.

The complainant's patent was for a machine for cutting the soles of shoes by means of a die cutter. This he accomplished by mounting the die cutter upon a shaft, which, during the operation of cutting, is bolted, and after the cut is made, the die is lifted and unbolted, and then,

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

by means of a rack and pinion at the top of the shaft, is made to perform a half revolution, thus reversing the ends of the cutting die, and then it descends, renewing the cutting operation, and so on continuously. One of the main features of the patented combination was the shaft, upon which, as a centre, the cutting die revolved. The defendants dispensed with the shaft, and substituted therefor a sleeve, by means of which the cutting die rotated, but the reciprocating motion was effected by the same operation, and the result accomplished was the same as in complainant's machine: *Held*, that the defendants infringed complainant's patent.

[This was a bill in equity by James E. Maynadier against Daniel W. Tenney and others to enjoin the infringement of a patent.]

J. E. Maynadier, for complainant.
J. W. Hubbard, for defendants.

SHEPLEY, Circuit Judge. The patent of complainants must be considered, upon the evidence in this record, as the first one in the class of machines to which the invention relates. The patent is for a machine for cutting the soles of shoes by means of a die cutter, which has a reciprocating motion, making after each cut a half revolution in order to present the widest extremity of the material to be cut opposite the narrowest extremity at the last cutting operation. This is accomplished by mounting the die cutter upon a shaft, which, during the operation of cutting, is bolted, and after the cut is made, the die is lifted and unbolted, and then, by means of a rack and pinion at the top of the shaft, is made to perform a half revolution, thus reversing the ends of the cutting die, and then it descends, renewing the cutting operation, and so on continuously. One of the main features of the combination was this shaft, upon which, as a centre, the cutting die revolved.

Under these circumstances, this being the first machine, it was competent for any person to do three things. He might, in the first place, dispensing with one of the elements of that combination in its precise form, introduce into it a known equivalent—equivalent not in the sense of being a shaft, for instance, but equivalent in the sense that, in that combination, it was the use of another well-known device, performing the same operation in the same way. That would be a naked infringement. It was competent, secondly, for a person to make the change in the machine by introducing, in the place of any one of the elements of that combination, another device, not known before as an equivalent device; that would not be an infringement under the decisions of the supreme court, which say it is not an infringement where the device substituted was not a known equivalent at the date of the patent. It was competent, in the third place, for a party desiring to change the features of the machine, to substitute for one of the elements in the combination, features which should accomplish the same result by the same mode of operation that this element accomplished, and which, in addition to it, should perform some other function which was novel and useful. That, without being a naked infringement, would be the subject of a patent for an improvement, in consequence of the additional new features which it introduced, but would still be subject to the original patent, having embodied in it that which was novel and useful in the original combination.

This last mode of modifying the machine, is the mode which it appears clearly to the court, upon inspection, has been resorted to in the defendants' patent. The shaft, as a shaft, although described as one of the elements, and as an essential element in the combination of all the claims in the complainant's patent, does not exist as a shaft in the defendants' device; but the defendants have substituted for that shaft a sleeve, by means of which the cutting die rotates, dispensing with the shaft, but still effecting the reciprocating motion, the reversed motion of the cutting die, by the same operation, and substantially accomplishing the same thing in the result of the machine; but it also accomplishes another result.

It being obvious, upon inspection of this machine, that, when the cutting die revolved upon a shaft, the cutting die was a prolonged one, as long as the sole of the shoe, so that, when the material to be cut was of unequal density or unequal thickness, the strain would be greater upon one end of the die than upon the other, it being mounted upon merely a central shaft, the new element in the combination introduced in the defendants' machine allowed the pressure to come down upon this die upon both sides of the central shaft, and thus, in the operation, effected an improvement over the mode of operation in the Hatch & Churchill—the complainant's machine. While it had this improvement, which is a valuable improvement, in some respects, over that of the complainant, it still substantially, under the impression which the court has from inspection of the two machines, clearly embodied what there was new in the complainant's invention. It is true that the experts in this case say that this mode of reciprocating the cutting die is not an equivalent, is not the same thing as the shaft which is made an important feature in the complainant's combination; and to the eye of a mechanic, perhaps, looking at it merely with the eye of a constructing mechanic, this is a different thing, and so it is to the eye of the court a different thing; but whether it be a different thing mechanically in that way or not, when we consider whether it be an equivalent in the sense of the law, by applying the doctrine of equivalents to a combination which is the first invention in a class of machines, and with the broader definition of the term "equivalents," as applied to such an invention, notwithstanding this testimony of the

experts, it is clearly an equivalent in that sense. The decree, therefore, will be for the complainant.

Case No. 9,351.

MAYNADIER v. WROE.

[1 Cranch, C. C. 442.] [1]

Circuit Court, District of Columbia. July Term, 1807.

BAIL IN CIVIL CASES—SURRENDER—NOTICE TO PLAINTIFF.

1. Upon surrender of the principal to the sheriff by the bail under the law of Virginia, notice must be given immediately to the creditor, his attorney, or agent.

2. The knowledge of the plaintiff's attorney is not sufficient.

[Action by Maynadier against Wroe, special bail of Bickenton.]

The question was, whether the surrender of bail to the sheriff, with the knowledge of the plaintiff's attorney, without regular notice, according to the 31st section of the act of Virginia of the 12th of December, 1792, is a discharge of the bail.

THE COURT was of opinion that the notice must come from the bail, and be given immediately to the creditor, his attorney, or agent.

Case No. 9,352.

In re MAYNARD.

[1 MacA. Pat. Cas. 536.]

Circuit Court, District of Columbia. Oct., 1857.

PATENTS—PATENTABLE INVENTION—SELECTION OF MATERIALS—GUN CARTRIDGES.

[There is no patentable novelty or invention in placing upon a brass or other soft metal gun cartridge a bottom of steel or other hard metal, which gives capacity for repeated discharges without injury to the vent hole in the center of the bottom; for this is but the exercise of judgment in the selection of materials. Hotchkiss v. Greenwood, 11 How. (52 U. S. 248) applied.]

[This was an appeal by Edward Maynard from the refusal of the commissioner of patents to grant him a patent for an alleged improvement in gun cartridges.]

Z. C. Robbins, for appellant.

MERRICK, Circuit Judge. The claim of the applicant is for combining with the tubular portion of a metallic gun-cartridge, when that is made of brass or its equivalent of soft and tough metal, a base or bottom of steel or other hard metal, which hard metal bottom capacitates the cartridge for repeated discharges, and that without injury to the vent-hole perforation in the centre of the bottom. And his claim is further for constructing this said bottom with a flange extending beyond the walls of the cylindrical tube of brass, by means of which flange the cartridge may be more readily handled, withdrawn from the gun after discharge, and also strengthened and guarded against rough handling and other casualties. The claim has been rejected by the commissioner as wanting both the grounds of novelty alleged in the specification. A flanged-bottom cartridge is shown to have been previously used in the patent of G. W. Morse (No. 15,996, October 28th, 1856) and in the improvements of Chambers, described in Brevets d'Invention, N. S. (volume 13, pages 71 and 72.) This branch of the claim and specification was, therefore, destitute of novelty, and properly rejected. As to the other branch of inquiry, it is well stated in the report of Examiner Baldwin, made in the case on the 5th of June, that "the advantages of the brass cylinder are the same in his patent (viz., Morse' patent of 1856) as to the position of the charge, the expansion of the metal, and the durability of the tubular portion of the cartridge as they are in the same cylinder with the steel disc, except what of additional strength it derives from the disc and the permanency of the vent, and all that the disc does for the brass in the application it does in the patent of Morse for the soft-metal tube." In other words, by using a hard metal, as steel, the bottom of the cartridge is stronger and the small size of the vent-hole is better preserved than with the other softer metals. The claim does not, therefore, rest upon the idea of combining a hard metal for the bottom of a cartridge with a soft one for the tubular part. Clearly, if this form of statement of the proposition be all, Morse has anticipated the discovery. But the essence of this claim seems to consist in this: That inasmuch as steel, case-hardened iron, &c., have that greater degree of strength and hardness, as compared with sheet-iron, and, perhaps, other metals which especially adapt them to this combination, he is entitled to a patent for being the first to make this particular combination. But these qualities of comparative strength and hardness were not discovered by him; they are functions or capacities of the metals well and long known. What, then, does the claim amount to? Stripped of the incidents with which it is colored, it is this: That within the range of metals having strength and hardness he has selected one amongst many, and has applied it in the manufacture of his cartridges, so as to make a better cartridge than has been made before by similar combinations of a hard with a soft metal. His improvement consists in the superiority of the material, and which is not new; one that was previously employed to make the cartridge.

The case seems to me to fall within the principles and meaning of the supreme court in the case of Hotchkiss v. Greenwood, 11 How. [52 U. S. 248]. At page 266, Judge Nelson, delivering the opinion of the court, says: "Now, it may very well be that by connecting the clay or porcelain knob with

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

the metallic shank in this well-known mode an article is produced better and cheaper than in the case of the metallic or wood knob; but this does not result from any new mechanical device or contrivance, but from the fact that the material of which the knob is composed happens to be better adapted to the purpose for which it was made. The improvement consists in the superiority of the material, which is not new, over that previously employed in making the knob. But this of itself can never be the subject of a patent. No one will pretend that a machine made in whole or in part of materials better adapted to the purpose for which it is used than the materials of which the old one is constructed, and for that reason better and cheaper, can be distinguished from the old ones, or, in the sense of the patent law, can entitle the manufacturer to a patent. The difference is formal, and destitute of ingenuity or invention. It may afford evidence of judgment and skill in the selection and adaptation of the materials in the manufacture of the instrument for the purpose intended, but nothing more."

The foregoing explanations seem to me to cover all that is embraced in the assignment of reasons of appeal; and therefore I am of opinion that the decision of the commissioner rejecting the claim must stand. And accordingly I now certify to the Hon. Joseph Holt, commissioner of patents, that pursuant to notice heretofore given and filed with the papers in the cause the claimant was heard by his counsel at the city hall on the 5th of October instant in oral explanation and by reading a written argument, and after having fully considered the claim, the decision of the commissioner, the reasons of appeal, and the reasons filed in support of the decision, the judgment of the commissioner rejecting the claim must be affirmed; and herewith I return all the papers, drawings, molds, &c.

MAYNARD (ARNOLD v.). See Case No. 561.

MAYNARD (BENEDICT v.). See Cases Nos. 1,294–1,296.

MAYNARD (LYELL v.). See Case No. 8,619.

MAYNE (MILLIGAN v.). See Case No. 9,606.

Case No. 9,353.

In re MAYO.

[4 Hughes, 382.]

District Court, E. D. Virginia. April 30, 1878.[1]

BANKRUPTCY—BOND GIVEN TO ASSIGNEE—LIABILITIES OF SURETIES—PAROL EVIDENCE.

[A bond under seal given by a bankrupt to the assignee in bankruptcy, and conditioned for the payment of money or the forthcoming of property, and the making good of any deficiency remaining after a sale of the same, being perfect and complete in all respects upon its face, *held* valid according to its terms, against the sureties, notwithstanding their testimony that they signed it under an agreement with the obligee that the signature of a certain third person was also to be obtained, and that it was understood that the sureties were only bound for the nonremoval of personal property and not for the payment of any money.]

[In bankruptcy. For prior proceedings in this litigation, see Case No. 5,245a.]

HUGHES, District Judge. This is a petition filed in the bankruptcy proceeding by the assignee in bankruptcy of D. C. Mayo, praying that Mayo's sureties, W. K. Watts and Lawrence Lottier in his bond of 27th October, 1876, conditioned to fulfil and perform all the conditions of the order of this court in this matter entered on the 12th October, 1874, shall be required to perform their obligation thereunder by paying the sum of $6,358.71, with interest, &c., to the assignee; that being the amount of their liability ascertained by the decree of this court in this matter, made on the 24th of May, 1876. The petition is resisted by Watts on the ground that at the time of signing the bond he did it on an understanding with W. H. Alderdice, the obligee and the then assignee in this bankruptcy, that the bond was also to be signed by one Joseph P. Winston, whose signature to it was not obtained. It is resisted by Lottier on a like ground and also on the ground that if the bond is void as to Watts, it is also void as to himself. The only question in the case is whether or not there was such an understanding in respect to the bond between Watts and Alderdice as renders valid this defense.

The bond itself is perfect in its form. On its face it contains no indication that any other name was intended by any party to it to be added to those apparent on its face. The signatures are admitted to be genuine. Watts did not insist when he signed the bond that Winston's name should be placed in the beginning of the bond where the names of the obligors were mentioned. That part of the bond is in appearance perfect and complete with the names of Mayo, Watts and Lottier recited as obligors, and contains no indication by interlineation or otherwise that Watts insisted upon the addition of Winston's name. So at the conclusion of the bond, the word seal is written but three times, and no proper room left for another seal. Mr. Wise testifies positively that the bond was in complete form just as it is, before any name was signed to it. In short, the bond is in form and appearance perfect, containing no indication that another obligor had been intended to be added by the draftsman or any one of the obligors or the obligee.

It is a bond under seal, attested by subscribing witnesses. It is an instrument of the most solemn form known to the law, and the law presumes everything in favor of its validity and binding effect, against the obligors.

[1] [Affirmed in Case No. 9,353a.]

Coupled with Watts' asseveration of an understanding with Alderdice that the bond should be signed by Winston, is the like asseveration of an understanding that the bond bound him only to the non-removal and forthcoming of the tobacco fixtures to which it refers, and not to the payment of money. This allegation is sustained by evidence scarcely less strong and direct than that in regard to Winston's signature; and yet an inspection of the language of the bond proves that there could have been no such understanding. The condition was to have all the personalty enumerated in schedule "B" forthcoming whenever the court should require him, &c., &c.; "and to pay said purchase money, to wit, $12,000, one fourth cash, the balance in six, twelve and eighteen months, from the date of an order requiring him so to do, or else surrender the personal property aforesaid for sale by the assignee, and in the event it sells for less than the balance due, to make good the deficiency." Watts is shown by the terms of the bond to be clearly mistaken as to any understanding with Alderdice, that the bond given did not bind him to pay money; and the complete form and finished appearance of the bond almost as clearly shows that there could have been no such understanding as he alleges as to the signature of Winston. For reasons stated in writing 30th of April, 1878, when I set aside the verdict of the jury then recently rendered, I cannot bring my mind to credit Watts' testimony or to conclude that this bond is void as to Watts. I do not mean in this declaration to impute bad faith to him or any witnesses who more or less corroborate him in regard to the alleged understanding with Alderdice as to Winston's signature. I have no doubt of his and their sincerity in such testimony as they have given. The strong bias of interest upon a mind long pondering over and much excited upon one subject has doubtless produced genuine convictions of the truth of the things to which he testifies. I think he has confounded what was said when the first bond which Mr. Wise prepared was brought to him for signature, with what was said when this second bond was executed. The testimony of Mr. Putney and Mr. Bondar when given before the jury was very indefinite, inconclusive and unreliable, and the fact of its having become much strengthened by the time their late depositions were taken, may be truly ascribed to their sympathy for a good man threatened with a loss of this sort. I do not think in refusing to accept their evidence as sufficient to overcome the strong, clear, unqualified language of the bond itself which stands before me as a fact which the law presumes to be genuine until absolutely disproved—that I reflect upon their veracity or integrity of purpose. I have taken pains to have the whole case put in writing in order that, if I myself am in error in making an order enforcing this bond, the error may be corrected on appeal. I will sign an order in accordance with the prayer of the petition.

From this decision of the district court appeal was taken to the supervisory jurisdiction of the circuit court, the chief justice of the United States sitting. [The judgment of the district court was affirmed. Case No. 9,353a.]

Case No. 9,353a.

In re MAYO.

[4 Hughes, 384.]

Circuit Court, E. D. Virginia. June, 1882.[1]

BANKRUPTCY—LIABILITY OF SURETY — SIGNATURE TO BOND—JURISDICTION.

[1. Where a bond is given pursuant to an order made in bankruptcy proceedings, and the order itself is copied into the bond, as presented to the sureties for signature, the sureties are affected with notice of all that is contained in the order, and it is immaterial what the obligee may have told them as to the legal liability created by the bond.]

[2. Where, pursuant to an order made in bankruptcy proceedings, the bankrupt has been allowed to retain possession of certain property on giving a bond with sureties, the court has jurisdiction, in case of a breach of the condition of the bond, to proceed against the sureties summarily by petition in the bankruptcy case; for, by signing the bond, they submitted themselves to the court's jurisdiction.]

[3. The fact that the assignee in bankruptcy, who was the obligee in the bond, first attempted to enforce it by an action at law, and that a verdict was rendered for defendants, which was set aside by the court, and a new trial granted, would not operate to prevent the subsequent proceeding to enforce the bond by petition in the bankruptcy case, for, after the granting of a new trial, the case stood as if no trial had ever been had.]

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

[In the matter of D. C. Mayo, a bankrupt. The appeal is from an order made by the district court, upon the petition of the assignee, Garnett, enforcing a bond against the bankrupt and his sureties, W. K. Watts and Lawrence Lottier. Case No. 9,353.

[For prior proceedings in this litigation, see Case No. 5,245a.]

WAITE, Circuit Justice. Upon the merits, I am entirely satisfied with the conclusion reached by the district judge. The defense relied on is not established by the evidence. The bond was conditioned as the order of the court required. The assignee had no authority to accept any other. As the order of the court was copied into the bond, the sureties are charged with knowledge of what the assignee was required to get before he delivered the property. It is clear, therefore, that what the assignee may have said as to the legal effect of the obligation to be assumed by the sureties is wholly immaterial. There can be no doubt as to the meaning of the language used to express the obligation.

The evidence does not satisfy me that the assignee is chargeable with knowledge of

[1] [Affirming Case No. 9,353.]

the alleged agreement between Watts and Mayo that the bond was not to be delivered unless signed by Winston. He, undoubtedly, did suppose Winston would become one of the sureties, but there is nothing to show that he understood that Watts was not to be bound unless Winston signed also. The understanding between Mayo and Watts is immaterial unless the assignee knew of it.

I think, also, that the district court had jurisdiction to proceed summarily as in bankruptcy to enforce the bond. The bond was taken by the bankrupt court in course of the administration of the bankrupt's estate. It was in the nature of a receiptor's bond, or a stipulation in admiralty, and took the place of the things which were delivered to Mayo on the acceptance of the security. In this way the sureties voluntarily made themselves parties to the bankruptcy suit, and submitted to the summary process of the bankruptcy court. In bankruptcy the court administers on the estate. The assignee is an officer of the court, charged with certain duties. The court must administer the estate according to law, and its proceedings are subject to examination and review by the circuit court under its supervisory jurisdiction in bankruptcy matters. Every one who contracts with the court in the course of the administration submits himself to the summary process which the law has provided to bring about a prompt settlement of bankrupt estates. Those who contracted with the bankrupt stand in no such position. Everything which depends on what was done before the bankruptcy, or afterwards, not connected with the administration, must be treated as outside of the bankruptcy proceedings, and governed accordingly. But all contracts with the court sitting in bankruptcy are in effect part of the proceedings in the bankruptcy suit. This is in accordance with the ruling of Judge Bond in Rosenbaum v. Garnett [Case No. 12,053], from which I am not disposed to depart. The fact that, after the order of the court requiring the assignee to proceed with the collection of the bond, a suit on the common-law side of the court had been begun, did not prevent proceedings for the same purpose under the summary jurisdiction before judgment actually rendered in the common-law suit. The power of the court to set aside the verdict in that suit, and grant a new trial, because the verdict was against the evidence, cannot be attacked collaterally. The new trial having been granted, the case stands as though no trial had ever been had, unless the order for the new trial is set aside in some appropriate form of proceeding instituted for that purpose.

The sureties were not entitled to special notice of the sale of the property after it was surrendered under the conditions of the bond. It was enough that the property was delivered up by the principal on demand, as he was bound to do, and that sufficient public notice of the sale was given. There is no allegation of fraud. It rested in the discretion of the court whether to submit the issues of fact to a trial by jury, or not. I think the court properly declined to allow a jury trial.

The judgment of the district court is affirmed, and an order may be prepared to that effect.

Case No. 9,354.

MAYO v. BLAIR et al.

[1 Hayw. & H. 96.] [1]

Circuit Court, District of Columbia. Aug. 13, 1842.

LIBEL—PLEADING—NOT GUILTY—JUSTIFICATION—EVIDENCE—DAMAGES—MITIGATION THEREOF.

1. Where a declaration charges a libel, to which the defendants pleaded not guilty, it is incompetent for the defendants to prove the truth of said libel even in mitigation of damages.

2. The defendants having pleaded justification, averring the truth of the libel, they must prove the truth of the alleged libel with the inuendoes as laid in the declaration.

3. It is not competent for the defendants in sustaining the issue on their part on the pleas of justification to give any evidence in mitigation of damages, if the jury shall believe from the evidence that the plea of justification was not made out by proof.

4. In a suit for libel the amount of damages is a matter for the determination of the jury.

[This was an action for libel by Robert Mayo against Francis P. Blair and John C. Rives.]

Richard S. Coxe and Brent & Brent, for plaintiff.

James Hoban and F. S. Key, for defendants.

The declaration is as follows: That whereas, heretofore, to wit, on the 7th of July, 1838, at the county aforesaid, the Hon. John Quincy Adams had stated in the house of representatives of the United States, that he had seen an original letter in the handwriting of Gen. Andrew Jackson, president of the United States, dated the 10th of December, 1830, and addressed to a certain Wm. Fulton, then, to wit, at the date of said letter, secretary of the territory of Arkansas, which letter was then stated by said Adams to be in the city of Washington, where it could be seen by any gentleman who had curiosity to examine it; and whereas the said Adams, at the same time and place, had read to the said house of representatives a paper purporting to be a true copy of said original letter, whereby it was represented that the said Jackson had written a letter marked "strictly confidential" to the said Fulton, advising him in substance that information had been received by said Jackson that an extensive expedition was organized in the United States

[1] [Reported by John A. Hayward, Esq., and George C. Hazleton, Esq.]

with the view to the establishment of an independent government in the province of Texas, and that General Houston was to be at the head of it, and requesting the said Fulton to keep him, the said Jackson, advised of any movements which might serve to justify the suspicions entertained; and whereas the defendants afterwards, to wit, on the 2nd of July, 1838, had notice that the said letter had been shown to said Adams by the plaintiff, and was then and there in the plaintiff's possession by delivery from the said Jackson; but the said defendants, well knowing the premises, but greatly envying the happy state and condition of the plaintiff, and contriving and wickedly and maliciously intending to injure the plaintiff in his good name, fame and credit, and to bring him into public scandal, infamy and disgrace, with and amongst all his neighbors and other good and worthy citizens, and to cause it to be suspected that he, the plaintiff, had been and was guilty of improperly and dishonorably acquiring said letter, and to vex, impoverish, harass and wholly ruin the plaintiff, heretofore, to wit, on the 21st of July, 1838, in a certain newspaper called "The Globe," of which the defendants were then and there publishers and proprietors, falsely and maliciously did print and publish, and caused and procured to be printed and published, of and concerning the said plaintiff, and of and concerning the manner in which he became possessed of the said original letter, and of and concerning the said Adams in connection therewith, a certain false, scandalous, malicious and defamatory libel, containing, among other things, the false, scandalous, malicious, defamatory and libellous matter following, of and concerning the said plaintiff, and of and concerning the manner in which he became possessed of the said original letter, and of and concerning the said Adams in connection therewith, that is to say: "This letter was adduced and read as proof that General Jackson was apprised of Houston's design on Texas, and the duplicity imputed in regard to it was the inference of Mr. Adams that it was not sent because the original was not found on the files of the state department. That original Mr. Adams admitted, however, he had examined, but he does not explain how he came possessed of that strictly confidential state paper, which was evidently out of place in his hands. The natural inference is, that it must have been purloined" (meaning that the plaintiff, who had communicated said original letter to said Adams, had purloined and stolen said letter), "a very sufficient reason why it was not to be found in its proper place."

2nd count: That the defendants in a certain, &c., printed, &c., that is to say: "Mr. Adams" (meaning the Hon. John Quincy Adams who had read the paper purporting to be a copy of said described original letter, and to whom the plaintiff had shown said original letter), "it will be recollected, upon being called on by the chairman of the committee on foreign affairs to state how he came into possession of that letter" (meaning how and in whose hands the said Adams had seen the said original letter which he had stated he had seen), "refused to do so unless he should be required by an order of the house. Subsequent disclosures in another quarter have afforded the information which he" (meaning the said Adams) "refused to give, and have revealed to the public the means by which this letter was obtained." (Meaning that the rumor and report charging the plaintiff with improperly obtaining the possession of said original letter had afforded the information which the said Adams had refused to give, and had revealed to the public the means by which the plaintiff had obtained said original letter.) "We leave it to an honest and high-minded community to pass sentence upon the transaction." (Meaning that the transaction, to wit, the mode of obtaining the said original letter by the plaintiff, had been such that an honest and high-minded community would condemn it.) "It is not a subject for reasoning. The instinctive impulses of every honest man will at once condemn the use of such means in assailing an adversary. No one possessing the least magnanimity or delicacy of feeling would have read to the house of representatives a letter which he had reason to believe was obtained without the knowledge of the party to whom it belonged, and which was marked 'Private and confidential.'" (Meaning that said Adams in reading said letter had exhibited a want of magnanimity and delicacy of feeling, and that the plaintiff had improperly obtained said letter without the knowledge of the party to whom it belonged.)

3rd count. That the defendants in a certain, &c., printed, &c., that is to say: "The evidence in possession of General Jackson on the other hand, of a contemplated expedition against Texas, consisted of a single letter from an individual" (meaning the plaintiff) "of whom we will say no more than that any person of common sense, considering the circumstances under which it was written, the person writing it" (meaning the plaintiff), "and the internal evidence afforded by the letter itself, would have attached no more weight to the statement it contained than did the president. There was in this case no 'voluminous mass' of testimony to act upon, but a solitary letter" (meaning the said letter of the plaintiff) "unsupported by concurrent information or by the particular credibility of the relator." (Meaning that the said letter of the said plaintiff was unsupported by the particular credibility of the plaintiff.)

By reason of all which premises the plaintiff is the worse and hath damages to the value of $30,000.

The following are the pleas of the defendants: 1st. Not guilty in the manner and form, &c., of the matter alleged against them

in the declaration. 2d. And for a further plea as to the words of the alleged libel as charged in the second count, defendants admit the publication thereof, and justify publishing the same because defendants say that it is true. 3d. And for a further plea they admit the publication of the words as stated in the third count and justify the publishing the same because they say it is true.

The plaintiff, through his counsel, offered evidence of the publication charged in the declaration, and the evidence of Mr. Adams as follows, taken de bene esse: "Dr. Mayo did exhibit to him certain documents, and stated to him the manner in which he became possessed of them. They formed a part of many letters which Dr. Mayo had written to President Jackson from the commencement or a very early period of his administration down to nearly its close; that a bundle of those letters, shortly before the expiration of the presidency of General Jackson, had been returned to him, Dr. Mayo, by order of President Jackson. That the letter from President Jackson to Mr. Fulton was included in the bundle, and that he never had seen it before the receipt of the bundle. That Dr. Mayo, in communicating this paper to him (Mr. Adams), did make some observations to him expressive of his own sense of duty to make these documents public; that he did subsequently receive a written communication from Dr. Mayo conveying to him copies of the papers referred to; and that Dr. Mayo never left with him any of the original documents or letters referred to, but only exhibited them to him for perusal."

The defendants, through their counsel, produced a pamphlet admitted to have been published by the plaintiff, and offered to read certain passages therefrom for the purpose of proving that plaintiff represented and set forth a certain affidavit of General Jackson in relation to the manner in which plaintiff had obtained possession of the letter mentioned in Mr. Adams' evidence, and that the plaintiff therein denied the truth of said affidavit, and stated the manner in which he did get possession of said letter. And the defendant's counsel, in offering to read the part of said publication containing said affidavit of said Jackson, stated they did not offer to read the same as a deposition or affidavit admissible as evidence of the facts it states, but only as evidence of what the plaintiff had stated, that General Jackson had sworn to, and of what the plaintiff said in answer to or in relation to what General Jackson had sworn to.

But THE COURT refused to allow the same to be read, which refusal was excepted to by the counsel of the defendants.

The following prayers were granted by THE COURT:

1st. The declaration in this case charging the libel as laid to consist in charging the plaintiff with purloining a certain paper, to which the defendants have pleaded not guilty, it is not competent for the defendants to prove the truth of said libel in this action even in mitigation of damages. But the defendants may prove the truth of any other improper way of getting possession of such paper by the plaintiff, or any improper use of such paper by plaintiff, known to the defendants, at the time of the publication.

2nd. The defendants having pleaded justification to the second and third counts of the declaration averring the truth of the libel, it is essential for the defendants to prove to the satisfaction of the jury the truth of the alleged libel with the inuendoes as laid in the declaration.

3rd. It is not competent for defendants, in sustaining the issue on their part on the pleas of justification, to give any evidence in mitigation of damages, if the jury shall believe from the evidence that the plea of justification was not made out by proof.

4th. It is not competent for the defendants to give evidence under the second and third pleas, if the jury shall believe the pleas averring the truth of said alleged libel not to be sustained, nor any evidence to disprove the malice which the law infers from the original publication of the alleged libel and from the retention of the same in the pleas of justification.

5th. That the only part of the declaration to which it is competent to defendants to give any evidence to disprove malice or in mitigation of damages, is the first count, and the jury are not to regard any facts as amounting to a negation of malice or as mitigating the damages, unless the jury shall be satisfied from said evidence that said facts actually existed and were known to defendants before and at the time of the alleged publication.

6th. If the jury shall believe from the said evidence that the defendants actually published the libel as laid in the first count of the declaration and that facts therein averred and the inuendoes in said first count mentioned are true, then the jury must find for the plaintiff upon the issue in that count, but the amount of damages is a matter for the judgment of the jury.

But the jury, before they can find a verdict for the plaintiff on said first count, with any damages, must be satisfied from the evidence that it was known to the defendants at the time of said publication that the plaintiff was the person who had delivered the letter to Mr. Adams. And if they find that the defendants had that knowledge at that time, they must be further satisfied by the evidence that the defendants intended to describe and point out the plaintiff in said publication as the person charged thereby.

The following prayer was refused by THE COURT:

Nor is it competent under pleas of justification for the defendants to give in evidence the use made by the plaintiff of the said letter after it came to his hands as evidence

of the truth of the libel laid in the second and third counts.

Verdict for the defendants.

The plaintiff, through his counsel, Coxe and Bradley, moved for a new trial—Because the court mistook the law. Because illegal testimony was admitted on the part of the defendants. Because the verdict was against law and against the evidence; and because of newly discovered evidence materially affecting the merits of the case.

The motion was overruled by THE COURT.

THRUSTON, Circuit Judge, absent.

MAYO (CLINTON v.). See Case No. 2,899.

MAYO (RANSOM v.). See Cases Nos. 11,571 and 11,571a.

Case No. 9,355.

MAYO v. SMITH et al.

[5 Cranch, C. C. 569.] [1]

Circuit Court. District of Columbia. Nov. Term, 1839.

BAIL IN CIVIL CASES—ACTION OF LIBEL—AMOUNT OF DAMAGES ALLEGED.

In an action upon the case for a libel, the damages were laid at twenty thousand dollars, and the plaintiff in his affidavit averred damages to the same amount; the court required the bail to justify to the amount of five hundred dollars only.

Case for libel. Damages laid at $20,000. The plaintiff's affidavit to hold the defendants [Thomas J. Smith and F. S. Myer] to special bail stated that the defendants, on the 26th of March, 1839, "in a certain newspaper, called 'The Metropolis,' in the publication of which the said Smith and Myer were then and there concerned, published of and concerning" the plaintiff [Robert Mayo] "a certain false, scandalous, and malicious libel, headed 'Dr. Mayo and the Intelligencer,' which said libel is hereto annexed," &c. "And this deponent also saith that he is informed and believes, that said Smith has no intention of remaining in the District of Columbia, but is about to depart from said district for the Southern States. He further saith, that by the publication of said libel he hath incurred and sustained damages to the amount of $20,000.

Mr. Hoban and Mr. Key moved for leave to appear for the defendant without special bail; or that the bail demanded should be mitigated, and cited Jones v. Kelly, 17 Mass. 115, and 2 Wheel. Abr. 54.

R. S. Coxe and Messrs. Brent & Brent contended that the affidavit of the plaintiff was conclusive; that the libel is atrocious. The affidavit is positive that the defendants published it in the newspaper in which they were concerned, and that the plaintiff has thereby suffered damages to the value of $20,000. The plaintiff's counsel cited the case of Barrell v. Simonton [Case No. 1,041], in this court, at May term, 1826, where bail was refused in an action for a malicious arrest, only on the ground that the action in which the plaintiff was arrested was not then terminated; and the case of McDonald v. Little [Id. 8,760], in this court, and the case of Doyne v. Barker [Id. 4,055], at November term, 1834, in which bail was required, in slander, in $700, upon an affidavit of the plaintiff's belief that she had suffered damage to the value of $3,000.

THE COURT (THRUSTON, Circuit Judge, absent), in the present case, said they would be satisfied with bail who could justify in $500.

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

Case No. 9,356.

MAYO et al. v. SNOW et al.

[2 Curt. 102; [1] 17 Law Rep. 494.]

Circuit Court, D. Massachusetts. Oct., 1854.

SHIPPING—LIABILITY OF OWNER—SUPPLIES—CONTRACT WITH MASTER—OWNER FOR VOYAGE.

1. Where a master of a fishing vessel agreed with the managing owner to take her for the season and go to the "Banks" codfishing, the owners to have one quarter of the fish and oil, and three eighths of the bounty; the residue to belong to himself and his crew, and to be applied first to pay the bills, and then any balance remaining to be divisible among the master and crew; the master to have the vessel fitted where he pleased, and have the fish cured by whom he should choose; and the master hired the crew and purchased the provisions and supplies for the voyage. It was *held*, that, on these facts, he was owner pro hac vice, and that he, and not the general owners, was responsible for the "small generals."

[Cited in Flaherty v. Doane, Case No. 4,849; Fox v. Holt, Id. 5,012.]

2. The statute of 1813 (3 Stat. 2, § 1) furnishes no ground for a distinction in this respect between codfishing and other voyages.

3. Although the master is owner for the voyage, the general owners may, nevertheless, be liable for supplies, upon the ground of an agency for the owners to procure them, arising out of the particular terms on which he hires the vessel.

4. And here the owners were liable for certain articles, because, by the contract of letting to the master, they were to procure and pay for such articles before the beginning of the voyage; and they having authorized him to buy them, it was considered that they made him their agent therefor, not because he was master, but by virtue of the particular authority so given.

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

[This was a libel in admiralty by Joshua C. Mayo and others against Jesse Snow and others, owners of the Lydia & Polly, to recover the price of certain supplies. From a decree of the district court in favor of respondents (case unreported), libellants appeal.]

William Brigham, for appellants.

H. A. Scudder, contra.

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

CURTIS, Circuit Justice. This is a suit in the admiralty, against the owners of the fishing schooner Lydia & Polly, to recover the price of supplies furnished to that vessel by the libellants. The supplies were of three kinds: first, ship-chandlery; second, that class of articles commonly called in the fishing business, "great generals;" third, what are denominated in that business "small generals." For the amount of the first two, the respondents made a tender before suit, which they pleaded in their answer, and the district court found it to be sufficient. In that respect, with the exception of one item, the decree of that court has not been seriously contested, and I see no reason to disturb it.[2]

Upon the question of the liability of the respondents for the "small generals," it is necessary to ascertain their relation and that of the master to the vessel, when the supplies were procured. The libellants have produced the testimony of the master, and he is the sole witness in the cause. He testifies, that about the last of February, 1853, he agreed with the managing owner of the vessel, to take her for the season and go to the "Banks" codfishing; that the owners were to have one quarter of the fish and oil, and three eighths of the bounty; the residue was to belong to himself and his crew, and to be applied first, to pay the bills, and then any balance remaining would be divisible among himself and the crew: that he was to have this vessel fitted where he pleased, and have the fish cured by whom he should choose; that he hired the crew, and purchased the provisions and supplies for the voyage.

Upon these facts, it is clear the master was the owner pro hac vice, and he, and not the general owners, was responsible for the "small generals." Webb v. Pierce [Case No. 17,320]. The libellants however, insist, that though this may be the law generally, it is not applicable to vessels engaged in the codfishery under the acts of congress, or that if it is, the special facts of this case take it out of that general rule. It is certainly true, that though a master be owner for the voyage, the general owners may nevertheless be liable for supplies, upon the ground of an agency for the owners to procure them, arising out of the particular terms on which he hires the vessel. This case affords an illustration. For what is called the ship-chandlery bill, the owners are liable in this case; because, by the contract of letting to the master, the owners were to procure and pay for these articles before the beginning of the voyage, and when they authorized the master to buy them, they thereby made him their agent for that purpose; not because he was master, but by force of the particular authority thus given to him. But, aside from such an authority, I do not find any distinction, as to ownership pro hac vice and its consequences, between fishing and other voyages, and none appears to have been made in any case which I have seen. I have been referred to the case of Harding v. Souther [307], decided by the supreme court of Massachusetts in 1853, and not yet reported, in which it was held that the general owners of a vessel engaged in the mackerel fishery, were liable for the wages of the cook. But I understand, that decision rests upon the principle above indicated; that, without regard to who was owner for the voyage, the usages of the business included authority to the master, to hire a cook on account of, and to be paid by, the general owners.

It was suggested that the language of the act of 1813, c. 2, § 1 (3 Stat. 2), implies that the owners have the control of the crew. But the word owner, occurring in connection with the discharge of the crew, may well mean owners pro hac vice. And if it be taken to mean the general owners, it does not prove that congress intended to prohibit such a letting of the vessel to the master, as would make him the temporary owner, as to third persons furnishing supplies. This is a subject which does not seem to have been at all within the view of congress; and I think it would not be safe or warranted to declare it was intended to make a distinction between fishing and other vessels in this particular. In Winsor v. Cutts, 7 Greenl. 261, and Houston v. Darling, 4 Shep. [16 Me.] 413, the supreme court of Maine has applied to the owners of fishing vessels, the same rule of law as is applied to the owners of other vessels; and I consider it correct to do so. Nor do I find any thing in the circumstances of this particular case to take it out of the general rule. There are some loose statements by the master, mostly made in answer to very leading interrogatories, concerning his having received directions from the managing owners as to hiring men and furnishing supplies. But I am satisfied, by a careful consideration of his evidence and of the surrounding circumstances, that what was said was advisory merely, and was not intended, and ought not to be taken, to change the substantial relation of the parties, or to confer on the master an authority to purchase the "small generals" supplies, on the general owners' account. As to the item for money borrowed, the master had no authority to borrow money as the agent of the owners; and if he, in fact, applied some of it to pay for articles which he purchased for the owners, he also had credit for what he thus paid in his account with the owners. He must be taken to have borrowed it on his own account,

[2] The liability of the respondents for the "great generals" and the ship-chandlery bill was not contested by them here or in the court below; and they had offered to pay for the same before, and in their answer; and I am informed that in the district court, Sprague, J., on the question of tender, *held*, that an offer to pay, made in good faith, with undisputed ability and readiness to perform, renewed in the answer in court, was a good and sufficient tender in the admiralty, although originally accompanied with a request for a receipt, and although the money was not subsequently brought into court.

and applied a part, as his own money, to the owners' use.

Decree affirmed, with costs for the respondent.

Case No. 9,357.

MAYO v. TAYLOR.

[A state case. See 8 Chi. Leg. News, 10.]

MAYO (UNITED STATES v.). See Cases Nos. 15,754 and 15,755.

MAYO (VOSE v.). See Case No. 17,009.

MAYOR, ETC., OF.

[Note. Cases cited under this title will be found arranged in alphabetical order under the names of the cities; e. g. "Mayor, etc., of Baltimore v. Pittsburgh & C. R. Co. See Baltimore v. Pittsburgh & C. R. Co."]

Case No. 9,358.

MAYOR AND COMMONALTY v. COOKE et al.

[1 Cranch, C. C. 160.] [1]

Circuit Court, District of Columbia. March 26, 1804.

BAIL—CIVIL CASES—CHANCERY ATTACHMENT.

The defendant cannot appear to a chancery attachment in Virginia, without giving bail.

Motion by Mr. Simms and C. Lee, for defendants [Stephen Cooke and others], to appear on a chancery attachment, without giving security according to Act Va. 1792, c. 78. (1) Because Dr. Cooke has so much real estate in town; (2) because the attachment is for taxes, and taxes can only be recovered by distress and sale.

Appearance refused without security.

Case No. 9,359.

MAYOR AND COMMONALTY v. MOORE et al.

[1 Cranch, C. C. 193.] [1]

Circuit Court, District of Columbia. Nov. Term, 1804.

DEEDS—ESCROW—CONDITION OF DELIVERY — BY WHOM CONDITION PERFORMED.

It is not necessary, to the delivery of a deed as an escrow, that the obligee should be privy to its delivery, nor that the thing to be performed, as a condition of the delivery, should be a thing to be done by the obligee.

[Action by the mayor and commonalty against Thomas Moore and his sureties, Charles Simms and Thomas Swann.]

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

Debt, on an auctioneer's bond. Plea, 1st, non est factum, and 2d, delivered as an escrow, to be his deed, if also executed by William Hodgson and Peter Sherran, who did not execute it. Issue to the 1st plea; special demurrer and joinder to the 2d plea, because, 1st, the plaintiffs were not privy to the delivery as an escrow; 2d, the thing to be performed is to be done by strangers and not by the plaintiffs.

E. J. Lee, for plaintiffs. The obligee must be privy and consent to the conditional delivery. It does not appear that Cleon Moore, to whom it was delivered as an escrow, was authorized by the plaintiffs to receive it as such. It must be on condition that the plaintiffs do something. Shep. Touch. 13, 57; Vin. Abr. 27. But here the condition was to be performed by strangers.

Mr. Simms. If Cleon Moore had no authority to receive the deed, then it is neither a deed nor an escrow.

THE COURT overruled the demurrer. KILTY, Chief Judge, contra.

Thereupon J. Lee moved the court to strike out the judgment, and for leave to withdraw the demurrer, and to file general replications to the pleas, which was granted upon payment of the cost. FITZHUGH, Circuit Judge, doubting whether the demurrer could now be withdrawn.

Upon the trial of the issues, E. J. Lee asked Cleon Moore, the subscribing witness, whether his name was signed by himself, to which he answered in the affirmative, but was not asked as to the delivery of the deed. The attestation was thus: "Sealed and delivered in presence of Cleon Moore."

Mr. Simms prayed the court to instruct the jury that there was no evidence of the delivery of the deed.

THE COURT gave the instruction. It being no more than proving the handwriting of the subscribing witness, while he was living, and within reach of the process of the court.

Verdict for defendants.

Case No. 9,360.

The MAY QUEEN.

[1 Spr. 588; [1] 23 Law Rep. 658; 44 Hunt. Mer. Mag. 626.]

District Court, D. Massachusetts. Feb., 1861.

SEAMEN—WAGES—EMPLOYED IN TOWING—LIEN—TO WHAT IT EXTENDS.

1. The mate and engineer of an enrolled steamer, employed in towing vessels in and about the harbor of Boston, have a maritime lien upon the steamer for their wages.

[Cited in Raft of Cypress Logs, Case No. 11,527; The Sarah Jane, Id. 12,349; The Atlantic, 53 Fed. 608.]

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

2. Such lien extends to the boiler, notwithstanding the claim of the makers, who put it into the steamer, under an agreement that it should continue their property, until paid for, with a right to remove it, should any instalment be overdue; and instalments are unpaid and overdue.

[Cited in The John Farron, Case No. 7,341; The Charlotte Vanderbilt, 19 Fed. 220; Blowers v. One Wire Rope Cable, Id. 448; The James H. Prentice, 36 Fed. 781.]

3. The lien of the seamen is not impaired by knowledge of such agreement.

The libellants, the engineer and mate of a tow-boat, sue for wages, and several parties come in as claimants for certain portions of the steamer, and for the proceeds, as mortgagees. Benjamin F. Rogers comes in, by petition, claiming to hold a mortgage, and to be paid the same out of the proceeds. M'Kay and Alders also come in, alleging that they put a boiler into the steamer, which they still own, by virtue of an agreement in writing, of the tenor and effect stated in the opinion of the court, on record at the custom-house, where the steamer is enrolled; that this agreement was made with Walter F. Dodge, the master and owner, and was known to the libellants; that the boiler is still their property, and not liable to process.

R. D. Smith, for libellants.

C. T. Russell & Chas. Houghton, for M'Kay, cited the following authorities: 1st. As to the service being maritime: Curt. Merch. Seam. 5, 353; 1 Pars. Mar. Law, 477, 489, 490; 2 Pars. Mar. Law, 583–585; Packard v. The Louisa [Case No. 10,652]; The Phoebus, 11 Pet. [36 U. S.] 183; Phillips v. The Thos. Scattergood [Case No. 11,106]; Thackarey v. The Farmer of Salem [Id. 13,852]; Smith v. The Pekin [Id. 13,090]; Gurney v. Crockett [Id. 5,874]; The Amstel [Id. 339]; 1 Stat. 132; Act July 20, 1790, § 6; The Canton [Case No. 2,388]; 1 Kent, Comm. 379, note 2d. As to the ownership of the boiler: Coggill v. Hartford & N. H. R. Co., 3 Gray, 545; Sargent v. Metcalf, 5 Gray, 306; Blanchard v. Child, 7 Gray, 155; Burbank v. Crooker, Id. 158.

SPRAGUE, District Judge. Two questions have been raised. 1st. Whether this service was in its character maritime; and 2d. Whether, if the libellants have a lien upon the vessel, it attaches also to the boiler, notwithstanding the claim of M'Kay and Alders.

As to the first, this steamer is about eighty tons burden, and duly enrolled as an American vessel, was built at Philadelphia, was subsequently found at Bucksport, Maine, and afterwards in Boston. Her employment, during the time which the libellants were on board, was that of a steam tug, towing vessels in and near the harbor of Boston; generally within, but sometimes going beyond, the light, upon the high seas. The whole employment was upon tide-waters. No part, not even loading or unloading of a cargo, was upon land. It certainly is not necessary that the service should have been upon the high seas, in order to be maritime. That idea is, indeed, thrown out in Thackarey v. The Farmer of Salem [Case No. 13,852], but the same judge decided in Smith v. The Pekin [Id. 13,090] that a voyage between two ports in the Delaware river was maritime; and there are several similar decisions. It is urged that the libellants lived on shore, but prior to the 18th of October, Taylor, the mate, lived wholly on board of the vessel, and Douglas, the engineer, took his meals on board, but slept on shore, except when his services were required at night, which was not often. After the 18th of October, both lived on shore, except dining on board. If it were doubtful, from the other evidence, whether the employment of the libellants was on land, or on the sea, the circumstance of their living on shore might be material; but the other evidence is not equivocal, and the living on shore is by no means a decisive criterion. Pilotage, for example, is a maritime service, and yet the pilot not unfrequently lives on shore. He may pilot vessels only outward bound, going on board and returning the same day, eating and sleeping in his own house, and follow this employment from day to day, or only occasionally, and yet each act of pilotage would be a maritime service. Hobart v. Drogan, 10 Pet. [35 U. S.] 120.

Indeed, such is the rapidity with which passages are now made, that a steamer may run by daylight, on the high seas, from state to state, and yet the officers may sleep and take their meals on shore.

In Gurney v. Crockett [Case No. 5,874], Betts, J., decided that merely moving a vessel from one anchorage to another, in the harbor of New York, was a maritime service. The present case comes within the principles laid down in The Canton [Id. 2,388].

One of the libellants was the mate, and the other the engineer, of this steamer. Some question has been made, as to the latter's having the lien of a seaman. But engineers are as essential to the navigation of a steamer, as mariners who manage the sails are to the navigation of a sailing vessel; both control the motive power, and are equally entitled to the rights of a seaman.

I am of opinion, that both the libellants have a lien upon this vessel, for the amount of their wages.

Does this lien attach to the boiler, notwithstanding the claim of M'Kay and Alders? They were the makers of the boiler, and put it into this steamer, under an agreement with Dodge, her owner, that it should remain their property, until fully paid for, and that, if any instalment of the purchase-money should be overdue, they should have a right to remove it. It has not been paid for, and the instalments are overdue, and they now claim to remove it. As between them and Dodge, they have a right to do so; and it is contended that they have the same right against

the libellants, at least, as to that part of their wages which were earned after they had knowledge of the claim of M'Kay and Alders.

This boiler was in the steamer, fastened in the usual manner, to her timbers, and united with her machinery, and constituted the sole motive power, at the time these libellants entered upon their service. There is no color for saying, that they had any knowledge of the claim of M'Kay and Alders, prior to the 11th of November; and, even then, there was no notice by M'Kay and Alders, that they should hold the boiler, as against the seamen; nor is there any evidence of an agreement, either express or implied, by the libellants to waive their lien, or relieve the boiler therefrom; the most that can be said is, that they had information, which might put them upon inquiry, as to the agreement under which the boiler was put into the boat, by its makers. But, if they had made such inquiry, and had obtained actual knowledge of the agreement between M'Kay and Alders on the one part, and Dodge on the other, it would not have impaired their security. When the makers of the boiler put it into, and made it a part of, this steamer, essential to her navigation, and left her under the exclusive control of her owner, they subjected that part of the steamer, in common with all other parts, to the lien of all seamen whom the owner might employ, in her navigation. If M'Kay and Alders had owned the whole vessel, and had made precisely the same agreement in regard to her, and let her go into the possession and control of Dodge, there is no doubt that seamen employed by him would have security upon the vessel. So, if they had owned an undivided portion. And it can make no difference, that the part of the vessel which they owned was physically separable; otherwise, the sails of a vessel might be withdrawn from a seaman's lien, by the sailmaker who furnished them; the rigging by the rigger; spars by the sparmaker; the rudder by the carpenter; and so of every separable portion, until nothing might be left for the security of the mariners but a condemned and worthless hulk; and, with equal reason, that also might be withdrawn by any person who had furnished it, upon condition of retaining the ownership, until paid for. Seamen are not bound to inquire into the ownership of a vessel, on board of which they serve; and if they know the general owners, in whole or in part, and know also, that those with whom they contract have only a special ownership and control for the time being, it does not impair their lien upon the whole vessel.

The mortgagees do not interpose any claim, as against these libellants. Decree for wages and costs.

MAY QUEEN, The (MERRIMAN v.). See Case No. 9,481.

Case No. 9,361.

MAYSHEW et al. v. TERRY.

FRANKLIN v. SAME.

[1 Spr. 584.] [1]

District Court, D. Massachusetts. Feb., 1861.

SEAMEN—WAGES—DISCHARGE—SHIPPING ARTICLES—WHALING VOYAGE—NOVEL PROVISIONS—SHARE.

1. A seaman, during a sea-elephant voyage, was discharged abroad, and received from the master a written order, directing the owner to pay him his share of all the proceeds of the voyage: *Held*, that reference was to be had to the shipping articles, not only to ascertain the lay set against the name of the seaman, but also the mode of computation, by which the amount of his share was to be determined.

2. During such voyage, the seaman agreed to take his discharge, and to enter into the service of another ship, but he being wholly in the power of the master, and not allowed the option of completing his first voyage, *held*, that he was not bound by the terms of the discharge, or of his new shipment, as to the rate of his compensation.

3. In such case, the seaman is entitled to a quantum meruit, for the whole time of his service, for both ships, to be apportioned between them.

4. The shipping articles were in the usual printed form for whaling voyages, with an additional clause in writing, containing novel provisions as to the mode of computing the shares of the seamen: *Held*, that the seaman was not bound by such new provisions, they not having been made known to him at the time of the shipment.

In admiralty.

E. L. Barney, for libellants.

A. S. Cushman, for respondents.

SPRAGUE, District Judge. These two libels, against the owner of the ship Samuel Robertson and the ship Arab, have been heard together. They are brought to recover compensation for services rendered in two sea-elephant voyages. In the summer of 1856, the ship Samuel Robertson sailed from Fairhaven, with a small schooner, as a tender, bound for the South Pacific Ocean, for the purpose of taking sea-elephant oil, at Desolation Isle. The schooner was lost, and the enterprise could not be prosecuted, without another tender. There was no harbor, or other place, where the ship could lie, within a hundred miles of Desolation Isle. The tender was used for the purpose of killing the animals at the island, and conveying the blubber, or oil, to the ship. Another schooner, called the Oxford, sailed from Fairhaven on the 17th day of July, 1857, to take the place of the tender, which had been lost. On her passage, she put into Fayal, and there, on the 5th day of August, 1857, the libellants were shipped. They were natives of that island, and had always resided there, and were ignorant of the English language. They signed the

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shipping articles, which had been made at Fairhaven, and were the usual printed articles for a whaling voyage, with the addition of a written clause, adapted to the novel and peculiar character of this voyage. Their lay, as entered against their names, was one two-hundredth; but the written clause provided that the Oxford was to be a tender to the Samuel Robertson; that the lay should be calculated on only seventy per cent. of the proceeds of that ship's voyage; and that they should have only such part of their lay, as the time they served was of the whole time of the Samuel Robertson's voyage. There is no proof that this new clause was read or explained to these libellants; the evidence, at most, only shows that they were informed that the Oxford was to be a tender to the ship, and that they were to have a two-hundredth lay of the ship's voyage.

The Oxford, with the libellants on board, arrived in due time at Desolation Isle; and the libellants, with others of the crews of the Oxford and the Samuel Robertson, continued to serve, on shore and on board of the schooner, until the ship was filled with oil, which was in May, 1858.

It was the purpose of the master of the ship, to leave the Oxford at the island, with an adequate crew, to continue the killing of the sea-elephants, and securing their oil, while the Samuel Robertson should make a voyage to the United States and return, or send out another ship in her stead.

The libellants were among those who remained; and on the 10th of May, 1858, they signed articles for the ship that should be sent out, at a one-hundred-and-forty-fifth lay; and at the same time, each of the libellants received from the master an order on the owner of the Samuel Robertson, to pay him "his share of all oil, bone, &c., turned out by the ship Samuel Robertson."

The Samuel Robertson did not return to the island; but the Arab, in her stead, sailed from Fairhaven on the 14th day of September, 1858, and arrived at the island in due time, and remained until she had obtained a full cargo of oil, when she and the Oxford, with the libellants on board, sailed for the United States, where they arrived in April last.

Several questions have arisen, as to the amount which the libellants are entitled to recover. If their claim is governed by the express terms of the articles, they would each be entitled to only such proportion of one two-hundredth part of seventy per cent. of the proceeds of that voyage, as the time they served the Samuel Robertson bore to the whole time she was absent from Fairhaven; the time of such service being about nine months, and the time of such absence being about twenty-six months. This would give them about five dollars a month, and leave them somewhat in debt to that ship, for clothing and other necessaries. But it is urged, that the order given by the master, on the 10th of May, is for their share of all oil, bone, &c., and that this means that they were to have one two-hundredth of the whole proceeds, and not of seventy per cent., for a part of the time, as stated in the articles. This construction cannot be maintained. The order says nothing of one two-hundredth or of a seventieth, but merely directs the owner to pay each libellant his share of all the proceeds, &c. In order to ascertain his share, we must look at the articles, and there we find that it is one two-hundredth of seventy per cent., reckoned in proportion to the time of service. It is insisted that the libellants are not bound by the terms of the articles, and the order founded thereon.

It is quite clear, that the new and peculiar clause in the articles was not obligatory upon them, because it was never made known to them. But previously to the 10th of May, 1858, they had become acquainted, both with the character of the enterprise, and the terms of the articles. They then received their discharge from the Samuel Robertson and accepted the order given by the master on the owner, and signed the new articles for the ship Arab. The agreement by which they were discharged from the first ship, was a new contract, as was also that by which they engaged in the service of the second ship; and if these contracts were entered into voluntarily, and understandingly, for an adequate consideration, they were binding upon the seamen. But it is contended, that they were not made voluntarily. By their original shipment, the libellants had a right to continue with the Samuel Robertson, and return with her to the United States; and there is evidence that they claimed that right, and that the master refused to permit them to do so, but insisted, even with threats of violence, that they should remain with the Oxford, and continue their labors for the ship that was to make the second voyage. The circumstances of this case render this evidence entirely credible.

In May, when the Samuel Robertson was about to leave, these men had been more than six months at the island, and had become fully acquainted with the nature of the service into which they had been drawn. The sea-elephants were killed by spears, on various parts of the island, whose name—Desolation—fitly describes its condition; encompassed by floating ice; and after taking the blubber from the animal, wherever killed, it was carried by the men, on their backs, over blocks of ice, and other impediments, with great toil and exposure, to their hut on shore; and then, either the blubber preserved, or the oil extracted, and put into casks. With no comforts or provisions, except what the little schooner, or their hut on shore, afforded, and subjected to such severe and repulsive labor, it is not easily

to be believed, that these young men, natives of Fayal, who had previously known only the fruitful soil and genial climate of the Azores, would have consented to see the ship depart, and continue such services for the uncertain period of the return of another ship.

I am fully satisfied that the whole arrangement, by which they were discharged from the Samuel Robertson, and entered into the service of the Arab, was made under duress. They were in the power of the master of the Samuel Robertson; and the option of coming in that ship to the United States was not allowed to them. They have a right, therefore, to set aside the agreement made at Desolation Isle, and are entitled to recover a quantum meruit for their services, from the time they shipped at Fayal, until the time of their discharge in the United States, to be apportioned in these two actions, according to the time they served for each of the ships.

The libel makes no claim for a wrongful discharge from the first voyage, but asks only compensation for services rendered.

MAYURKA, The. See Case No. 1,175.

MAZANGE (ESLAVA v.). See Case No. 4,527.

Case No. 9,362.

MAZE v. MILLER.

[1 Wash. C. C. 328.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1806.

PAYMENT—RECEIPT—EFFECT OF—NOTES—RECEIVED IN SATISFACTION—NOTICE.

1. A receipt for so much money, is only evidence of a payment, which may be explained by parol, or other proof.

[Cited in Frick v. Algeier, 87 Ind. 256. Approved in Ryan v. Rand, 26 N. H. 15. Cited in Kelly v. Perseverance Bld'g Ass'n, 39 Pa. St. 151.]

2. If the payment acknowledged in the receipt, turn out to be a note, bill, or the like; and, if the same were not paid or received in satisfaction, and turn out unproductive, it is no payment.

[Cited in Re Hurst, Case No. 6,925.]

[Cited in First Nat. Bank of Pueblo v. Newton, 10 Colo. 161, 14 Pac. 433; Frick v. Algeier, 87 Ind. 256.]

3. In order to make such bill or note a payment, it is necessary that it be received in satisfaction, and the receiver to run all risks; or, where the receiver has made it his own, by neglecting to give notice.

A rule was obtained to set aside an execution issued against the defendant, upon the ground, that the judgment was satisfied by a note of hand, given by the defendant, with an endorser, and a receipt by the plaintiff's attorney in fact, endorsed on the power of attorney, and given up to defendant, as follows: "Received from J. Miller, the sum of 1177 dollars, being in full, including costs and expenses of property he sold in Alexandria, belonging to J. Maze."

The note when it became due, having been protested, and the defendant having become insolvent, the plaintiff sued out execution of the judgment, to set aside which this motion was made. The affidavit of the plaintiff's attorney, proves that he did not receive the note as a satisfaction of the debt or judgment, and that it was not paid as such, or so intended by defendant, as he believes; and that no agreement was made, tending to show such an intention. The defendant's attorney stated, that when the negotiation was made, respecting the note, he never thought upon the subject, whether the payment was to operate as a satisfaction, or merely as a collateral security.

WASHINGTON, Circuit Justice. After stating the above facts, the rules of law applicable to this case are, that the receipt of so much is only evidence of a payment and satisfaction, and may be explained by parol, or other evidence. This was gone into, and we find that the note was neither paid nor received as satisfaction; but, to constitute a good plea of accord and satisfaction, both should be averred. The plaintiff, then, received a note, which proved unproductive; and it is clear, that it was no satisfaction of this debt, or a discharge of the judgment, unless it were received as such, and the party agreed to run all risks; or, by his after conduct, made it his own. Rule discharged.

See Carth. 238, note. A receipt in full, with full notice, is a discharge. Esp. 174, cited by the counsel, in favour of this motion.

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

Case No. 9,363.

The M. B. STETSON.

[1 Lowell, 119.] [1]

District Court, D. Massachusetts. Dec., 1866.

SALVAGE—VESSEL AGROUND—SIGNAL OF DISTRESS—IN PERIL—BENEFIT CONFERRED.

1. A vessel driven on one of the islands in Boston harbor in the daytime set her colors union down, and was pulled off and towed to her dock by a tug, whose master had during the same morning, and before the vessel was beached, offered to tow her up for seventy-five dollars. *Held*, a salvage service.

[Cited in Baker v. Hemenway, Case No. 770.]

2. Salvage is the saving of property from extraordinary sea peril, by persons not bound by any existing contract to render the service. A signal of distress is evidence of such peril; and a vessel driven on shore in a gale, is, while the gale continues, in such peril.

[Cited in The Athenian, 3 Fed. 250.]

3. The remuneration in salvage cases is reckoned with a view to the benefit conferred as

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

well as to the time, trouble, danger, &c., of the salvors, especially when the danger is still present or imminent.

[Cited in The Mary E. Long, 7 Fed. 365; The Dennis Valentine, 47 Fed. 666.]

4. A bark loaded with sugar was driven on shore in the harbor of Boston in a severe gale and was promptly rescued and brought to a wharf, while the gale was still blowing, by a powerful tug. Value saved, $33,000; salvage awarded, $1500.

The bark M. B. Stetson, on her voyage from Cuba, with a cargo of sugars, made Boston harbor before daylight on the morning of the 30th of October, 1866. The wind was blowing very heavily from the south-east, and in the darkness the vessel came to anchor about five hundred yards to windward of George's Island, a place nearer shore than was entirely prudent, if there had been an opportunity to choose the ground. The master thought himself in no special danger, and in the course of the forenoon refused to take the tow-boat D. A. Mills to tow him to Boston at the price of seventy-five dollars. The vessel lay in the same position until soon after one o'clock in the afternoon, when the gale changed to the south-west, and increased in violence, and she parted her starboard chain and dragged towards the island until her stern took the ground, when she swung round and lay nearly broadside on the beach; the tide being between two and three hours' flood. Her port chain continued to hold, and had some effect in preventing the bark from getting as fast on shore as she might otherwise have done. The master immediately set his colors union down, and the same tug saw the signal soon after and promptly came to his assistance, and on the second trial succeeded in throwing a line on board, put on a very high pressure of steam, and after shifting the position of the hawser twice so that the strain would not pull the tug's bows to leeward, dragged the bark off the shore in fifteen or twenty minutes, with some aid from her own crew, who heaved upon the port chain. When the bark floated the master of the tug ordered her chain to be cut, and then towed her to Boston. The whole service occupied less than two hours. Almost immediately upon the vessel being relieved the gale began to moderate, and before high-water it had become comparatively calm. Upon examination it was found that the vessel had not been strained nor otherwise seriously injured, nor had she started any leak, so that the cargo was in perfect order. Both vessel and cargo were the property of the claimant and were together valued at about thirty-three thousand dollars. The tug was a large and powerful vessel of her class, valued at about $18,000. The libellants demanded $5000; the claimant offered $500.

J. C. Dodge, for libellants.

R. H. Dana, Jr., for claimant. The bark was not in much danger; she might probably have been hauled off at high-water by her own crew; the work done and risk run by the tug were not greater than are common in towage services. The master explains his signal by saying that owing to the relative position of the two vessels, the ordinary signal for a tug, which is a color set in the rigging, could not have been seen by the D. A. Mills, which was the nearest steamer from which he could expect assistance, and so he set the only signal that could be seen and understood, which was the flag put at the peak, union down; but that he did not intend this to be taken as a signal of distress, but to attract attention. The service is one of towage merely, and not of salvage. The Princess Alice, 3 W. Rob. Adm. 140; The Albion, 2 Hagg. Adm. 180, note.

LOWELL, District Judge. I cannot doubt that the libellants have performed a salvage service. Salvage is the saving of vessels or other property from peril at sea by persons not bound by any existing contract to render the service. The compensation in the absence of express contract is understood to be contingent upon success, but that is perhaps not absolutely essential to a salvage service when it has been rendered by request, though if that contingency is shown the contract is presumed to be for salvage; the degree of peril is not usually important except as bearing upon the amount of the reward, provided it be something beyond the mere ordinary dangers of the seas. If there is no danger at all, as where a neutral vessel not liable to condemnation by the law of nations, has been retaken from a belligerent who respects and acts upon the law of nations, or where the master of a ship accepts some aid as mere matter of precaution or to accelerate his voyage or the like, no salvage service is rendered. But where the vessel is in actual or apparent danger, or her position or condition is such that she may probably soon be in danger, and the master acts and permits others to act upon that supposition, it would require a strong case of mistake on his part to reduce the service rendered to something less than a salvage service. So that if there were here merely the fact of the signal seen and acted on, it would be very difficult to say that a salvage service was not undertaken by the master's request. I am aware that there are a good many cases in which salvage and towage have been discussed, and which have turned or seemed to turn upon a distinction between those two kinds of service, but the real inquiry in those cases was, not whether the service, but whether the contract was for towage or salvage. If a tug plying in her usual waters takes hold of a vessel and tows her into port, under no express contract, the question is what was the implied contract. If the circumstances were ordinary, we may well infer the usual towage contract; otherwise if the case is one quite out of the ordinary course. In this point of view the amount of danger may be important as a reasonable

test of the probable contract. It is thus that I understand the case of The Princess Alice, 3 W. Rob. Adm. 140, and the others cited by the claimants. But here the evidence of the acts of the parties repels the inference of a towage contract, and so does the situation of the vessel. The James T. Abbott [Case No. 7,202]; The Reward, 1 W. Rob. Adm. 174; The Isabella, 3 Hagg. Adm. 427; The Charles Adolphe, Swab. 153. Speaking generally, it may be said, that the mere fact that a vessel is aground is enough to show that she is in a situation to have a salvage service rendered her. No doubt grounding in a tidal harbor or in the Mississippi river or some similar place, may often be in fact one of the ordinary incidents of navigation and not enough of itself to show danger or distress. But I apprehend it will be difficult to find an adjudged case of a vessel driven ashore in a gale of wind, and assisted while the gale is still blowing, in which any doubt has been expressed of her being in such danger as to be open to salvage.

The question of compensation remains; and this is always a nice and difficult question. Upon a careful examination of the evidence, I am satisfied that the property was in considerable danger, not of destruction, but of further damage. I cannot believe that the master felt then the confident security which he now testifies to. The gale was very severe, and the sea, considering the place, very high, three or four feet high, as the witnesses assert. It must have appeared to the master to be, and it was highly important that prompt relief should be afforded, not to save life, nor to save the ship from destruction, but to prevent damage to some extent to the vessel, and serious damage to the cargo of sugar, which, in case of a leak, must have been much injured. The aid was given with readiness and skill, and to so good purpose, that the small damage incurred is made a ground of argument to lessen its importance; and fairly, so far as it may tend to show that a longer stay on the beach would have had no very bad consequences, but no farther. On the other hand the risk was, as I have said, not of destruction, but of such damage as one or two hours more of pounding and straining might have caused. The bark was in a harbor within reach of assistance, and would in all probability have been gotten off at high-water, if not by her own crew, which I think she would not, yet by the aid of other vessels. The case of a vessel stranded in a thoroughfare, is to be distinguished from that of one on a lonely shore, where relief may not be expected, and where the first vessel that offers may probably be the only one available for the purpose. Upon this ground it has sometimes been said that a vessel abandoned in or near a much used harbor, could not be considered derelict in the strict sense. Neither was the danger to the tug very considerable. There was some danger, undoubtedly, arising from the high pressure of steam necessary to be used; and if this strain should break the machinery there would be great danger, but this was not very probable.

What then should be the reward? Where a vessel on shore in such a place as this in good weather is pulled off by a tug, it has been held that one fair criterion of the value of the service is what the tug would have undertaken to do it for, if payment had been made contingent, upon success. The James T. Abbott [supra]. It is obvious, however, that this rule will not answer for all, or most cases, because it takes into view only one side of the question,—the risk, labor, and expense of the salvors,—without regard to the value of their services to the other party. Where the necessity is more urgent, and no time is given to bargain, and to choose between different offers, another element, namely, what would the owners of the property be willing to give rather than that the service should not be rendered, may fairly be looked at. That a steamer, usually employed at remunerative pay, in towing about a harbor, does not stand precisely on the same footing in respect to salvage, as a vessel kept on purpose for saving life and property, nor as a merchant or passenger steamer deviating from an important voyage to give aid, must also be admitted. The H. B. Foster [Case No. 6,291]. And in this point of view some of the cases concerning tow-boats find their just application.

Taking into consideration all the circumstances, I have concluded that a fair and adequate remuneration for this salvage service is fifteen hundred dollars, which is nearly five per cent of the value saved. Salvage decreed.

MEACO, The. See Cases Nos. 10,755 and 10,756.

Case No. 9,364.

In re MEAD et al.

[28 Leg. Int. 277;[1] 8 Phila. 174.]

District Court, D. New Jersey. June 14, 1871.

BANKRUPTCY—PETITIONING CREDITOR — SERVICES AND COUNSEL FEES—COMMON BENEFIT —DOCKET FEE.

1. Upon application made to the court for payment to the petitioning creditor of $500 for personal services rendered and time spent by him in procuring the adjudication of bankruptcy, and of $1000 for indebtedness incurred by him for the professional services of counsel in the proceedings, and it appearing that the court had allowed to him payment in full for his expenses and costs, and that the aid rendered by counsel was chiefly to enable the petitioning creditor to hinder the other creditors of the estate, either from participating in the choice of an assignee or in the assets of the debtor. *Held*, that while the petitioning creditor is entitled to his costs and reasonable expenses out of the funds of the estate, in procuring the debtor to be adjudged a bankrupt, no compensation should be made to him for his personal services.

[1] [Reprinted from 28 Leg. Int. 277, by permission.]

2. The counsel fee allowed in such cases should only be for the services rendered by him in the proceedings for the common benefit of all the creditors.

3. The docket fee of $20 is only allowable in involuntary cases, and where there has been a denial and trial by jury.

[In the matter of B. F. Mead & Co., involuntary bankrupts.]

F. H. Nye, for petitioner.
A. C. Keasbey, for assignee.

NIXON, District Judge. This was a case of involuntary bankruptcy, and the petitioning creditor now files his petition in the court, setting forth "that in the discharge of his duty as such petitioning creditor, and in the conduct of the proceedings therein, in his behalf, and in the obtaining possession of the property of said bankrupts, and preserving the same until the appointment of an assignee, he necessarily performed many services and spent much time, and that the reasonable value of the same to the estate of said bankrupts, is five hundred dollars;" and further, "that he employed a solicitor and counsel in said matter, who carried on the proceedings on the part of said petitioner, and gave him advice in regard to the same, and that he incurred an indebtedness to him therefor in the sum of one thousand dollars." Upon the filing of the petition, a rule was taken, ordering the assignee to show cause before the court, on the 14th day of February last, why the prayer of said petitioner should not be granted. No testimony has been taken under the rule, but at the hearing, the respective counsel for the assignee and of the petitioning creditor, submitted to the court all the papers on file, as exhibiting the proceedings in the case, and agreed that the court should decide from their inspection, whether any, or, if any, what allowance should be made to the petitioning creditor for his own and his counsel's services, in procuring the adjudication of bankruptcy. These papers are very voluminous and have been carefully examined. It appears from them that the original petition was filed on the 26th day of August, A. D. 1869, and that Mead & Co. were adjudged bankrupts on the 14th day of September following. The first step taken by the counsel for the petitioning creditor, after the adjudication, was to apply to the court for an order excluding Henry A. Merrill and Harry Rockafellar, trading as Merrill & Co., and sixteen other firms, embracing nearly all the creditors of the bankrupts, from proving any debts or claims against the estate, and from voting in the choice of an assignee. Upon this application a rule to show cause was granted, a special examiner was appointed in New York, at the instance of the petitioning creditor, and a large amount of evidence taken before him, to establish the fact, that these creditors had forfeited all right to prove their claims and participate in the estate of the bankrupts, because they had been parties to an attempt to obtain a preference of their debts, contrary to the provisions of the bankrupt act [of 1867 (14 Stat. 517)].

As my predecessor, after hearing the testimony and the argument of counsel, made an order discharging the rule and requiring the petitioning creditor to pay the costs of the proceeding, it is proper for me to assume, that it was an unwarrantable attempt on his part, either to secure the position of assignee, by the exclusion of proper votes, or to receive the payment of his own claims in full, by the exclusion of the great bulk of the creditors, from their equal share in the assets. After the appointment of the assignee, the next step in the proceedings on the part of the petitioning creditor, appears to have been an application by him to the court, for an order "that he be paid and re-imbursed certain expenses incurred by him and his solicitor, as petitioning creditor, amounting in all to $454.27, out of moneys in the custody of the court, belonging to said estate." The court ordered, that a copy of the bill of items of said expenditures, be served, with a copy of the order, upon the assignee, and that he show cause against reimbursing said amount, before the court, on the eighth day of February following. On the return day of the rule, and upon proof being filed that a copy of the order and the bill of items of the petitioning creditor's claim, had been served upon the assignee, the court adjourned the hearing until the fifteenth, and the assignee not then appearing, an order was made that he pay, out of the monies of the estate, to the petitioning creditor, the amount of his claim, to wit, the sum of $454.26, for the expenses which he had necessarily incurred in having the debtors adjudged bankrupts. I have examined the bill of items thus ordered to be paid, and find that the petitioning creditor has been exceedingly minute and particular in his statement of his expenses; items, as small as six cents for ferriage to Jersey City, being charged. As it nowhere appears that he has performed any duty in reference to the bankrupt's estate, since this claim for reimbursement for his expenses, I must assume that all his expenses have been paid; and his present claim rests entirely upon his demand for payment for personal services.

The question as to what allowance should be made to the petitioning creditor out of the funds of the estate, for his instrumentality in having the debtor adjudged a bankrupt, has been much discussed, and there seems to be a general concurrence of the judges that he should be paid his costs and reasonable expenses. He acts for the equal benefit of all the creditors, and it is not equitable that they should enjoy the fruits of his labors without contributing a fair share towards the burden borne by him in gathering them. Chief Justice Chase, in Re Mitteldorfer [Case No. 9,675]; Judge Bryan, Re Williams [Id.

17,704]; Judge Benedict, Re Schwab [Id. 12,498]; Woodruff, Circuit Judge, Re N. Y. Mail Steamship Co. [Id. 10,208]. Provision is made for his costs and fees in general orders in bankruptcy, rules 29, 31. What are reasonable expenses must depend upon the circumstances of each case. The expression has reference to necessary disbursements made in connection with the steps proper to be taken by the petitioning creditor, preliminary to, and attendant upon, the adjudication of bankruptcy. I can find no authority to extend it to compensation to such creditor for his time and personal services, and if I were permitted upon principle to give it any such construction, I do not think it would be to the general interests of creditors that I should do so, in this or any other case. It would be holding out encouragement to persons to make a business of putting their debtors in bankruptcy. The application, therefore, of the petitioning creditor for an allowance of five hundred dollars for his services and time, in addition to the $454.27 paid to him for the expenses incurred by him, is denied.

2. His petition further states, that in carrying on the proceedings against the bankrupts, it became necessary for him to employ counsel, and that he has hence incurred an indebtedness to the sum of $1000, for which he asks an allowance. It is just and proper to allow a fair counsel fee in such cases. But it should be only for the services rendered by him in proceedings for the common benefit of all the creditors, and such are the tendencies now a days, of courts as well as municipal corporations, and state and national legislatures, to be liberal and generous with other people's money, that great care should be exercised lest injustice be done to the creditor, by a thoughtless and undue liberality in such allowances. Where the petitioning creditor, as in this case, attempts, after adjudication, to use his position to exclude other creditors of the bankrupt, from participating, either in the choice of an assignee or in the assets of the estate, and so signally fails in the effort, that the court is constrained to charge him with the costs of the proceedings, it is hardly respectful to the judgment of the court, that he afterwards file a petition, asking to be allowed $1000 for counsel fees, for professional service, the bulk of which, as the items of the account show, was rendered in these unjustifiable proceedings against the interests of the general creditors. Upon presenting this matter to the court, the counsel for the assignee, hinted his opposition to any allowance for counsel fees, upon the ground, that the evidence disclosed gross professional impropriety on the part of the counsel employed by the petitioning creditor.

I have examined the testimony in reference to this charge, and find that he first acted as counsel for the debtor, in an effort to have his assets distributed by one of the creditors, for the equal benefit of all, without taking the estate into the bankrupt court, and that afterwards, when that course of settlement was interrupted by the intervention of the petitioning creditor, he came into this court, as his counsel, and attempted to exclude the other creditors from sharing in the estate, upon the allegations, that their proceedings, which he had advised, was a fraud upon the bankrupt law. I cannot but perceive that such a course of proceeding is not marked by that nice sense of delicacy and honor, which ought to characterize the gentlemen of the profession; and if the question was one of compensation to him upon his application I might feel constrained to refuse to make an order for an allowance.

But the real question is, whether the petitioning creditor has incurred liability in instituting proceedings for the pecuniary advantage of the other creditors, and whether the fund, secured, in part at least by his diligence, should be made to contribute towards re-imbursing him for what he has become liable. Looking at the matter in this light, I think that a reasonable fee should be allowed, for filing the petition and obtaining the order of adjudication, which is all the service that he seems to have rendered for the general benefit of the creditors. His other acts appear to have been at the instance of the petitioning creditors, and against the interests of the other creditors, and for these he must look to his client for compensation. As there was no denial filed, and no contest made by the debtor upon the petition, I cannot allow the docket fee of $20, which the statute gives upon a trial. I am aware that Mr. Bump, in his excellent and well arranged work, on the Law and Practice of Bankruptcy (page 195), states that, "in all cases in involuntary bankruptcy, the appearance fee of $20, is taxable in favor of the attorney of the successful party;" but neither the authority which he quotes, nor the act of congress regulating fees, sustains his position. He refers to Gordon v. Scott [Case No. 5,620], and a careful examination of that case, will show that the docket fee is allowable only in those involuntary cases, where there has been a trial by jury. The statute of February 26th, 1853 (10 Stat. 161), authorizes it only where there is "a trial before a jury in civil and criminal cases, or before referees, or on a final hearing in equity or admiralty."

Let an order be drawn in this case, refusing to the petitioning creditor any farther allowance, except the sum of sixty dollars, a reasonable compensation to his counsel for filing the petition, and obtaining an adjudication of bankruptcy.

Case No. 9,365.

In re MEAD.

[19 N. B. R. 81; [1] 2 N. J. Law J. 26.]

District Court, D. New Jersey, Oct. Term, 1878.

BANKRUPTCY — FRAUDULENT CONVEYANCE — PURCHASER WITH KNOWLEDGE OF FRAUD—IMPROVEMENTS—INCUMBRANCES PAID.

One who, with notice of the fraud, purchases property fraudulently conveyed by a bankrupt, has no right, after being compelled to surrender it to the assignee, to reimbursement either for improvements upon the premises or for moneys advanced to reduce incumbrances.

On petition to expunge claim of Edmund Mead.

NIXON, District Judge. The assignee of Peter Mead, bankrupt, filed a bill in this court, some years ago, to set aside, as fraudulent and void against creditors, a conveyance of real estate made by said Mead and wife to one Temperance Berry. The claimant in this case was one of the defendants in that suit, filing a separate answer and contesting the assignee's right to recover. The decree of the court was that the sale was fraudulent and void, and that the claimant, who was a purchaser of the premises of the bankrupt's grantee, had sufficient notice of the fraud to put him upon inquiry, and that, although he may have paid full value, he took the property subject to the right of the creditors of Peter Mead to be paid their debts.

The testimony in these proceedings disclose the fact that when Peter Mead transferred the premises to Berry they were incumbered with two mortgages; one to a Mr. Bonnell, to secure the payment of five hundred dollars, and the other to a Mr. Whitty, for two thousand dollars, and that Berry paid off the latter in the month of October, 1868, while the property was held by his wife. He did not cancel the mortgage, however, but caused it to be assigned to one Alfred Berry, who says that he was ignorant of the transaction at the time and paid nothing on the mortgage. There seems to be some confusion in the testimony whether the Bonnell mortgage was paid by Berry before the execution of the agreement to sell the property to the claimant on the 19th of May, 1869, or with the five hundred dollars that Edmund Mead advanced on the delivery of the said agreement. But it is a matter of small consequence whether the mortgages were in fact paid by Edmund Mead or by Berry. In either case the person paying has no claim upon the estate of Peter Mead, as against his creditors, to have the amount refunded. The court has already decided that the transfer to Berry was a fraud and that Edmund Mead had cause to know that the fraud was being perpetrated upon the creditors of Peter Mead.

Under these circumstances he purchased the property at his peril, and when, after a long litigation, he was compelled to surrender it to the assignee, there does not remain in him any claim either for improvements upon the premises for reduction of incumbrances. The case falls within the rulings of the supreme court in Railroad Co. v. Soutter, 13 Wall. [80 U. S.] 517, and there must be an order entered expunging the claim.

[1] [Reprinted from 19 N. B. R. 81, by permission.]

MEAD (CUMMINGS v.). See Case No. 3,476.

Case No. 9,366.

MEAD v. NATIONAL BANK OF FAYETTEVILLE.

[6 Blatchf. 180; 2 N. B. R. 173 (Quarto, 65); 7 Am. Law Reg. (N. S.) 818; 1 Am. Law T. Rep. Bankr. 108; 15 Pittsb. Leg. J. 137.] [1]

Circuit Court, N. D. New York. Sept. 21, 1868.

BANKRUPTCY—PARTNERSHIP—NOTES ENDORSED INDIVIDUALLY—JOINT AND SEPARATE ESTATES—ENGLISH RULE OF ELECTION.

1. Where a creditor, to whom a debt was due by a copartnership composed of three persons, took, for a part of it, the note of the copartnership endorsed by one of the copartners, and for other parts of it, severally, three notes, each made by one of the copartners, and endorsed by the two copartners other than its maker, and afterwards the copartners were adjudged bankrupts, and the creditor proved his debts against the makers alone of the four notes: *Held*, that he was entitled to dividends, according to such proofs, out of the several estates, joint or separate, against which the proofs were made.

[Cited in Re Bigelow, Case No. 1,397; Re Bradley, Id. 1,772; Emery v. Canal Nat. Bank, Id. 4,446; Re Long, Id. 8,476; Re Thomas, Id. 13,886.]

[Cited in Winslow v. Wallace, 116 Ind. 321, 17 N. E. 923; Ex parte Nason, 70 Me. 367.]

2. The copartners, in respect to the notes made or endorsed by them individually, were accommodation makers or endorsers for the copartnership, which, as between the copartners, and in equity, was the principal debtor.

3. There is nothing in the 36th section of the bankruptcy act of March 2, 1867, (14 Stat. 534.) which, in terms, prohibits such creditor from proving his debts, and taking dividends, against the joint and separate estates of his debtors, in virtue of their joint and several liabilities respectively, he being a legal creditor of the individual copartners in respect to the notes bearing their individual names either as makers or endorsers.

[Cited in Re Bigelow, Case No. 1,397.]

4. It is the doctrine of the English court of chancery, that, in bankruptcy, a creditor who has knowingly taken both the copartnership and the individual obligation of his debtors for the same debt, must elect whether he will prove his debt against the joint estate or the separate estate of his debtors.

[Cited in Re Tesson, Case No. 13,844; Re Bigelow, Id. 1,397; Re Foot, Id. 4,906; Re Vetterlein, 20 Fed. 110.]

[Cited in Roger Williams Nat. Bank v. Hall, 160 Mass. 171, 35 N. E. 666.]

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission. 1 Am. Law T. Rep. Bankr. 108, contains only a partial report.]

5. The English rule is, that the mere form of the security or evidence of indebtedness does not control in respect to the question whether the debt can be proved against the copartnership, or must be proved against the separate estate of a partner.

6. Whether the creditor in this case would, at his election, have a right to prove his whole debt against the copartnership estate alone, or would have a right to prove, upon the copartnership note, against the copartnership and the endorsers on that note, and, upon the other notes, against the several makers and endorsers thereof, quere.

[Cited in Re Bigelow, Case No. 1,397.]

7. The English rule of election, discussed.

8. Whether, in this case, the joint estate of the copartnership ought not to be deemed a debtor to the separate estates of the several copartners, to the extent of any payment to be made, on the debt due to the creditor, out of such separate estates, quere.

[This was a bill in equity by Charles H. Mead against the National Bank of Fayetteville and others. Final hearing on pleadings and proofs.]

HALL, District Judge. The defendants Edwin P. Russell, Porter Tremain, and Augustus Tremain, were adjudged bankrupts on the 6th of January, 1868; and the plaintiff was soon after appointed their assignee. These defendants had been copartners in business, and, on the 5th of December, 1866, were indebted to the other defendant, the bank, in the sum of $43,000. This indebtedness was evidenced by sundry notes of the firm, as maker. Each of these notes of the firm bore the endorsement of one of the copartners, Porter Tremain being such endorser for $13,500, Augustus Tremain for $12,000, and Edwin P. Russell for $17,500. On the day last-named, and for reasons not deemed necessary to be determined or discussed, the form of the paper which evidenced such indebtedness was changed, on the application of the officers of the bank; and the notes of the firm were taken for $14,000, those of Porter Tremain for $10,000, and those of Augustus Tremain for $9,000, and those of Edwin P. Russell for $10,000. The notes made by the firm were endorsed by Edwin P. Russell, and those made by one of the individual partners, were respectively endorsed by the other two members of the firm. These notes were all given for the old previously-existing copartnership debt, and they were afterward renewed by like notes and like endorsements, all of the original and renewed notes and endorsements being in fact securities for debts which were the proper debts of the copartnership. In respect to the firm, whatever may have been the legal relations between the bank and the individual partners (see In re Babcock [Case No. 696]), these individual partners, in respect to the notes made or endorsed by them in their individual names, were accommodation makers or endorsers for the benefit of the firm; and the firm, as between the partners and in equity, must be considered as the principal and primary debtor. As between the bank and the individual partners, the making or endorsing of these notes created a legal obligation against the individual partner who thus made or endorsed such notes, and the bank might sue upon and enforce such obligation, according to its form and terms. It, therefore, had its election to sue either the maker or the endorser; and it might, if it chose, have maintained separate suits against the maker and each endorser, and taken a judgment against each. In short, the bank, when these notes were dishonored, was the legal creditor of the several parties thereto, according to their several and respective obligations; and there is no reason for holding that the legal relation of debtor and creditor, thus subsisting, did not exist under the bankruptcy act. In re Babcock, ubi supra.

After the adjudication in bankruptcy, the bank, being then the holder and owner of the paper thus given in renewal, proved its debts as against the makers alone, that is, against the firm and joint estate, upon the firm-note for $14,000, and against the individual members of the firm and their separate estates, upon the notes signed by each partner respectively; but it did not prove any demand against the separate estates of the copartners, upon such endorsements. There being assets in the hands of the plaintiff belonging to the joint estate of the bankrupts, as such copartners, and also assets belonging to the separate estates of the several individual members of the firm, and the relative amount of those assets being such that the bank would receive a much larger dividend, if allowed to take a dividend on its debt or debts as thus proved, partly against the firm, and partly against the partners individually, the plaintiff, as assignee, has filed his bill in this court, and now insists, that the whole debt of the bank, being in equity and in fact the debt of the firm, must be proved as a debt against, and take a dividend from, only the joint estate of the bankrupts, and that no part of it can be paid out of the separate or individual estates of the bankrupts, in consequence of their individual liability either as makers or endorsers.

It is impossible for me, at this time, to give this case the careful examination and deliberate consideration which its importance deserves, without neglecting other cases having equal claims to an early decision. The counsel who argued the case were, as they said, unable to find any decision, under the act of 1841 [5 Stat. 440], which determined this question; and my own limited research has brought under my observation but a single case, (that of In re Farnum [Case No. 4,674], which will be hereafter noticed,) in which the question appears to have been decided.

[In respect to the firm, whatever may have been the legal relations between the bank and the individual partners (see Babcock's

Case [supra]), these individual partners, in respect to the notes made or endorsed by them in their individual names, were accommodation makers or endorsers for the benefit of the firm, as between the partners and in equity, must be considered as the principal and primary debtor. As between the bank and these individual partners, the making or endorsing of these notes created a legal obligation against the individual partner who thus made or endorsed those notes, and the bank might sue upon and enforce such obligation according to its form and terms. It therefore had its election to sue either the maker or the endorser, and it might, if it chose, have maintained separate suits against the maker and each endorser, and taken a judgment against each. In short, the bank, when these notes were dishonored, was the legal creditor of the several parties thereto, according to the form of their several and respective obligations; and there is no reason for holding that the legal relation of debtor and creditor thus subsisting did not exist under the bankrupt act. Babcock's Case, ubi supra.] [2]

The act of 1867 (section 36) provides, "that, where two or more persons who are partners in trade shall be adjudged bankrupt, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners, a warrant shall issue in the manner provided by this act, upon which all the joint stock and property of the copartnership, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as are hereinbefore excepted; and all the creditors of the company, and the separate creditors of each partner, shall be allowed to prove their respective debts; and the assignee shall be chosen by the creditors of the company, and shall also keep separate accounts of the joint stock and property of the copartnership, and of the separate estate of each member thereof; and, after deducting out of the whole amount received by such assignee, the whole of the expenses and disbursements, the net proceeds of the joint stock shall be appropriated to pay the creditors of the copartnership, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors; and, if there shall be any balance of the separate estate of any partner, after the payment of his separate debts, such balance shall be added to the joint stock, for the payment of the joint creditors; and, if there shall be any balance of the joint stock, after payment of the joint debts, such balance shall be divided and appropriated to and among the separate estates of the several partners, according to their respective right and interest therein, and as it would have been if the partnership had been dissolved without any bankruptcy; and the sum so appropriated to the separate estate of each partner shall be applied to the payment of his separate debts." The same provisions, in substance, are contained in the act of 1841 (section 14); and these provisions have been said to be in accordance with the rule as previously established. See In re Marwick [Case No. 9,181], before Judge Ware; Collins v. Hood [Id. 3,015]; In re Ingalls [Id. 7,032]. These provisions of our statute do not, in terms, prohibit the bank, which had taken the precaution to require the note of the copartnership to be endorsed by the members of that copartnership, in their individual names, before giving credit upon it, from proving its debts and taking dividends against the joint and separate estates of these debtors, in virtue of those joint and several liabilities respectively; for the bank is clearly a legal creditor of the individual partners, in respect to the notes upon which their individual names appear, either as makers or endorsers. But the English court of chancery, (in the absence, it is said, of any statutory provision on the subject,) has, it seems, established the doctrine, that, in cases of bankruptcy, a creditor having knowingly taken the copartnership and the individual obligation of his debtors for the same debt, must elect whether he will prove his debt against the joint estate or the separate estate of his debtors. Colly. Partn. §§ 940–948; Avery & H. Bankr. 308; 2 Lindl. Partn. (2d Ed.) pp. 1188–1195; 87 Law Lib. pp. 1013–1025. This doctrine of election necessarily concedes, that the creditor is a creditor of the firm and likewise of the separate partner whose individual liability he has taken the precaution to exact, and is, therefore, an authority sustaining the claim of the bank in this case, that it is the creditor of the individual partners upon the notes signed or endorsed by them individually.

The reasonable doctrine, that the mere form of the security or evidence of indebtedness does not control in respect to the question whether the debt can be proved against the copartnership or must be proved against the separate estate of a partner, seems, also, to be well established in England. See cases referred to by Avery & H. Bankr. pp. 309–311; Agawam Bank v. Morris, 4 Cush. 99. Thus, where a firm borrowed money for partnership purposes, and only one of the partners gave a bond for its payment, the other being a witness to it, and the moneys being entered in the cash book of the firm, it was held, that the debt therefor might be proved as a joint debt. Ex parte Brown [cited in] 1 Atk. 225; Ex parte Emly, 1 Rose, 61.

In this case, it is probable that the bank would, at its election, have a right to prove its whole debt against the copartnership estate alone, if the rules established by the English court of chancery were to be adopted; but it is not necessary now to decide whether the bank has such right to prove

[2] [From 2 N. B. R. 173 (Quarto, 65).]

against the joint estate, or whether it has a right to prove against the firm upon the firm-note, and against the endorsers thereon, and against the general makers and endorsers of the notes not signed in the firm-name, according to the legal liability of each, for the bank has not, as yet, insisted upon a right to prove its debts, except as against the makers of the several notes which evidence the indebtedness. Looking to the questions actually presented in this case, I am of the opinion, that the bank had a right to prove its debts against the makers of the notes held by it, and is entitled to dividends from the joint and separate estates of the bankrupts, according to such proof. The utmost that can be claimed against the bank is, that it may be driven to its election; and, as it has proved its debts against the makers of the notes, and them alone, no valid objection has been urged against such proof.

It may, perhaps, be doubtful, whether the bank is compelled to elect, according to the English practice in bankruptcy. In the case of In re Farnum [Case No. 4,674], already referred to, the learned judge of the Massachusetts district held, that, under the bankruptcy act of 1841, a creditor who presented a bill of exchange drawn by the firm and endorsed by one of the partners, was entitled to a dividend from the joint estate of the firm, and also a dividend from the separate estate of the partner who made such endorsement; and he repudiated the English rule, which required an election by the creditor under like circumstances. The question seems to have been carefully considered by Judge Sprague, and I confess I regard the rule he adopted as more reasonable than that of the English courts; but, if I did not, I should be unwilling to disregard a decision, directly in point, made by that able judge, without very careful and deliberate consideration. The English rule has been disapproved by some of the most eminent judges and ablest lawyers of England; and Judge Sprague, in the case alluded to, declared, that the right of a party, holding two valid obligations, to the benefit of both, was founded both in law and justice, and that he did not think himself authorized to set aside that right, on account of an arbitrary rule, justly reprobated by the most eminent judges and jurists in England, and never recognized in this country. The English rule was condemned by Judge Story (Story, Partn. § 376 et seq.); and, in Borden v. Cuyler, 10 Cush. 476, Judge Cushing, in delivering the opinion of the court, declared, that it remained a mooted question in the United States, and that, in Massachusetts, the practice and the weight of professional opinion favored the double proof, but that the point had not then been adjudicated. It was not adjudicated in that case, nor has it been in any other case in our own courts, that has fallen under my observation, except in the case of In re Farnum, already noticed; and, upon the authority of Judge Sprague's decision, and the best consideration I have been able to give to the questions presented, I am of the opinion that the bank had, at least, a right to prove its debts and claim dividends in the manner stated.

It is not, perhaps, necessary now to consider, whether the assignee, as the representative of the creditors of the individual partners, is not, in equity, entitled to require, that the joint estate shall be deemed a debtor to the assignee, as such representative, to the extent of any payments which may be made upon the debt of the bank out of the separate estates of the individual partners, in the same manner that any other party, who has made or endorsed similar notes for the accommodation of the firm, might be—and that, whether the English doctrine of election is, or is not, to prevail. The bill states, that the assets of the firm, though nominally amounting to about $50,000, are really worth much less; that the individual assets of the partners, over and above incumbrances, are about as follows: Russell's, $7,000; Porter Tremain's, $11,000; and Augustus Tremain's, about $3,000. The amount of the debts (other than those of the bank) proved against the firm, and against the several individual partners, is not stated, but the firm was insolvent and bankrupt, and it is alleged that Russell, individually, owed debts amounting to about $900, while the other two partners owed no individual debts likely to be proved against their individual estates; but I see no statement of the firm or individual debts proved, either in the bill or in the testimony in the case, other than the debts held and proved by the bank. At all events, the question just suggested has not been argued, and a final disposition of it might require a settlement of the accounts of the individual partners with the firm; and, as the case decided by Judge Sprague, and the intimation made in 10 Cush., were not called to the attention of the counsel, and were not discussed by them, I think it better not to make any decree in this case at present, but to advise the counsel that, in my opinion, the bank has a right to dividends against the joint and separate estates of the bankrupts, according to their proofs in the case, and that any other question in the case may be further argued. Further research by the counsel or myself may lead to the discovery of other cases decided under the act of 1841, and bearing on the main question, but I am not able, at this time, to pursue the investigation. See Howe v. Lawrence, 9 Cush. 559, 560; Somerset Potters' Works v. Minot, 10 Cush. 597; Agawam Bank v. Morris, 4 Cush. 99; Fuller v. Hooper, 3 Gray, 334; Tucker v. Oxley, 5 Cranch [9 U. S.] 34.

Case No. 9,367.

MEAD v. PURDY.

[Cited in Perego v. Bonesteel, Case No. 10,977. Nowhere reported; opinion not now accessible.]

Case No. 9,368.

MEAD v. SCOTT.

[1 Cranch, C. C. 401.] [1]

Circuit Court, District of Columbia. June Term, 1807.

COSTS—ON APPEAL FROM JUSTICE OF PEACE—DISCRETIONARY.

Costs on appeal from a judgment of a justice of the peace, are within the discretion of the court, if the judgment be affirmed in part.

Upon an appeal from the judgment of a justice of the peace, the jury found a verdict for the appellee, for $10.69. The judgment of the justice was for $17.50.

Mr. Law, for appellant, contended for costs. Appeals from justices of the peace are given by the Maryland act of 1791 (chapter 68). The condition of the appeal-bond only provides for costs in case the judgment shall be affirmed. The appellee cannot sue upon the bond, for the condition has not been broken. The judgment has not been affirmed, although the appellee has recovered something; yet he had obtained a judgment below for too much. In the case of Austin v. Hughes, in Montgomery county court the judgment was diminished only two dollars, and yet the appellant recovered judgment for costs.

F. S. Key, contrà. It is an appeal as to fact as well as law, and new evidence was admitted. The case is taken up de novo. Costs are a matter of discretion. The bond, if appellant had given one, would have bound him to pay all such damages and costs as this court shall award against him.

Mr. Morsell, in reply, admits that this court has original jurisdiction as to fact, but as to law it is only appellate. If the proceedings below are not regular, the judgment must be reversed. If this court, or the jury, should give more than the justice of the peace had given, appellee may release and affirm the judgment as to the residue. If the judgment below was erroneous, the appellant has sustained his appeal, and ought not to pay costs.

THE COURT was of opinion that in such cases costs are within the discretion of the court, and as there was no evidence of a tender of any part of the money, or any offer to pay as much as the appellee finally recovered; it is the opinion of the court that the judgment of the justice ought to be affirmed as to the sum awarded by the jury, with costs, and reversed as to the residue.

MEAD (YAW v.). See Case No. 18,129.

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

Case No. 9,369.

In re MEADE.

[See Case No. 9,372.]

Case No. 9,370.

In re MEADE.

[19 N. B. R. 335.] [1]

District Court, S. D. New York. April 22, 1879.

BANKRUPTCY—PETITION TO VACATE ADJUDICATION—FRAUD—KNOWLEDGE THEREOF—LACHES—REPEAL OF ACT.

1. A creditor seeking to vacate an adjudication must make his application with due diligence on being informed of the facts, and even slight want of diligence is in such case imputed as laches and forfeits his claim to the aid of the court.

2. From the time creditors first receive notice of an adjudication they are put upon inquiry as to any matters in which it may affect their interests and which can be readily discovered by them, and if they make no inquiries and do nothing, it is evidence of acquiescence on their part.

3. In June, 1878, the bankrupt was adjudicated by consent in involuntary proceedings. In March, 1879, a petition was filed by a creditor who had recovered judgment and had a receiver appointed before the filing of the said petition in bankruptcy to vacate the adjudication on the ground of fraud and collusion; that the paper, suspension of which was alleged as the act of bankruptcy, was not made or passed in the bankrupt's business as a trader; that the petitioning creditors swore to the petition without knowing its statements to be true; that the greater part of their claims were fictitious; and that they did not constitute the requisite number and amount. It appeared that the petitioner did not prove her claim, but that she combined with other creditors and contributed money to pay the expenses of a re-examination of the proof of debt by one of the petitioning creditors and that she had been admitted to and did oppose an application of the bankrupt for a discharge. *Held*, that her actions in the proceeding estopped her from any claim of right to make this application; that she was guilty of laches, especially so as she waited until after the repeal of the bankrupt law of 1867 (14 Stat. 517), and thereby prevented the bankrupt from going into voluntary bankruptcy. In August, 1878, she had prepared a petition, but abandoned it because she had not then sufficient proof of the facts.

4. This did not excuse the delay; she should have made immediate application, and, if necessary, should have applied for such examination of the parties and such taking of testimony as was necessary for eliciting the truth.

[In the matter of Abraham Meade, a bankrupt.]

Coleridge E. Hart, for petitioner.

Wheeler H. Peckham and P. W. Ostrander, contra.

CHOATE, District Judge. This is an application of a creditor of the bankrupt to set aside the adjudication. On the 19th of June, 1878, a petition was filed against the bankrupt signed by six persons alleging themselves to be at least one-fourth in number

[1] [Reprinted by permission.]

and one-third in value of all the creditors of Meade, and alleging as an act of bankruptcy the suspension for forty days of his commercial paper, made in his business as a trader, and praying that he be adjudicated a bankrupt. On the return-day of the order to show cause, June 29, 1878, Meade appeared, and upon his filing a written consent thereto he was adjudicated a bankrupt.

This application to vacate the adjudication is made upon the petition of Elizabeth L. Hart, a creditor of said bankrupt, who recovered a judgment against him in March, 1878, for two thousand and eighty-six dollars. The petition now presented was filed March 12, 1879. The grounds upon which this relief is sought are fraud and collusion between the bankrupt and the petitioning creditors in procuring the adjudication; that the bankrupt was not in fact a trader; that the paper, the suspension of the payment of which constituted the alleged act of bankruptcy, was not made or passed in the course of his business as a trader; that the petitioning creditors, and especially three of them, swore to the petition without knowing that Meade was a merchant or trader within the meaning of the bankrupt law; that the greater part of the alleged claims of the petitioning creditors were fictitious, and that they did not constitute in fact one-third in value of the creditors of said Meade; and especially that the said claim of James C. Meade, one of the petitioning creditors, whose claim is stated at thirty-four thousand dollars, and constituted about one-third of the aggregate claims of the petitioning creditors, and which was necessary to make up the one-third in value of all the debts, was wholly fictitious; that the petition was prepared and filed collusively and fraudulently between the bankrupt and the petitioning creditors, who were relatives and friends of his family, to obtain a discharge without paying any part of his debts, and with intent on the bankrupt's part to defraud the petitioner, Mrs. Hart, of the result of her diligence in obtaining a judgment and an appointment of a receiver of Meade's property, which had been obtained in proceedings supplementary to her judgment the day before the petition in bankruptcy was filed; that the bankrupt knew that he had not committed an act of bankruptcy when he consented to the adjudication and permitted the court to be misled by the false averments of the petition.

Notice of this application having been given to the bankrupt and the petitioning creditors, and also to all known creditors of the bankrupt, the petitioning creditors and the bankrupt appeared and answered, denying the alleged frauds and false statements, and some of the other creditors appeared and offered no objection to the vacating of the adjudication; other creditors did not appear.

By the papers accompanying this petition, and in which, together with the petition, this application is made, it appears that the petitioner procured the appointment of a receiver of the property of the bankrupt by a state court in proceedings supplementary to her execution, and he gave bond and was duly qualified as such receiver, June 18, 1878; but that no assets have come to his hands, and that the receivership secures but a small part, if any, of her debt; that the petitioner, Mrs. Hart, has never proved her debt; that at the first meeting of creditors, July 19, 1878, objection was made by other creditors to the proof of James C. Meade's claim, and he was not allowed to take part in the election of an assignee; that a re-examination of his claim was demanded, and has been ever since proceeding before the register; that though this petitioner did not prove her claim, because she believed that her receivership gave her security on the debtor's property, yet that she entered into a combination with other creditors to defeat in the bankruptcy proceedings the claim of James C. Meade as fictitious, contributing the money to pay the expenses of this re-examination of James C. Meade's proof of debt; that an application by the bankrupt for his discharge has been opposed by this same combination of creditors, including the petitioner, who has obtained a special order of the court permitting her to appear therein and file specifications. These proceedings have involved very protracted examinations, at a large expense to the parties interested; that in August, 1878, this petitioner prepared a petition similar to her present petition, asking the setting aside of the adjudication on substantially the same grounds as are now urged, but abandoned it because she was advised that she had not at that time sufficient proof of the facts alleged to proceed with it successfully. The bankrupt and the petitioning creditors insist that the petition should be dismissed, on the ground that upon her own petition and accompanying papers she is not entitled to relief. This motion must be granted. The power of the court to vacate its own decree, which has been procured by fraud and deceit, either upon the motion of any party interested in having it set aside, or on its own motion when the facts are properly brought to its attention, cannot be doubted. But the power is one to be exercised cautiously, with a due regard to the interests of all parties who may be injuriously affected thereby, and especially to the rights and interests of any parties who may have relied on the decree as valid and be injuriously affected by its being vacated. In other words, the application is one made to the sound discretion of the court under all the circumstances. In re Court [Case No. 3,284]; In re Griffith [Id. 5,820]; In re Funkenstein [Id. 5,158], and cases cited; In re Lalor [Id. 8,001].

As regards the parties who may apply for such relief, it must appear that they have made the application with diligence on being informed of the facts; and even slight want of diligence is in such a case imputed as

laches, and forfeits their claim to the aid of the court. Such delay is regarded as virtual acquiescence in the decree, so far as it affects them. Same cases; also, In re Thomas [Case No. 13,891]; In re Neilson [Id. 10,090]. In this case the petitioner has, through the co-operation and under the names of other creditors who personally appeared, actively taken the benefit of the decree now sought to be set aside, and also more recently in her own name endeavored, by proceedings in the due course of the bankrupt law, to obtain relief only attainable under and by virtue of the decree of adjudication as a valid judgment. This clearly estops her from any claim of right to make this application. It also appears clearly that early in August, 1878, she was fully aware of all the facts now relied on as the ground of this application. It was clearly incumbent on her, if she intended ever to proceed to set aside the adjudication, to make immediate application to the court, and if not yet in possession of all the evidence essential to her case, she should have applied to the court for such examination of the parties and such taking of testimony as was necessary for eliciting the truth. Instead of this, she has in fact proceeded under the adjudication for relief wholly inconsistent with the vacating of the decree.

Clearly no case is made which calls on the court of its own motion to vacate the decree. If erroneous, it has been acquiesced in by creditors by their inaction and failure seasonably to move to set it aside. Even their ignorance of the facts at this late day could not excuse their inaction, for, from the time creditors first receive notice of an adjudication, they are put upon inquiry as to any matters in which it may affect their interests, and which can readily be discovered by them, and if they make no inquiries and do nothing, it is evidence of acquiescence on their part. In this case, the decree has been made the basis of long and expensive litigation, all of which will be utterly without result if the decree shall be vacated. This renders it improper to disturb the decree, if originally procured by false suggestion. As to one of the principal grounds on which it is attacked—the alleged fictitious nature of the claims of the petitioning creditors—this petitioner and all other creditors have also full and adequate relief without vacating the decree, because if this fact is proved it bars the bankrupt's discharge, since he must have known the fact and did not disclose it. As to the other ground, that there was in fact no act of bankruptcy, the alleged bankrupt not being a "trader" within the meaning of the bankrupt law [of 1867 (14 Stat. 517)], the suggestion on behalf of the bankrupt is, I think, entitled to great weight: that if at any time before the repeal of the bankrupt law, September 1, 1878, this application had been made, he could have gone into voluntary bankruptcy, and that the petitioner, though knowing or having ample means to ascertain the fact, has waited till it is too late for him to take the benefit of the bankrupt law at all. The same suggestion is properly made also in respect to those of the petitioning creditors who are not directly charged with fraud, but only with carelessly joining in a petition, not knowing that its averments were true. It is observable that the petition does not allege that they did not believe that this averment of the act of bankruptcy was true, or that they knew that it was false; and however such carelessness is to be censured it seems to me that the petitioning creditors, who presumably had an interest in the adjudication of their debtor under the bankrupt law, have not forfeited thereby all title to consideration, and as to them and their interests this petitioner has been guilty of gross laches in not moving before the repeal of the bankrupt law.

I have gone thus at length into the reasons for dismissing this petition, not because I have entertained any doubt on the question, but because of the great diligence and earnestness with which the case of the petitioner has been presented to the court by the petitioner's counsel. Petition dismissed.

[For subsequent proceedings in this litigation, see 14 Fed. 287; 109 U. S. 230, 3 Sup. Ct. 129.]

MEADE (BALFOUR'S LESSEE v.). See Case No. 808.

Case No. 9,371.

MEADE et al. v. BEALE et al.

[Taney, 339.] [1]

Circuit Court, D. Maryland. Nov. Term, 1850.

RELIGIOUS SOCIETIES—BEQUEST TO — INCORPORATION — VALIDITY — STATE DECISIONS — WHEN ADOPTED—IN EQUITY—REMEDY—RIGHT.

1. A citizen of Maryland, by his will, dated the 6th of March 1836, bequeathed "to the Education Society of Virginia, for the benefit of the theological students at the Protestant Episcopal Theological Seminary of Virginia, near Alexandria, District of Columbia, one thousand dollars, the interest only to be annually expended." The object of the bequest was an unincorporated and voluntary association of individuals to take in succession. On a bill filed to enforce this bequest, *held*: that the case must be governed by those of Dashiell v. Attorney-General [5 Har. & J. 392, 6 Har. & J. 1], and consequently, the bequest was void.

[Cited in McDonogh v. Murdoch, 15 How. (56 U. S.) 398.]

[Approved in State v. Warren, 28 Md. 353.]

2. It does not follow that, because such a bequest would be maintained in England independently of the statute of 43 Eliz. c. 4, it will also be maintained in Maryland.

[Approved in State v. Warren, 28 Md. 353.]

3. The case of Vidal v. Girard College [2 How. (43 U. S.) 194] does not affect this case, as the decision of that case was founded on the common law of Pennsylvania.

4. This case must be decided on the doctrines of the Maryland law, as recognised and established by judicial decisions; and the two cases of

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

Dashiell v. Attorney-General [supra] are conclusive against the validity of the bequest in question.

5. The circuit courts of the United States administer the laws of the states in which they sit, unless those laws are in conflict with the constitution of the United States, or its treaties, or the acts of congress.

6. These courts regard the decisions of the highest judicial tribunals of the state, when based upon the laws of the particular state, as conclusive evidence of the law affecting the right or claim in dispute.

[Cited in McDonogh v. Murdoch, 15 How. (56 U. S.) 398.]

7. In cases depending upon the usages of commerce, and the general principles of commercial law, where the state court does not decide the case upon any particular law of the state, or established local usage, but upon the general principles of commercial law, if it falls into error, that erroneous decision is not regarded as conclusive evidence of the commercial law of the state; and will not be followed by the supreme court.

8. In regard to equitable rights, the power of the courts of chancery of the United States is, under the constitution, to be regulated by the law of the English chancery.

9. But this rule applies to the remedy, not to the right. It is the form of the remedy for which the constitution provides; and if a complainant has no right, the circuit court sitting as a court of chancery has nothing to remedy in any form of proceeding.

This bill was filed against the defendants [Beale and Latimer], as executors of Philip J. Ford, deceased, late a citizen of Maryland, by William Meade, Edward McGuire, John Hooff, Philip Williams, and John Johns, citizens of Virginia, on behalf of themselves, and all others the members of the Society for the Education of Pious Young Men for the Ministry of the Protestant Episcopal Church; said society having its place of business in Virginia, and being there situated, and all the members thereof being either citizens of that state or of other of the United States than Maryland.

The bill stated that, on the 6th of March, 1836, the said Philip J. Ford made and published his last will and testament in writing, whereby, amongst other things, he gave to the Society for the Education of Pious Young Men for the Ministry of the Protestant Episcopal Church, by the name of the Education Society of Virginia, for the benefit of the theological students at the theological seminary of Virginia, near Alexandria, District of Columbia, one thousand dollars, the interest only to be expended. That the testator having departed this life leaving said will unrevoked, the same was duly proved in the orphans' court of Charles county, Maryland, and the execution thereof assumed by the defendants. That the assets received by the executors were large, and amply sufficient to liquidate the whole of the said legacy in due course of administration. That the said Society for the Education of Pious Young Men for the Ministry of the Protestant Episcopal Church, whereof the complainants were members, and on behalf of which they sued, was commonly known and designated by the name of the Education Society of Virginia, and was the same society so designated by the testator in his said will; and that the place of the annual meeting of said society was now, and always had been, at the theological seminary of the Protestant Episcopal Church in the diocese of Virginia, situated in Fairfax county, in said state. That the said society was composed of about two hundred members, who resided in various states of the Union, remote from each other. That, according to the constitution of said society, the affairs of the same were committed to the management of a board of directors, which consisted of the president, four vice-presidents, the secretary, the treasurer and thirty managers, who were all appointed annually, at their annual meeting at the said theological seminary. That the complainants were, at the death of the testator, and had been, ever since, members of said society and of its board of directors. That it was the duty of said board of directors, among other things, to determine on the propriety of accepting and approving of the candidates for the aid of the society aforesaid, in the prosecution of their education for the ministry aforesaid, selected and recommended by the standing committee, composed of four members of said board of directors, and upon the approval of the persons so recommended, it was the duty of said standing committee to appropriate and furnish the funds and assistance from the treasury of the society aforesaid, to the said beneficiaries. That said beneficiaries were bound to prosecute their studies at said seminary, under the direction of its professors, unless such condition were dispensed with by the standing committee; and they were provided with board and other necessaries by said seminary, which was provided for and supported, so far as the board of the students there is concerned, by said society. That said seminary was in full existence as a theological school; and the said society, through its board of directors, had been for many years before the death of the testator, and had continued ever since, in full existence and organization, and prosecuting successfully the objects of its formation, precisely in the same manner as at the time of the publication of the testator's will and at the time of his death. Prayer for discovery and relief.

The will of the testator, so far as it related to this bequest, was as follows: "I give and bequeath to the Education Society of Virginia, for the benefit of the theological students at the Protestant Episcopal Theological Seminary of Virginia, near Alexandria, District of Columbia, one thousand dollars, the interest only to be annually expended."

To this bill, the defendants demurred generally, and the case was submitted, upon written arguments, upon the demurrer.

J. M. Campbell, in support of the demurrer, contended (1) That the legacy was void, be-

ing in violation of the 34th article of the bill of rights of Maryland. (2) That the legatee not being incorporated, the legacy was void for want of a competent person to take. 2 Story, Comm. § 1147; 3 Pet. [28 U. S.] Append. 497. The statute of Elizabeth (43 Eliz. c. 4), it is true, supplies the defect of want of a charter, but without that statute, in England, and where it is not in force in this country the legacy is void. The statute is not in force in Virginia, and such a legacy is void there. Trustees of Philadelphia Baptist Ass'n v. Hart's Ex'rs, 4 Wheat. [17 U. S.] 1; 3 Pet. [28 U. S.] Append. 481. In Pennsylvania, the statute of Elizabeth is not in force, as to its mode of proceeding, but it is, as to the principles involved ([Vidal v. Girard's Ex'rs] 2 How. 192), and the supreme court of the United States, in the case of Girard's Will, in 2 How. [supra], while upholding the legacy there given, under the law of that state, refers to and adopts the principle of the case [Trustees of Philadelphia Baptist Ass'n v. Hart's Ex'rs] in 1 Wheat. [supra], as applicable, where the statute of Elizabeth is not in force. In Maryland, the statute of charitable uses (43 Elizabeth) is not in force (5 Har. & J. 398); and on page 401 of that volume the very case of a devise to persons in succession, not incorporated, is put by the court.

R. J. Brent, for complainant. The doctrine of charities and conveyances to charitable uses has been so fully discussed in the opinion of the supreme court, in Vidal v. Girard's Ex'rs, 2 How. [43 U. S.] 194, that we can only refer to that decision as finally settling the law on this subject, and conclusively settling that such devises could be enforced in equity, independently of the statute of Elizabeth, thus virtually overruling the contrary decision made by our court of appeals, in Dashiell v. Attorney-General, 5 Har. & J. 400, which was based on the mistaken notion that chancery had no jurisdiction previously to that statute. The question, therefore, recurs whether the circuit court will not, in such a case, rather follow the federal decisions than the state decision? If so, the sole remaining question is, whether this legacy, as claimed, is not a charity? which will clearly appear by reference to the bill.

Henry Winter Davis, on the same side. The case is succinctly and accurately stated by the defendant's counsel; and in the two points insisted on, the merits of the case are fairly met. (1) The law of charitable bequests is not dependent on the statute of 43 Elizabeth, but is a part of the common law, prior to and more comprehensive than that statute. (2) The bequest of Ford's will is such, as within the principles of the law of charitable bequests, is valid and enforcible by bill in equity. (3) The bill of rights of Maryland does not affect the matter.

I. The elements of perfect trust are, a trustee, a subject, and an object or beneficiary competent to take. The want of a trustee will always be supplied by equity, and is not suggested or relied on here. The subject here exists in the legacy. The object or beneficiary is the party stated in the bill. It is an unincorporated, voluntary association, and it is on this that the objection of its incompetency rests. The purpose of the trust—the education of youths for the ministry—is directly within the immediate scope of the organization of the society, and we suppose is conceded to be a charitable purpose, which would be sustained and effectuated, if the body designated to take the fund be competent to take. In all cases there must be a beneficiary sufficiently certain and definite, or any gift or bequest will be void. That certainty varies with the subject-matter of the gift or bequest, and the objects to which it is directed. It may either be a natural person, or a corporate person, or a more indefinite body, such as a religious congregation, a voluntary association, or the public—either of the whole commonwealth, or limited portions of it. The first two are the ordinary objects of gifts and bequests. The third class is recognized as competent to take property—not generally, but only for specified purposes. The individual can take for all purposes, generally; the body corporate only for purposes within the scope of its charter. When the bequest or gift is for certain public or charitable purposes, an enlarged policy has relaxed the rigid rules which define the certainty of a competent donee, where individuals are concerned, and indefinite gifts and dedications are recognised and enforced. One class of such cases is, that in which dedications to the public, or to particular societies, have been protected; such was the case of Mayor, etc., of New Orleans v. U. S., 10 Pet. [35 U. S.] 662, where the proprietors of the soil had laid out a town, and on the plat had designated a portion as "the quay," and the court held it a valid dedication to the public; and remarked that, without such dedications, an advanced state of society could not exist; and that the right might exist in the public at large, or in a definite part of it, without the intervention of a corporation (page 713). Similar principles are reiterated in the cases of Cincinnati v. White's Lessees, 6 Pet. [31 U. S.] 431; Barclay v. Howell's Lessee, 6 Pet. [31 U. S.] 499; and Beatty v. Kurtz, 2 Pet. [27 U. S.] 566; in which latter case, a piece of ground marked on the plan of Georgetown "for the Lutheran church," an unincorporated society taking in succession, was protected from violation, as a place of burial for the dead, validly dedicated to the public, and to pious uses. Such gifts as the above, to an individual, would have been void: to the public, the citizens of the town, the religious congregation—for those particular purposes, they were valid; and the persons intended to enjoy the gift were vague and uncertain, shifting, unascertained, unincorporated, and not protected by the intervention of trustees. The cases are thus far directly in point; they suffice to remove all à priori presumptions

against the existence of other cases, embraced by their principles, where the rules relative to gifts or bequests to individuals for private purposes do not operate to avoid the gift. They lay the foundation for the principle, that for public purposes relative to the religion, the commerce, the municipal conveniences, the education of the people, the laws of limitation and conveyancing are not the same which govern the disposition of private property between private persons; but that an indefinite public may have rights which courts will protect. It is this principle which lies at the foundation, and is the origin of charitable bequests of an indefinite nature, whereby transfers of property—void if between private persons for private purposes—are taken under the protection of the courts, when applied to public or charitable uses. Within it, gifts or bequests for the establishment of schools or colleges, for the education of ministers or orphans, for the support of ministers, for the benefit of dissenting congregations, unincorporated, for the erection of light-houses, bridges, &c., are protected. The fact that such gifts are protected in England, and in certain states of this Union is conceded; but it is denied that they are so protected on the above principle, but only by virtue of the statute of charitable uses. 43 Eliz. c. 4.

We had supposed this principle at rest before the courts of the United States, since the case of Vidal v. Girard's Ex'rs, 2 How. [43 U. S.] 127; but it would seem that the counsel for the defendants entertains a different view of that case. It is true, that it was held, in conformity with the case of Zimmerman v. Anders, 6 Watts & S. 218, that the conservative provisions of the statute of Elizabeth were in force in Pennsylvania; but it is equally true, that that statute has been held not to be in force in Pennsylvania, and also that, independently of it, the more extensive range of charitable uses which chancery supported before that statute, and beyond it, were held to exist in that state; and that, after an elaborate examination of the cases, the supreme court solemnly affirmed the doctrine of Sugden in 1 Dru. & War. 258, that courts of equity have, independently of the statute of Elizabeth, an inherent jurisdiction in cases of charity; that cases of charity, in courts of equity in England, were valid prior to the statute of Elizabeth, and that from the more recent cases, and the result of recent investigations, such was the case at the common law prior to the statute; and therefore, without reference to the cases from the Pennsylvania reports, those doctrines would be part of the common law of Pennsylvania. [Vidal v. Girard's Ex'rs] 2 How. [43 U. S.] 197, 198. Indeed, it is plain, such must have been the case, for St. 43 Eliz. only created a new tribunal for the enforcement of acknowledged rights; its language creates no new right, nor makes one valid which before was void; and if its modes of proceeding were not in force, nothing remained to be in force; for the rights it protected were old rights, which fraud had invaded, but not nullified in the eye of the law. The courts of Pennsylvania were, therefore very accurately discriminating when they held the statute not in force, but that the principles chancery had adopted in applying its provisions, obtained in Pennsylvania, not by force of the statute, but as part of the common law. Witman v. Lex, 17 Serg. & R. 88–90.

Upon such and much more powerful arguments, Sugden, in the case of Incorporated Soc. v. Richards, 1 Dru. & War. 294, in Ireland, where the statute of Elizabeth is no more in force than it is in Maryland and Virginia, and where, consequently, the bequest must either be void or valid by some other law, held the jurisdiction of chancery to decree and enforce indefinite charities; and that the statute only introduced a new and special, but not exclusive mode of enforcing trusts and uses previously valid; and Lord Redesdale in Plunkett v. Mayor, etc., of Dublin, 1 Bligh [N. S.] 312, 346, 347, held that the statute created only a new jurisdiction, by analogy to certain old writs—a jurisdiction ancillary to the court of chancery; and similar doctrines were maintained in Zane's Will Case, Brightly, N. P. 346, till finally, on the fullest investigation, and on the faith of new lights making plain a path over which their predecessors had groped in darkness, and not unfrequently stumbled, the supreme court proclaimed the same doctrine in so convincing a form, as to silence controversy; in a scientific point of view, however, doubts may still invest its practical application in particular cases. If this be so, it seems to be immaterial that the court of appeals of Maryland, following in the footsteps of Trustees of Philadelphia Baptist Ass'n v. Hart's Ex'rs, 4 Wheat. [17 U. S.] 1, have said the statute of Elizabeth is not in force in Maryland. We concede it, but ask relief of the courts of equity of the United States, administering the general equity jurisprudence of the common law, as expounded by the supreme court. If the question were whether St. 43 Eliz. is in force in Maryland, the case of Dashiell v. Attorney-General [supra] might well be relied on as a conclusive adjudication upon the local statute law of the state. So far as it decides that, we do not impeach it; we say only, that it is error in supposing that the whole law of charitable bequests of an indefinite character sprang from, and fell with, that statute, shall not bind the courts of the United States in deciding a question, under the common law, of general equity jurisprudence, and our protest rests on the reiterated decisions of the supreme court. That such was the only point decided in 5 Har. & J., appears from the very opening of the opinion on p. 398, where it is held, that the peculiar law of charities originated in St. 43 Eliz., and that, independently of it, equity could not, in its ordinary

jurisdiction, sustain a bequest which, if not a charity, would, on general principles, be void. Then the vagueness of the particular bequest is discussed, and finally, it is shown that St. 43 Eliz. is not in force in Maryland. Now we concede, as a point of local law, that 43 Eliz. is not in force in Maryland; we controvert the opinion that the courts of equity had no general jurisdiction over indefinite charitable bequests; and as a point of general equity jurisprudence, the circuit court is not bound by the court of appeals of Maryland.

The question then, relates, not to a local statute, nor to a rule of law of title to real property, nor even to the meaning and effect and construction of the language of the will; but simply to the powers of a court of equity to enforce what is confessed to have been the intention of the testator. Neither is it a question as to whether the powers of the Maryland court of chancery are adequate to the enforcement, for they may be entirely inadequate, or such courts may not exist at all in Maryland, as they do not in Louisiana, or Massachusetts or Pennsylvania; but can the United States circuit court enforce this trust, no local statute declaring it void in itself; and if it fall at all, it being for want of competent power to enforce it. Now it is obvious that the powers of the circuit court cannot depend either upon the equity powers conferred by the state upon its courts of equity, or upon the decision of those courts upon their powers. And though they may decide, and profess to rest their decision upon general equity law, yet that would not bind the circuit court's decision as to its powers on the same question. For example, suppose it should decide that a legacy to the family of A., was too vague: or that a trust declared in a will was void, if no trustee were named; or that a court of equity had no power to substitute a surety to the right of the creditor secured; or that equity had no power to relieve against a mistake of fact; nobody would suppose the circuit court bound. On the contrary, the supreme court has declared that the judiciary act confers the same chancery powers on all, and gives the same rules of decision in all the states, whether courts of equity exist there or not; U. S. v. Howland, 4 Wheat. [17 U. S.] 108; and by parity of reasoning, whatever limit, whether by legislation or judicial construction, may have been set to their powers. And in Robinson v. Campbell, 3 Wheat. [16 U. S.] 212, it was the opinion of the court, that their equity jurisdiction and powers were not confined to the modes and extent of administering relief possessed by the local tribunals; for in some states no courts of equity exist, and in others equitable rights are considered nullities, and no relief given for their violation; so that the United States courts would not have the same powers in all the states; and therefore, they must look to the common source of our law (England) for the powers of courts of common law and equity. In Livingston v. Story, 9 Pet. [34 U. S.] 633, 654–657, the above cases are affirmed, and the principle reiterated, that the courts of the United States may recognise and enforce equitable rights and remedies, even where they are not recognised in the laws or local tribunals of the state.

In the case of Swift v. Tyson, 16 Pet. [41 U. S.] 1, 18, 19, the supreme court decided that the decisions of the local tribunals on contracts and instruments of a commercial nature (not on local statutes or land titles) did not furnish positive rules or conclusive authority to bind the judgment of the supreme court; that their interpretation and effect must be sought, not in the decisions of local tribunals, but in the general principles of commercial law, and this in a case upon a New York acceptance. So also in the case of Carpenter v. Providence Wash. Ins. Co., Id. 495, 511, 512, the court said, the questions were of the general commercial law depending on a construction of the contract of insurance, not local in its character, and that on such a question, the decisions of the state courts could not conclude them, however much they might regret the arrival at results varying from those of the state courts; similar principles are affirmed in the case of Gaines v. Chew, 2 How. [43 U. S.] 650. In the case of Swift v. Tyson [supra], the court draws the distinction between laws and mere judicial decisions, often re-examined, reversed, and qualified by the same courts; mere evidence of the laws, and so liable to be rebutted by further and better evidence; of which no better illustration can be imagined than the law of charitable uses—first repudiated as no part of equity jurisprudence in Trustees of Philadelphia Baptist Ass'n v. Hart's Ex'rs [4 Wheat. (17 U. S.) 1], because supposed to have originated from St. 43 Eliz., then on recent investigations, readopted and re-instated in its place as an integral portion of that jurisprudence. And the court further distinguishes decisions on statutes, and relative to rights and things having a permanent locality, and other things immovable and intra-territorial in their nature and character (by which they confess themselves bound) from decisions on the general doctrines of the common law, whether administered in a legal or equitable forum; of the latter character is Dashiell v. Attorney-General, 5 Har. & J. 400. And in the case of Flagg v. Mann [Case No. 4,847], Story has expressly held that the courts of the United States are not bound by the decisions of a state court on a matter of general equity jurisprudence.

That this bequest is not too vague under the law of charitable uses, and that it is charitable in its nature, and may be executed by the courts of equity under their general powers, we refer to Witman v. Lex, 17 Serg. & R. 88; West v. Knight, Cas. Ch. 134; Simon v. Barber, 5 Russ. 112; Hayter v. Trego, Id. 113; Widmore v. Woodroffe, Amb. 639; Wellbeloved v. Jones, 1 Sim. & S. 40; Society for Propagation of the Gospel v. Attorney-General, 3 Russ. 142; Foley v. Wontner, 2 Jac. &

W. 245; Milligan v. Mitchell, 3 Mylne & C. 72, 84; 1 Dow, 1; 2 Bligh, 529; 3 Mer. 353, 418. Indeed, the case of the Trustees of Philadelphia Baptist Ass'n v. Hart's Ex'rs, 4 Wheat. [17 U. S.] 1, would of itself be sufficient on this point, for the complainants there failed only because the court thought the law of charitable uses arose from and depended on St. 43 Eliz., but it is plain that the court considered the bequest perfectly valid under the law of charitable uses, and would have sustained it had they considered that law a part of general equity jurisprudence at common law. Upon what part of the case in [Vidal v. Girard's Ex'rs] 2 How. [(43 U. S.) 125], the counsel for the defendant bases his statement, that the supreme court refers to and adopts the principle of the case [Trustees of Philadelphia Baptist Ass'n v. Hart's Ex'rs] in 4 Wheat. [supra], as applicable, where the statute of Elizabeth is not in force, we are entirely unable to surmise. In reply to the authority of 4 Wheat. the court distinguish it from the one at bar, 1st, as arising in Virginia, where 43 Eliz. was repealed; and 2d, as being the case of an unincorporated association, an answer quite sufficient to withdraw the case at bar from the influence of 4 Wheat. But the court does not stop with that distinction between the cases, but proceeded to show the law to be other than it had been decided to be in 4 Wheat. and to adopt and affirm the law of charitable uses as a part of the common law of equity jurisprudence. And it was because the bequests of the will were within this general law that the court supported them. That such bequests have frequently been held valid in the courts of the states, independently of the statute of Elizabeth, and under the common law, and that these bequests in manner and form fall within those which have been sustained as sufficiently definite, will appear from the following cases: Attorney-General v. Dashiell [supra], decided in 1822, following close upon, and undoubtedly the result of Trustees of Philadelphia Baptist Ass'n v. Hart's Ex'rs [supra], in 1819; since then we have Witman v. Lex, 17 Serg. & R. 88, in 1827, and Burr's Ex'rs v. Smith, 7 Vt. 241, in which case, among many charitable legacies to persons not competent to take except under the law of charitable uses, all held valid, was one to the treasurer for the time being of the American Home Missionary Society, formed in New York in 1826. Notwithstanding a misnomer and error as to the organization of the society, the bequest was sustained, and the whole question of the relation of the law of charitable uses to the statute of Elizabeth was investigated with the greatest learning. The same is the case in Wright v. Trustees of M. E. Church, 1 Hoff., ch. 204–238. One bequest was to the Methodist society that met in the meeting house in John street; the corporate style was, the Trustees of the Corporation of the Methodist Episcopal Church of the City of New York; and the corporation consisted of eleven congregations, having separate organizations, but not constituting separate parts of the corporate body. This was nevertheless held good, and that the money could be well paid, either to the clerk of this congregation, or to the general secretary or treasurer of the corporation. There was another bequest in the same will to the "Yearly Meeting of Friends in New York." It was a voluntary association, whose members resided in New York, Vermont, Massachusetts and Upper Canada, and yet the bequest was sustained. The opinion is one of the most elaborate on the subject of the independence of the law of charitable uses of the statute of Elizabeth, and its common law origin (pages 239–265). A similar decision was made in Dutch Church v. Mott, 7 Paige, 77. The case in 1 Hoff. Ch. was decided in 1839; that in 7 Paige, in 1838; that in 7 Vt. in 1835. The case of Moore's Heirs v. Moore's Devisees, 4 Dana, 354, decided in 1836, is fully up to the same point. We likewise refer to the case of Wellbeloved v. Jones, 1 Sim. & S. 40, for a case illustrating the circumstances under which the court refer it to a master to settle the safe and proper mode of disposing of the fund, where voluntary associations are interested, in certain circumstances.

II. The bill of rights is further evoked to avoid the legacy. Its 34th article is aimed, not at charitable donations generally, or even exclusively, but embraces all legacies, and only such legacies of goods and chattels as are given to the persons or the bodies designated. It avoids legacies for one particular class of charitable objects; but from this negative on one class of charitable donations, which would not have been forbidden, had they not previously been allowable and legal, arises a strong inference of the general validity of donations to general and indefinite, and unincorporated objects and purposes. Why avoid a legacy to a minister as such, to be taken in succession, if they were not previously valid? And how were such valid, save under the law of charitable donations? Does not the avoidance of all gifts to religious congregations, except land for a church, &c., admit their previous capacity, as such congregations, to take such gifts generally? of which general capacity the above exception still remains. But this only in passing to the construction of the article. The portion relied on is, we presume, that which avoids "any devise of goods or chattels for the support, use or benefit of any minister, public teacher or preacher of the gospel, or for any religious sect, order or denomination." Certainly, this legacy does not fall within the language descriptive of either of the two classes of proscribed objects. It is not to a minister, public teacher or preacher of the gospel. It is to the Education Society, not composed of clerical persons according to its constitution, but of all classes and denominations who conform to its constitution; the legacy is for the benefit of students at the Theological Seminary of Vir-

ginia. But students of theology are neither ministers, public teachers nor preachers of the gospel; they may become such, and so may any lawyer or scholar; and they may never become such, though they may study the science of theology. The bequest, in its very terms, excludes any benefit to any minister, teacher or preacher, and confers it solely on persons not clerical, studying a particular science at a particular institution of learning. On the principle which alone can bring this legacy under those terms, every legacy to any institution of learning, for the foundation of scholarships, wherein theology shall be taught, must be void; that is, any bequest for the benefit of any university, in the German, or English, or indeed, the American sense of that phrase. There is no abnegation whatever upon the students ever to become ministers.

Neither does this legacy seem to fall within the terms, for the benefit, use or support of any religious sect, order or denomination. Certainly, in no strict sense of the terms, is the Education Society, as described in the bill, either a religious sect, order or denomination; it is an education society, not a religious society; it may, or may not, be composed of religious persons; its objects are not religious worship, but the education of certain persons in one branch of moral science. An incidental advantage may result to one religious denomination, but if the gift be not for the use of that denomination, as such, it seems not to be within the intent of the article; it may derive an incidental advantage from the establishment of any institution of learning where persons might be aided in studying theology; for persons might there be aided who afterwards enter the Protestant Episcopal Church. A bequest to St. John's College might be void on the same ground. The words, religious sect, order or denomination, have a well understood meaning, which will not embrace the Education Society; they mean a number of persons united in a particular organization called a church, for the purposes of common religious worship; but surely a set of gentlemen forming a society for aiding youth in their theological education, could hardly be called a religious sect, order or denomination. Runkel v. Winemiller, 4 Har. & McH. 452. But in fact, whatever may have been the meaning of the article, has it not been virtually repealed and annulled by subsequent legislation? The act of 1798 (chapter 24), incorporating the Vestrymen of the Protestant Episcopal Church, expressly allows them to take bequests of goods and chattels, provided the income do not exceed a certain amount (section 28). The act of 1802 (chapter 111, § 8), confers like power on the trustees of any religious congregation of any denomination, with a proviso against gifts, &c., not to take effect till after death, and limiting the amount to be held by any congregation. This restriction of gifts to take effect after death, was annulled by the act of 1815 (chapter 222, § 1), and the power to take by will or deed made general and absolute. The act of 1814 (chapter 58), conferred like capacity on the Methodist Baltimore Conference, though its jurisdiction extended beyond the state, into Pennsylvania on one side, and to the Rappahannock, in Virginia, on the other; for the benefit of all which region it is empowered to hold property. These acts reflect a double light on this subject.

1. They show distinctly what was meant by religious sect, order or denomination; merely a congregation or single society, organized for purposes of common worship; not any multitude of persons who might happen to concur in one or more tenets of belief, still less any society, whatever might be the prevailing complexion of the religious opinions of its members, organized, not for the purposes of religious worship and improvement, but for the purpose of scientific instruction in matters of theology generally. This meaning appears from the preamble of the act of 1802. It speaks of petitions from religious societies and of all denominations of Christians, and their holding property in a congregational capacity, &c.

2. It is plain, that the bill of rights is entirely repealed in its principle and substance by these acts. The whole policy of the state is changed; it now sanctions what it before condemned. It forbade all bequests for the benefit of religious sects, and now all bequests for all sects are valid, if not beyond a certain sum. Upon what principle can this bequest be considered void under the article, when if in favor of any sect or denomination as such, it is in favor of those vested specially with power to take and hold property in Maryland? If the court should think this bequest ought to be confined to the benefit of certain of the Protestant Episcopal congregations of Maryland, it is competent for the court, in directing the execution of the trusts of the will, to limit the application in such manner, and to designate the mode of applying the fund: i. e., that it should be applied to the education of ministers for the church in Maryland, on a scheme to be reported by the master for that purpose.

Should the court not take that view, it may be worth while to consider, if the article extends to bequests to ministers or religious denominations beyond the state of Maryland, as this society is beyond the state. The same reasons would not apply to prohibiting bequests to foreign as to domestic associations; and we know that money bequeathed in England to be laid out in land in a foreign country, for charitable purposes, will be sustained, when if it be to be laid out in England, it would have been void. Whether the analogies of these cases touch the present is submitted, with a simple reference to 2 Story, Eq. Jur. §§ 1184, 1185, etc. If this bequest should be considered such in its character as the bill of rights describes, and so void, if the persons to take were in Maryland, it is not

unfair to argue, that the article only contemplates gifts to such persons, or to such purposes, within the state; but never had any application to such persons, or associations or objects, beyond the state, since the state policy could in no manner be affected by the growth of such associations, or the accumulation of wealth in the hands of ministers beyond the state.

J. M. Campbell, in reply. The defendants' counsel in support of the demurrer in this cause, and in reply to the counsel for the complainants, deems it unnecessary to advert to a large part of their argument, and the bulk of their authorities, because, in his view, the question is disposed of by the cases already cited by him, in the supreme court, and in the state of Maryland. It is conceded by the complainants' counsel, that the statute is not in force in Maryland, and that under the decisions of the court of appeals in Maryland, the legacy now sued for would not be recoverable there, or at any rate such is the fair conclusion from what they say. Now, do the courts of the United States, in deciding questions of charities and charitable uses, cut loose from the law settled in the states where those courts sit? The case of Trustees of Philadelphia Baptist Ass'n v. Hart's Ex'rs, 4 Wheat. [17 U. S.], has already been cited by us. Of that case, the supreme court, in Vidal v. Girard's Ex'rs, 2 How. [43 U. S.] 192, say, it "arose under the law of Virginia, in which state St. 43 Eliz. c. 4, had been expressly and entirely abolished by the legislature, so that no aid whatsoever could be derived from its provisions to support the bequest." No objection is taken to the decision, upon the ground that the law of Virginia had nothing to do with the question, but on the contrary, the assumption is, that the court in Hart's Case decided rightly as far as that ground went, though possibly they might have erred on the ground that there was no jurisdiction of charities independently of the statute.

This view becomes still more clear on an examination of the case of Vidal v. Girard's Ex'rs [supra]. That case having come up from the Pennsylvania circuit, care is taken, on pages 192 and 196 of the opinion of the court, to affirm and repeat with emphasis the fact, that though St. 43 Eliz. is not in force in Pennsylvania, its principles are, "by common usage and universal recognition; and not only these, but the more extensive range of charitable uses which chancery supported before that statute and beyond it." And on page 197, the opinion goes on to state, that "the case is completely closed by the principles and authorities already mentioned, and is that of a valid charity in Pennsylvania." It seems to us that, upon the principles laid down by the complainants' counsel, it was quite unnecessary for the court to have examined at all into the laws of Pennsylvania, and the fact that it has done so, coupled with its observation as to the different law prevailing in the circuit where Hart's Case was decided, shows that the United States courts, whatever they may do in other cases, do not mean to get up a different law of charitable uses from that recognized by the states in which they sit. Nor would it be proper. Upon general principles of law, commercial or otherwise, in which a state can have no interest different from that of the rest of the world, or Union, the federal courts may decide according to state decisions which break in upon the uniformity of a general system; but they never have so decided, where the effect was to uproot a particular line of policy adopted by the state; and such is the case of the doctrine of charitable uses. If a state sets its face against particular charities, the courts of the United States will never consent to plant them in its borders.

TANEY, Circuit Justice. This case has been submitted on written arguments. The money in question is bequeathed to the Education Society of Virginia, for the benefit of the theological students, at the Protestant Episcopal Theological Seminary of Virginia, near Alexandria, District of Columbia; and the demurrer admits that the complainants represent the society to whom this bequest was intended to be made. The society is not incorporated, and the bequest is to a voluntary association of individuals to take in succession.

The court is of opinion that this case must be governed by the case of Dashiell v. Attorney-General, 5 Har. & J. 392, 6 Har. & J. 1, decided in the Maryland court of appeals; and consequently, that this bequest is void. The principles decided in these two cases were also ruled by the supreme court, in a case arising in Virginia, in which state, as in this, the statute of Elizabeth concerning charitable uses has not been adopted, nor its principles recognized, as a part of the common law of the state. Trustees of Philadelphia Baptist Ass'n v. Hart's Ex'rs, 4 Wheat. [17 U. S.] 1. The case of Vidal v. Girard's Ex'rs, was decided altogether upon the law of Pennsylvania. 2 How. [43 U. S.] 192.

It is very true, that in the last-mentioned case, the supreme court express the opinion that the courts of chancery in England possessed the power of enforcing charities of this description, before the statute of Elizabeth was passed; in other words, that such a devise was good, and might be enforced in chancery. But assuming this to be correct, and that the court were mistaken in the contrary opinion expressed in the case of Trustees of Philadelphia Baptist Ass'n v. Hart's Ex'rs [supra], yet it does not follow, that because such a bequest would be maintained in England, it must also be maintained in Maryland. Nor is such the doctrine of the supreme court in the case of the

Girard College; on the contrary, while the court in that case held that such a devise was valid in Pennsylvania, it still recognized as authority the case of Trustees of Philadelphia Baptist Ass'n v. Hart's Ex'rs [supra], which decided that a similar devise was void in Virginia. The statute of Elizabeth is not in force in either of these states, and the supreme court founded its decision in the last of these cases, upon the common law of the state as recognized in Pennsylvania, by universal usage and judicial decision. Upon the same principle, this case must be decided upon the doctrines of the Maryland law, as recognized and established by judicial decisions; and the two cases in the court of appeals before mentioned are conclusive against the validity of the bequest in question.

The circuit courts of the United States administer the laws of the states in which they sit, unless those laws are in conflict with the constitution of the United States, treaties or acts of congress; and as a general rule, regard the decisions of the highest judicial tribunals of the state as conclusive evidence of the law. We do not speak of matters of practice, or the forms of proceeding; but of decisions upon the right or claim in dispute between the parties, where that right depends upon the laws of the particular state.

The cases of Swift v. Tyson, 16 Pet. [41 U. S.] 1, and Carpenter v. Providence Ins. Co., Id. 511, 512, were cases depending upon the usage of commerce, and the general principles of commercial law. And the supreme court have always said that in cases of that description, where the state court does not decide the case upon any particular law of the state, or established local usage, but upon the general principles of commercial law, if it falls into error, that erroneous decision is not regarded as conclusive evidence of the commercial law of the state, and will not be followed as such by the supreme court. And the reason of this distinction is obvious. The state court does not decide in such cases upon the peculiar laws and institutions of the state. Its decision, therefore, is no evidence that any law has been adopted by the state in conflict with the general principles which regulate commercial contracts throughout the commercial world.

So too, as relates to the jurisdiction of the circuit court sitting as a court of chancery. It is undoubtedly true, as contended for in the argument of the complainant, in regard to equitable rights, that the power of the courts of chancery of the United States, is, under the constitution, to be regulated by the law of the English chancery; that is to say, the distinction between law and equity as recognized in the jurisprudence of England is to be observed in the courts of the United States, in administering the remedy for an existing right. The rule applies to the remedy and not the right; and it does not follow, that every right given by the English law, and which, at the time the constitution was adopted, might have been enforced in the court of chancery, can also be enforced in a court of the United States; the right must be given by the law of the state, or of the United States. It is the form of remedy for which the constitution provides; and if a complainant has no right, the circuit court, sitting as a court of chancery, has nothing to remedy in any form of proceeding.

In the case before the court, the question is: is the bequest which the complainants claim, a valid one by the laws of Maryland? It is a question which, in its nature, necessarily depends upon the laws of the respective states. Some of the states sanction devises of this description; some do not; and undoubtedly it depends upon every state to determine for itself, to whom and in what form, and by what instrument, any property within its borders may pass by devise or otherwise. The court of appeals in Maryland have decided, that a bequest like this is void by the laws of the state, and passes no right to any one. This court is bound to respect this as the law of the state; and if there is no right vested in the complainants by this bequest, this court cannot create one. There is, therefore, neither an equitable nor legal title upon which the powers of a court of the United States can be called into action, either as a court of equity or of law, in behalf of these complainants.

This is not a proceeding to appoint a trustee to execute a valid trust; nor, indeed, are there any cestuis que trust. This doctrine is fully maintained in the case of Wheeler v. Smith, 9 How. [50 U. S.] 55, which was decided at the last term of the supreme court. The cases of Trustees of Philadelphia Baptist Ass'n v. Hart's Ex'rs, and Vidal v. Girard's Ex'rs, were in that case recognized as depending upon the laws of the respective states, and not merely upon the doctrines of the English chancery. The bill in this case must, therefore, be dismissed with costs.

MEADE (COOMBE v.). See Case No. 3,188.

Case No. 9,372.

MEADE v. DEPUTY MARSHAL.

[1 Brock. 324;[1] 5 Hall, Law J. 536; 2 Car. Law Repos. 329.]

Circuit Court, D. Virginia. Nov. Term, 1815.

MILITARY LAW—COURT MARTIAL—ASSESSMENT OF FINES—MILITIA—NOT IN ACTIVE SERVICE—NOTICE.

1. It seems, that a court martial, organized under the authority of a state, has no power to assess fines upon delinquent militia-men, for fail-

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

ing to obey a requisition to enter the service, emanating from the secretary of war.

2. A court of inquiry is the proper tribunal for assessing fines against delinquent militia, or for the trial of privates not in actual service, under the laws of Virginia.

3. The sentence of a court martial rendered against an individual without notice, is void.

[Cited in Flint River S. Co. v. Roberts, 2 Fla. 102; Flint River S. Co. v. Foster, 5 Ga. 194; Board of Com'rs v. Johnson, 124 Ind. 153, 24 N. E. 148; Dullam v. Willson, 53 Mich. 406, 19 N. W. 112; People v. Martin (Colo. Sup.) 36 Pac. 546; Evans v. Johnson (W. Va.) 19 S. E. 624.]

[This was an action by William Meade against the deputy marshal of the Virginia district.]

Motion to be discharged under a writ of habeas corpus.

MARSHALL, Circuit Justice. By the return of the deputy marshal, it appears, that William Meade, the petitioner, was taken into custody by him, and is detained in custody, on account of the nonpayment of a fine of forty-eight dollars, assessed upon him by the sentence of a court martial, for failing to take the field, in pursuance of general orders of the 24th of March, 1813, the marshal not having found property, whereof the said fine might have been made. The court martial was convened by the following order:

"November 8th, 1813. Brigade Orders. A general court martial, to consist of Lieutenant Colonel Mason, president, &c., will convene at the court house, in Leesburg, on Friday, the third day of next month, for the trial of delinquencies, which occurred under the late requisitions of the governor of Virginia, and secretary of war, for militia from the county of Loudoun. (Signed) Hugh Douglass, Brigadier General, Sixth Brigade of Va. Militia."

The court being convened, the following proceedings were had: "It appearing to the satisfaction of the court, that the following persons of the county of Loudoun, were regularly detailed for militia duty, and were required to take the field, under general orders, of March 24th, 1813, but refused, or failed to comply therewith; whereupon, this court doth order and adjudge, that they be, each, severally fined the sum annexed to their names, as follows, to wit: William Meade, forty-eight dollars," &c. On the part of the petitioner, the obligation of this sentence is denied. 1st. Because it is a court, sitting under the authority of the state, and not of the United States. 2dly. It has not proceeded according to the laws of the state, nor is it constituted according to those laws. 3dly. Because the court proceeded without notice.

1st. The court was unquestionably convened by the authority of the state, and sat as a state court. It is, however, contended, that the marshal may collect fines, assessed by a state court, for the failure of a militiaman to take the field, in pursuance of the orders of the president of the United States. The constitution of the United States, gives power to congress, "to provide for calling forth the militia to execute the laws of the Union," &c. In the execution of this power, it is not doubted, that congress may provide the means of punishing those who shall fail to obey the requisitions, made in pursuance of the laws of the Union, and may prescribe the mode of proceeding against such delinquents, and the tribunal before which such proceedings should be had. Indeed, it would seem reasonable to expect, that all the proceedings against delinquents, should rest on the authority of that power, which has been offended by the delinquency. This idea must be retained, whilst considering the acts of congress. The first section of the act of 1795 [1 Stat. 424], authorizes the president, "whenever the United States shall be invaded, or be in imminent danger of invasion," &c., "to call forth such number of the militia of the state, or states, most convenient to the place of danger, or scene of action, as he may judge necessary, to repel such invasion, and to issue his orders for that purpose, to such officer, or officers of the militia, as he shall think proper." The fifth section enacts, "that every officer, non-commissioned officer, or private of the militia, who shall fail to obey the order of the president of the United States, in any of the cases before recited, shall forfeit a sum, not exceeding one year's pay, and not less than one month's pay, to be determined and adjudged by a court martial." The sixth section enacts, "that courts martial, for the trial of militia, shall be composed of militia officers only." Act Feb. 28, 1795; 1 Story's Laws, 389, c. 101 [1 Stat. 424, c. 36]. Upon these sections, depends the question, whether courts martial for the assessment of fines against delinquent militia-men, should be constituted under the authority of the United States, or of the state to which the delinquent belongs. The idea originally suggested, that the tribunal for the trial of the offence, should be constituted by, or derive its authority from, the government against which the offence had been committed, would seem to require, that the court thus referred to in general terms, should be a court sitting under the authority of the United States. It would be reasonable to expect, if the power were to be devolved on the court of a state government, that more explicit terms would be used for conveying it. And it seems, also, to be a reasonable construction, that the legislature, when in the sixth section, providing a court martial for the trial of militia, held in mind the offences described in the preceding section, and to be submitted to a court martial. If the offences described in the fifth section, are to be tried by a court, constituted according to the provisions of the sixth section, then we should be led by the language of that section, to suppose, that congress had in contemplation a court formed of officers in actual service, since the provision that it should be composed "of militia officers only," would other-

wise be nugatory. This construction derives some aid from the act of 1814. By that act, courts martial for the trial of offences, such as that with which Mr. Meade is charged, are to be appointed according to the rules prescribed by the articles of war. The court in the present case, is not appointed according to those rules. Additional act of April 18, 1814, 2 Story's Laws, 1424, c. 140 [3 Stat. 134, c. 82]. The only argument which occurs to me against this reasoning, grows out of the inconvenience arising from trying delinquent militia-men, who remain at home, by a court martial, composed of officers in actual service. This inconvenience may be great, and well deserves the consideration of congress; but I doubt whether it is sufficient to justify a judge, in so construing a law, as to devolve on courts, sitting under the authority of the state, a power which, in its nature, belongs to the United States. If, however, this should be the proper construction, then the court must be constituted according to the laws of the state.

On examining the laws of Virginia, it appears, that no court martial can be called for the assessment of fines, or for the trial of privates, not in actual service. This duty is performed by courts of inquiry, and a second court must sit to receive the excuses of those against whom a previous court may have assessed fines, before the sentence becomes final, or can be executed. If it be supposed, that the act of congress has conferred the jurisdiction against delinquent militia privates on courts martial, constituted as those are for the trial of officers, still this court has proceeded in such a manner, that its sentence cannot be sustained. It is a principle of natural justice, which courts are never at liberty to dispense with, unless under the mandate of positive law, that no person shall be condemned unheard, or without an opportunity of being heard. There is no law authorizing courts martial to proceed against any person, without notice. Consequently, such proceeding is entirely unlawful. In the case of the courts of inquiry, sitting under the authority of the state, the practice has, I believe, prevailed, to proceed in the first instance, without notice; but this inconvenience is, in some degree remedied, by a second court, and I am by no means prepared for such a construction of the act, as would justify rendering the sentence final, without substantial notice. But, be this as it may, this is a court martial, not a court of inquiry, and no law exists, authorizing a court martial to proceed without notice, as in this case, the court appears to have proceeded. For these reasons, I consider its sentences as entirely nugatory, and do, therefore, direct the petitioner to be discharged from the custody of the marshal.

NOTE. This case, in some of its aspects, resembles very much the case of Houston v. Moore, 5 Wheat. [18 U. S.] 1. In that case, it was said by Mr. Justice Washington, in delivering the opinion of the court, that, although the "court martial," designated in the act of 1795, was in fair construction, to be considered a court martial, organized under the authority of the congress of the United States, yet, as the act had not withheld the power conferred by it from a court martial, organized under state authority, and as it was expressly conferred by a law of the state of Pennsylvania, the state court martial had a concurrent jurisdiction with the court, pointed out by the act of congress, Story, J., and another judge, dissenting. The latter judges held, that the state law of Pennsylvania, erecting a tribunal, and vesting it with jurisdiction to carry into effect an act of congress, was unconstitutional and void. See, also, Martin v. Mott, 12 Wheat. [25 U. S.] 19. (6 Pet. Cond. R. 410.)

MEADE (INGRAHAM v.). See Case No. 7,045.

Case No. 9,373.

MEADE v. KEANE.

[3 Cranch, C. C. 51.] [1]

Circuit Court, District of Columbia. Dec. Term. 1826.[2]

EVIDENCE—PRODUCTION OF RECEIPT—COMMISSION TO TAKE DEPOSITION—CLERICAL ERROR—BY WHOM DEPOSITION WRITTEN.

1. If a witness for the plaintiff testifies that on a certain day he paid to the defendant a certain sum of money, and took his receipt, the plaintiff is not bound to produce the receipt on the trial.

2. If a dedimus issue to take depositions in a cause in which Richard M. Meade is plaintiff, whereas the name of the plaintiff was Richard W. Meade, and the commissioners certify that they took the depositions to be read in a cause in which Richard W. Meade was plaintiff, the depositions are admissible, notwithstanding the clerical error in writing an M. for a W. in the commission.

3. In taking a deposition under a commission it is not necesary that it should be written by the commissioners, or by their clerk, or by the witness.

[This was an action at law by Richard W. Meade against Richard R. Keane.] Assumpsit, for money had and received.

C. C. Lee, for plaintiff, offered to read a part of a deposition, in which the witness testified that he paid a certain sum of money on a certain day, and took his receipt.

Mr. Key, for defendant, objected, unless the plaintiff should produce the receipt.

But THE COURT (THRUSTON, Circuit Judge, contrà) overruled the objection.

Mr. Key, then objected to the deposition, because the commission, under which it was taken, purported to be issued in a cause in which Richard M. Meade (not Richard W. Meade, which was the name of the plaintiff,) was plaintiff; although the commissioners certified that they took the deposition to be read in a cause in which Richard W. Meade was plaintiff.

But THE COURT (THRUSTON, Circuit Judge, contrà) overruled this objection also;

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

[2] [Affirmed in 3 Pet. (28 U. S.) 1.]

saying it was a mere clerical error; and that a commission is not an ex parte proceeding, as is the case where a deposition is taken under the act of congress, and the parties are not bound to the same strictness.

Mr. Key also objected that the commissioners had not certified that the deposition was taken down by the commissioners or their clerk, or by the witness himself.

But THE COURT (THRUSTON, Circuit Judge, contrà) overruled this objection also.

Affirmed by the supreme court. 3 Pet. [28 U. S.] 1.

Case No. 9,374.

MEADE v. ROBERTS.

[1 Cranch, C. C. 72.] [1]

Circuit Court, District of Columbia. March Term, 1802.

PRACTICE—CALLING DOCKET—OFFER TO APPEAR—AFFIDAVIT—BAIL.

Upon calling the appearance docket, if the defendant offers to appear, the court will not give the plaintiff's attorney time to procure an affidavit to hold the defendant to special bail.

Motion to appear without special bail, there being no cause of action filed.

Mr. Woodward, for plaintiff, produced an account, but no affidavit. THE COURT decided it to be insufficient to hold to bail.

Mr. Woodward requested time to get an affidavit.

THE COURT were of opinion that the defendant had a right now to appear, and they could not amerce the marshal when an appearance was offered, unless there appeared to be a good cause of action.

MARSHALL, Circuit Justice, absent.

MEADE (ROTCHFORD v.). See Case No. 12,083.

MEADE, The GEN. GEO. G. See Case No. 5,312.

MEADER (NORTON v.). See Case No. 10,351.

Case No. 9,375.

In re MEADOR.

[1 Abb. U. S. 317; 2 Am. Law T. Rep. U. S. Cts. 140, 153; 10 Int. Rev. Rec. 74; 5 Am. Law Rev. 166; 3 West. Jur. 209; 2 Leg. Gaz. 193.] [2]

District Court, N. D. Georgia. Aug. 24, 1869.

INTERNAL REVENUE LAWS—COMPELLING PERSONS TO TESTIFY—POWERS OF SUPERVISOR.

1. It is not necessary, in order to support an application by a supervisor of internal revenue, for an attachment to compel a person liable to taxation to appear and testify and produce his books, &c. that the supervisor should appear to have acted, in issuing the summons, under any special instructions from the commissioner of internal revenue. The supervisor must obey any special instructions which are shown to have been given. But in the absence of proof of instructions, it will be presumed that his acts have been in pursuance of his official duty.

[Cited in Re Platt, Case No. 11,212; U. S. v. Three Tons of Coal, Id. 16,515.]

2. The extent of the powers of a supervisor of internal revenue to order persons chargeable with a tax to appear before him for examination, and to produce books and papers; and the powers of a district court to punish disobedience to such order as a contempt,—explained.

Application for an attachment for contempt.

J. Milledge, Dist. Atty., and L. E. Bleckley, for the motion, cited 1 W. Bl. 555; 4 Bancr. Hist. U. S. 414; Act July 13, 1866, § 9 (14 Stat. 102); Act July 13, 1866, § 14 (14 Stat. 151); Conk. Tr. 740; Act July 20, 1868 (15 Stat. 125); Act 1831 (4 Stat. 457); 3 Am. Law Rev. 641.

O. A. Lochrane and L. J. Gartrell, in opposition, cited In re Judson [Case No. 7,563]; 5 Taunt. 260; Act March 2, 1831; Brightly, Fed. Dig. 94, 166, 168, 189; 1 Nev. & M. 725; [Geyger v. Geyger] 2 Dall. [2 U. S.] 333; Henry v. Ricketts [Case No. 6,386]; De Lome, 89, note; Writs of Assistance; Int. Rev. Acts 1866–67, p. 286; L. R. 417; Law U. S. Cts. 47; Code Ga. 995; Hurd, Hab. Corp. 325–328; 11 Exch. 290; Brown v. Galloway [Case No. 2,006].

ERSKINE, District Judge. The supervisor of internal revenue for the states of Florida and Georgia issued a summons against each of the members of the firm of Meador & Brothers, dealers in tobacco, in Atlanta, Georgia, under a provision contained in section 49 of the act of congress of July 20, 1868, requiring them to appear before him, at his office, at a certain time, and to testify under oath, and to produce their books, papers, &c. relating to any business transacted by or through them, from July 20, 1868, to July 1, 1869. The foregoing is only a synopsis of the contents of the summons. The parties were duly served, but failed to appear or to produce their books before the supervisor. He then made application to me, in pursuance of a provision contained in section 9 of the act of July 13, 1866 (14 Stat. 102), for an attachment against the Meadors. But, before it was issued they voluntarily appeared; an attachment nisi was granted and time given to them to show cause why it should not be made absolute. On the return day, they appeared, and by their counsel, Gartrell and Lochrane, placed their defense on file. It is in substance as follows:

First. That so much of the act of July, 1868, as grants authority to a supervisor to compel persons to testify and to produce their books, &c. in an imaginary case, is unconstitutional and void.

Second. If constitutional, still the supervisor can only proceed to compel the production of books, &c. in the same manner and

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

[2] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission. 5 Am. Law Rev. 166, and 2 Am. Law T. Rep. U. S. Cts. 153, contain only partial reports.]

to the same extent as assessors can do; and that neither "can compel persons to testify and produce their books, &c. in an imaginary case against parties residing out of their districts."

Third. That section 49 of the act authorizing the supervisor to summon any person to produce books, &c. and to appear and testify under oath, is of no effect, "because the provisions of the act of July, 1866, for enforcing the summons are inconsistent with the provisions of existing laws for the punishment of contempts."

Fourth. That no order of punishment can be rendered in a case before the judge, for disobeying a summons to appear before a supervisor, as the act "directs that no order can be issued inconsistent with existing laws for the punishment of contempts, and by those laws no court or tribunal can punish for contempt, except as against violations of its own orders."

Fifth. That the powers here claimed by the supervisor "are judicial powers, and that the judiciary is expressly fixed by the constitution and previously existing laws—neither assessors nor supervisors forming any part of it."

During the argument, which was elaborate and able, additional propositions were advanced orally, and various objections were taken to the constitutionality of section 9 of the act of 1866, and section 49 of the act of 1868.

Section 49 of the act of 1868 (15 Stat. 144), after providing for the appointment by the secretary of the treasury, on the recommendation of the commissioner of internal revenue, of certain officers, to be called supervisors of internal revenue, proceeds to define their duties and powers as follows: "It shall be the duty of every supervisor of internal revenue, under the direction of the commissioner, to see that all laws and regulations relating to the collection of internal taxes are faithfully executed and complied with; to aid in the prevention, detection, and punishment of any frauds in relation thereto, and to examine into the efficiency and conduct of all officers of internal revenue within his district; and for such purposes, he shall have power to examine all persons, books, papers, accounts, and premises, and to administer oaths and to summon any person to produce books and papers, or to appear and testify under oath before him, and to compel a compliance with such summons in the same manner as assessors may do," &c.

The mode by which assessors may compel a compliance is pointed out in section 9 of the act of 1866: "In case any person so summoned shall neglect or refuse to obey such summons, or to give testimony, or to answer interrogatories as required, it shall be lawful for the assessor to apply to the judge of the district court or to a commissioner of the circuit court of the United States for the district within which the person so summoned resides for an attachment against such person as for a contempt. It shall be the duty of such judge or commissioner to hear such application, and, if satisfactory proof be made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing, the judge or commissioner shall have power to make such order as he shall deem proper, not inconsistent with the provisions of existing laws for the punishment of contempts, to enforce obedience to the requirements of the summons and punish such person for his default or disobedience."

At the opening of the proceedings, Mr. Milledge, United States attorney, stated that he held a letter of instructions from the commissioner of internal revenue to the supervisor, dated June 11, 1869, and added that it was desirable it should be read to satisfy the Meadors that it was not idle curiosity, but duty, that guided him in issuing the summons. It was produced and read.

The substance of the letter was, that certain officers of the internal revenue department had been in Georgia, examining with reference to the affairs of certain dealers in tobacco, snuff, &c., whose factories in Virginia and North Carolina had been seized, and that the assessor at Atlanta was instructed to procure information from agents of the tobacco houses in question, which it was necessary to use in connection with the cases in which the officers referred to were engaged. He is then instructed to obtain from the books, &c. of these agents,—whose names would be furnished to him by the said assessor,—the information needed by the said officers, and forward it to them, at Richmond, Virginia.

It was argued for the Meadors that the provision in the act giving power to the supervisor to compel persons to testify under oath before him, and to produce their books, papers, &c. for his inspection, in an imaginary case, is unconstitutional and void.

Admit the assumption—directly or hypothetically—does it therefore follow that the law is unconstitutional? If this is an "imaginary case"—a mere visionary fancy emanating from the brain of the supervisor—it ought not to be countenanced; for a proceeding of this kind might prove little less hurtful to the mercantile interests of the Meadors than one begun and prosecuted to gratify sinister inquisitiveness or mischievous espionage, and not bona fide, and for the public good. Moreover, to institute a proceeding or action, not to determine a right or controversy, but to deceive the court and raise a prejudice against third persons, is a contempt. Coxe v. Phillips, Cas. T. Hardw. 237, 3 Hawk. P. C. 229.

But after a careful perusal of the statute and the letter of the commissioner (which letter is in evidence), my mind is satisfied that this proceeding is not in an imaginary case;

but that, on the contrary, there was sufficient cause for the issuing of the summons by the supervisor, and that his action in the premises was warranted by the statute. If so, then this proceeding is legitimately here. Under direction of the commissioner, it is the duty of the supervisor to aid in the prevention, detection and punishment of any frauds in reference to the collection of internal revenue. The commissioner informs him that certain tobacco factories had been seized in Virginia and North Carolina; and directs him to procure the names of the agents of those factories, and to ascertain from their books, papers, &c. information needed by certain internal revenue employees or officers, touching the factories seized. Upon these instructions he seems to have acted.

But it must not be imagined from what has been just said that either written or verbal instructions are necessary before the supervisor can issue a summons under section 49 of the act of 1868. Congress did not so intend to limit his authority and usefulness. True, he must obey and follow the instructions of the commissioner when given. He must also act in good faith. And a public officer is presumed to act in obedience to his duty, until the contrary appears.

The ruling on this point being adverse to the Meadors, the proceedings, with the exception of, perhaps, some brief details, might end here; so far, at least, as the constitutionality of the provision in section 49 of the act of 1868, has been impugned. For, if this provision is void, when there is no real case, the presumption is fair that it is constitutional and valid, when the case is not an imaginary one.

Another point was presented and discussed, namely: That, granting the constitutionality of the provision, still, the supervisor can only proceed to compel parties to appear, testify or produce their books, &c. in the same manner, and to the same extent as assessors can do; and that neither can compel them to do any of these acts, in an imaginary case against persons residing out of his (the supervisor's) district.

Section 49 declares that it shall be the duty of the supervisor to aid in the prevention, detection and punishment of any frauds in relation to the collection of internal taxes, and to examine into the efficiency and conduct of all officers of internal revenue within his district.

For what purpose were the powers in question conferred upon the supervisor? The act says to aid in the prevention, detection, and punishment of any frauds in relation to the collection of taxes. There are no words in this clause—nor can any be imported into it—restricting the operation and effect of the supervisor's action to the territorial boundary of his district. True, his action is within his denominated district; but the legal consequences of the action may affect persons or things elsewhere. The next clause confers on the supervisor powers distinct and different from these, namely, to examine into the efficiency and conduct of the revenue officers within his district. And on this point I concur with the counsel for the Meadors. I likewise agree with them, that the supervisor can compel the production of books, &c. only in the manner and to the extent that an assessor can, under section 9 of the act of 1866. When either issues a summons, and the party served neglects or refuses to appear, to testify under oath, or to produce his books, &c. the power of each—the one as assessor, and the other as supervisor—is exhausted. For remedy, to compel compliance with the exigencies of the summons, he must make application in the manner provided in the section last referred to, to a judge or a commissioner.

Even on the hypothesis that this is an imaginary case, it is yet due to counsel on both sides, that the clauses cited from section 49 of the act of 1868, should receive a construction to the extent of their argument. Counsel for the Meadors insisted that section 49, empowering the supervisor to summon persons to appear, produce books, &c. and to testify under oath, is of no effect, because the provision in section 9 of the act of 1866 is inconsistent with the provisions of existing laws for the punishment of contempts.

It may be borne in mind that the section just referred to gives the same power to the judge to punish for contempts when acting under the authority of these revenue statutes as is possessed by the national courts themselves.

Congress, deriving authority from the constitution to ordain and establish courts of justice subordinate to the supreme court, has hitherto conferred upon these courts such jurisdiction as it has thought proper to bestow; but there still lie dormant in the national legislature vast and various powers which only await the exigency essential to call them into action.

Notwithstanding the jurisdiction of the national courts—supreme and inferior—is limited; they yet possess powers not granted by positive law; not independent, but auxiliary. For instance, although they have been vested by statute with power to inflict punishment for contempts (act of 1789 [1 Stat. 93], modified, after the impeachment of Judge Peck, by the act of 1831), still it does not follow, either from the peculiar constitution of these courts—their limited and defined powers—or the statutes declaratory of these powers, that they could not exercise the same authority without the aid of acts of congress; for the right to inflict summary punishment for a contempt is an inherent one, and indispensable to all courts of justice.

Chief Justice Marshall, in the case of U. S. v. Hudson, 7 Cranch [11 U. S.] 32, said: "Certain implied powers must necessarily result to our courts of justice from the nature of their institution. . . . To fine for con-

tempt—imprison for contumacy—enforce the observance of order, &c. are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others; and so far, our courts no doubt possess powers not immediately derived from statute."

Section 1 of the act of March 2, 1831, empowers the several courts of the United States to issue attachments and inflict summary punishment for contempts of court, but this power shall not extend to any cases except, &c., ". . . and the disobedience or resistance by any officer of said courts, party, juror, or witness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of the said courts." See also the act of 1789.

Unlike those courts which have their origin in the common or unwritten law, the courts of the United States were created by written law. In the former, the jurisdiction is general, and all the proceedings brought before them are presumed to be within their cognizance until the contrary appears. In the latter, the jurisdiction is limited and defined, and they can take cognizance of such proceedings only as are affirmatively shown to be within their jurisdiction. Yet they possessed certain unexpressed powers incidental and appurtenant to all courts of adjudicature.

Comparing the provision of section 9 of the act of July, 1866, with the act just quoted and the act of 1789 referred to, I have failed to perceive wherein section 9 is inconsistent with either of those statutes. The powers granted by those acts are, I apprehend, sufficiently ample to enable the judge to carry into effect the provisions of section 9 of the act of 1866.

It was insisted that no court or tribunal could punish for contempt, except for violations of its own orders. This, as a general proposition, is correct. But, in proceedings under section 9 of the act of 1866, the question of contempt would arise for consideration only when some process or other lawful command of the judge was disobeyed.

It was contended, also, that the authority claimed by the supervisor to issue summons, requiring persons to appear before him, is a judicial act. That issuing a summons and requiring persons to appear, testify under oath, produce books, &c. may be, if taken in an extended sense, a judicial act, must, I think, be admitted. But the mere issuing of a summons is in itself only a ministerial act. Nor did congress in using the term "summons," in section 49 of the act of 1868, contemplate it to be of the legal dignity of a writ, or other judicial process; but simply a notice—and similar in its nature to a summons issued by an overseer of roads requiring persons to attend, with the necessary implements, and to work on the public highway. His summons, as has already been said, neglected or disobeyed, his authority ends. He must then apply to the proper officer, as directed by section 9 of the act of 1866, to enforce obedience. And when the alleged delinquent is brought before the judge, he will "proceed to a hearing of the case"; and then, and not till then, can it be properly said that there is any exercise of judicial authority.

There exists in every political sovereign community the inherent power of guarding its own existence and protecting and exalting the happiness and welfare of its people at large. This sovereign power is known as the eminent domain of the nation or state, and embraces the power to appropriate the acquisitions of its subjects or citizens to public purposes, and to control and preserve the relations of social life—internal polity or police, public health and public morals.

Generic with the power of eminent domain is the power of taxation; each is essentially a sovereign attribute, lodged in the aggregate of the people. When the right of eminent domain is exercised, it appropriates property exceeding the owner's share of contribution to the public burden. Taxation is the proportional and reasonable assessment which may be imposed from time to time upon persons or property. The national constitution prohibits the taking of private property for public use without just compensation. The tax-payer receives a full and just compensation for his share of contribution to the public necessity by the benefit conferred on him, in the proper appropriation of the tax paid.

Notwithstanding these two powers have, in my judgment, a common origin, both being inherent in the sovereign authority—the object of both being the safety and welfare of the whole community—yet the weight of authority would seem to be that there exists a distinction between these two modes of taking individual property for public use. West River Bridge Co. v. Dix, 6 How. [47 U. S.] 507; Brewster v. Hough, 10 N. H. 138,—in which it was held "that the power of taxation is essentially a power of sovereignty, or eminent domain." But see Com. v. Alger, 7 Cush. 53, and Williams v. Mayor of Detroit, 2 Mich. 560. The direct question has not—at least so far as my knowledge extends—been decided by any of the national courts. See State of New Jersey v. Wilson, 7 Cranch. [11 U. S.] 164; Charles River Bridge v. Warren Bridge, 11 Pet. [36 U. S.] 420, 640, Story, J.; Gilman v. City of Sheboygan, 2 Black. [67 U. S.] 510. But whether there is any substantial difference in principle is not here a question requiring determination. It is enough for me on this occasion to declare that congress has not made any provision for trial, by jury, whether property be taken by right of eminent domain, or by authority of the taxing power.

It is, nevertheless, unquestionable that when the government appropriates individual property for public purposes, the obligation to make just compensation is concomitant;

but congress is the sole judge of how the compensation shall be ascertained and paid. And as to the executorial and summary modes employed for the collection of taxes—fixed debts due to the government—although they cause a certain diversity in "the law of the land," and although such proceedings have been sometimes questioned, as infringing the right of trial by jury; nevertheless, it is, at this day, too well settled in this country—and in England from time immemorial—to be now disputed. Moreover, the collection of the excise or public taxes has never been deemed a judicial, but simply a ministerial act. Murray v. Hoboken Land & Imp. Co., 18 How. [59 U. S.] 272; Peirce v. City of Boston, 3 Metc. (Mass.) 520.

Out of the provision in section 49 of the act of 1868, empowering a supervisor to examine premises, and to issue summons requiring persons to appear before him, testify under oath, produce their books, papers, &c. —and that part of section 9 of the act of July, 1866, which provides the mode of compelling obedience to the summons—two questions arise for adjudication. The one is based upon the fourth amendment of the constitution, which says "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized." The other is found among the enumerated private rights in the fifth amendment, and is as follows: No one shall "be deprived of life, liberty, or property, without due process of law."

The rights of personal security, personal liberty, and private property—and incidentally, the near identity of writs of assistance and general warrants to the summons issued by the supervisor, were fully discussed.

The introduction into the constitution of the provisions in regard to search warrants, was doubtless occasioned by the strong feeling excited both in England and America, from the practice of issuing general warrants on bare suspicion and without foundation, empowering the officer to enter and search any house, to break open any receptacle, seize and carry away all or any private papers or other property. These abuses had continued for many years until, at length, in 1765, the court of king's bench (then presided over by Lord Camden), in the case of Entick v. Carrington, 2 Wils. 275, declared them to be manifestly illegal. Vide Huckle v. Money, Id. 205; Money v. Leach, 1 W. Bl. 555; Com. v. Dana, 2 Metc. [Mass.] 329; Story, Const. § 1901. Several years anterior to the decision in Entick v. Carrington, the illegality of general warrants had been eloquently maintained by James Otis, in Massachusetts, in the discussion had respecting writs of assistance. The writer of an able article on Mr. Otis in the July number of the Am. Law Rev. (1869), gives a brief history of these writs, derived from notes to Quincy by Mr. Justice Gray, of the supreme judicial court of Massachusetts. A copy of this writ may be found in the article. It authorized the person to whom it was issued to enter, accompanied by a sheriff, justice of the peace, or constable, any house, where uncustomed goods were suspected to be concealed; and, if resistance was made, the writ empowered the searcher to break open the house and seize the goods. These writs, modified in some degree, are still of force in England. 3 Am. Law Rev. 641; 4 Bancr. Hist. U. S. 414.

Counsel for the Meadors contended that, if there was any distinction in principle between general search warrants or writs of assistance and the power claimed by the supervisor to enter and examine premises, and to issue summons requiring persons to appear before him, &c., there was no difference in their practical effect—each being repugnant to the constitution, and all equally illegal.

The first point in the question presented for decision, is as to the right of the supervisor to enter and examine the premises. This power, as already noticed, is given by section 49 of the act of 1868, and no warrant whatever is made necessary before entry and examination.

Sir William Blackstone, speaking of the excise duty, which is an inland imposition upon commodities, charged, in some cases, on the manufacturer, and in others, on the seller or dealer in the manufactured articles, and answering substantially to our system of internal revenue or taxes, says: "The frauds that might be committed in this branch of the revenue, unless a strict watch is kept, make it necessary, wherever it is established, to give the officers the power of entering and searching the houses of such as deal in excisable commodities at any hour of the day, and, in many cases, the night likewise." 1 Bl. Comm. 318. Such was the law of England and of the colonies prior to the war of independence, and so it has continued to this day under the national government, and in nearly every state of the Union; and the validity of this apparently rigorous law, in its application to the inland revenue and the collection of taxes, has never yet been successfully questioned. Vide Act March 3, 1791 (1 Stat. 139); Act May 8, 1792 (1 Stat. 267); Act July 22, 1813 (3 Stat. 22) &c.

The second point in the question for determination involves the right of the supervisor to issue summons requiring persons to come before him, to testify under oath, and to produce their books, &c., for his inspection. The legal principles which govern the first point in this question are so closely blended with those which control the second, that the answer given to the first might suffice for this.

The objection made to the power given to

the supervisor by the statutes is, as just mentioned, that it is forbidden by the fourth amendment to the constitution. But this is a civil proceeding, and in no wise does it partake of the character of a criminal prosecution; no offense is charged against the Meadors. Therefore, in this proceeding, the fourth amendment is not violated. Said Merrick, J., in pronouncing the judgment of the court in Robinson v. Richardson, 13 Gray, 454: "Search warrants were never recognized by the common law as processes which might be availed of by individuals in the course of civil proceedings, or for the maintenance of any mere private right; but their use was confined to cases of public prosecutions, instituted and pursued for the suppression of crime or the detection and punishment of criminals." Murray v. Hoboken Land & Imp. Co., supra; 1 Bish. Cr. Proc. § 716. I do not perceive any likeness in principle between the summons issued by the supervisor and either general warrants or writs of assistance.

The second question in this branch of the case grows out of that important private right secured to the citizen by the fifth amendment, that he shall not "be deprived of life, liberty, or property, without due process of law." This provision is deduced from its grand original, chapter 29 of the Great Charter, which protected every individual in the free enjoyment of his life, his liberty and his property, unless declared to be forfeited by the judgment of his peers, or the law of the land. By "law of the land" was probably meant the ancient Saxon common law.

In Murray v. Hoboken Land & Imp. Co., supra, it was said by Curtis, J., in delivering the judgment of the court: "The words 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land.'" If the converse of this be true, the phrase, "by the law of the land," imports a meaning as comprehensive as "due process of law," and consequently includes, like the latter, trial by jury. But neither—even in an enlarged sense—means that, to deprive a man of his life, his liberty, or his property by means of the law in its regular administration through courts of justice, the intervention of a jury is, in all cases, necessary. Take for instance the case of a person indicted for a capital or other offense, and who, on arraignment, instead of pleading "not guilty" to the charge elects, for reasons satisfactory to himself to plead "guilty;" if the indictment be sufficient in law the court awards judgment against him; and this is judgment "by the law of the land," and as lawful under the constitution as if he had been tried and found guilty by the judgment of his peers. So, if a person stands in contempt of the court, the court summarily punishes him by fine and imprisonment, or either, thus depriving him of his property, or liberty, or both, without a trial by jury. And it may be remarked that if the imprisonment be for a time certain, executive pardon is the only mode of releasing him, before the expiration of his sentence. So, in cases of demurrer or special verdict, or where a person makes default, or confesses judgment; and so, too, in equity causes, where trial by jury is quite unusual, men are deprived of their property. Other instances could readily be given to show that the words "by the law of the land," "due process of law," do not necessarily import a jury trial as essential in every case to deprive a person of his life, liberty or property. Indubitable proof of this may be found in the case of Murray v. Hoboken Land & Imp. Co., supra.

That case arose out of the act of May 15, 1820 (3 Stat. 592). The main question was, whether the issuing, by the solicitor of the treasury, of what was denominated in the statute a warrant of distress, against a defaulting collector of revenue, was in conflict with the constitution. The court held the law to be valid, and not inconsistent with the constitution. The decision was placed mainly on the ground that the ancient common law of England recognized a summary remedy for the recovery of debts due to the government. See Martin v. Mott, 12 Wheat. [25 U. S.] 19; U. S. v. Ferreira, 13 How. [54 U. S.] 40.

It was further insisted that the power given to the supervisor is violative of that clause in the fifth amendment to the constitution which declares that no one shall be compelled in any criminal case to be a witness against himself. This clause, like that in the fourth amendment in reference to search warrants, is applicable to criminal cases only.

And here a thought suggests itself. As the Meadors, subsequently to the passage of this act of July 20, 1868, applied for and obtained from the government a license or permit to deal in manufactured tobacco, snuff and cigars, I am inclined to be of the opinion that they are, by this their own voluntary act, precluded from assailing the constitutionality of this law, or otherwise controverting it. For the granting of a license or permit—the yielding of a particular privilege—and its acceptance by the Meadors, was a contract, in which it was implied that the provisions of the statute which governed, or in any way affected their business, and all other statutes previously passed, which were in pari materia with those provisions, should be recognized and obeyed by them. When the Meadors sought and accepted the privilege, the law was before them. And can they now impugn its constitutionality or refuse to obey its provisions and stipulations, and so exempt themselves from the consequences of their own acts?

These internal revenue or tax laws were characterized as being not only repugnant to the constitution, but also unreasonably burdensome. With the most minute attention I examined those portions of the acts of July 13, 1866, and July 20, 1868, presented for my consideration; and carefully sought to ascer-

tain whether they were in conflict with any of the provisions of the constitution. My conclusion on that question has been expressed. I do not concur with counsel, that these laws are unreasonably burdensome. But even if they are, nay, even if they are oppressive, and unjust modes are employed for their enforcement, the remedy lies with congress, and not with the judiciary. By enacting these laws congress has exercised the constitutional power of taxation, and the courts have no power to interfere. Providence Bank v. Billings, 4 Pet. [29 U. S.] 514; Extension of Hancock Street, 18 Pa. St. 26; Kirby v. Shaw, 19 Pa. St. 258; Livingston v. Mayor, etc., of New York, 8 Wend. 85; In re Opening Furman Street, 17 Wend. 649; Herrick v. Randolph, 13 Vt. 525. In McCulloch v. State of Maryland, 4 Wheat. [17 U. S.] 316, 430, Chief Justice Marshall said, that it was unfit for the judicial department to "inquire what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power."

Thus it will be seen that there are many cases in which the right of property must be made subservient to the public welfare. The maxim of the law is, that a private mischief is to be endured rather than a public inconvenience. On this ground rests the right of public necessity. 2 Kent, Comm. 336. And it is well to bear in mind that the national government is supreme within its constitutional limits, for to it is intrusted the paramount interest of the whole nation.

In declaring and carrying into effect the laws, my action, as a judge, will ever be "to use the least possible power adequate to the end proposed." Yet, let no one hesitate to do homage to the law; the very least as feeling her care, and the greatest as not exempted from her power.

Order.—It is ordered that the said John T. Meador, Newton J. Meador, and James G. Meador, composing the firm of Meador & Brothers, dealers in tobacco, in obedience to the summons of the supervisor, appear forthwith before him, and answer under oath, touching the receipt, storage, delivery or sale by the firm of Meador & Brothers, between July 20, 1868, and July 1, 1869, of any and all tobacco which came to their possession, or under their control in the way of business, during said period. And, also, that they, at the same time, produce to the said supervisor all books and papers of said firm, specified in said summons, which contain any entry, statement, or communication touching or in any way relating to tobacco.

And it is further ordered, that the clerk file this opinion in his office, and, that on payment of his fee, he furnish to the supervisor a copy of the same certified under his official seal.

NOTE. An application was made, a few days after the above determination, by the defendants' counsel, for a writ of error, and a supersedeas. Objection was made in behalf of the government, that no provision of law existed whereby a writ of error would lie to a decision made by the judge in a proceeding of this nature out of court, and whilst he was sitting simply as judge under the revenue acts of 1866 and 1868. The objection was sustained, and the application denied.

Case No. 9,376.

MEADOR et al. v. EVERETT.

[3 Dill. 214;[1] 10 N. B. R. 421; 1 Cent. Law J. 453.]

Circuit Court, W. D. Missouri. Aug., 1874.

LEASE—ASSIGNMENT BY LESSOR AS SECURITY—RIGHTS OF SUCH ASSIGNEE AGAINST THE ASSIGNEE IN BANKRUPTCY.

The assignment, transfer and delivery of a lease by the lessor to secure a debt, is valid as against the assignee in bankruptcy of the lessor.

[Cited in Platt v. Preston, Case No. 11,219; Re Oliver, Id. 10,492.]

Appeal in bankruptcy. In the bankruptcy proceedings against [R. D. Everett, assignee of] L. H. Clark, in the district court, the petitioners, Daniel F. Meador and his copartners, filed a petition in the nature of a bill in equity for the enforcement of a lien, to which the district court sustained a demurrer and dismissed petition. The petitioners, Meador & Co., appeal from this action of the district court. Their petition as filed in the district court, in substance states, that, in July, 1870, the complainants sold to L. H. Clark, one of the bankrupts, certain furniture to be used in his hotel at Kansas City, for the sum of $6,731.90, for which said Clark executed six notes for $1,000 each, payable in two, three, four, five, six and seven months from date, and one note for $731.90, payable eight months from date; that the same having been proved against the estate of said Clark, that on the 1st of May, 1870, Clark executed a lease of said hotel to one J. C. Parks for five years; that Parks took possession of the property under the lease July 1st, 1870; that the lease was duly recorded July 8th, 1870; that on the 7th day of July, 1870, said Clark, to secure the payment of said notes, assigned, transferred and delivered possession of said lease to complainants with the consent of said Parks; that on the 6th of July, 1870, said Clark gave complainants a power of attorney to receive and collect the rents accruing to said Clark under the lease, until their debt should be paid, and thereby authorized and empowered them to do and perform all in reference to said lease that said Clark himself could do; that on the 6th of July, 1870, as a further security, and a further recognition of the assignment of said lease from said Parks, said Clark drew his bill of exchange for $6,731.90 on said Parks, who accepted the same, thereby becoming liable for said debt, and agreeing to apply the rent of said building to its payment, as the

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

same became due; that said Everett, as assignee, now has possession of said hotel; and that by reason of the premises complainants have a lien upon the rents of said hotel, and pray that the assignee be required to rent said hotel for —— months, the proceeds to be applied to the payment of their debt, and for general relief.

W. B. Napton, Jr., for petitioners.
Lay & Belch, for assignee in bankruptcy.

DILLON, Circuit Judge. The bankrupt, owning a hotel, made a lease of it for five years to one Parks, reserving rent. Being indebted to the petitioners, the bankrupt, to secure them, it is alleged, "assigned, transferred and delivered possession of said lease to the petitioners, with the consent and sanction of said Parks, the lessee." At the same time it is further alleged, that "the bankrupt executed to the plaintiffs a power of attorney to receive and collect the rents accruing under the said lease, and to do and perform all acts with reference to said lease that the said lessor himself could do." And it is further alleged that lessee accepted the lessor's bill in the plaintiffs' favor for the amount of their debt against the lessor, said bill to be paid out of the rents as they fell due. No copy of the lease or assignment, or power of attorney is in the record, but according to the averments it must be taken that the assignment was in writing. In the absence of the written assignment and instrument I can do no more than to indicate the legal rights of the parties upon the facts set forth in the plaintiffs' petition.

If the transaction between the bankrupt and the plaintiffs gave to the latter any rights or equities in respect to the rents or the demised property, the assignee in bankruptcy takes the estate subject thereto. In this respect he stands precisely in the place of the bankrupt. Assuming the allegations of the petition to be true, they show in the plaintiffs, as against the bankrupt, such rights in respect to the rents or demised property as the law will recognize and protect. It is well settled that it is competent for the lessor to separate, by contract or devise, the rent from the reversion, retaining one and disposing of the other, or disposing of the rent to one person and the reversion to another. 1 Washb. Real Prop. 338, where many cases are collected.

Whatever the contract between the bankrupt and the plaintiffs shows the former disposed of to the latter, will be binding upon the former and his assignee in bankruptcy. In Russel v. Russel, 1 Brown, Ch. 269, it was decided that the pledge of a lease by the lessor, by delivery, merely, was in equity a mortgage of the lease-hold estate as against the assignee in bankruptcy. Much more clearly would this be the case where there was an express assignment and delivery of the lease by the lessor to secure a debt. In Ex parte Wills, 1 Ves. Jr. 162, Lord Chancellor Thurlow, said: "An assignment of rents and profits is an odd way of conveying, but it amounts to an equitable lien, and would entitle the assignee to come into equity and insist upon a mortgage."

The petition states a case which, prima facie, as to the demised estate puts the plaintiffs, so far as necessary to secure payment of their debt against the bankrupt, in the place of the bankrupt, and therefore the demurrer of the assignee ought to have been disallowed. The extent of the plaintiffs' rights I can not determine in the absence of the lease, the assignment and power of attorney. I only hold that the petition makes a case giving, to some extent at least, a lien which the bankruptcy court should respect. I see no reason why the rights of the plaintiffs and assignee may not be well determined upon the petition of the plaintiffs.

The order sustaining the demurrer and dismissing the petition is reversed, and the district court directed to permit the assignee to answer the petition if he shall be so advised. Ordered accordingly.

NOTE. After the cause was remanded it was tried on its merits in the district court, which rendered a decree dismissing the petition of Meador & Co.; and on appeal this decree was affirmed on the ground that Meador & Co. failed to show any assignment or delivery of the lease to them, and because, by the statute of Missouri, assignments of leases are required to be in writing, and to be recorded, or else are declared void as to all persons except the parties thereto, and persons having actual notice thereof. 1 Wag. St. p. 277, §§ 24–26; Id. p. 287, § 33; Id. p. 655, §§ 2, 3.

MEADOW, In re. See Case No. 9,375.

Case No. 9,377.

MEAGHER v. The LIZZIE.

[2 Woods, 243.] [1]

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

APPEAL — ADMIRALTY — FACTS NOT AVERRED IN PLEADINGS NOR SHOWN IN EVIDENCE.

Where, on a libel in rem to recover for repairs to a steamer, the jurisdiction of the district court was submitted to and the cause tried on its merits; after appeal to the circuit court, the claimants could not for the first time set up that the repairs were made in the home port of the steamer, and therefore did not create a maritime lien, no such fact being averred in the pleadings or shown by the evidence.

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

[This was a libel by M. Meagher and J. Meagher against the steamboat Lizzie, to recover a balance due for repairs.]

B. Egan, for libellants.
Thomas Gilmore, for claimants.

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

BRADLEY, Circuit Justice. This suit was brought to recover a balance claimed by the libellants to be due them for repairs made to the steamer Lizzie. The point is taken by the claimants in this court for the first time, that the repairs were made to the steamer in her home port, and therefore did not create a maritime lien. This point is made too late, and is not tenable now. It is not made by the pleadings, nor was it made in the district court, and I cannot find anything in the evidence even to show that the Lizzie belonged to the port of New Orleans when the repairs were made. The jurisdiction of the court was submitted to, and the cause tried on its merits. The objection cannot be raised now.

Case No. 9,378.

In re MEALY.

[2 N. B. R. 128 (Quarto, 51).] [1]

District Court, N. D. New York. 1868.

BANKRUPTCY—FEES—BY WHOM PAID—FURTHER STATEMENTS BY BANKRUPT.

The party for whom services are performed by the officers of the court must pay the fees incident to such service. A creditor is only bound to pay expenses of his own examination. A bankrupt making further statements, after creditor's examination is closed, must pay his own expenses.

[Criticised in Re Noyes, Case No. 10,370.]

A creditor had obtained an order for the examination of the bankrupt [Stephen A. Mealy] and other witnesses in respect to the property, &c., of the bankrupt, and upon that examination it was insisted by the bankrupt that the creditor was bound to pay not only the register's fees for the direct examination of such bankrupt and witnesses, but also fees charged for taking down the statement of the bankrupt on the so-called cross-examination of the bankrupt by his own counsel, and the fees for taking down the bankrupt's cross-examination of the witnesses produced and examined by the creditor. The register being of opinion that the creditor was bound to pay such fees, the question was certified to the district judge.

HALL, District Judge. The general rule in regard to the payment of the fees of officers of the court undoubtedly is that such fees must be paid, in the first instance, by the party or persons for whom the service is performed; subject, of course, in respect to the party upon whom the burden shall ultimately rest, to the decree or judgment of the court upon the final disposition of the case. This rule is applicable in its full force to the case above presented, and the creditor is only bound to pay the expenses of his own examination of the bankrupt and the direct examination of the witnesses produced by such creditor, and of his cross-examination of the witnesses produced by the bankrupt. The rule suggested by the register might lead to great abuses, and the fact that a bankrupt might, after the direct examination was closed, go on and charge the opposing creditor with large sums for taking down an irrelevant statement requires that the general and proper rule should be vigorously adhered to.

If the bankrupt make further statements, after his examination by the creditor is closed, he does so as a witness in his own behalf, and must pay the expenses of his examination—the same as those of the examination of any other witness called by him.

The rule which should govern in cases of this character is, in substance, that laid down by Chancellor Walworth in Trustees of Watertown v. Cowen, 5 Paige, 510.

[1] [Reprinted by permission.]

Case No. 9,379.

MEANY v. HEAD.

[1 Mason, 319.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1817.

REPLEVIN — WHEN LIES — UNLAWFUL TAKING — PLEA OF NON CEPIT—LIENS—JUS AD REM—IN RE.

1. Replevin does not lie unless there has been an unlawful taking from the possession of another. If after a bailment of goods, they are unlawfully converted or detained, detinue or trover and not replevin is the proper remedy.

[Cited in Williamson v. Ringgold, Case No. 17,755.]

[Cited in note to Chinn v. Russell, 2 Blackf. 176. Cited in Marshall v. Davis, 1 Wend. 113. Distinguished in Kimball v. Adams, 3 N. H. 184. Cited in Osgood v. Green, 30 N. H. 216; Ramsdell v. Buswell, 54 Me. 548; Holmes v. Doane, 3 Gray, 330. Approved in Richardson v. Reed, 4 Gray, 443.]

2. A lien is neither a jus ad rem, nor a jus in re, but a simple right of retainer. It is therefore not attachable as personal property, or as a chose in action of the person, who is entitled to it.

[Cited in The Alida, Case No. 199; Raft of Spars, Id. 11,528.]

[Cited in McMahan v. Green, 12 Ala. 71; Andrews v. Burdick, 62 Iowa, 722, 16 N. W. 279. Approved in Smith v. Jewett, 40 N. H. 513.]

3. Non cepit in replevin puts in issue the question of general property only, and not of special property; at least in a suit between the principal and his agent. On non cepit, the issue must be for the defendant, if there was not a wrongful taking of the goods from the possession of another.

[Cited in Marshall v. Davis, 1 Wend. 113.]

Replevin for two hundred barrels of rye flour. Plea, that the property of the goods at the time, when, &c. was in one Charles W. Greene, and not in the plaintiff [John Meany]. Replication denying the plea, and alleging property in the plaintiff; upon which an issue was taken to the country. At the trial, it appeared that the goods were the property of the plaintiff, and had been con-

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

signed by him to Charles W. Greene, for sale; and Mr. Greene placed them in the store of the defendant [Charles Head] on storage. Mr. Greene having failed in business, a Mr. Haskins, as a creditor of Greene, on the 5th of February, 1817, sued out a trustee writ against Greene and the defendant, as his trustee; and process was actually served on the defendant, on the 5th of the same month. Upon the 6th of the same month, the plaintiff gave notice to the defendant, that certain wheat flour, and other merchandise, placed in his hands by Mr. Greene, and on which he had advanced money, was his property, and requested him to hold the same on his account; and stated that Mr. Greene had no authority to place it in the defendant's hands for any purpose. It appeared by the defendant's books, which the plaintiff called for, that the defendant had advanced $3,500 on this wheat flour, but nothing on the flour sued for. On the 15th of the same month, the plaintiff, having paid all the demands, which the defendant had for storage and truckage of the said flour, and the defendant refusing to deliver over the same to him, sued out the present writ of replevin. At the commencement of this suit, a large sum of money, being the balance of accounts, was due from the plaintiff to Mr. Greene, as his agent and factor; and on the first day of October, 1817, there still remained due to him the sum of $1,826. There was no proof that either before, or at the time of the service of the writ of replevin, or at any time since, Mr. Greene authorized the defendant to hold the flour sued for, or any part thereof, for him, to secure his (Mr. Greene's) lien for the balance of the accounts due him. The evidence was, that the defendant received the said goods simply on storage. And at the trial, Mr. Greene swore, that he never gave any authority to Mr. Head to detain them for his (Mr. Greene's) lien; and he now expressly waived all his lien for such balance; and requested and authorized the defendant to suffer judgment to go in favor of the plaintiff. It further appeared in evidence, that on the 7th of December, 1816, a trustee process was issued from the district court of Pennsylvania against the plaintiff, as trustee of C. W. Greene, at the suit of William Payne and Co., which was served on the 10th of the same month on the plaintiff.

Upon these facts, by consent, a verdict was taken for the plaintiff, under the direction of the court. The defendant to be at liberty to move for a new trial, and if upon the facts the court were of opinion, that the plaintiff was not entitled to recover, then the verdict was to be amended, and a verdict entered for the defendant. And it was farther agreed by the parties, that if the defence of the lien of Mr. Greene could not be asserted under the present plea, then, that the court in its discretion, might, if the justice of the case required it, set aside the verdict, and grant a new trial, and give liberty to the defendant to amend his plea.

The case was shortly argued upon the motion for a new trial.

Mr. Welsh, for plaintiff.
Mr. Gorham, for defendant.

STORY, Circuit Justice. There is no pretence of a general property in Mr. C. W. Greene; and the plea puts in issue, so far as respects the parties to this suit, the general property only in the goods replevied. Nor had Mr. Greene any special property in the goods; for he had a lien only for the general balance of his account, as a factor; and a lien, as has been well observed in Brace v. Duchess of Marlborough, 2 P. Wms. 491, is neither a jus ad rem, nor a jus in re. The lien of a factor is a mere right of retaining the goods of his principal, until his demands in that capacity are settled; and it gives the factor a rightful possession, which cannot be devested without his own consent. But as against his principal, it gives him no general or special property, whatever may be the case in respect to mere strangers. Hammonds v. Barclay, per Grose, J., 2 East, 235; Lickbarrow v. Mason, per Buller, J., 6 East, 25, note; Wilson v. Balfour, 2 Camp. 579. And in the present case, Mr. Greene never authorized the defendant to assert any claim for a lien on his account. On the contrary, Mr. Greene now expressly waives any claim for a lien on account of his general balance, and justifies the defendant in abandoning it; and the defendant has been paid his own charges for storage. Under these circumstances a return irreplevisable could not, under any acknowledged form of pleading, be awarded by the court.

It is as clear, that the lien of Mr. Greene is not an attachable interest under the trustee process served on the defendant, either as personal property, or as a chose in action, due from the defendant to Mr. Greene. The only doubt, that I have ever entertained, is, whether a writ of replevin was a proper remedy in this case. At common law a writ of replevin never lies, unless there has been a tortious taking, either originally, or by construction of law, by some act, which makes the party a trespasser ab initio. In case of a bailment, or rightful possession of the property, replevin is certainly not the proper remedy at common law; but detinue or trover lies in such case, where there is an unjustifiable detention or conversion. This doctrine is very fully expounded and justified by Lord Redesdale in some recent cases (Ex parte Chamberlain, 1 Schoales & L. 320; In re Wilson, Id. 321, note; Shannon v. Shannon, Id. 324, 327. See, also, Galloway v. Bird, 4 Bing. 299); and has been recognised by a very learned judgment in our country (Pangburn v. Patridge, 7 Johns. 140). Nor has the statute of replevin of Massachusetts (Act June 25, 1789, c. 26, § 4) altered the com-

mon law in this respect. It gives the remedy only, when goods are taken, distrained, or attached, which are claimed by a third person, who thinks proper to replevy them. The act requires, that there should be a wrongful taking, distress or attachment from the possession of another; for the count in the statute, expressly alleges the goods to be taken unlawfully, and without justifiable cause.

Under the circumstances of this case, if the issue had been non cepit, it must have been found for the defendant; for he never took the goods in any legal sense from the possession of another. He received them on storage; and the delivery to him was a lawful delivery, upon a bailment for safe keeping. Non cepit puts in issue the fact of an actual taking; and unless there be a wrongful taking from the possession of another, it is not a taking within the issue. A wrongful detainer after a lawful taking is not equivalent to a wrongful original taking.

But if on non cepit, the issue would have been found for the defendant, no return could have been awarded to him. It would therefore after all be but a mere question as to costs; and as the parties have agreed in no event to claim any costs, there is no reason for entertaining the motion for a new trial, since the merits are clearly against the defendant. The motion is overruled, and the judgment must pass for the plaintiff upon the verdict. Portland Bank v. Stubbs, 6 Mass. 422.

MEARS (MERCHANTS' NAT. BANK v.). See Case No. 9,450.

MEARS (TWICHELL v.). See Case No. 14,286.

Case No. 9,380.

In re MEBANE.

[3 N. B. R. 347 (Quarto, 91).] [1]

District Court, North Carolina.[2] 1869.

BANKRUPTCY—LIENS—JUDGMENTS—PRIORITY—ASSIGNEE—DUTY AS TO PETITIONING COURT—SALE OF ENCUMBERED PROPERTY.

1. L. C., a creditor, recovered two judgments, in a county court of North Carolina, against a debtor, executions on which judgments were enjoined by the United States military commandant. The injunction was thereafter rescinded, and fieri facias were filed, but never delivered to or acted on by the sheriff. Subsequently two other judgments against said debtor were respectively obtained by R. T. and De V. & G., creditors, upon which executions issued, and property of debtor was levied on by the sheriff, before proceedings commenced in bankruptcy. Debtor thereafter was adjudged bankrupt, and assignee was appointed, who agreed with the sheriff that the property so levied on should be offered and sold by the assignee, free from all incumbrances, on account of said executions and levies, and it was sold accordingly. *Held*, that L. C., the senior judgment creditor, is not entitled to any of the proceeds of said sale, as he had no perfected lien upon proceedings commenced in bankruptcy.

2. The action of the United States military officer preventing him from issuing executions, does not help or cure the defect.

3. The junior judgment creditors are entitled to have their claims paid pro rata by the assignee out of said proceeds, after deducting expenses, costs, and fees of sheriff and assignee, and this by virtue solely of said agreement.

[Cited in Re Tills, Case No. 14,052.]

4. It is not the duty of an assignee to petition the court respecting the sale of encumbered property of bankrupt, unless he believes such sale will produce a larger fund for the general creditors whom he represents.

[Cited in Re Carrier, 39 Fed. 201.]

5. Assignee may sell encumbered property in his possession without petitioning the court, or without an order of the court, but in so doing he sells subject to lawful encumbrances. He can convey no higher or better interest than he took.

[Cited in Sutherland v. Lake Superior Ship-Canal, R. & I. Co., Case No. 13,643; Re Cooper, Id. 3,190.]

In bankruptcy.

BROOKS, District Judge. This is a case agreed under the provisions of the 6th section of the bankrupt act of March 2, 1867 [14 Stat. 520]. Lewis Cobb recovered two judgments against John A. Mebane, said bankrupt, in the county court of Guilford county, at the August term, 1867. Executions on said judgments were enjoined or forbidden to be issued by the military commandant at the post of Greensboro', who was acting, at that time, under general orders from the headquarters of the Second military district. By reason of the orders of the post commander, no execution issued from the said term. The said order was rescinded in April or May, 1868, and thereupon the clerk of the Guilford county court filled up writs of fieri facias on said judgments, tested of the May term, 1868, which executions were never taken from the clerk's office, and never came to the hands of the sheriff, nor were they in any manner acted upon by the sheriff. At a special term of the superior court of Guilford county, held in December, 1867, two other judgments were obtained against John A. Mebane, said bankrupt, one in favor of Robert Thomas, administrator, and the other in favor of De Varnet & Gerringer; upon which executions regularly issued and were levied by the sheriff of Guilford county, on the real and personal property of the defendant, in February, 1868, and before the commencement by him of proceedings in bankruptcy. The property so levied upon was not sold until after the appointment of an assignee. Subsequently to the appointment of Peter H. Adams as assignee, and the execution of the assignment to him, the said assignee, by the consent of and agreement with the sheriff, sold the real estate so levied upon. Pursuant to said agreement between said assignee and sheriff, the assignee

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[2] [District not given.]

offered said real estate, clear of any and all encumbrances, on account of said executions and levies.

The question presented, and upon which the opinion of the court is desired, is, which of the judgment creditors is entitled to the proceeds of the sale, or so much thereof as will satisfy their debts. It appears to be conceded that if Cobb is not so entitled, the plaintiffs in the junior judgments are. I hold that but for the agreement between said assignee and the sheriff, and the terms of the sale made by the assignee, pursuant to such agreement, neither of the judgment creditors, in the present condition of the claims, would have been entitled to any part of the money realized by the sale. Upon the bankruptcy of a party all right and interest in the whole of the property he has at the time passes to his assignee, excepting only such of it as shall be exempted and subject only to existing legal liens or encumbrances. The bankrupt act respects existing, perfected liens. There is in the 1st section express provision in regard to their ascertainment and liquidation.

The judgments in favor of Lewis Cobb were first obtained, and it becomes necessary to inquire whether such proceedings were had as were necessary to create in his behalf a lien upon the land of the bankrupt, Mebane, before proceedings in bankruptcy in his case were commenced. I do not think any lien was so created in his behalf. The filling up of the fieri facias by the clerk was not issuing the executions. And even if they had been delivered to the sheriff, and he had not acted upon them by making and returning a levy, no lien would have been created in behalf of the plaintiff. In some of the states, by statutory provision, a judgment is made a lien from the time of its rendition. It was not so in North Carolina prior to the enactment of the Code of Civil Procedure. A levy was required to complete a lien. It does not help the plaintiff, Cobb, that his executions were enjoined by military power. He may have been greatly wronged by such interference. But this court cannot repair that wrong. In truth, the plaintiff, from that or some other cause, did not do, or procure to be done, an act indispensable to the perfecting of a lien. This may be set down as one of the many acts, extra constitutional or extra legislative, perhaps, performed by the military authorities subsequent to the cessation of hostilities, wherein powers of a questionable nature, some of them undefined, were exercised, and authority not warranted by law being frequently assumed. It would then be a matter of no surprise if many things were done, resulting in injuries beyond the ability of the courts to remedy, while keeping within the limits prescribed by the constitution and laws.

The next inquiry is: Did the plaintiffs in the junior judgments, at the instance of Robert Thomas, administrator, and De Varnet & Gerringer, so prosecute their claims as to acquire liens before the bankrupt filed his petition in bankruptcy? I think they did. They obtained their judgments, and immediately followed them up by executions, which were received by the sheriff, and by him were levied upon the land of the defendant, who afterwards became a bankrupt. By these proceedings a lien in behalf of these plaintiffs was clearly and perfectly created. It does not follow, however, that the proceeds realized by the assignee's sales of the property so encumbered should be applied to the satisfaction of such executions. If it be ascertained that the property of a bankrupt is encumbered by lien or mortgage, the assignee may, if he shall believe it to be to the interest of that class of creditors whom he especially represents—for instance, the class entitled to pro rata distribution—file his petition, and obtain an order directing him to sell the property encumbered, on such terms as to the court may seem proper, and convey the property freed from such encumbrances. The court will then protect the lien creditors by a proper disposition of the proceeds. But it is not part of the duty of an assignee so to petition, unless he shall believe such a sale will create a larger fund for distribution to creditors generally than if there should be a sale by the mortgagee or sheriff. So in regard to property the title to which is in dispute. The assignee may sell, however, without petitioning the court, or without any order of the court, any property of the bankrupt in his possession encumbered in any manner. But when he so sells, he does so subject to any and all lawful encumbrances, and can convey no higher or better interest. The proceeds of such a sale are supposed to be the price or value of the interest so sold, and with a knowledge of the encumbrances. I think this is not the rule, however, to apply in this case, for the real estate was offered by the assignee in conformity to the agreement with the sheriff, who, with executions in hand, was claiming all his rights under them, concurring with all parties in interest that a sale clear of encumbrances would prejudice no one, but be the surest means of obtaining fair prices. The bidders had good reason to believe that they were bidding for a good title.

It is therefore ordered and decreed by the court that the assignee, Peter H. Adams, of the proceeds of the sales of the property levied upon as aforesaid, pay the executions in favor of Robert Thomas, administrator, and De Varnet & Gerringer, if sufficient, first paying costs of sale, etc., and retaining his lawful commissions. And if the same shall not be sufficient for that purpose, that he pay the cost, and retain his commissions as aforesaid, and distribute the surplus proceeds of such sales pro rata, in the payment of said last-mentioned executions. Let this be certified to the parties to this case agreed.

Case No. 9,381.

MECHANICS' & FARMERS' BANK v. TOWNSEND.

[5 Blatchf. 315;[1] 3 Int. Rev. Rec. 143.]

Circuit Court, N. D. New York. May 12, 1866.

TAXATION—LICENSE TAX ON BANKS—CAPITAL—SURPLUS EARNINGS.

The term "capital," as used in the 1st subdivision of the 79th section of the internal revenue act of June 30, 1864 (13 Stat. 251), means, in reference to a bank whose charter fixes the amount of its capital, the amount of capital so fixed, and does not include the surplus earnings of such bank, so as to subject it to a license tax on such surplus earnings, as capital.

In equity. This was an application for a provisional injunction, to restrain [Theodore Townsend], a collector of internal revenue, from collecting a license tax. The bill was filed in a state court, by the plaintiff, a banking corporation doing business at Albany, New York, and the suit was removed by the defendant into this court, under the provisions of the 3d section of the act of March 3, 1833 (4 Stat. 633). The tax was claimed to be collectible under the provisions of the 1st subdivision of the 79th section of the act of June 30, 1864 (13 Stat. 251), which provided, that bankers using or employing a capital not exceeding the sum of $50,000, should pay $100 for each license, and that those using or employing a capital exceeding $50,000 should pay, for every additional $1,000, in excess of $50,000, $2. The charter originally granted to the corporation, under the state law, fixed its capital at $350,000. It applied for a banker's license under the national banking law of congress, on such capital of $350,000. The application was refused by the assessor, on the ground that the surplus earnings of the bank were not included as capital. The bank refused to pay a tax upon such surplus earnings, as capital, and the collector was proceeding to enforce the collection of such tax, when this suit was instituted.

John H. Reynolds, for plaintiff.

William A. Dart, Dist. Atty., for defendant.

NELSON, Circuit Justice. [2][The bill of complaint in this case was filed in the state court, to enjoin the defendant from collecting a license or tax on surplus capital claimed under the first sub-division of the 79th section of the act of congress passed June 30, 1864; and has been removed into this court under the 3d section of the act of March 3, 1833 (4 Stat. p. 633). The first sub-division of section 79 provides that bankers, using or employing capital not exceeding the sum of $50,000, shall pay $100 for each license; when using or employing a capital exceeding $50,000, for every additional $1,000, $2. The charter of the bank in this case under the state law, fixes the capital at $350,000. Application was duly made for a license as a banker, under the act of congress, on a capital as above named, which was refused, on the ground that the surplus earnings of the bank were not included as capital. And the assessors and collector on refusal to submit to this view, thereupon proceeded to enforce the collection of the tax according to the law in such case made and provided, until restrained by the instillation of this suit and injunction.][2]

I am satisfied that the assessor and the collector have fallen into an error. The term "capital," as used in the 1st subdivision of the 79th section, means the amount of capital fixed by the charter. This amount cannot be altered, enlarged, or diminished, except by legislative authority. A surplus earned by the bank is no part of its capital under its charter, nor does the act of congress, either expressly or impliedly regard it as such. Besides, a tax is levied specifically on all dividends in scrip, or money declared due, &c., to stockholders, &c., and on all undistributed sums made or added, during the year, to the surplus or contingent funds of the bank, (section 120,) thereby treating and dealing with surplus earnings as separate and distinct from the capital of the bank. According to the construction claimed, the surplus earnings would be subject not only to all the tax that is imposed upon the capital of a bank, as such, but to five per centum, in addition, as surplus. I think that, if congress had intended thus to deal with this description of property, and to regard it both as a part of the capital of a bank, and, at the same time, as surplus earnings, and to be taxed in both aspects, it would have said so in plain words, and not have left the question to inconsistent and strained construction.

It has been argued that, inasmuch as the 110th section, speaks of the average amount of the capital of a bank, the word "capital" may embrace something more or less than the amount fixed by the charter. But, admitting this to be so, it by no means follows that it includes surplus earnings. The "capital" of a bank and its "surplus earnings" convey distinct and different ideas and meanings. But, on looking at this section, the reason of the phraseology is very obvious. The words are, "a duty of one-twenty-fourth of one per centum each month, &c., upon the average amount of the capital of any bank, &c., beyond the amount invested in United States bonds." This amount would necessarily be fluctuating and variable, depending on the time and the amount of the investment in the United States bonds, and might often require an average to be made of the amount of capital stock liable to be taxed. This same section provides, that in case of banks with branches, the duty shall be imposed,

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

[2] [From 3 Int. Rev. Rec. 143.]

[2] [From 3 Int. Rev. Rec. 143.]

&c., and "the amount of capital of each branch shall be considered to be the amount allotted to such branch"—not the amount including surplus earnings or any other addition. The same section also provides for a duty of one-sixth of one per centum each month upon the average amount of circulation, &c., beyond the amount of ninety per centum of the capital of the bank, &c. It will hardly be contended, on the part of the government, that the term "capital" here includes surplus earnings; and yet the claim would be as well founded as in the case under consideration. I may add, that, according to the construction contended for, the capital of the bank would be changing during the whole period of the license. It might become much greater than the amount for which a license was paid, for, only the surplus at the time the license was granted could be estimated.

Upon the whole, I am satisfied that the assessor erred in setting up the claim that the plaintiffs were bound to take out a license on the basis that the surplus earnings of the bank were a part of its capital, and that an injunction must be granted.

MECHANICS' & MERCHANTS' INS. CO OF POTTSVILLE (BROWN v.). See Case No. 2,019.

Case No. 9,382.

MECHANICS' BANK v. LYNN.

[2 Cranch, C. C. 217.] [1]

Circuit Court, District of Columbia. Nov. Term, 1820.

NOTES—INDORSER—PLACE WHERE PAYABLE—DEMAND OF MAKER—PROTEST.

If a promissory note be made payable at the house of R. Y., the first indorser, and the notary public, on the day after the last day of grace, demand payment of R. Y., at his house, without asking for the maker, or inquiring whether he had left funds to pay the note, such demand is not sufficient to entitle the plaintiff to recover against the second indorser.

Assumpsit against the second indorser of John Weightman's note to Robert Young, payable at the house of Robert Young, four months from the 25th of December, 1816. James Millan, a notary public, testified, that on the 29th of April, 1817, (the day after the last day of grace,) he demanded payment from Robert Young, and the defendant, Adam Lynn; and believed it was at the house of Robert Young; but did not ask for John Weightman, the maker of the note, nor inquire whether he had left funds to pay it. That Weightman did not reside in the county of Alexandria, and therefore he could not demand payment from him. The other parties all resided in Alexandria. Christopher Neale testified that the defendant requested the bank not to sue him, as, in the event of his being obliged to pay it, it would save the expense of one suit.

Mr. Swann, for plaintiff.

Mr. Taylor, for defendant.

THE COURT (nem. con.) instructed the jury that the evidence, so stated, was not sufficient to entitle the plaintiff to recover.

Nonsuit.

[See Case No. 9,384.]

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

MECHANICS' BANK (NUTT v.). See Case No. 10,382.

Case No. 9,383.

MECHANICS' BANK v. TAYLOR.

[2 Cranch, C. C. 217.] [1]

Circuit Court, District of Columbia. Nov. Term, 1820.

NOTES—INDORSER—PROTEST—DEMAND—EVIDENCE.

If a notary-public, after demanding payment from the maker of a promissory note, go to the shop of the indorser, (a coachmaker who had journeymen,) and there demand payment, but of whom he does not remember, and thinks he did not see the indorser, this is not sufficient evidence of notice, to the indorser, of non-payment by the maker.

Assumpsit against [Evan P. Taylor] the indorser of Peyton's promissory note. The notary-public demanded payment from the maker on the last day of grace, after banking hours, and afterwards, on the same day, called at the shop of the defendant, and demanded payment, but did not remember whether he saw the defendant, and thought that if he had, he should have stated it in his protest, which he did not. The defendant was a coach-maker, and employed journeymen. The witness did not remember of whom he made the demand.

THE COURT, at the prayer of Mr. Taylor, for the defendant, instructed the jury that the plaintiff could not recover that evidence, because, as they thought, the notice was not proved.

MECHANICS' BANK (UNITED STATES v.). See Case No. 15,756.

MECHANICS' BANK (WILLIAMS v.). See Case No. 17,727.

MECHANICS' BANK OF ALEXANDRIA (GRAY v.). See Case No. 5,723.

Case No. 9,384.

MECHANICS' BANK OF ALEXANDRIA v. LYNN.

[2 Cranch, C. C. 246.] [1]

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

LIMITATION OF ACTIONS—WHEN PLEADED.

The statute of limitations may be pleaded on the first day of the term next after office-judgment.

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

At law.

Mr. Swann, for plaintiff.
Mr. Taylor, for defendant.

THE COURT (MORSELL, Circuit Judge, absent) decided that the plea of the statute of limitations is an issuable plea, and may be pleaded on the first day of the term next after the office-judgment.

[See Case No. 9,382.]

Case No. 9,385.

MECHANICS' BANK OF ALEXANDRIA v. MINOR.

[Cited in Rockville & W. Turnpike Road v. Van Ness, Case No. 11,986. Nowhere reported; opinion not now accessible.]

Case No. 9,386.

MECHANICS' BANK OF ALEXANDRIA v. TAYLOR et al.

[2 Cranch, C. C. 507.][1]

Circuit Court, District of Columbia. Nov. Term, 1824.

FRAUDULENT CONVEYANCES—DEED TO WIFE—MONEY USED IN PURCHASE.

It is no fraud in a husband toward his creditors, to purchase real estate with the money which belonged to the wife before the marriage, and to take the deed directly to the wife, pursuant to a verbal agreement to that effect made with her before the marriage.

The bill states that the complainants levied an execution issued on a judgment in their favor against E. P. Taylor, upon a house and lot which were purchased by him with his own funds and fraudulently conveyed to his wife; that the complainants purchased it at the marshal's sale, under the fieri facias; that E. P. Taylor refuses to give them possession; and prays that the deed to the defendant's wife, and the deed from the defendant E. P. Taylor to the defendant David Marle may be set aside; and that the defendants may deliver possession of the premises to the complainants, and account for the rents and profits. The defendant Marle, in his answer, stated that he held a lien on the property for a debt of $205 under a deed purporting to be from E. P. Taylor and his wife, but executed only by E. P. Taylor. The separate answers of E. P. Taylor and wife, aver that the wife, having been a widow, and in trade before her intermarriage with E. P. T. had acquired considerable property, and had, at the time of the marriage, about $3,000 in bank; and that it was agreed between them, before the marriage, that it should be laid out in building a house upon a lot belonging to the wife; but that the lot being supposed to be too small, the intention to build was abandoned, and in lieu thereof the house and lot in question were purchased by E. P. T. with the wife's money, and conveyed directly by the vendor to the wife; denying all fraud, &c. The cause being, by consent, set for hearing on bill and answer,

THE COURT (THRUSTON, Circuit Judge, absent) decided that the claim of the wife was fair and upon a valuable consideration, and dismissed the bill.

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

MECHANICS' BANK OF MICHIGAN (BISSELL v.). See Case No. 1,446.

MECHANICS' INS. CO. (ROGERS v.). See Cases Nos. 12,016 and 12,017.

MECHANICS' NAT. BANK (ARMSTRONG v.). See Case No. 545.

MECKLENBURG FEMALE COLLEGE, Ex parte. See Case No. 2,954.

Case No. 9,387.

MECKLIN v. CALDWELL.

[1 Cranch, C. C. 372.][1]

Circuit Court, District of Columbia. Dec. Term, 1806.

BAIL IN CIVIL CASES—SUFFICIENCY OF AFFIDAVIT

Assault and battery. Affidavit of the fact, but not of any amount of damage; *held* not sufficient to hold to bail—(nem. con.)

[See Case No. 9,388.]

Case No. 9,388.

MECKLIN v. CALDWELL.

[1 Cranch, C. C. 400.][1]

Circuit Court, District of Columbia. June Term, 1807.

BAIL IN CIVIL CASES—SUFFICIENCY OF AFFIDAVIT—SPECIFIC INJURY—DAMAGES.

In assault and battery, the affidavit to hold to bail, must state some specific injury to the person of the plaintiff, and must be positive as to some amount of damages.

Assault and battery. The affidavit stated a beating, without any special damage, except that the plaintiff could not, for some days, transact all his business, as clerk in one of the departments, as well as usual, and that the injury was such, that he thinks that ten pounds sterling would not be too great a compensation therefor.

THE COURT refused to hold defendant to bail on the affidavit, it not being positive as to any amount of damages, and not stating any specific injury to the person of the plaintiff.

FITZHUGH, Circuit Judge, absent.

[See Case No. 9,387.]

MEDBURY (CAMPBELL v.). See Case No. 2,365.

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

MEDE, In re. See Case No. 9,372.

Case No. 9,389.

MEDFORD v. DORSEY.

[2 Wash. C. C. 433.][1]

Circuit Court, D. Pennsylvania. April Term, 1810.

JUDGMENT—ERROR IN ENTERING—MOTION TO VACATE—FOR WHAT ERRORS GRANTED.

If there was error in entering a judgment, the court, at a subsequent term, cannot set it aside, unless it was entered by misprision of the clerk, by fraud, or the like.

[Cited in West v. Davis, Case No. 17,422; Bank of U. S. v. Moss, 6 How. (47 U. S.) 38; Edwards v. Elliott, 21 Wall. (88 U. S.) 552; U. S. v. Millinger, 7 Fed. 189; Newman v. Newton, 14 Fed. 635; U. S. v. Walsh, 22 Fed. 648; Grames v. Hawley, 50 Fed. 320.]

[Approved in Cook v. Wood, 24 Ill. 298; Mason v. Pearson, 118 Mass. 63. Cited in Gibson v. Chouteau's Heirs, 45 Mo. 173; McMicken v. Com., 58 Pa. St. 217; Parish v. Gear, 1 Pin. 276.]

This cause had been referred to arbitrators by rule of court, who made a report in favour of the plaintiff, for 1850 dollars, provided the plaintiff should give to the defendant a bond of indemnity against Holt & Co. [assignees of McCall Medford] and two or three other persons. The report was returned, about four years ago, and it appears by the records, that, on motion, it was confirmed and decreed. [Case No. 6,647.] The defendant now obtained a rule to show cause why the judgment should not be vacated, the judgment having been improvidently entered, until the indemnity was given, and by which it appeared, upon showing cause, the agent of the plaintiffs (they living in England) had refused to give or to receive the sum awarded, on the condition prescribed. It also appeared, that Holt had recovered, and been paid by the defendant, 1000 dollars, of the sum for which the indemnity was to be given; and other suits were now depending.

WASHINGTON, Circuit Justice (PETERS, District Judge, absent). This judgment, having been entered at a former court, though probably improvidently done, and might have been refused, had it been opposed, until the indemnity was given, cannot now be vacated. If there was error in entering it, the court, at a subsequent term, cannot set it aside, unless it was entered by the misprision of the clerk, by fraud, or the like. It is a hardship upon the defendant, to have his real estate bound by a judgment which it is improbable will ever be enforced; and there is possibly no way to help the defendant, but by entering satisfaction on the judgment, whenever it is made to appear, that the sum awarded has been paid to those against whose claims the defendant was to be indemnified.

Rule discharged.

[Subsequently, upon motion of the defendant, the judgment was ordered to be entered satisfied. Case No. 9,390.]

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

Case No. 9,390.

MEDFORD v. DORSEY.

[2 Wash. C. C. 467.][1]

Circuit Court, D. Pennsylvania. April Term, 1810.

JUDGMENT—MOTION TO ENTER SATISFACTION—EVIDENCE.

Judgment on an award that the defendant pay so much on receiving from the plaintiff an indemnity against certain claims. The plaintiff afterwards refused to give the indemnity; and on the defendant paying more claims, against which he was to be indemnified, than the amount of the judgment, the court ordered satisfaction to be entered on the judgment.

[The case was originally brought in this court by Holt & Co., assignees of McCall Medford, against John Dorsey, when the jury found for the plaintiff. Case No. 6,647.]

The defendant, since the decision [Case No. 9,389], having paid to one of the persons who had sued him, and against whom the plaintiff, by the report of the referees, was to indemnify him so much of the sum awarded, as with the sum before paid to Holt, and a small sum now paid into court, amounts to eighteen hundred and fifty dollars; moved the court to enter satisfaction of the decree, which the court directed.

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

Case No. 9,391.

The MEDORA.

[1 Spr. 138.][2]

District Court, D. Massachusetts. Aug., 1846.

BOTTOMRY—SUPPLIES—WHAT ARE NECESSARY—MASTER—COMPETENCY AS WITNESS.

1. In a suit by the holder of a bottomry bond, given by the master of a vessel, in a foreign port, for necessary supplies, the master is a competent witness, to prove that the supplies were furnished, and that they were necessary.

2. Supplies are necessary, when they are fit and proper for the service in which the vessel is engaged, and such as a prudent owner would order.

[Cited in The Lulu, 10 Wall. (77 U. S.) 201; The George T. Kemp, Case No. 5,341.]

3. Particular items examined.

In admiralty.

S. Bartlett, for libellants.

R. Choate, for claimants.

SPRAGUE, District Judge. This is a libel to enforce payment of a bottomry bond, given

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

by the captain of the bark Medora, at Manilla. The holders of the bond, offer the captain as a witness, to the circumstances under which the bond is given. This evidence is objected to, and the case of The Fortitude [Case No. 4,953] is cited. In that case, the deposition of the captain was rejected, at the hearing, but in a subsequent and more deliberate examination of the question, Judge Story states, that he finds no authority in support of his ruling, but several against it, and indicates such doubts of its correctness, as to neutralize its authority. The Nestor [Id. 10,126] was the case of material men, claiming a lien for articles furnished in a foreign port. The captain was offered, as a witness for them, and admitted. There is an exception from the general rule of evidence excluding interested witnesses, by which agents are admitted, from necessity or public convenience. 1 Greenl. Ev. § 416, and cases there cited; Fuller v. Wheelock, 10 Pick. 137. It is urged by the counsel for the respondent, that agents are not admitted, unless where their interest is balanced. If so, agents constitute no exception from the general rule, by which, in order to exclude, there must be a direct and certain interest. If balanced, there is no interest.

It has been suggested, that the case of The Nestor was overruled by that of The Fortitude [supra], but for the reasons already stated, I cannot so consider it, nor can I perceive any sufficient ground of distinction, by which the captain is a competent witness for material men, to prove that supplies were furnished, and necessary, in order to maintain their lien; and not a competent witness for the bondholders, to prove the same facts, in order to maintain their lien.

Were the supplies necessary? They are necessary, if they are fit and proper for the service in which the vessel is engaged, and what the owner of that vessel, as a prudent man, would have ordered, if present. The Alexander, 1 Wm. Rob. Adm. 362.

First. As to the one hundred and three dollars, paid for unlading the outward cargo. I see nothing in this case to exempt the owner of the vessel from the obligation to bear this expense. It was clearly necessary.

Second. Wages. The amount paid, was due to the seamen, and the owners were legally bound to pay it, at the time, and it was eminently fit and proper that that obligation should be fulfilled by the captain.

Third. The fifty-two dollars borrowed of the clerk. On the outward passage, the crew became sick, and the captain put into St. Helena, for fresh provisions. He was without money, and borrowed of the clerk, and promised payment at Manilla. I have no doubt that the clerk had a lien upon the ship, which he might have enforced at Manilla, and that the master might well have taken up money on bottomry, for the purpose of discharging his claim. The Vibilia, 1 Wm. Rob. Adm. 8; The Trident, Id. 34.

Fourth. The sixteen dollars mentioned in the account, as board. The captain testifies, that this was, in fact, expended for several small items of necessity, at Manilla. I do not see sufficient ground to discredit the statement of the captain; and I have no doubt, that it was proper that the master should receive the small amount for contingencies, which was advanced to him for that purpose.

Fifth. The captain expended sixty dollars, at Manilla, for his own clothing. It is insisted, that this sum ought to have been appropriated by him to the necessities of the vessel, and reduced the bond to that extent. The owners had, on board the ship, an invoice of naval stores, to the nominal amount of about eight hundred dollars, which was consigned to Peel, Hubbell & Co., of whom the captain obtained an advance of one hundred and ten dollars, sixty of which he expended in necessary clothing for himself. This having been actually and rightfully expended by the captain; I cannot see that it affects the question of the necessity for the supplies to the vessel.

Sixth. The two hundred and thirty-four dollars, since realized from that invoice of naval stores. Peel, Hubbell & Co., were the agents of the libellants in making the advances for which the bond was given; and it is strenuously urged in behalf of the respondent, that, to the extent of the two hundred and thirty-four dollars, the captain was not without funds, or the means of raising them; and that the goods, being in the hands of the agent of the libellants, that amount, at least, ought to be deducted from the bond. If the libellants' agents had in their hands, property which ought to have been appropriated to the use of the vessel, the bond, to that extent, cannot be upheld.

How, then, is the fact? All the evidence comes from the captain; he testifies, that one hundred and ten dollars was all that could be obtained upon that invoice; that he went throughout Manilla, and made great exertions to obtain more, by sale or otherwise, but without success; and that he was compelled to leave the property in the hands of the consignees. I cannot say that the consignees were bound to advance more on that property, or that the captain could have obtained, by means of it, more than the one hundred and ten dollars. We have no information, under what circumstances the two hundred and thirty-four dollars have since been realized; and if any credit is to be given to the captain's testimony, this invoice did not furnish him the means of procuring funds to any amount over the one hundred and ten dollars.

Decree for $1587.35, and costs.

That the master is a competent witness, in favor of the holder of the bottomry, was decided in Furniss v. The Magoun [Case No. 5,163], a case reported since the decision of Deshon v. The Medora [Id. 3,820]. See same case, Leland v. The Medora [Id. 8,237].

MEDORA, The (DESHON v.). See Case No. 3,820.

MEDORA, The (LELAND v.). See Case No. 8,237.

MEE (MARSHALL v.). See Case No. 9,129.

MEEKER (UNITED STATES v.). See Case No. 15,757.

Case No. 9,392.

MEEKER et al. v. WILSON.

[1 Gall. 419.] [1]

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

SALE — ASSIGNMENT OF CHATTELS — DELIVERY — CREDITORS—PROPERTY WITHOUT COUNTRY—EXECUTION SALE—NOTICE OF ASSIGNMENT.

1. A grant or assignment of chattels is valid at common law between the parties, without actual delivery of the chattels, and the property passes immediately on the execution of the deed. But, as to creditors, the title is not perfect, unless possession accompanies and follows the deed.

[Cited in Re Hussman, Case No. 6,951.]

[Cited in note to Perry Ins. Co. v. Foster, 58 Ala. 502; Hempstead v. Johnston, 18 Ark. 123; Walters v. Whitlock, 9 Fla. 86; Watson v. Williams, 4 Blackf. 29; Shaw v. Thompson, 43 N. H. 132; Davis v. Bigler, 62 Pa. St. 248.]

2. Want of possession is evidence of fraud.

[Cited in Shaw v. Thompson, 43 N. H. 132; McKibbin v. Martin, 64 Pa. St. 355.]

3. If, at the time of the transfer, the property was without the country, possession must be taken within a reasonable time after its return, or the grant will be held fraudulent.

[Cited in Perry Manuf'g Co. v. Brown, Case No. 11,015.]

[Cited in Fall River Iron Works Co. v. Croade, 15 Pick. 18; Ricker v. Cross, 5 N. H. 572.]

4. Property in the hands of a third person, having a lien thereon, is not attachable in a suit against the general owner; but if the depositary waive his lien, the objection does not lie in the mouth of the general owner.

[Cited in Ricker v. Cross, 5 N. H. 571.]

5. If chattels are sold on an execution, the regularity of such sale cannot be contested by mere strangers.

6. Notice of an assignment of chattels to a judgment creditor, where possession has never been taken under the assignment, does not affect the right of the sheriff or the creditor to seize the property in execution, as the property of the assignor.

This was an action of trover, brought by the plaintiffs [Samuel Meeker and others,] against the defendant [Luther Wilson], who was a deputy sheriff of the county of Bristol, for the conversion of a parcel of sugars, alleged to be the property of the plaintiffs. At the trial, the facts proved or admitted were as follows. Jacob Shoemaker and Charles R. Travers, of Philadelphia, being in failing circumstances, on the 6th of December, 1806, made an assignment of their estate to the plaintiffs for the benefit of their creditors, including, among other things, the cargo on board of the brig Deborah from Guadaloupe, of which cargo the said sugars were a part. Soon after this assignment, and in the month of December, 1806, the Deborah arrived at New Bedford, and the cargo, not being entered according to law, was taken possession of by the collector of the port for payment of the duties due thereon to the United States. On the 17th of January, 1807, while the cargo was in the custody of the collector, Messrs. Port & Russell of New York, creditors of Shoemaker and Travers, sued out of the court of common pleas for Bristol county a writ of attachment against Shoemaker and Travers, upon which the defendant returned, that he had attached the cargo of the Deborah, the same having been previously attached at the suit of Howland and Allen, and Thomas Allen. At the time of this attachment, the property was in Messrs. Howland and Allen's store, where it had been deposited by the collector and attached by them, and no removal was made; and it was admitted that the attachment was intended to be made by all parties subject to the claim of the United States for the duties. On the 21st of July, 1807, a writ issued at the suit of the United States against Shoemaker and Travers, upon which an attachment was made of the same property. No removal, however, took place, but a part of the property was then separated from the rest, by a partition in the store, for the purpose of being applied to satisfy the duties due to the United States and charges. This suit of the United States was discontinued at the December term of the district court, 1807. On the 28th of September, 1807, the collector sold so much of the cargo, as was necessary for the payment of the duties and charges; and the residue was, on the 29th of the same month, sold by the defendant on the execution, which issued on the 24th of said month, upon a judgment obtained at September term, 1807, of the common pleas, by Messrs. Port & Russell, against Shoemaker and Travers, on their writ of attachment aforesaid, for the sum of $13.7056, damages, and $12.96, costs. The defendant, in his return on the execution, did not state that he had kept the property four days, &c. according to the requisitions of the statute of Massachusetts of March 17, 1784 (section 5). The present suit was commenced against the defendant on the 18th of October, 1808, and there was no evidence, that at any time before that day, he had had any notice of the assignment or claim of the plaintiffs, or that the plaintiffs had made any effort to obtain possession of the property.

Upon these facts the court directed the jury, that although an assignment of property abroad might be valid in law, yet it was the duty of the assignee, in order to perfect his title, to take possession of the property within a reasonable time after it came within his reach, and if he neglected so to do, it became liable to attachment at the suit of the creditors of the assignor. That in the present case, there was no notice at all of the

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

claim of the plaintiffs for more than a year after the property had been seized and sold in execution; and that, under these circumstances, the laches of the plaintiffs must be considered as extinguishing all right of action against a public officer, who, having no notice of an adverse claim, was compellable to seize the property on the execution; that as between the parties to the present suit, it was not material to inquire, whether the officer had, in the sale, conformed strictly to the law or not. On the face of his return, there was nothing repugnant to law; and if he had acted in an irregular manner, he was liable to Shoemaker and Travers for all the damages, they had sustained thereby; that the title of the present plaintiffs stood altogether independent of the regularity of these proceedings. If their title were good, it could not be affected by the conduct of the officer, whether correct or otherwise; and in this suit, which was for mere damages and not in rem, it could not be disputed, that the property in the goods passed by the sale under the execution; that whatever legal doubts might arise, as to the right to attach property in the custody of the collector for a lien of the United States, the question could only arise in a suit, to which the United States or the collector was a party, and not in a suit between strangers to that lien; and it was sufficient, in the present case, that the property sold on the execution had been completely discharged of such lien before the levy; that admitting the right of the United States to a priority of attachment, (on which the court gave no opinion), that right could not be vindicated by mere strangers, and in the present case it was utterly extinguished by the voluntary discontinuance of the suit of the United States, previous to the commencement of the present action; and at all events, none of those special circumstances varied the necessity of the plaintiffs' giving reasonable notice of their claim to the defendant, and, therefore, the general principle, as to the reducing of the assigned property to possession within a reasonable time, must govern the rights of the parties to the suit.

A motion having been made for a new trial, upon the ground of a misdirection of the court; and also of the possession of other important evidence, which was omitted at the trial, from the inadvertence of counsel:

G. Blake, for plaintiff.
S. Dexter, for defendant.

STORY, Circuit Justice. By the common law, a grant or assignment of goods and chattels is valid between the parties, without actual delivery thereof, and the property passes immediately upon the execution of the deed. But as to creditors, the title is not considered as perfect, unless possession accompanies and follows the deed. The want of possession is considered in some of the authorities as an evidence or badge of fraud to be submitted to the jury, but the more modern authorities hold it, as constituting in itself, in point of law, an actual fraud, which renders the transaction, as to creditors, void. 3 Coke, 80; 2 Term R. 587; [Hamilton v. Russell] 1 Cranch [5 U. S.] 309. In Benton v. Thornhill, 2 Marsh. 427, 429, Gibbs, C. J., dissented from the doctrine, that want of possession was per se conclusive of fraud. The entire law will be found collected in Mr. Smith's note to Twyne's Case, 3 Coke 80. See 1 Smith, Lead. Cas. p. 1. See, also, Mr. Wallace's careful and elaborate note to the same case, where all the American learning is collected. Philadelphia Law Lib. for January, 1844. It is true, that the cases, in which these decisions have been made, turned upon the construction of the statute of frauds of 13 Eliz. c. 5, but that statute is now fully settled to be only an affirmance of the common law. Cowp. 434; [Hamilton v. Russell] 1 Cranch [5 U. S.] 309. An exception to the rule is, where the possession of the grantor is consistent with the deed, or where the property conveyed is, at the time of the conveyance, abroad and incapable of delivery. In the latter case the title is complete, provided the grantee takes possession within a reasonable time after the property comes within his reach. If he does not, the same inference of legal fraud arises, as if the property had been originally capable of immediate delivery, and the possession had remained unchanged. These principles of the common law are undoubtedly founded upon the consideration, that possession of personal chattels constitutes the ordinary indicium of ownership, and that the greatest public mischiefs would arise, if secret and unavowed transfers might overreach the attachments of creditors. It would enable debtors to hold out false colors, and protect covinous contracts from the animadversion of the law. The mischief would be still greater as to sheriffs and other public officers, who are bound to take the property of debtors in execution. They must act at their peril (Dalton, 146; Gilb. Ex'ns, 21), and where the debtor is in the open and visible possession of property, exercising acts of ownership, they are compellable to seize it on the proper judicial process; and great indeed would be the hardship, if their proceedings could be overhaled in an action of tort, where the utmost diligence and care could not protect them from deception. Upon principle, independent of all authority, it would seem that substantial justice would require that a party, who has a secret transfer of property left in the possession of the original owner, should be held to waive his rights in favor of creditors and public officers, even if the case were not held infected with fraud. "Vigilantibus non dormientibus leges subserviunt."

Upon these principles, independent of the special objections, which I shall notice hereafter, how stands the present case? The assignment was made on the 6th of December; the cargo arrived soon after at New Bedford;

and an almost irresistible presumption arises of early notice thereof to the assignees. The property was documented as belonging to Shoemaker and Travers, was taken into the custody of the United States as such, was attached in the same character by Howland and Allen, and also by Messrs. Port & Russell, by the defendant, on the 17th of January following, and again by the United States in the July following; and although it remained unsold until September, the assignees never made any claim thereto, nor asserted their possession: nay further, no notice ever appears of their claim, until October, 1808. Under such circumstances, it seems impossible to maintain the present suit, unless the grossest laches entitle a party to the favor of the law. The case of Bamford v. Baron, 2 Term R. 594, note a, would alone be decisive. But it is argued, that the property, being in the custody of the United States, was not legally attachable by the defendant, and that therefore he stands in the character of a mere trespasser ab initio; and I have no doubt that in point of law, property in the hands of a person having a lien thereon cannot be taken from him under an attachment against the general owner. Vide Whitaker, Liens, 142; Vin. Abr. tit. "Pawn," A 3. He has a right to retain it, until discharged of the onus; and if it be wrongfully taken away, he may maintain an action against the seizing officer for the tort. But he may waive his right, and if he does, it is no objection in the mouth of the debtor himself. As to his assignees, if their title be consummate before the seizure, the officer is not the less liable on account of the lien; and if their title be defective, it cannot be made better by an independent title in a third person, with whom they have no relation. The objection rests on the supposition, that the plaintiffs had a legal title to the property; for if they have not, it is immaterial to them what has been done with it; but on the general principle, which I have stated, we are of opinion, that the title of the plaintiffs, under the assignment, was void as against creditors. A similar answer may be given to the argument, that the officer has not, on the face of his return, disclosed matter sufficient to show, that the property was sold under the levy in a legal manner. If the assignees had no title to the property, they cannot be injured by this irregularity: and the wrong, if any, was done to Shoemaker and Travers; and as to the objection founded on the suit of the United States, it is sufficient that no right under that suit is now in controversy.

On the whole, we are satisfied that the direction of the court at the trial was correct. The assignees, having omitted to take possession of the property within a reasonable time after it came within their reach, must be considered as voluntarily leaving it in the possession of the assignors, and as therefore possession did not accompany or follow the deed, the conveyance, as to this property, was in point of law void against creditors. The laches of the assignees amounted to a legal abandonment of all right to the property under the conveyance. But an application has been made to our discretion to grant a new trial, because the party has not had the benefit of the whole evidence of his case, through the inadvertence of counsel. I do not know, that the inadvertence of counsel in the management of a cause has ever been considered as a substantive ground for granting a new trial, and it would certainly be a dangerous practice to introduce at this time. There are however peculiar circumstances connected with this case, which, if the new evidence proposed could be available in point of law, might induce the court to accede to the application.

The new evidence proposed, as it was admitted in the argument, would go no further than to show, that Messrs. Port & Russell, before their attachment was made, had notice of the assignment. But it is not now pretended that the defendant ever had any such notice. I am at a loss to perceive how notice to Messrs. Port & Russell can vary the legal rights of the sheriff. No authority has been produced to show, that where a sheriff seizes goods in execution, which are in the possession of the judgment debtor, and used by him as his own, the acts of the sheriff become tortious by mere knowledge in the judgment creditor, that the same goods had been previously transferred to a third person. No such authority can be presumed to exist. The sheriff is bound to act in conformity with the commands of his writ, and to seize the property of the judgment debtor. If he seizes it, he is bound to proceed in the execution. If the property turn out to be the debtor's, the sheriff is at all events protected, whatever notice he or the judgment creditor may have, as to the rights of third persons. If the property turn out not to be the debtor's, the seizure is unlawful, and the sheriff is liable to an action, whether he has or has not any notice of the claim of the real owner. He acts, as I have before stated, at his peril. Notice of the claim of the assignees could not, as such, vary the legal rights of the sheriff. It could only be material, as one ingredient in the case, to unite with others in showing, that possession or its equivalent was sought and obtained within a reasonable time after the property came within their grasp.

In the present case, the original attachment by the defendant is conceded on all sides to have been in subjection to the rights of the United States; and as no actual custody was taken, it was merely nominal as to third persons. The first effective seizure was upon the execution; and at that time, all other prior claims of the United States by lien being extinguished, the property was in effect in the possession of the judgment debtors; no adverse claim having been made, or possession taken. The general property draws after it the possession, unless in special cases.

If at this time the officer had had actual notice of the plaintiffs' claim, as their laches would, in favor of a creditor, have avoided their title, I have no doubt that he would have been bound to have seized the property in execution; and if so, certainly notice to Messrs. Port & Russell could not make the case stronger. It is not necessary, however, to assume this strong ground. It is very clear, that the sheriff cannot be prejudiced by any knowledge of the judgment creditor. The legality of his acts depends exclusively upon the ownership of the property and the requisitions of his precept. Suppose there had been an agreement between the creditor and debtor not to take any property on the execution, would it be contended that a sheriff, to whom such agreement was unknown, would be a trespasser for obeying the injunctions of his precept? In Turner v. Felgate, 1 Lev. 95, no doubt was entertained that a sheriff was justified in seizing goods on an execution, although it issued irregularly under a judgment which was afterwards vacated on account of its having been unduly obtained. Bull. N. P. 84. I am yet to learn, however, in what manner the knowledge of Messrs. Port & Russell could affect the legality of the levy under the execution. Notwithstanding that knowledge, they had a right to contest, if they chose, the validity of the assignment. It has not as yet been established, to my knowledge, that the mere notice of a defective conveyance of property precludes the party having notice from availing himself at law of any right to attach that property; much less can it be admitted, that notice of a conveyance of personal chattels unaccompanied with possession, which the law has pronounced a fraud, can estop the party from his right, as a creditor, to defeat that fraud. And if the law were otherwise, it is clear that such notice cannot render a sheriff responsible in damages for conduct which otherwise would stand completely justified. And for myself, I am prepared to go further, and to hold, that if Messrs. Port & Russell not only had notice of the assignment, but had actually approved the same, and come in under it, (as was at first intimated to be the real fact, but is now abandoned,) the present action could not be maintained. A remedy at law or in equity might perhaps lie against Messrs. Port & Russell, to recover the proceeds of the execution after they had passed into their hands; but the sheriff himself would be protected, if the property, in point of law, was still to be considered as the property of the judgment debtors. No question has been made as to the effect of such an assignment, to convey the property of the debtor, lying in this state, so that it may not be subject to the attachment of creditors here. It will be time enough to consider that question when it shall arise. Vide, on this point, Le Chevalier v. Lynch, 1 Doug. 170; Hatch v. Smith, 5 Mass. 42; Widgery v. Haskell, Id. 144; Harrison v. Sterry, 5 Cranch [9 U. S.] 289; Hunter v. Potts, 4 Term R. 182; Rex v. Watson, 3 Price, 6; West, Extents, 334; Pickstock v. Lyster, 3 Maule & S. 371. On the whole, I am satisfied that substantial justice, as between these parties, has been done; and I am against granting a new trial.

As the district judge concurs in this opinion, the motion for a new trial is overruled. Vide Ladbroke v. Crickett, 2 Term R. 649.

Case No. 9,393.

MEEKS v. VASSAULT et al.

[3 Sawy. 206.] [1]

Circuit Court, D. California. Nov. 30, 1874.[2]

ADMINISTRATORS — REAL ESTATE ASSETS—SALE—TRUSTEE—CESTUI QUE TRUST — ACTION BY ADMINISTRATOR—BAR—REMEDY—EFFECT OF JUDGMENT.

1. Under section 190 of the probate act of California, an action to recover lands in the possession of a purchaser, at a sale made by an acting administrator under the orders of a probate court, even though the sale is void, must be brought within three years next after the sale, or it will be barred.

2. Under the statutes of California, real estate of deceased parties is assets in the hands of the administrator, to be administered like personalty.

3. Under the statutes of California, the exclusive right to the possession of real estate of the deceased, and the exclusive right of action to recover it is vested in the administrator, pending the administration, or till the lands are distributed to the heirs.

[Cited in Sharon v. Terry, 36 Fed. 353.]

[Distinguished in Staples v. Connor, 79 Cal. 15, 21 Pac. 380.]

4. The heir cannot maintain an action to recover the real estate of the deceased after administration has commenced, until the administration is closed, or the land has been distributed to the heir.

5. The pendency of administration and the inability of the heir to maintain an action to recover real estate by reason thereof, and of the present right of action being in the administrator, do not constitute a disability on the part of the heir within the meaning of section 191 of the probate act of California. Such a state of facts does not interrupt or prevent the running of the statute, as provided in section 190.

6. For the purpose of bringing an action to recover land belonging to the intestate's estate, the administrator is the trustee or representative of the heir, and since the exclusive right to bring the action is vested in him, the law also imposes upon him the duty to bring it.

7. Where the administrator neglects to bring an action to recover property of the estate until it is barred under the statute of limitations applicable to the subject, the heir is also barred, even though the heir is a minor at the time the action accrues to the administrator.

[Cited in McLeran v. Benton, 73 Cal. 343, 14 Pac. 884.]

8. In such case the heir has his remedy against the administrator and his bondsmen, or he may, in a proper proceeding, compel the administrator to sue.

9. Where the trustee having the right of action is barred, the cestui que trust is barred.

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

[2] [Affirmed in 100 U. S. 564.]

10. If the title to real estate of the deceased is put in issue and determined in an action between the administrator and another, the judgment will bind the heir to the same extent that it binds the administrator.

11. Sections 258 and 259 of the probate act, do not limit the operation of section 190.

12. An adverse possession of land for the time prescribed by the statute of limitations, vests the title thereto in the adverse possessor.

[This was an action of ejectment by William Newton Meeks against Ferdinand Vassault and others.] The land in controversy is one hundred-vara lot number ten, of the hundred-vara survey south of Market street, in the city of San Francisco, and within the limits embraced by the Van Ness ordinance, the decree confirming the pueblo title, and the acts of the legislature of California and of congress, confirming it; and not within any of the exceptions mentioned in said decree or in said acts. Said lot was granted by George Hyde, alcalde of San Francisco, to James G. D. Dunleavy, January 14, 1847, and possession duly taken under said grant. Said grant was duly recorded in "Book A" of alcalde grants on the same day. On June 2, 1847, said Dunleavy conveyed said lot to George Harlan, who afterwards died intestate in Santa Clara county, of which he was then a resident, July 8, 1850, seized of all the right, title and interest in said land derived from said grant and the possession thereunder. Said George Harlan left surviving him as his heirs-at-law, a widow, six children, and two grandchildren, lawful issue of a deceased child, who died during the lifetime of said Harlan, of whom four of said children, and the two grandchildren were minors, and the others adults of full legal age. The said widow and three eldest children conveyed all their interest in said lot to plaintiff at various times prior to August 11, 1874; the three next eldest in 1869, and the two grandchildren in 1872, by virtue of which said several conveyances, all the interest of the heirs of Harlan, deceased, in said lot, became vested in said plaintiff before the commencement of this suit. Some of said heirs attained their majority within three years next before the commencement of this action. Before, and at the time of the commencement of this action, the several defendants were severally in possession of the portions of said lot described in their respective answers. On August 19, 1850, Henry C. Smith was appointed by the probate court of Santa Clara county, administrator of the estate of said George Harlan, deceased. Letters of administration having issued to him, he duly qualified and entered upon his duties as administrator. On December 31, 1853, said Henry C. Smith, without first having settled his accounts as administrator, filed in the Probate Court his resignation in writing of his administratorship; and thereupon the court, without in express terms accepting said resignation, made an order in which, after the introduction, "Now comes Henry C. Smith, administrator of the above estate, and files his resignation as administrator of said estate," he is ordered to turn over to John Yontz, public administrator, all the said estate; to make with said public administrator a full and complete settlement relating to said estate on or before the first day of the next succeeding term of said court, and providing that upon such full settlement he and his sureties should be discharged. And it was further ordered that said estate be placed in the hands of said public administrator "for purposes of general administration." Sufficient funds had come to the hands of Smith, had they been properly applied to have paid all the debts of the estate, together with the expenses of administration. No final settlement of the accounts of said Smith as administrator was ever made, either with the public administrator or the court, but no further proceedings were had with respect to his removal except such as are implied from the recital in the foregoing order and from the appointment of a successor, and the subsequent recognition of the latter as administrator in the further proceedings of the court. On June 15, 1855, Benjamin Aspinwall, on his own petition, was by the same court, appointed administrator of said estate of Harlan, deceased. He duly qualified as such, and letters of administration were issued to him in due form of law, under which he acted till he resigned, settled his accounts, and was discharged. On August 25, 1855, said Aspinwall, as administrator, presented a petition to the probate court, praying the sale of said lot number ten, in order to raise funds for the payment of a judgment before recovered by himself personally against said Smith as administrator. Said petition was defective in that it omitted to state certain facts required by the statute to give authority to the court to order a sale. After notice given upon November 10, 1855, the probate court upon said petition, made an order for the sale of said lot. On January 7, 1856, in pursuance of said order, said Aspinwall, acting as such administrator, upon due notice, exposed said lot number ten to sale at public auction in thirty-two subdivisions, and sold the same in said subdivisions to said several defendants and their grantors respectively. Said sale was fairly conducted. The several purchasers paid the several sums bid at said sale to said Aspinwall. The sales, with the proper vouchers and proofs, having been reported to the probate court, they were confirmed, and deeds of conveyance ordered to be given to the several purchasers; and deeds were accordingly executed and delivered by the administrator on February 13, 1856, purporting to convey the fee simple of said lots held by Harlan at his decease.

Said several grantees of Aspinwall as administrator in said conveyances, made in pursuance of said sale, either immediately upon their execution, to wit, on February 13, 1856,

entered into the actual possession of the subdivisions respectively purported to be conveyed thereby, or being already in possession, continued in such possession, and from that time forth till the commencement of this action, they and their grantees, including the defendants to this action, have actually and continuously possessed said several subdivisions, claiming title thereto in fee simple, under and by virtue of said several deeds of conveyance, and so possessing and claiming them openly, notoriously, exclusively of any other right, and adversely to all the world. Some of said defendants are the original grantees in said deeds from Aspinwall as such administrator, and the others have acquired the title of other such grantees of Aspinwall by conveyance in due form of law and for valuable considerations by them paid. Said Aspinwall continued to act as administrator till May 12, 1864, when, upon a citation issued, a rendering of his accounts, and a settlement, allowance and confirmation thereof by the probate court, he was discharged by order of the court. Afterwards, on May 12, 1864, Joel Harlan and Lucian B. Huff were appointed administrators of said estate. Having duly qualified, they entered upon the discharge of their duties as administrators, and they are still acting as such, the administration of said estate not having been finally closed. On October 16, 1869, the plaintiff filed a petition in the probate court in which the administration of said Harlan, deceased, was pending, stating, among other things, that said Joel Harlan and Lucian B. Huff were the administrators of said estate; that no debts or claims of any kind had been presented to them or either of them, as such, against said estate, and that none existed; that he had acquired from the said heirs of said Harlan, and then owned all the right, title and interest, which said heirs had derived from said Harlan in and to said lot number ten, and praying that said lot number ten might be distributed to said plaintiff, and he be declared by the court to be the owner thereof upon his giving security for the payment of his proportion of the debts of the estate. Afterwards, on November 6, 1869, a citation having been issued and notice given, and a hearing having been had upon said petition, it was by said court "ordered, adjudged and decreed, that there be, and there hereby is, distributed to the said Wm. Newton Meeks (the plaintiff in this action), said lot number ten (10), and he is hereby adjudged and decreed to be the owner thereof in fee simple absolute as against the said administrators and their successors, and the heirs at law of said deceased, and entitled to the possession thereof." Afterwards, on September 30, 1872, said Meeks, as plaintiff, commenced this action.

Wm. H. Patterson, for plaintiff.

S. M. Wilson and Alexander Campbell, for defendants.

SAWYER, Circuit Judge. The probate proceedings down to, and including the administration of Aspinwall, are the same in question in the supreme court of California in Haynes v. Meeks, 20 Cal. 288, and the facts relating thereto are fully set out in the report of that case. These proceedings were also, to some extent, considered by the supreme court of California in Haynes v. Meeks, 10 Cal. 110; Meeks v. Hahn, 20 Cal. 621; and Harlan v. Peck, 33 Cal. 515. The sale by Aspinwall having been adjudged void in Haynes v. Meeks, by the highest court in the state, plaintiff claims a right to recover. But the defendants set up and rely on the special statute of limitations found in the probate act relating to administrators' sales. Section 190 of that act is as follows: "No action for the recovery of any estate sold by an executor, or administrator, under the provisions of this chapter, shall be maintained by any heir or other person claiming under the deceased testator or intestate unless it be commenced within three years next after the sale." If this section is applicable to a void sale, like the one in question, then the action was long since barred, unless there is some other provision of the statute, or rule of law, that preserves the right of action in the plaintiff upon the facts of this case. That the statute is applicable to the sale in question, has been settled, and I think correctly, by the supreme court of California, in cases arising upon a sale of a portion of this very estate. Harlan v. Peck, 33 Cal. 520, and Harlan v. Miller, Jan. Term, 1868, affirming it. This being the construction of a statute of California by the highest court of the state, it is conclusive in this court. Walker v. State Harbor Commissioners, 17 Wall. [84 U. S.] 648; Williams v. Kirtland, 13 Wall. [80 U. S.] 311; Tioga R. R. v. Blossburg & C. R. R., 20 Wall. [87 U. S.] 137. The statute would be useless if it did not apply to a void sale. A purchaser at a valid sale would not need the protection of the statute.

Under the statutes of California real estate, like personalty, is assets in the hands of the administrator, and is to be administered, and applied first to the payment of the expenses of administration and debts of the deceased, and then the residue after satisfying all lawful claims distributed to the heirs. Realty and personalty stand upon the same footing, except that the personalty must be first exhausted before the real estate can be sold and applied to payment of the debts of the deceased. The right of possession, and right of action to recover possession of the real estate, vests exclusively in the administrator. The heirs cannot maintain an action to recover the real estate pending the administration, or after administration has been commenced, until the estate has been settled, or the real estate has been distributed to them by the probate court. This is also settled by numerous de-

cisions of the supreme court of this state. Meeks v. Hahn, 20 Cal. 621; Meeks v. Kirby, 47 Cal. 168; Chapman v. Hollister, 42 Cal. 462; Burton v. Lies, 21 Cal. 91. This being so, it is insisted by plaintiff's counsel, that since neither he nor his grantors, the heirs of Harlan, could maintain an action for the recovery of the lands in controversy pending the administration, or until distributed by the probate court on November 6, 1869, they were under a legal disability to sue, within the meaning of section 191 of the probate act; and the action having been brought within three years after the said distribution, that it is not barred. Section 191 is as follows: "The preceding section shall not apply to minors or others under any other legal disability to sue at the time when the right of action shall first accrue; but all such persons may commence such action at any time within three years after the removal of the disability." The question is, what is the meaning of the phrase, "any legal disability to sue," as here used? This provision does not define the term "legal disability." It assumes that there are other disabilities known to the law, and we must go to the law as it existed outside of this section to ascertain what they are. The provision mentions "minors," and adds, "or others under any legal disability."

Upon turning to the general statute of limitations we find specified as disabilities, infancy, insanity, imprisonment for criminal offenses, coverture, etc., but neither in that nor in any other statute is anything of the kind now claimed as a disability, named or recognized as such. The definition of "disability," as given by Bouvier, is "The want of legal capacity to do a thing." Bouv. Dict. The disability may relate to the power to contract, or to bring suits; and may arise out of want of sufficient understanding, as idiocy, lunacy, infancy; or, want of freedom of will, as in the case of married women, and persons under duress; or out of the policy of the law, as alienage when the alien is an enemy, outlawry, attainder, praemunire, and the like. The disability is something pertaining to the person of the party—a personal incapacity—and not to the cause of action or his relation to it. There must be a present right of action in the person, but some want of capacity to sue. In this case there was no want of power, or capacity in the person. The difficulty is in his relation to the subject-matter of the suit. There was no present right of action in the heir, or his vendee. He had not yet succeeded to the right of action. The cause of action had accrued, but it was in the administrator, and had not yet passed to the heir. There was, however, a party in existence competent to sue—one to whom the law gives the right, and upon whom it imposes the duty to sue. This party is the administrator who is the trustee of the estate, and who for this purpose represents both the heirs and the creditors of the estate. He represents the title. If the administrator sues, or is sued, and fails when the title is in issue and determined, the judgment is binding both upon the heirs and the creditors of the estate. The matters thus adjudged would afterwards be res adjudicata between the opposing party in the action and the heirs, as well as the administrator. This has also been settled by the supreme court of the state. Cunningham v. Ashley, 45 Cal. 485. This could not be so unless the administrator represented the heirs. The disability mentioned is undoubtedly one of the disabilities already existing recognized by the statute, such as those mentioned in the statute of limitations affecting the capacity to sue of a person having a present right of action existing in himself, and which excuses him from bringing the action. It cannot mean the want of a present cause of action. If there is no present right of action in a party, he has no occasion for a present capacity, an ability, to sue, or, for an excuse for not suing. The administrator being invested with the right of action to recover land of the estate, if he neglects to sue too long the action is barred, and as he represents the creditors and heirs for this purpose, it has often been decided that when an action is barred as to him, it is barred as to the heir, even though the heir be at the time a minor, or resting under some other disability. Darnell v. Adams, 13 B. Mon. 278, 279; Couch's Heirs v. Couch's Adm'r, 9 B. Mon. 161, 162; Rosson v. Anderson, Id. 425; Williams v. Otey, 8 Humph. 569; Wooldridge v. Planter's Bank, 1 Sneed, 297; Worthy v. Johnson, 10 Ga. 358; Long v. Cason, 4 Rich. Eq. Cas. 60; Wych v. East India Co., 3 P. Wms. 309; Pentland v. Stokes, 2 Ball & B. 74; Smilie v. Biffle, 2 Barr. [2 Pa. St.] 52. Several of these are cases of administrators, and others of other trustees, where the cestui que trust was held to be barred when the trustee was barred. It is difficult to see how upon principle it should be otherwise. The moment an adverse possession by a wrong doer, of lands belonging to an estate in course of administration commences, a cause of action arises to recover it; but the policy of the law vests it exclusively in the administrator, and there it remains until the lands are lawfully sold and conveyed for purposes of administration, or are distributed to the heir. In the former case the right of action passes to the purchaser; in the latter to the heir. It is the same cause of action, and it exists in but one party at the same time. If the cause of action is barred before the sale and conveyance to the purchaser, or the distribution to the heir, there is none left to pass to either, and neither ever acquires any valid cause of action at all. If the authorities cited are not all wrong, the difficulty with the plaintiff is, not that he was laboring under a disability to sue upon an existing cause of ac-

tion in his favor, but that he never became vested with a living cause of action. The cause of action became barred, and the title vested in the adverse possessor under the special statute of limitations before it came to him. Statutes of limitations are now regarded as statutes of repose, and not mere penalties for neglect, and are intended for the benefit of those who have purchased and occupied lands in good faith, believing they acquired a good title; and the policy of the law seems to have been, to shorten the time within which rights acquired in good faith under the sanction of judicial proceedings in probate courts can be disturbed. Whether as effective as desirable or not, the heirs are not without a remedy. They have a remedy against the administrator and upon the administrators' bond; and they may, in a proper proceeding, also compel the administrator to sue. Smilie v. Biffle, 2 Barr. [2 Pa. St.] 52–54; Tyler v. Houghton, 25 Cal. 29. Besides, it is not apparent in this case why the partial distribution could not have been made as well within three years, as more than thirteen years after the sale, and thus have enabled the distributees to sue. There must have been gross negligence on the part of the heirs in not compelling the several administrators to account, and in not applying for a distribution. Ample funds appear to have come to the hands of the administrator to pay all claims against the estate as early as 1855. If the heirs are not bound where the bar has attached as against the administrator, the administration, by the non-action of the heirs, might be kept open indefinitely, and the right of action prolonged for a century at their option.

The defendants entered under their conveyances in 1856. If, as claimed by plaintiff, the whole proceedings were void, a right of action accrued in favor of the administrator to recover possession immediately; and it was barred as to him at the end of three years, or in February, 1859. The partial distribution to plaintiff was not made till November, 1869, more than ten years after the bar of the statute attached as against the administrator. If the cause of action is not barred as to the heirs and the plaintiff, their successor in interest, then, we have this curious condition of things.

For upwards of ten years the defendants were wrongfully in possession of the land, and yet there was no right of action in favor of anybody to recover. The administrator could not recover because he was barred. The heirs could not recover because the law vested the right of action exclusively in the administrator. The heirs would at length acquire the land, while it would cease to be assets of the estate, and the creditors be cut off. Why should the creditors, who, under the statute, have the first lien upon the estate, be barred by the neglect of the administrator, while the heirs, whose interest is subordinate, are not? The language of the statute is express, that "no action shall be maintained by any heir or other person claiming under the deceased testator or intestate, unless it be commenced within three years next after the sale." The heir is named in terms.

The plaintiff's counsel insists that under our statute the heir occupies a position similar to a remainderman; that the remainderman is not barred by the neglect of the holder of the preceding estate to sue until his right is lost, and that for similar reasons, the heir is not barred by the failure of the administrator to sue. The decisions relating to remaindermen seem to depend upon the particular language of the various statutes under which they arose, and to vary with the language. But whatever the rule may be with respect to remaindermen, I do not think their position is like that of the heir under our statute. The owner of the particular estate and the remaindermen do not represent the same estate. There is no connection whatever between them, except that one estate begins where the other shall end. The intermediate owner is in no respect the trustee or representative of the remainderman. But the administrator is a trustee of the heir and the creditor. He represents the heir and the creditor in the administration. As we have seen, a judgment in a suit to which the administrator is a party, and in which the title to the estate is determined, binds the heir. This must be because he represents the heir. I put the decision upon the statute, and upon this principle as sustained by the authorities. The same statute which vests the right to the exclusive possession of the real estate, and the exclusive right of action to recover it from a disseisor pending administration, and which confers the power to sell and convey title to the real estate under the authority and direction of the probate court. also prescribes the time within which an action must be brought by the heir or any other party claiming under the deceased, to recover the land from a purchaser in possession under a sale improperly made. It also prescribes the exceptions to the general rule laid down, and the court is not authorized upon the idea that other cases are within the equity, though not within the letter of the statute, to interpolate other exceptions than those expressed in the statute itself. McIver v. Ragan, 2 Wheat. [15 U. S.] 28; Tynan v. Walker, 35 Cal. 643.

Sections 258, 259, providing for a final distribution to the parties entitled, and providing that each party to whom a specific portion is allotted, "shall have the right to demand and recover their respective shares from the executor, administrator, or any person having the same in possession," in no respect limit the provisions of section 190, as claimed by plaintiff. These sections only apply to property belonging to the estate at the time of distribution. Of course, there can be no title created by the act of distribu-

tion. Nothing can be given to the distributee but that which remains in possession or custody of the administrator, as a portion of the estate. Property lawfully sold by the administrator and conveyed by valid conveyance, ceases to be a portion of the estate; and the fact that the court should assume to distribute such property to the heir would not revest a title in the distributee. The adverse possession for the time prescribed vests a perfect title in the possessor as against the former holder of the title and all the world. Arrington v. Liscom, 34 Cal. 380-387; Cannon v. Stockmon, 36 Cal. 541; Lamb v. Davenport [Case No. 8,015]; Winthrop v. Benson, 31 Me. 384; Leffingwell v. Warren, 2 Black [67 U. S.] 605, and cases therein cited.

Suppose an action upon a promissory note or other demand or to recover a piece of personal property belonging to the estate had become barred under the general statute of limitations by neglect of the administrator to sue, would it be claimed that a subsequent distribution of the dead cause of action to the heir, would give it new life and enable him to recover on it? I think no such claim would be made. Yet sections 258, 259, would as clearly apply to such cause of action as to real estate, the title to which has been vested in an adverse possessor under the section in question. I see no way of escape from the conclusion that plaintiff's action is barred under section 190 of the probate act. There must be a judgment for defendants with costs, and it is so ordered.

[The cause was taken by the plaintiff, on a writ of error, to the supreme court, where the judgment of the circuit court was affirmed. 100 U. S. 564.]

Case No. 9,393a.

MEERSE v. ALLEN.

[Betts, Scr. Bk. 599.]

Circuit Court, S. D. New York. Oct. 14, 1859.

PLEADING IN EQUITY—PATENTS—INFRINGEMENT—MULTIFARIOUSNESS—AVERMENT OF TITLE.

[1. A bill in equity to restrain infringement of patents is not demurrable for multifariousness, because charging that defendant's machine contains all the improvements contained in complainant's several patents, thereby infringing the same.]

[2. Complainant on such a bill need not set forth a deduction of title to the patents by numerous assignments, a simple averment that the title was vested in him is sufficient.]

[This was a bill in equity by Joel Meerse and others against R. L. Allen. Defendant demurs to the bill.]

NELSON, Circuit Justice. First. This is a demurrer to a bill in equity filed to restrain the defendant from the infringement of several patents for improvements in a reaping machine. The demurrer is grounded mainly upon the multifariousness of the matters set forth in the bill, namely, four distinct and several patents for as many improvements entering into the construction of what is claimed to be a perfect reaper. These improvements as patented are not limited to the improvement of any particular machine, but are intended to be used in any or all the variety of instruments of this class. Nor do all of them enter into the construction of the machine as necessarily connected together in practical operation and use; any one or more of them may be omitted. Hence it is argued that the bill sets up distinct and independent matters wholly unconnected, and in which the defendant is compelled in his answer to unite different and distinct matters pending upon different and distinct proofs, thus complicating and embarrassing the defence. It is undoubtedly true that four different claims set forth in the bill upon which the defendant is sought to be enjoined, and for the alleged infringements of which damages are claimed, call for separate and distinct defences, and the objection to the bill on the ground of multifariousness in a general sense, would seem to be well founded, within the settled rules of equity pleading. But on looking at the case made in the bill, we are inclined to think the objection not maintainable. The bill charges that the machine made and used by the defendants, sought to be enjoined, contains all the improvements embraced in the several patents, and hence the act of making, vending or using a single machine constitutes an infringement on all of them. The several improvements being capable of a combined use, and being thus connected by the defendant, the convenience of both parties, as well as a saving of expenses in litigation, would seem to be committed in embracing all the patents in one suit. A court of chancery allows distinct and separate causes of complaint between the same parties to be joined in one, in order to avoid multiplicity of actions, unless it is apparent that the defence will be seriously embarrassed by confounding different and unconnected issues and proofs in the litigation. In this case, although the defence as it respects the several improvements may be different and unconnected, yet, according to the allegations in the bill so far as the question of making or using a machine is concerned, the infringement of all of them is involved, and to this extent they are connected with each other. We agree if one of these improvements had been charged to have been used upon one machine and another upon a different machine there would have been much force in the objections taken to the bill. But in the respect in which the case is thus presented, we think them not well founded. It has not been unusual in actions at law, in case of alleged infringements of patents, to count upon two or more patented improvements upon the same machine.

Second. It is also objected that the bill does not set forth a complete title to the several patents in the complainants. The pleader has set a deduction of the title by numerous assignments which leave the question of title

exceedingly complicated, but as far as we have been able to look into it, we discovered no defect, we think this deduction of title unnecessary, and that a simple averment that the title to the patents was vested in the complainants would have been sufficient. Such an averment is found in this bill in addition to the special title set forth.

The demurrer is overruled and the defendants directed to answer.

Case No. 9,393b.

MEGRAW v. CARROLL et al.

[5 Ban. & A. 324.] [1]

Circuit Court, D. Maryland. April, 1880.

PATENTS—INFRINGEMENT—BRUSH BLOCK—SAME EFFECT.

The complainant's patent consisting in cutting a groove of considerable depth in a brush block, and in nailing the bristles through a leather strip into the groove, so that the butts of the bristles being bent into the curve formed by the groove are thus fastened more securely, and are made to spread and flare, giving the brush a fuller and handsomer appearance, is infringed by nailing on the brush block a narrow strip about as thick as, and in lieu of, the groove, and which has the same effect.

[This was a bill filed by Evalena L. Megraw against J. Bond Carroll and others to restrain certain alleged infringements.]

Charles Marshall and G. H. Howard, for complainant.

W. H. Cowan, for defendants.

Before BOND, Circuit Judge, and MORRIS, District Judge.

This is a bill for injunction and account, alleging that the respondents are infringing patent No. 160,933, granted March 16th, 1875, to William A. Megraw, for an improvement in brushes, which patent now belongs by assignment to the complainant.

The invention consists in cutting a groove of considerable depth in the brush block, and in nailing the bristles through a leather strip into the groove, so that the butts of the bristles being bent into the curve formed by the groove, they are thus fastened more securely, and are made to spread and flare, giving the brush a fuller and handsomer appearance, making it more salable, and, it is claimed, more serviceable. The defences set up in the answer are want of novelty and absence of utility in the invention, and a denial that the brushes manufactured by the respondent are an infringement of the complainant's patent.

The evidence produced by the respondents, tending to show use of the same device by others prior to the date of the application for the Megraw patent, has failed, in our judgment, to countervail the presumption which the issuing of the patent creates in favor of the patentee, and the testimony of the witnesses in support of its novelty. It appears that in the old tied brush there was always a small groove in the block, the only purpose of which, however, was to sink the knot of the cord. It was not used at all on the brushes made with straps and nails. But it does not appear that there was any thought then of having the groove deep enough to serve any useful purpose in connection with brushes made in that manner. No one had then, so far as the evidence shows, brought into use the idea of having the groove of a considerable depth, and of forcing the butts of the bristles to bend into it, and, by that means, prevent their being pushed up or pulled out, and at the same time give them a flare, and spreading them. This was the invention of Megraw, and the remarkable increase in the demand for brushes of the class that are now made in that mode, as shown by the testimony, together with the respondents' substantial imitation of it, and the direct testimony of the complainant's witnesses, are conclusive proofs of its usefulness. The brushes made by the respondents do not have a deep groove cut in the brush block, but in lieu thereof a narrow strip about as thick as the groove is deep, nailed on the block, which has the same effect as the groove and is, obviously, and indeed confessedly, put on to produce that effect. A groove or channel can as well be made by nailing a narrow strip on and thus raising the surface of the block as by cutting a strip out and thus sinking a groove into it. This is what the respondents have done, and we are satisfied that one is the mechanical equivalent of the other.

In our judgment, the complainant is entitled to the relief prayed for in her bill, and we will so decree.

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

Case No. 9,394.

MEIER et al. v. KANSAS PAC. RY. et al.

[4 Dill. 378.] [1]

Circuit Court, D. Kansas. 1877.

UNITED STATES—SUITS AGAINST—MORTGAGEE.

Whether the United States can compulsorily be made a defendant to a foreclosure bill where it holds a lien or mortgage on the property in respect of which the foreclosure is sought, quaere?

The bill [by Adolphus Meier and others against Kansas Pacific Railway and others], which was originally filed in the state court, seeks to foreclose a mortgage on the railway and property of the Kansas Pacific Company —one of the companies aided by congress in what is known as the Pacific system of railroads. The United States, under the legislation of congress, has certain rights in and liens on the property, and was made a defendant to the bill, but has entered no appearance.

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

After the suit was removed to this court, the complainants' solicitor made the application set forth in the opinion of the court.

J. P. Usher, for the motion.

Before MILLER, Circuit Justice, and DILLON, Circuit Judge.

PER CURIAM. The solicitor for the complainants has filed in this court the following motion: "Complainants move the court that a motion, under the seal of this court, be issued, respectfully addressed to the attorney-general of the United States, notifying him that a suit has been instituted against the United States of America in this court, accompanied by a copy of the petition or bill of complaint, and requesting the attorney-general to appear and state whether the United States of America claim any rights in the premises which are the subject matter of this action, and whether the United States desire any adjudication of their rights in the premises to be made, and to show cause, if any he has, why the prayer of the bill shall not be granted. J. P. Usher, Solicitor for Complainants."

In support of this application, the complainants' solicitor has referred the court to the case of Elliot v. Van Voorst [Case No. 4,390], in which the late Mr. Justice Grier held that a mortgagee may have an effectual decree of foreclosure where the United States is the owner of the equity of redemption, on a notice given in such manner as the court may prescribe, if the land be not held for government purposes.

We grant the motion for which the complainants ask, but we do not thereby commit the court to the proposition that it can, on the final hearing, pronounce a decree against the United States without an authorized appearance by the attorney-general. This question is reserved. That officer, on being notified of this order, can take such action as he may be advised by asking the direction of congress, or by appearing or declining to appear in the cause on behalf of the United States. Let an order be entered and served in conformity with the motion. Ordered accordingly.

Subsequently the attorney-general directed the district attorney to apply for leave for the United States to enter its appearance and to plead.

Case No. 9,395.

MEIER v. KANSAS PAC. RY. CO.

[5 Dill. 476; 6 Reporter, 642; 11 Chi. Leg. News, 41.] [1]

Circuit Court, D. Kansas. 1878.

RAILROAD COMPANIES—RECEIVER — APPOINTMENT —REMOVAL.

1. Principles upon which receivers should be selected stated.

2. A receiver should be an impartial person, not interested in the litigation or the partisan of any of the litigant parties.

[Cited in Wood v. Oregon Development Co., 55 Fed. 902.]

3. Neither a non-resident receiver of a railway corporation, nor more than one receiver, should ordinarily be appointed.

4. Where two receivers were originally appointed as the representatives of different interests which became hostile, leading to dissensions and unnecessary expense, both were removed and a single disinterested resident receiver appointed.

[Cited in Wood v. Oregon Development Co., 55 Fed. 902.]

Motion [by Adolphus Meier] to remove H. Villard, one of the receivers heretofore appointed by the state court, from whence this cause was removed. Mr. Carlos S. Greeley was the other receiver. The circumstances under which they were appointed, the grounds upon which the removal was sought, and the action of the court and the reasons for such action, appear in the opinions of the judges.

J. P. Usher and others, for the motion.

A. H. Holmes and others, opposed.

Before MILLER, Circuit Justice, and FOSTER, District Judge.

MILLER, Circuit Justice. I think the action of Mr. Greeley, in the paper which he sent to the court, relieves the court of the only serious embarrassment which the case presented, namely, the difficulty of removing one of two receivers who had become hostile to each other in their feelings and actions in relation to their duties, thereby leaving the other in sole possession of the field. As no motion was made to remove Mr. Greeley, and as, therefore, no charges against him were properly before us, it would hardly have been just to him for the court to remove him sua sponte. Nor do I think, for reasons which I shall presently suggest, if Mr. Villard was to be removed, and Mr. Greeley remain, that any one should be appointed in place of the former. Mr. Greeley having, with much consideration, expressed to the judges his willingness to give up his receivership if his retaining it would embarrass their actions, we are happily relieved of that difficulty.

I am of opinion that both receivers should be removed, and a single receiver appointed, for the following reasons:

1. The existence of two receivers is unnecessary and embarrassing, even if they were on amicable terms and had but a single place of business at or near the theater of the road's operations. They are obviously unnecessary as regards the successful operation of this road, which I assume to be the principal—if not the only—purpose for which a court should appoint receivers. If they should chance to disagree about the management of the road or the exercise of any functions of their office, as they have done in this

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission. 6 Reporter, 642, contains only a partial report.]

case, the difficulty of the successful or proper discharge of their duties becomes manifest. When, in addition to this want of harmony, they establish separate places of business a thousand miles apart, and neither of them within two hundred miles of the road whose operations they are to control, it is apparent, without argument, that the hand of the court which they are must be, if not paralyzed, rendered very inefficient and uncertain in its grasp and control of the business of the company.

2. There is no necessity and a manifest impropriety in having a receiver located in New York. It is true, many such Western corporations as this have offices in New York, at which much of the financial business of the companies is transacted. But this has always been felt to be a grievance by the people of the West, whose business the road does, and by which alone it can live, and when such a company comes under the control of a court by reason of its insolvency, and a receiver is appointed to take charge of it, such control as the court can exercise over the operations of the road, and in collecting and disbursing its receipts, can be most safely used, exercised, and more strictly under the eye of the court, by an officer residing within its jurisdiction. I think, therefore, on general principles, and on the facts of this case, there was no necessity for a receiver in the city of New York.

3. I am of opinion that the receivership in New York should be abolished in the interest of economy. Its expenses are unnecessary and excessive. No reason can be perceived for the employment of three firms of lawyers —each firm composed of several members— for any business properly pertaining to the receivership [and the expenditure of $42,000 in that office inside of two years seems to me to be unwarranted by any requirements of a receiver's duties].[2]

4. The main argument against any action by the court is that Mr. Greeley and Mr. Villard were appointed by an agreement between the parties interested, and at their instance, because they represented certain classes of lien creditors of the company, and that to remove Mr. Villard would be to sacrifice one of those interests, or at least to leave it unprotected. There can be no doubt that such was the motive which led to the appointment of two receivers instead of one, and there can be as little doubt that it was a mistake to have done this, whatever the motive. But while a court may very properly conform its action in such a matter to the wishes of all the parties interested in the suit, when their wishes harmonize, it must consider for itself what is proper to be done when that harmony is turned into hostility, so that the two receivers represent two hostile camps, each intent upon securing the whole or the larger share of the spoils. It then becomes a duty of the court to see that its powers are exercised on principles of strict neutrality as regards the belligerents, and this can only be done in this case by removing the representatives of these hostile interests and appointing a receiver who, in feeling and in conduct, will be strictly neutral and strictly honest. The foundation of the agreement by which Greeley and Villard were appointed has given way, and the only possible excuse for appointing two receivers is gone. I have only a word to add.

In my view, a receiver is strictly and solely the officer of the court. By reason of the inability or neglect of the officers of the corporation to conduct its business as it ought to be done, the conduct of that business is taken charge of by the court and carried on by its agent. It is the duty of that agent so to conduct the business as that the lawful rights and legal interest of all persons in the property and in the business shall be protected, as far as possible, with equal and exact justice. This is much more likely to be done by a receiver who has no interest in the capital stock of the road, none in its debts, and no obligations to those who have. Such a person, acting under the control of the court, seeking its advice (as he would be inclined to do in all questions of doubtful duty), and bound in a sufficient surety for the faithful performance of his duty, is, in my opinion, the proper one for such an office. While it may be true that a large personal interest may stimulate the activity and direct the vigilance of the receiver, it is equally true that such vigilance, whenever occasion offers, will be directed unduly to advancing that personal interest and that activity to securing personal advantages.

For these reasons, I think that the offices of the two receivers should be consolidated into one, that both the present receivers should be discharged, and that one living in the state in which the road mainly lies, and where its business operations are conducted, and who also has the requisite capacity and knowledge of the business, and the honesty and firmness to discharge his duty faithfully, free from the influence of the hostile interest in the case, should be appointed.

FOSTER, District Judge. In addition to what has already been said by Mr. Justice MILLER, I have but a few words to offer. At the time of the appointment of the two receivers in this case, the parties then before the court, or at least the parties controlling the proceedings, plaintiffs and defendants, were acting in harmony, and agreed upon Mr. Villard and Mr. Greeley as the receivers—the former as representing the Denver extension bondholders, and the latter the defendant company and junior securities. The theory of the parties seems to have been that the different interests should be represented and protected by the different receivers. So long as harmony pre-

[2] [From 6 Reporter, 642.]

vailed among these diverse interests, no difficulty was experienced in operating the road under this double management, excepting the additional expense of two receivers and the delay occasioned in transacting the business with their offices a thousand miles apart. But, eventually, the different interests antagonized each other, and whether one party or the other is in fault we need not stop to inquire, for we cannot discriminate between these interests in deciding who shall be the receiver of this property. Suffice it to say, the theory upon which these two receivers were appointed has failed in the practical management of the road, and the only clear way out of the difficulty is to go back to the general principles upon which a court acts in taking the custody of property through its receiver. And nothing can be more apparent than that this officer of the court should stand indifferent between the contending parties. He should act on rules of strict neutrality. He should aim to manage and operate the road to the best advantage, neither favoring one party or the other, but leaving all to seek protection and adjustment of their rights through the adjudication of the court. Upon these principles we must act in this case, and the several reasons so clearly stated by Mr. Justice MILLER, and in which I fully concur, demonstrate not only the necessity but the advantages of such a course.

Therefore, an order will be made removing both Villard and Greeley as receivers, to take effect on some day to be named in the near future, and upon the appointment and qualification of a successor, to whom they will deliver possession of all the property (real and personal), moneys, books, and all other effects of the defendant railway company in their hands as receivers. Ordered accordingly.

Case No. 9,396.

MEIGS v. SUN MUT. INS. CO.

[17 Hunt, Mer. Mag. 183.]

Circuit Court, S. D. New York. June, 1847.

MARINE INSURANCE—PROPERLY MANNED—END OF VOYAGE—TEMPORARY ANCHORAGE.

[1. The fact that a ship has performed her voyage and arrived at her home port in safety raises a presumption that she had been all the time properly manned and in every respect seaworthy, and it devolves upon insurers of the cargo defending against a suit for loss by fire, to prove that at the time of loss she had not a full complement of men.]

[2. To terminate a risk upon a marine policy insuring a vessel against loss, until she arrived at the port from which she started after her voyage and had been "moored 24 hours in safety," the voyage must have ended by the arrival of the vessel at the port of delivery, and anchoring her with a view to end the voyage at her proper station at that port for the delivery of cargo.]

[3. Merely dropping anchor in the harbor short of the usual anchorage grounds, for temporary purposes, and especially if from necessity or on account of the character of the navigation or of the harbor is not such a mooring.]

This was an action [by Loring Meigs against the Sun Mutual Insurance Company] to recover the amount of a marine policy of insurance, effected on the ship Joseph Meigs, on a whaling voyage from Mattapoisett, Massachusetts. The terms of the policy were, that it was to continue in effect until the vessel arrived at the same port, after her voyage, and had been moored 24 hours in safety. The vessel reached home in November, 1844, and was anchored within a mile and a half of the dock, for the purpose of lightening her, as it was supposed that she drew too much water to proceed to the usual landing place, without first taking out some of her cargo. She was, therefore, kept at anchor, three-quarters of a mile from the wharf, for seven or eight days, during which lighters were employed unloading her; and, while in this position, she took fire from lightning, or some other cause which did not appear, and was totally destroyed, and the insured now seek to recover the amount of their loss. For the defence it was contended that the policy had expired before she was destroyed, as she had arrived at her port of destination, and was safely moored 24 hours before the fire took place, and that, therefore, the insurers were not responsible.

NELSON, Circuit Justice (charging jury). This was an action on a policy of insurance taken out on the Joseph Meigs, a whaling ship, her outfit and tackle, to continue for a limited period of time, until her return, after her cruise and safe arrival, at the same port, and until she was there moored at the wharf 24 hours in good safety. In order to call your attention to the material part of the policy, I will refer to it in its terms, as the whole question depends on a proper understanding of a particular clause, namely, the clause indicating the termination of the voyage and risk. The defendant, on the 24th of September, 1844, at noon, made an insurance on a vessel, at and from Mattapoisett, on a whaling voyage, to continue until said vessel had safely arrived at Mattapoisett, and until moored 24 hours in good safety. This is the material clause on which the whole case hangs, taken in conjunction with the clause, "until the same shall be safely landed." This clause differs materially in respect to the insurance of the ship and cargo. With respect to the ship, the risk ends on the arrival of the same at the port of Mattapoisett, and on being there moored 24 hours in good safety. But as respects the cargo, the risk does not end until the same is safely landed.

In respect to the cargo, the first objection taken to the right of the plaintiff to recover, is that, in point of fact, at the time of the loss—that is, the destruction of the ship and cargo by fire—the vessel was not seaworthy, for the reason that she had not on board a competent number of hands to take care of the

ship, and to keep watch. But the fact that the ship had performed her voyage, and arrived at her home port in safety, for aught that appeared to the contrary, the presumption of fact is that she had been all the time properly manned, and in every respect seaworthy; and, as I apprehend, it devolves on the insurers to prove that at the particular time of the loss, she was not manned with a proper complement of hands. If that fact is established to your satisfaction, it is a sufficient answer to as much of the case as it covers, namely, in respect to her cargo. If not, then the plaintiff is entitled to your verdict on that branch of the case. The main question is in respect to the ship, and, as has been very properly stated by counsel on the trial, the simple question on this branch of the case is, whether this voyage had ended, within the meaning of the clause in the policy, before the loss of the vessel, by destruction from fire.

On the part of the defendant it is insisted that it did, and the plaintiff says that it did not. This clause is inserted in the policy for the purpose of indicating the termination of the voyage, and contains the express stipulations of the parties on the subject. The decision of the case, you will therefore see, involves the necessary and proper understanding of this clause, when applied to the particular voyage in question. Now, as a general rule, I lay down this to be the meaning of that clause, namely, that in order to terminate the risk on the part of the underwriters, by virtue of this clause, the voyage must have ended by the arrival of the vessel at the port of delivery, and the anchoring her at the usual anchorage ground in that port, for the delivery of her cargo. I, of course, refer to the port of delivery in which the voyage is to terminate. The question as to what is the usual anchorage ground, in any given port, is of course a question of fact, and depends on the usage and custom of that port. And several of the witnesses in this case have proved the fact, that every port has its particular anchorage ground. The mere dropping of the anchor in the harbor, short of the usual anchorage ground, for temporary purposes, and especially if from necessity, or on account of the character of the navigation, or on account of the harbor, under the view that I take of the case, proves nothing. It must be a dropping of the anchor for securing the vessel at the end of the voyage, and with a view to end the voyage, and for the purpose of securing the ship in its proper station, in the port of delivery, for the purpose of unloading the cargo. It is for the jury to say whether, in this sense of the policy, the vessel was moored in safety more than 24 hours, and that the policy expired before the destruction of the vessel. I regard the main question as one of fact for the jury to determine, under the instructions I have given you. You will, therefore, say whether, on the whole case, was casting anchor at the usual place for large vessels, drawing 13 feet of water, with a view to lighten her—was that casting anchor, in the meaning of this clause of the policy, at the usual anchoring ground of that harbor, or was the usual anchoring ground at the wharf, which is the usual place for unloading the cargo?

The jury found a verdict for the plaintiff for $10,500, being the full amount of the policy, subject to liquidation.

Case No. 9,397.

MEISSNER et al. v. DEVOE MANUF'G CO.

[9 Blatchf. 363; 2 O. G. 545; 5 Fish. Pat. Cas. 285.] [1]

Circuit Court, S. D. New York. Jan. 27, 1872.

PATENTS—STOP-VALVES FOR PETROLEUM—CUP-SHAPED—CONVEX-FORM.

The letters patent granted to Albin Warth, April 19, 1870, for an improvement in stop-valves for petroleum packages, make, in each one of their two claims, a cup-shaped disk, a material part of the invention, such disk being a valve-seat for a valve, and having the effect, by reason of being cup-shaped, to sink the valve within the package, so that there shall be no part projecting outside. The cup-shaped form of the disk is made, by the specification and claims, an essential part of the invention. Such patent is not infringed by a stop-valve of convex-form, not suspended below the surface of the package, though in other respects constructed like the patented arrangement.

This was a final hearing, on pleadings and proofs, of a suit in equity [by Frederick Meissner and others against the Devoe Manufacturing Company], founded on letters patent [No. 102,187], granted to Albin Warth, April 19th, 1870, for an improvement in stop valves for petroleum packages. The specification said: "This invention consists in the arrangement of a cup-shaped flanged disk, provided with a vent-hole, with a discharge opening, and with a central hole, and with a flat internal face, said central hole being intended to receive a screw, which is tapped into the solid body of a valve covered with leather or other suitable packing, in such a manner that, by means of its flange, the disk can be readily soldered to the side of a petroleum package or case for carrying petroleum or other liquid, without producing an objectionable projection on said package, and that, by turning the screw in and out, the valve can be readily opened and closed, the valve being prevented from turning with the screw, and from dropping off, by hook-shaped arms, extending from the inner surface of the cup-shaped disk, and bearing against lugs projecting from the periphery of the valve. When the valve is opened, the contents of the case or package can be readily poured out through the discharge-spout, the vent-hole admitting the external air into said case. In the drawing, the letter A represents a case or package made of tinned sheet-iron,

[1] [Reported by Hon. Samuel Blatchford, District Judge, reprinted in 5 Fish. Pat. Cas. 285, and here republished by permission.]

or any other suitable material, and capable of containing petroleum or other liquids, particularly such as are intended for transportation. In one side of this case is secured a stop-valve, B, which consists of a cup-shaped disk, provided with a flange, a, and perforated with three holes, (see Figs. 2 and 3,) one in the centre, to receive the screw, b, and two on the sides, the hole, c, being the vent, and the hole, d, the discharge-opening, of the case. The head of the screw, b, is provided with a circular shoulder, to catch under a lip, e, projecting from the edge of the central hole in the cup-shaped disk, and to the bottom of said disk is secured a plate, f, so that the head is confined in a chamber, and prevented from moving in the direction of the axis of the screw. The plate, f, is smoothed off on its exposed surface, so that it forms a seat for the valve, g, and said plate is provided with two hook-shaped arms, h, which form guides for the valve, and prevent the same from dropping off, and also from turning round, said valve being provided with lugs projecting from its periphery, and bearing against the edges of the arms, h. The valve, g, is cast of Babbitt metal, or other suitable material, and it is provided with a socket to receive the screw, b. The face of the valve is covered with a disk, i, of leather, or other suitable material, which is retained by studs cast solid with the valve, and riveted over said disk, as shown. The flange, a, is soldered to the side of the case, A, the head of the screw being situated in the cavity of the cup-shaped disk, so that no part of the valve projects materially beyond the face of the case. By turning the screw, b, in the proper direction, the valve, and the holes, c and d, are opened, so that the contents of the case can be poured out through the discharge-opening, d, the external air having free access to the interior of the case, through the vent-hole, c. By screwing up the screw, b, the valve is closed, and the case is hermetically sealed. The nip of the screw, b, is dove-tailed, to receive a handle, C, of the proper form, for the purpose of operating the same. It (the screw) may, however, be also operated by means of an ordinary screw-driver. If desired, the cup-shaped disk of the valve, together with the hook-shaped arms, h, may be produced by casting, and, in this case, the lip, e, is omitted, and the screw is prevented from moving in the direction of its axis, by a pin passing through it under the cup-shaped disk, as shown in Fig. 2. This valve is of particular value for petroleum packages, which are transported across the ocean in very large quantities, and which have to be hermetically sealed, and, at the same time, so constructed, that their surfaces have no projecting parts, and that the contents of the package can be readily drawn off." The claims were these: "1. The cup-shaped disk, suspended within the package, A, receiving the screw, b, and forming a valve-seat, in combination with the valve, g, suspended from the screw between guides, h, substantially as and for the purpose described. 2. The vent-hole, c, and discharge-opening, d, in the cup-shaped disk, in combination with the central screw, and with the valve and the guide-arms, all constructed and operating substantially as described."

John Van Santvoord, for plaintiffs.
George Gifford, for defendants.

WOODRUFF, Circuit Judge. I deem it highly probable that the stop-valve made by the defendants, when considered in reference to its construction, and its office and function, as a mere stop-valve, is substantially like that described in the complainants' patent, and that, if the latter had been described and claimed by the patentee independently of the precise form and location of the parts, and of the material office or function which such precise form and location perform in the combination described, the stop-valve of the defendants must have been declared an infringement. But, the patentee has seen fit, by his specification and claim, to confine the right secured to him within much narrower limits. He does not, in his specification, claim that either part used in the construction of his stop-valve is new, or that any number of the parts, not including a cup-shaped disk by means of which the whole apparatus is sunk below the outer surface of the oil can, are new in their combination with each other.

Viewing the device, as described and claimed in either the first or second claim, as a combination of parts not new, the cup-shaped disk is, by each claim, made a material part of the invention. The form of the disk is material. Without the form described, the result at which the invention is directed, and which is represented as its peculiar feature, would not be effected, that is to say, without that form, it would not be a stop-valve which could be applied to packages for transportation, so that their surfaces would have "no projecting parts." It is, therefore, not (as represented in the specification and claim) a case in which form is not of the substance of the combination.

Viewing the device, as described and claimed, as a machine or structure—for, all machines and structures are, in a literal sense, combinations of things, old or new—the same observations are applicable. The patentee has made the peculiar disk which he describes, and which forms the valve-seat, a prominent feature. He has done so in both of his claims, and, in his specification, he represents the immediate and necessary effect of that form of disk as constituting the peculiarity of his stop-valve and its especial utility.

It is quite possible that he might have claimed this identical stop-valve, useful, and adapted for use, in admitting oil to a can or vessel, enclosing it tightly within the can, and, at pleasure, to be opened for discharging it therefrom, and to be inserted in the end or side of the can or vessel, according to the judgment of the manufacturer of such can or

vessel. Had he done this, the question whether the defendants' stop-valve is within the claim would have been a very different one. Here he has chosen to define the object or result of his invention, to describe the parts thereof, and to specify the form, without which the object in view would not be attained.

The defendants do not use the parts in the same form, nor in an equivalent form. and do not produce the same result. The change they have made in the form of the disk constituting the valve-seat, is such as necessarily defeats the purpose for which the complainants' device was intended, and which it accomplishes. The defendants' disk is, therefore, not an equivalent to that used by the complainants. It has not the same effective operation. Instead of suspending the stop-valve below the surface of the can or vessel, by its convex form, it rises, necessarily, above that surface, and carries still higher the parts with which it is connected, thus doing the very thing which the complainants, by the peculiar form of their disk or valve-seat, profess to avoid and do avoid. The conclusion cannot be escaped by saying that the difference is not in the material or essential characteristics of the device, but only in the degree of utility, that the defendants' device is the same in principle and in substantial structure, but that, by a change in the form of the valve-seat, by inverting it, the device is rendered less perfect and less useful. Under a specification and claim which might readily be suggested, this reasoning might be entirely just and true, and might render it necessary to pronounce the defendants' device an infringement. But the actual claims cannot be rejected. The complainants must stand or fall by the claims as made, and those, not only in terms, but when read and construed with reference to the whole specification, make the form of the disk a part of the complainants' structure, material to its location in connection with the can, and especially material to the function or effect designed to be produced, and in fact produced thereby. I think, therefore, that, under this patent, the complainants cannot reject the form of the valve-seat, and the location of the structure within the can, and allege that any form of valve-seat, and any location of the stop-valve, however projecting above the surface of the can, is an infringement of their claims, provided, in other respects, it is substantially like theirs. I think, that, in all other respects, the defendants' stop-valve does include the complainants', and all of its parts, in substantially the same form and manner of combination, and operating in substantially the same way, and producing the same result. The difference in the nut and screw, in the guide, and in the contrivance for preventing the turning of the valve, are not changes in the principle, or in the manner of operation, which would relieve their stop-valve from condemnation as an infringement. They are a mere substitution of equivalents. For this reason, it seems not improbable that the conclusion to which I am compelled is not because the actual invention of the complainants has not been infringed or copied by the defendants, but because the specification and claims upon which the patent is granted have so narrowed the ground on which they stand, that they fail to realize all the monopoly to which, in virtue of the actual invention, the patentee may have been entitled. If this be so, the court is, nevertheless, unable to relieve them. We can only deal with the rights of the complainants as they are defined in and secured by the letters patent; and, as there defined, my conclusion is that the defendants' stop-valve is not an infringement. The bill of complaint must, therefore, be dismissed, with costs.

Case No. 9,398.

MEISTER v. BISSELL et al.

SAME v. MOORE et al.

[22 Pittsb. Leg. J. 85; 32 Leg. Int. 5.]

Circuit Court, W. D. Pennsylvania. Dec. 21, 1874.[1]

MARRIAGE—IN MICHIGAN—HOW CELEBRATED.

Under the statutes of Michigan, it is essential to the validity of a marriage that it shall have been solemnized in the presence of a minister or magistrate and at least two witnesses.

[These were actions in ejectment brought by Rebecca Meister, executrix of Bernard L. Meister, against F. H. Bissell and others, and by the same plaintiff against Robert C. Moore and others, for the possession of certain property.]

Marston, Hatch & Cooley, of Bay City, Michigan, Ferguson & Murray, and Weir & Gibson, for plaintiff.

Holmes & Haynes, of Bay City, Michigan, Schoyer Acheson, Morrisons & Palmer, for defendants.

McKENNAN, Circuit Judge (charging jury). Both parties claim the property, which is the subject of these suits under Dr. Peter Mowry, and thence to W. A. Mowry, one of his sons. The plaintiff is the alienee of the alleged wife and daughter of Wm. A. Mowry, and the defendants are his mother's vendees. Mrs. Eliza Mowry, in whom the title of the property was vested if he died unmarried and without issue. It is obvious then that the fundamental question in the case is, whether the Indian woman alleged to have been Mowry's wife was united to him by a valid marriage, and this is to be determined by the laws of the state where the marriage contract was made. So the plaintiff's counsel have requested me to instruct you, in the second point submitted by them, and that point is accordingly affirmed. The alleged marriage took place in the state of Michigan, in the

[1] [Reversed in 96 U. S. 76.]

latter part of the year 1845. From 1833, when the present state of Michigan was a territory, down to the present time, a statute on the relation of marriages has been in force, and during that period it has remained without essential changes. So far as we are advised, and we have had the benefit of the knowledge and researches of learned counsel from that state, on both sides, of these cases, there has not been any judicial construction of that statute or any determination of its effect, upon the marriage contracts, not made in conformity with its requirement. The only case touching it, to which we have been referred, decides that in so far as the age of consent is fixed by it, the common law is abrogated. We are therefore, left without the guidance of an authoritative exposition to ascertain its meaning, and declare its effects upon the marriage in question. The sixth section of the act authorizes the solemnization of marriages by justices of the peace, within the counties for which they are respectively chosen, and by resident or ordained ministers of any denomination at any place within the state. By the eighth section it is provided that "in the solemnization of marriages, no particular form shall be required, except that the parties shall solemnly declare in the presence of the magistrate or minister and the attending witnesses, that they take each other for husband and wife. In every case there shall be at least two witnesses besides the minister or magistrate, present at the ceremony." The requirements of the section are imperative and its meaning clear. It is expressly applicable to every case of the solemnization of marriage, or in other words, of the proposed creation of the marriage relation. No particular form is required to be observed in any case, but a magistrate or minister prescribed in the sixth section, and two witnesses shall be present, and before them the parties shall solemnly declare their assent to the contract. The co-existence of both conditions is imperatively prescribed, and the fulfilment of each is, therefore, indispensable to the lawful creation of the marriage relation.

This construction of the section is confirmed by subsequent sections of the act. Thus, the 14th section declares that, "No marriages solemnized before any person professing to be a justice of the peace, or a minister of the gospel, shall be deemed or adjudged to be void, nor shall the validity thereof be in any way affected on account of any want of jurisdiction or authority in such supposed justice or minister: provided, that the marriage be consummated with a full belief on the part of the persons marrying, or either of them, that they have lawfully been joined in marriage." Does not this recognize the necessary presence of a minister or magistrate invested with the jurisdiction defined in the sixth section of the act, at the solemnization of marriage, and declare in effect that only when it is solemnized in the presence of a person professing such character and authority, under a full belief of the persons so married, or either of them, that the pretended magistrate or minister was really such, shall not be deemed or adjudged invalid. But if the false pretence was known before the nuptials, or was discovered before the consummation of the marriage, is not the indication clear that the marriage shall be deemed or adjudged to be void? More certainly then would this result follow, where the presence of either of these functionaries was wilfully pretermitted. No less significant in this connection, is the next section of the act, which is in these words: "The preceding provisions, so far as they relate to the manner of solemnizing marriages, shall not affect marriage among the people called Friends or Quakers, nor marriages among the people called Mennonists. But such marriages may be solemnized in the manner heretofore used and practised in their respective societies." Now this section is certainly not to be assumed to be meaningless or intended to have been ineffective. What reason can there be assigned for its insertion, if it be not upon the hypothesis that the eighth section, to which it plainly refers, prescribed essential conditions in the ceremonies of marriage which were exclusive of all different modes of solemnizing it? It is well known that among the Quakers at least, there were no ordained ministers, and that in the solemnization of marriage among them the agency of a minister or civil magistrate, was not permitted. According to their practice, marriage was contracted by the declared acceptance by a man and woman of each other, as husband and wife in the presence of witnesses. This comprehended all that the common law required to constitute marriage, but it did not embrace all that the eighth section of the act prescribed. Why then were these people relieved from observances of the requirements of this section, when they omitted but a single one—the presence of a minister or magistrate—if such an omission would not otherwise invalidate the contract? Can there be any sufficient answer to this question, other than this, that the fulfillment of all the requirements of the section was essential to the validity of marriage, but as the observance of one of them was not practicable among Quakers, it was therefore necessary, to save the validity of their marriage, to exempt them from the operation of the section?

It is said, however, by some text writers, whose opinions are entitled to respect, that statutes regulating marriage are not to be construed to avoid marriages contracted in violation of some of their provisions, unless the acts contained express words of nullity. Although there is high authority against this statement of the law, it certainly has the apparent support of a number of decisions by courts of great respectability. But it should be predicated of what, in the sense of the statute, may be treated as irregularities, and

of a non-observance of provisions simply directory, not of a disregard of conditions prescribed to be performed when the contract of marriage is made, and which constitute essential elements of the mode of its solemnization. The supreme court of Pennsylvania has gone beyond this, but not for the reason upon which the rule is stated to rest, declaring that the colonial acts of 1700 and 1729 had outlasted their adaptation to the habits and customs of society, they gave a constructive effect to a clause in those acts, substantially like the 8th section of the Michigan statute, confessedly against its natural import, that they might thereby avert the extended social mischief which would result from its rigid execution. Rodebaugh v. Sanks, 2 Watts, 11. But this court has no such dispensing power with regard to the Michigan statutes. It is not so old that it has grown into disuse. It is a cherished feature of the policy of the state in reference to a subject which it has wisely undertaken to regulate. Whatever its true import is, must be accepted by tribunals, at least as its intended meaning and effect must be given to it accordingly. If the jury, therefore, find that neither a minister nor a magistrate was present at the alleged marriage of Wm. A. Mowry and the daughter of the Indian Perot—and such is the plaintiff's own proof—they are instructed that such marriage was invalid under the Michigan statute, and their verdict in such case should be for the defendants.

[A writ of error was sued out from the supreme court, where the judgment of the court below was reversed and a new trial ordered. 96 U. S. 76.]

MEISTER v. MOORE. See Case No. 9 398.

MELDRUN (WELLS v.). See Case No. 17,402.

Case No. 9,399.

In re MELICK.

[4 N. B. R. 97 (Quarto, 26).] [1]

District Court, D. New Jersey. 1870.

BANKRUPTCY — PARTNERSHIP—JOINT CREDITOR — ADJUDICATION OF ONE PARTNER.

An adjudication of bankruptcy may be made against one partner only upon a joint debt. The partnership creditor has such an interest in the separate property of any one of the partners, that he may proceed against one alone.

[Cited in Re Jewett, Case No. 7,306; Re Redmond, Id. 11,632; Re Lloyd, Id. 8,429; Re McLean, Id. 8,879; Re Webb, Id. 17,317; Re Litchfield, 5 Fed. 50.]

[Cited in Curtis v. Woodward, 58 Wis. 506, 17 N. W. 328.]

In bankruptcy.

W. L. Dayton and J. N. Voorhees, for creditor.

James Wilson, for debtor.

NIXON, District Judge. Benjamin Cole files his petition in this court, praying that one Isaac C. Melick be adjudged a bankrupt, and in his petition he sets out that the nature of his demand against the said Melick is a certain judgment obtained by him in the supreme court of the state of New Jersey, on the 10th day of June, A. D. 1870, against the said Isaac C. Melick and one Daniel H. Cole, late partners, and trading as Cole & Melick, for the sum of five hundred and six dollars and eighty cents damages, and forty dollars and sixty-five cents taxed costs of suit. Various acts of bankruptcy are charged in the petition to have been committed by the said Melick, which are denied by the alleged bankrupt, and before the trial the said Melick appears by counsel, and moves the court to set aside the petition upon the ground that the debt proved is against the late firm of Cole & Melick, and that the proceedings in bankruptcy should have been taken, if at all, against both members of the firm.

This objection brings before the court the consideration of the question, whether the bankrupt law [of 1867; 14 Stat. 517], confers upon the court jurisdiction against one partner where the debt proved is a partnership debt. The question is not a new one. It arose in the time of Lord Hardwicke, and he entertained such grave doubts upon the subject that he directed a trial before Lord Chief Justice Willes. The chief justice also doubted, and reserved the matter for argument by counsel before the court of common pleas, which unanimously decided that a commission could be regularly issued in such a case. Lord Hardwicke, in adverting to the case Ex parte Crisp, says, "Whatever doubts I might have before, it is now established to be law, in the unanimous opinion of the court of common pleas, that a commission of bankruptcy may issue against one partner only for a joint debt." 1 Atk. 134. This early settlement of the question in England has been uniformly adhered to by subsequent chancellors. It was recognized by Lord Loughborough, Ex parte Elton, 3 Ves. 239, and expressly acted on by Lord Eldon in Ex parte Clay, 6 Ves. 813a, and Ex parte Chandler, 9 Ves. 35, and Ex parte Bolton, 2 Rose, 389, where he says, "Since the case of Ex parte Crisp [1 Atk. 134], a decision now, at least, sanctioned by time, it has been clearly settled, that a joint creditor may take out a separate commission." The same view of the question has been taken by the courts of this country. The case of Tuckers v. Oxley, 5 Cranch [9 U. S.] 34, turned upon this, and all the reasoning of Chief Justice Marshall, in his able opinion, goes to the recognition of the principle, that the joint creditor of a partnership, upon the proof of his debt, is entitled to have a separate commission against any one of the partners.

In Murray v. Murray, 5 Johns. Ch. 60, Chancellor Kent reviews the English cases with his usual learning and discrimination, and, although that case is principally taken

[1] [Reprinted by permission.]

up in discussing and stating the proper mode of marshaling the partnership and separate assets, in the payment of the partnership and separate debts, yet it distinctly asserts the right, and in many cases the propriety, of a separate commission against one partner when the debt proven is a partnership debt. But it was insisted upon the argument of the learned counsel of the alleged bankrupt, that the bankrupt act of 1867 has changed the law in this respect, and that section 36 of that act was framed and designed to prevent proceedings in bankruptcy against one partner upon proof of a partnership liability. In the judgment of the court, counsel has misapprehended the object, purport, and scope of that section. It was inserted simply to indicate the correct and equitable mode of administration of the partnership property and separate estates of each partner, when "two or more persons who are partners in trade shall be adjudged bankrupt," and cannot be made to apply to the case under consideration, where only one of the partners is proceeded against. That section was first introduced into the bankrupt act of 1841 [5 Stat. 440], and, in its main features, embodied no new law, but was only declaratory of the equitable principles which the courts had adopted in the distribution of the bankrupt's assets. It was, nevertheless, proper and useful in this respect: that it put to rest the long mooted and much discussed question of the power of the bankrupt court in administering the bankrupt's estate, to make orders for the marshaling of assets and the payment of partnership debts with partnership funds, and separate debts with separate funds, without the intervention of proceedings by bill in equity. It required some such provisions to enlarge the jurisdiction of the bankrupt court, and to clothe its orders with authority, for before this time, as was quaintly said by one of the lord chancellors, each order seemed "to carry a chancery suit in the bosom of it," and thus involved greater delays and expenses in the equitable administration of partners' estates.

I do not now consider the other objection, urged in the argument against this proceeding, to wit: The practical difficulties which may arise in administering the joint and separate estates, where a joint creditor asks for a separate commission. This objection is addressed rather to the fears of the petitioning creditor than to the power of the court. There are, doubtless, many difficulties in the proceeding. The relation which the assignee of the bankrupt will sustain towards the other partner, as to the right to administer and control the partnership property: how far the assignee, by an order of the court, and without the intervention of a bill making the other partner a party, can reach the joint assets: whether, if there be partnership assets and the other partner is living and solvent, and if there should be separate debts of the alleged bankrupt, the dividend of the petitioning creditor must be postponed until the payment of such separate debts; are all questions which have heretofore arisen, and have been the fruitful source of doubt and discussion, and may arise in this case. But without expressing any opinion in reference to them, and looking to the single question now before me, I am constrained, upon principle and authority, to say that a partnership creditor has such an interest in the separate property of any one of the partners, that he may proceed against one alone upon the proof of his debt, and the motion to set aside this petition is overruled with costs.

MELINE (McLEAN v.). See Case No. 8,890.

MELINE (McQUAIN v.). See Case No. 8,923.

Case No. 9,400.

The MELISSA.

[Brown, Adm. 476;[1] 6 Chi. Leg. News, 271.]

District Court, E. D. Michigan. Feb., 1874.

SEAMEN—WAGES—STALE CLAIM—PLEADING—INFANCY—COSTS.

1. The defense of stale claim must be set up in the answer, and will not avail where the owner has retained a portion of the purchase money in his hands, and the suit is defended in the interest of the vendor.

[Cited in The Hercules, Case No. 6,400.]

2. A minor may recover for his wages where the contract was made personally with him, and it does not appear that he has any parent, guardian, or master entitled to receive his earnings.

3. Quaere, whether the defense of infancy can be made available otherwise than by a plea to the competency of libellant to sue in his own name?

4. Costs were awarded where the suit was defended in the interest of a former owner, though no demand had been made of the claimants.

Libel for wages. The libel was filed October 6, 1873, and is based upon a due bill for $44.75, for services as seaman in the season of 1871, bearing date June 3d of that year. The answer ignores the facts alleged as to the services rendered, and the giving of the due bill, and alleges the purchase of the scow in 1873 by the claimants; that the scow was within the jurisdiction of the court during the whole time between the giving of the due bill and the claimant's purchase, and therefore, as to them, libellant's claim has become stale, and is no longer a lien upon the vessel. No other defense is set up in the answer.

Jno. C. Donelly, for libellant.

L. S. Trowbridge, for claimants.

LONGYEAR, District Judge. In order to maintain the defense of stale claim it is necessary to allege and prove that the respondents are purchasers in good faith, for a valuable consideration, and without notice of the existence of the claim. The answer con-

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

tains none of these allegations. The defense set up might, therefore, be overruled, without further remark. But as proofs were taken as though the defense had been sufficiently alleged, the case will be considered briefly in view of what was proven. The proofs show that the claimants bought the vessel of one Brown, April 8, 1873, for $1,425, of which $600 was paid in cash, and the balance was secured by a mortgage on the vessel, to be paid in two years from that date, Brown to pay all claims then existing against the vessel; and that the claimants are defending this suit for and in the interest of Brown. There is no pretense that the claim of libellant was not good against the vessel in Brown's hands at the time of the sale by him to respondents; and, the suit being defended in fact by Brown, and the respondents having full protection by means of the balance of purchase money still unpaid, against any decree which may be made against the vessel, the defense set up is wholly untenable under the proofs. The proofs were all taken by deposition, and certain objections taken by respondents before the commissioner were insisted upon at the argument. The above facts, however, are all arrived at without resort to the testimony objected to, and for that reason the objections are not noticed.

Libellant was examined as a witness, and on his cross-examination it came out that when this suit was commenced he was, and that he still is a minor; that he was twenty years of age on the 18th day of November, 1873. He further testified that his father had been dead ten or twelve years, but that his mother was still living. On this proof it was contended, upon the argument, that the libel must be dismissed, for the reasons: (1) That libellant's mother was entitled to his earnings, and was the only person who could sue therefor; or (2) that if libellant could bring the suit, he could do so only by next friend. I think the objection comes too late. No such defense is set up in the answer; and I think it exceedingly doubtful, even if a legal defense, whether it could be made available otherwise than by a plea to the competency of the libellant to sue in his own name. Wicks v. Ellis [Case No. 17,614]. Even if a proper foundation had been laid, however, I do not think the defense would have been good in this case. The contract was made with libellant in person, payments were made to him, and the due bill for balance due him upon which this suit was founded, was given to him, and a payment made to him upon it, and the matter had lain upward of two years before the libel in this case was filed, and the mother nowhere appears as setting up any claim. Under these circumstances, I think she would be estopped from setting up a claim after the recovery against the vessel by libellant.

There is no rule in the admiralty courts requiring minors to sue by next friend. Their right to sue in the admiralty for wages has been fully recognized. Wicks v. Ellis [supra]; The David Faust [Case No. 3,595]; The Etna [Id. 4,542]. The general rule seems to be this: That a minor may recover in the admiralty for wages, where the contract was made personally with him, and it does not appear that he has any parent, guardian, or master entitled to receive his earnings. 2 Pars. Adm. 372, and note 3; Wicks v. Ellis and The David Faust, supra. And, in Wicks v. Ellis, on a motion by respondent to be discharged from arrest on the ground, among others, that the libellant was a minor, and no next friend had been appointed, &c., Judge Betts held that it could not be demanded as a matter of right, that a minor, suing in the admiralty for wages, should sue by next friend; and, also, that if his so doing in his own name, without the appointment of a next friend, was a legal defense in any case, the respondent must be put to his plea to the competency of the libellant.

Minors suing in admiralty for wages become peculiarly the wards of the court, and the court will go to the utmost limit consistent with the interests and rights of respondents in protecting and enforcing their rights. The Etna [supra]. In this case, the rights of the respondents can be in no manner jeopardized by a decree in favor of libellant, on account of any danger of having to pay the claim to the mother of the libellant, because, as has been already remarked, she must be held, in any suit she might bring for that purpose, by having permitted libellant to contract in his own name, to receive wages, and delayed so long to set up any claim on account of the balance here sued for, to have abandoned all claim thereto in her own right.

There is no dispute that the amount due libellant is the amount of the due bill, and interest from its date, less $10 paid June 8, 1872:

Due bill dated June 3, 1873	$44 75
Interest to June 8, 1872—1 year 5 days.	3 17
	$47 92
Paid June 8, 1872	10 00
	$37 92
Interest from June 8, 1872, to date, February 23, 1874	4 25
Balance due libellant	$42 17

—And for which he must have a decree.

It was claimed, on the argument, that costs ought not to be awarded against respondents, because no demand had been made of them before the libel was filed. But, as we have seen, the respondents are fully protected, and the suit is defended in the interest of the former owner, Brown. So far as the question of costs is concerned, the case must be treated as though Brown was the responsible party respondent, and as against him the court has no hesitation in awarding costs.

Decree for libellant [for $42.17, and costs of suit to be taxed].[2]

[2] [From 6 Chi. Leg. News, 271.]

MELITA, The (HATTON v.). See Case No. 6,218.

MELLINGER v. FIRST NAT. BANK OF MT. PLEASANT. See Case No. 4,135.

Case No. 9,401.

In re MELLOR et al.

[10 Ben. 58; 17 N. B. R. 402; 26 Pittsb. Leg. J. 8.] [1]

District Court, N. D. New York. July, 1878.

BANKRUPTCY—STATE PROPERTY—SALE BY WARDEN OF STATE PRISON—PRIORITY.

S., who was the warden of Clinton prison, in the state of New York, sold to M. & Co. goods which were the property of the state. Thereafter M. & Co. being in bankruptcy, S. filed a proof of debt for the price of the goods, stating the debt to be due to him as agent and warden of Clinton state prison. A priority for the debt was claimed as due in fact to the state of New York: *Held*, that the debt was entitled to such priority.

[In the matter of Joseph Mellor and John Mellor, bankrupts.]

William A. Beach, for the State.

Martin A. Knapp, for assignee.

WALLACE, District Judge. This case involves the question whether a claim proved by James C. Shaw and stated in the proof of debt to be due to him as agent and warden of Clinton state prison, is entitled to priority in the distribution of the bankrupt's estate, as a debt due to the state of New York.

Disregarding for the present the form of the proof, and going behind that to the evidence produced upon the re-examination of the claim, I am of opinion that the debt is in fact a debt to the state of New York, and as such entitled to priority. It is a debt for merchandise sold to the bankrupts, which at the time of the sale was the property of the state. It was sold by the warden of Clinton prison as the agent of the state. I am aware of no reason why the state cannot maintain an action to recover the price of the merchandise upon the same rule which authorizes any other principal to sue upon the contract of an agent made in behalf of the principal. If the state can maintain an action, it can prove the claim against the estate of the bankrupts. Doubtless, the warden could maintain an action to recover the price of the goods, because where a public office is created by the state, an implied authority is conferred in the officer to bring all suits which the proper discharge of his official duty requires; but this is not inconsistent with the right of the state to adopt his contract and sue upon it.

My attention has been called to the case In re Corn Exchange Bank [Case No. 3,242], and to that in 11 Metc. [Mass.] 129, cited in the former case. These cases are not applicable here. They were decided upon the assumption that, under the statutes regulating the rights and responsibilities of wardens of state prisons in Wisconsin and Massachusetts, the warden was in effect a contractor with the state, and chargeable as such with all moneys that came to his hands, and not responsible as an agent to his principal; and, therefore, when he had deposited the money in a bank which failed, it was his money and his loss, and the state had no priority in bankruptcy. Under the laws of this state no personal liability is imposed upon a warden of a prison for contracts made officially, and no action could be maintained against him by other parties to the contract, neither could an action be maintained against him officially or his successor in office. He has no control over the funds transmitted to him, except to apply them to the specific uses for which they are designated. So far as he is invested with any duty in regard to the moneys of the state, it is that of an agent, merely, to obey the directions of other officers of the state to whom in this behalf he is a subordinate.

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission. 26 Pittsb. Leg. J. 8, contains only a partial report.]

Case No. 9,402.

In re MELLOR et al.

[1 Pa. Law J. 134; 1 Pa. Law J. Rep. 26.]

District Court, W. D. Pennsylvania. July 22, 1842.

BANKRUPTCY—PETITION FILED — TITLE THEREAFTER TO PROPERTY—EXECUTION LEVIED.

The property mentioned in the schedule of a petitioner belongs to his creditors from the time of filing his petition, and an injunction will be granted to stay proceedings on an execution issued after the filing of such petition, unless it should be shown that the application was not bona fide.

The question decided by the court arose in the case of John H. Mellor & Co., who presented their petition for the benefit of the bankrupt law [of 1867 (14 Stat. 517)], on the 6th ult., at which time the court ordered cause to be shown on the 5th of September, why they should not be declared bankrupts. It seems, that on the day after this order was made, an execution was placed in the hands of the sheriff of Allegheny county, in favor of Adams H. Gale & Co., by virtue of which the said sheriff had levied upon various articles of household furniture, which were returned by the said petitioners in their schedules for the benefit of all their creditors, in consequence of which they petitioned the court for protection. Upon this petition, the court directed notice to be given to the execution creditors to show cause why an injunction should not issue, to restrain the sale under said execution until further order.

On the 22d of July, Magraw and Hamilton appeared for said creditors, and Mr. Austin for petitioners.

After argument, THE COURT decided, that from the time of filing a petition in bankruptcy, the petitioner is by law deemed a bankrupt, and the property mentioned in his schedule, if not secured by previous lien, belonged to his creditors generally, and could not be legally seized upon execution by any one of them; that, if it remained in possession of the petitioner, it was in trust for his creditors; and that after the decree in bankruptcy their rights related back to the time of filing the petition; and that it would be the duty of the assignee in bankruptcy to demand such property, or to sue for it or its value, as circumstances might require. Unless, therefore, it was proved that the application for the benefit of the bankrupt act was not bona fide made, an injunction would be directed to issue to prevent the sale of property mentioned in the execution, until further order, with permission to the respondents to move to have it dissolved in case the petition is not prosecuted, or in case a decree in bankruptcy should not be granted.

MELLOR (FRANCIS v.). See Case No. 5,039.

MELLOR (LOUTREL v.). See Case No. 5,039.

Case No. 9,403.

MELLUS v. HOWARD.

[2 Curt. 264.] [1]

Circuit Court, D. Massachusetts. May Term, 1855.

PRACTICE IN EQUITY—TAKING OF EVIDENCE—TIME RULE—WAIVER.

Where a time rule has been waived by the parties, and no other substituted, some special order must be obtained, on motion, before either party can force the other to proceed.

[This was a bill by Henry Mellus against William D. M. Howard asking that certain conveyances between the parties be set aside, and for an accounting and settlement to the plaintiff as partner in the firms of Mellus & Howard and Mellus, Howard & Co.]

In this case, F. C. Loring, for respondent, moved for an order of publication of the evidence in an equity suit. It appeared that the three months, allowed by the 69th rule for taking evidence having expired, both parties, without obtaining any order from a judge enlarging the time, had taken out commissions and proceeded to take evidence. The respondent now insisted that the complainant had had time enough to take his evidence, and that due diligence had not been used by him. The complainant asserted that he had used all possible diligence, and had not been able to obtain his needful evidence.

F. C. Loring, for the motion.

J. M. Bell (with whom was C. B. Goodrich), contra.

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

CURTIS, Circuit Justice. The parties have, by mutual consent, waived the 69th rule; and there is no other general rule of practice limiting the time within which evidence is to be taken. The respondent now asks me to declare that his opponent has had time enough to take his evidence, and to give effect to this declaration, by ordering publication, and thus cutting him off from the production of further evidence. I can make no such declaration. I cannot undertake, in this summary way, to pass on the rights of parties, and finally conclude them, on my ex post facto view of their conduct of their cause, guided by no rule whatever. This is too broad a discretion to be exercised in any case where it can be avoided. I think the party has a right to know, beforehand, what time is allowed him to take his evidence. And where the only rule fixing a limit of time has been dispensed with, by mutual consent, some other rule, to operate prospectively, must be made, before the party can be put in default.

In the great liberality, not to say laxity, of practice, which exists in this circuit, I have frequently had occasion to consider this matter; and I desire now to say, that where a time rule is waived by mutual consent, either express, or implied from the conduct of the parties, some other rule, prospective in point of time, must be obtained on motion, by special order of the court, before one party can force the other to proceed.

[NOTE. The respondent, W. D. M. Howard, died in 1856. The complainant then filed his bill of revivor against Joseph P. Thompson and others, administrators of Howard. Service was had on Thompson, who appeared, and filed a special plea to the jurisdiction. The plaintiff demurred to the plea. The case was then heard upon the demurrer, which was overruled, and the plea to the jurisdiction sustained. Case No. 9,405.]

Case No. 9,404.

MELLUS v. SILSBEE.

[4 Mason, 108; [1] 1 Robb, Pat. Cas. 506.]

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

PATENTS—PUBLIC USE—DEDICATION—ENGLISH PATENT ACT—ON A SALE.

1. If an inventor knowingly suffers his invention to go into public and general use without objection, it is a dedication of it to the public, and he cannot afterwards resume the exclusive right.

[Cited in Whitney v. Emmett, Case No. 17,585; Shaw v. Cooper, 7 Pet. (32 U. S.) 318; Bartlette v. Crittenden, Case No. 1,082; Locomotive Engine Safety Truck Co. v. Pennsylvania R. Co., Id. 8,453; Henry v. Providence Tool Co., Id. 6,384; Anderson v. Eiler, 46 Fed. 780.]

2. Our patent act differs from the English in several respects. A mere public use by others before taking a patent, on a sale thereof by the inventor, is not decisive against him here, as it is in England.

[Cited in Allen v. Blunt, Case No. 217; Wilder v. McCormick, Id. 17,650; Jones v.

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

Sewall, Id. 7,495; Henry v. Francestown Soap-Stone Stove Co., Id. 6,382.]

Case for infringement of a patent, dated the 3d of August, 1822, for an improvement "in the mode of securing from decay the plank, forming the deck, waist, or bottom of ships or vessels, at or near the head of the nails, spikes, or bolts, in correction of the mode heretofore adopted of boring and driving the nails, spikes, or bolts, by which the planks are secured to the timber, beams, or frames, and the mode of securing the head from the effect of the water." Plea, the general issue.

Upon the trial it appeared, that the plaintiff first made the invention in 1804; and had suffered it to go into general use without any claim of an exclusive right, or any objection, and without receiving any compensation, until the year 1822. The invention was not much used until after 1809, but since the peace of 1815 it had come into very general and public use.

Mr. Webster, for defendant, took several exceptions to the plaintiff's right, and among them, that the plaintiff could not recover, because his allowing the invention to go into public use was a waiver of the exclusive privilege, and it would now be a fraud to enforce it.

Nichols & Gorham, for plaintiff, contended, e contrà, that there had been no such general use as excluded the plaintiff from a recovery. He had a right to allow the public use, so as to test the utility of the invention, and for as long a period as he thought necessary for that purpose.

STORY, Circuit Justice. There is a difference between the language and effect of our statute respecting patents, and that of England. The statute of 21 Jac. 1, c. 3, commonly called the statute of monopolies, prohibits the grant of monopolies generally; but in the sixth section it excepts "letters patent and grants of privileges for 14 years or under, of the sole working or making of any manner of new manufactures within this realm, to the true and first inventor and inventors of such manufactures, which others at the time of making such letters patent and grants shall not use." Upon this statute it has been held, that it is not necessary that the invention should be new to all the world, but it is sufficient, if new within the realm of England, and it matters not whether learned by travel or by study. Edgeberry v. Stephens, Salk. 446. The provision further is, that it must be an invention which others, at the time of making the letters patent, "shall not use." Therefore it was held in Wood v. Zimmer, Holt, 58, Dav. Pat. Cas. 429, by Lord Chief Justice Gibbs, that if the inventor, before obtaining a patent, allows his invention to go into public use, he cannot entitle himself to a patent. The public sale of it by the inventor to other persons for use, makes the patent void. It is not then new to the realm, but is used by others within the meaning of the statute.

Our patent act uses language somewhat different. The first section (Act Feb. 21, 1793, c. 11 [1 Stat. 318]) declares, that "when any person or persons, &c. shall allege that he or they have invented any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement on any art, machine, manufacture, or composition of matter, not known or used before the application," he or they shall, on application to the secretary of state, &c. &c. be entitled to a patent. If this were all, there would be great difficulty in construing the words, "not known or used before the application," differently from the words of the English statute, "which others, at the making of the letters patent and grants, shall not use." We should be driven, therefore, to consider the accuracy of the decision of Lord Chief Justice Gibbs. But the 6th section of our statute throws light on this subject, and enables the court to ascertain with more precision the intention of the legislature. That section authorizes the defendant to give certain matters in evidence, by way of defence, under the general issue, upon proper notice, and among other things, that "the thing thus secured by patent was not originally discovered by the patentee, but had been in use, or had been described in some public work, anterior to the supposed discovery of the patentee." Upon these clauses it has been uniformly held, that it must be shown that the invention is new, not only in the United States, but to the world, and that it was not in use before the asserted discovery. The fact of its being in use before his discovery is, by the sixth section, made decisive against the patentee. Now, if the intention of the legislature had been, by the first section, to provide, that the mere fact of the invention being "known or used," even with the inventor's permission, before the application for a patent, should destroy his right, however otherwise well founded, it is strange, that the use should not be limited, in the sixth section, to the time of such application, instead of the "supposed discovery." The sixth section manifestly proceeds upon the ground, that the same thing being in use at the time of the supposed discovery establishes, that there is nothing new in the invention; but it may be known and used at the time of the application for a patent, and yet the applicant have been the true and first discoverer. And the words of the first section are susceptible of the same construction. The things sought to be patented must be something "not known or used" by others before, but must be first known or first used by the person claiming to be the inventor; that is, others must not have known or used it before his discovery. Upon any other construction, if a party were the true and first inventor, yet if, before his application for a patent, another were to know his invention or

use it, piratically or innocently, the first inventor would be ousted of his right to a patent, which is inconsistent with the spirit of the act. Construing therefore the first section by the sixth, it seems to me, that the true meaning is, that the first inventor has a right to a patent, though there may have been a knowledge and use of the thing invented by others, before his application for a patent, if such knowledge or use was not anterior to his discovery.

But however this may be, I am clearly of opinion, that if the inventor dedicates his invention to the public, he cannot afterwards resume it, or claim an exclusive right in it. It is like the dedication of a public way, or other public easement. The question, in such cases, is a question of fact, Has he so dedicated it? I agree his acts are to be construed liberally; that he is not to be estopped by licensing a few persons to use his invention to ascertain its utility, or by any such acts of peculiar indulgence and use, as may fairly consist with the clear intention to hold the exclusive privilege. But if the inventor proclaims his intention to all the world, and suffers it to go into general and public use, without objection; if he asserts no exclusive right for years, with a full knowledge that the public are led by it to a general use, such conduct, in my judgment, amounts to strong proof, that he waives the exclusive right, and dedicates the invention to the world. After such conduct, the attempt to regain the exclusive right, and secure it by a patent, would operate as a fraud upon the public; and would hold out inducements to incur heavy expenses in putting inventions into operation, of which the party might be deprived at the mere will or caprice of the inventor.

If the jury believe the evidence in the present case, it seems quite decisive But of that they will judge.

Verdict for defendant.

Case No. 9,405.

MELLUS v. THOMPSON et al.

[1 Cliff. 125.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1858.

PRACTICE IN EQUITY—RULES OF COURT — NO REPLY — ADMINISTRATOR — SUED OUT OF STATE WHERE APPOINTED—ACT OF CONGRESS—BILL OF REVIVOR.

1. When a plea to a bill in equity is set down for hearing under the thirteenth additional rule, without being replied to by the complainant, all the facts therein alleged, which are well pleaded, must be considered as admitted, for the purpose of determining whether the plea constitutes a sufficient answer to the suit.

2. An executor or administrator, deriving his authority solely from one state, cannot sue or be sued in his official character in another state for assets lawfully received by him in the jurisdiction where he was appointed.

[Cited in Bartlett v. Rogers, Case No. 1,079.]

[Cited in brief in Luce v. Manchester & L. R. R., 63 N. H. 588, 3 Atl. 619.]

3. The thirty-first section of the act of congress of the 24th of September, 1789 [1 Stat. 90], confers no jurisdiction upon this court of a bill of revivor against the administrator with the will annexed, of the deceased respondent in the original suit, said administrator having been appointed by a probate court in California. Clark v. Mathewson, 12 Pet. [37 U. S.] 170, reviewed and construed not to assert a doctrine contrary to this.

[Cited in Mason v. Hartford, P. & F. R. Co., 10 Fed. 337.]

This was a bill of revivor, in which it was alleged that, at the May term of this court, in the year 1853, [Henry Mellus,] the complainant, exhibited his bill of complaint against one William D. M. Howard of San Francisco, in the state of California (since deceased), praying that certain conveyances from him, the complainant, to said Howard, and certain settlements between them, might be set aside, and the said Howard might be decreed to account to the complainant and settle with him as partner in the firm of Mellus and Howard, and Mellus, Howard, and Company, and for other purposes and interests as were in the bill of complaint more fully set forth. The bill of revivor further alleged that the same Howard, having been fully served with process, appeared and answered to the original bill, and filed the general application, and proofs were also taken. [See Case No. 9403.] In January, 1856, the respondent, Howard, deceased. The bill further set forth that the deceased left a last will and testament; and that letters of administration, with the will annexed, were duly granted to [Joseph P. Thompson and others,] the respondents in this case, and that they had taken upon themselves the trust. Service of the bill of revivor was only made upon one of the respondents, which one appeared and pleaded, denying the jurisdiction of the court, and alleging that the decedent at the time of his death was a citizen and resident in the state of California, and that his last will and testament was duly proved and allowed by the court of probate for the county of San Francisco in that state, by which court also the respondent was appointed as one of the executors, but that he never was appointed an executor of the said will, or an administrator upon the estate of the deceased by any court of probate or any other court in the state of Massachusetts. The respondent also alleged that at the time service was made upon him he was casually in the state of Massachusetts for a temporary purpose, and that he then had no assets of the estate of the deceased in his possession or under his control. None of the facts alleged in the plea were in any manner controverted by the complainant.

R. Choate and Mr. Bell, for complainant.

F. C. Loring, for respondent.

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

CLIFFORD, Circuit Justice. When a plea to a bill in equity is set down for hearing under the thirteenth additional rule, as in this case, without being replied to by the complainant, all the facts therein alleged which are well pleaded must be considered as admitted for the purpose of determining the question whether the plea constitutes a sufficient answer to the suit. Accordingly the complainant insists, notwithstanding the present respondent is not a citizen of, or resident in, this state, and was never appointed executor of the last will and testament of the decedent by the state courts of this district, that he is entitled to revive the suit against him by virtue of his appointment as such executor by the court of probate for the county of San Francisco in the state of California, where he was domiciliated at the time of his appointment. All of the transactions for which relief is sought took place in California, and all of the assets belonging to the estate of the decedent are in that jurisdiction. Certain rules and principles respecting the rights and powers of executors and administrators appear to be so fully settled that they ought not to be regarded as the proper subjects of dispute. One is, that an executor or administrator, deriving his authority solely from another state, is not liable to be sued in his official character in this state for assets lawfully received by him in the jurisdiction where he was appointed, under and in virtue of the original letters of administration. Every grant of administration is strictly confined in its authority and operation to the limits of the territory of the government which grants it, and it is well settled that it does not extend to other political jurisdictions. As matter of right it cannot confer any authority to collect by suit the assets of the deceased in another state; and whatever operation is allowed beyond the jurisdiction of the state where it is granted is mere matter of comity, which every other state is at liberty to accord or withhold, according to the policy of its own laws and with reference to the interests of its own citizens. Vaughan v. Northup, 15 Pet. [40 U. S.] 1; Bond v. Graham, 1 Hare, 482; Spratt v. Harris, 4 Hagg. Ecc. 405; Price v. Dewhurst, 4 Mylne & C. 76; Whyte v. Rose, 3 Adol. & E. [N. S.] 507, 43 E. C. L. 842. Executors and administrators are bound in general to account exclusively for all the assets they receive, under and in virtue of their administration, to the proper tribunals of the government from which they derive their authority; and it was expressly determined by the supreme court, in the case of Vaughan v. Northup, that the tribunals of other states have no right to interfere with the assets which come to their possession in the jurisdiction where they are appointed, or to control their application. Repeated decisions have affirmed the principle that no suit can be maintained by or against an executor or administrator, in his official capacity, in the courts of any other state except that from which he derived his authority, in virtue of the probate and letters testamentary or the letters of administration there granted to him. Fenwick v. Sears, 1 Cranch [5 U. S.] 259; Dixon's Ex'rs v. Ramsey's Ex'rs, 3 Cranch [7 U. S.] 319; Kerr v. Moon, 9 Wheat. [22 U. S.] 565; Armstrong v. Lear, 12 Wheat. [25 U. S.] 169. Some attempts have been made by courts of justice in one or two jurisdictions to limit and qualify the general rule laid down in the earlier cases, but without success, as appears from numerous decisions both in this country and in England; and it may now be regarded as the established doctrine, that an executor or administrator appointed in one state cannot sue or be sued in his official character for any debts due to or from the estate under his administration in any other state, unless he is first appointed as such administrator or executor in the state where the suit is brought. These principles, so far as respects the maintaining of an original suit are not controverted by the counsel for the complainant, and they have been so repeatedly affirmed by courts of the highest respectability, that it seems unnecessary to multiply authorities upon the subject. That letters testamentary or of administration granted abroad, without new probate authority, give no right to sue or be sued, is a principle almost universally acknowledged by courts of justice. It was so held in Carter v. Crost, Godb. 33, decided in 1585, and since that period has been the received doctrine in most jurisdictions to the present time. Tourton v. Flower, 3 P. Wms. 369; 2 Kent, Comm. (9th Ed.) 563, and note c; Hutchins v. State Bank, 12 Metc. [Mass.] 421; Story, Confl. Law, § 513; Tyler v. Bell, 2 Mylne & C. 110; Whyte v. Rose, 3 Adol. & E. (N. S.) 507, 43 E. C. L. 842. But attention is drawn to the thirty-first section of the act of congress of the 24th of September, 1789, and it is insisted, that the original suit in this case may be revived against the present respondent, within the principles of that provision. It provides, that where any suit shall be depending in any court of the United States, and either of the parties shall die before final judgment, the executor or administrator of such deceased party who was plaintiff, petitioner, or defendant, in case the cause of action doth by law survive, shall have full power to prosecute or defend any such suit or action until final judgment; and the defendant or defendants are hereby obliged to answer thereto accordingly; and the court before whom such cause may be depending is hereby empowered and directed to hear and determine the same, and to render judgment for or against the executor or administrator, as the case may require. Further provision is also made, in case such executor or administrator shall refuse to become a party to the suit, that the court may render judgment against the estate of the deceased party in the same manner as if the

executor or administrator had voluntarily made himself a party to the suit. At common law, the death of either party before judgment in real and personal actions abated the writ; and it was held by the supreme court, in Green v. Watkins, 6 Wheat. [19 U. S.] 260, that the provision contained in that section was necessary to enable the action to be prosecuted against the representatives of the deceased party in cases where the cause of action survived. In the case of Macker's Heirs v. Thomas, 7 Wheat. [20 U. S.] 530, the same court held, that this provision was clearly confined to personal actions, assigning as the reason for the conclusion, that the power to prosecute or defend is given to the executor or administrator of the deceased party, and not to the heir or devisee. Neither of those cases precisely touches the question under consideration, for the reason that the abatement of a suit in equity by the death of a party, in cases where the cause of action survives, does not amount to an unconditional determination of the suit. Unlike the abatement of a suit at common law, the death of one of the parties to a bill in equity, before a final decree, only has the effect in general to suspend the proceeding in the suit, but does not operate to extinguish the right of further prosecution, provided the proper representatives of the deceased party seasonably appear and prosecute the same by bill of revivor. Bills of revivor, strictly so called, lie only against the persons who are the proper representatives of the deceased party. If the suit has respect to the personal assets only of the deceased party, his executor or administrator is the proper person by or against whom the bill of revivor should be brought; but if the suit has respect to the real estate of the deceased, and the cause of action survives, then the heirs of the deceased party are the proper persons to institute and prosecute the bill of revivor. Story, Eq. Pl. (6th Ed.) § 54. Applying these principles to the present case, there would be no difficulty in sustaining the views of the complainant, but for the fact that the respondent in the bill of revivor has never been appointed an executor of the last will and testament of the decedent by the tribunals of Massachusetts. His appointment, as the plea shows, emanated from the court of probate for the county of San Francisco in the state of California; and if it be true, as was expressly held by the supreme court in Vaughan v. Northup, 15 Pet. [40 U. S.] 5, that the grant of administration upon the estate of a deceased person is strictly confined in its authority and operations to the limits of the territory of the government which grants it, then it follows, as it would seem, that the appointment of the respondent as executor by the tribunals of the state of California cannot have the effect to confer upon him that character in the courts of another state. Federal laws do not make provision for the appointment of executors or administrators. They only recognize the existence of such appointments under the local law. Executors and administrators are recognized in the thirty-first section of the judiciary act now under consideration, but they are such as have received their appointments, not from federal authority, but from the tribunals of the state where the suit was pending at the time the abatement took place. Accordingly it was held by the supreme court, in Aspden v. Nixon, 4 How. [45 U. S.] 497, that executors and administrators appointed in one state cannot be known in another state as the representatives of the estate of a deceased person, for the purpose of prosecuting or defending a pending suit. This principle was subsequently affirmed by the same court in the case of Stacy v. Thrasher, 6 How. [47 U. S.] 58, in still more decisive language. Mr. Justice Grier said, in the case last named, that an administrator receives his authority from the ordinary or other officer of the government where the goods of the intestate are situate. But coming into such possession by succession to the intestate, and encumbered with the duty to pay his debts, he is considered in law as in privity with him, and therefore bound or estopped by a judgment against him. Yet his representation of his intestate is a qualified one, and extends not beyond the assets of which the ordinary had jurisdiction. He therefore cannot do any act to affect assets in another jurisdiction, as his authority cannot be more extensive than that of the government from whom he received it, and the courts of another state will not acknowledge him as a representative of the deceased, or notice his letters of administration. Borden v. Borden, 5 Mass. 67; Pond v. Makepeace, 2 Metc. [Mass.] 114; Chapman v. Fish, 6 Hill, 554. Similar views were also held by the same court in Hill v. Tucker, 13 How. [54 U. S.] 467, in which the preceding cases were cited and approved. Nevertheless, circuit courts have jurisdiction of suits by or against executors or administrators, if they are citizens of different states, in certain cases where they are the real parties in interest before the court, and have succeeded, by virtue of their appointment, to all the rights and interests of their testators or intestates, as in suits upon promissory notes given by the deceased in certain special cases, or in bills of equity for an account. Chappedelaine v. Dechenaux, 4 Cranch [8 U. S.] 306; Childres v. Emory, 8 Wheat. [21 U. S.] 669. Both of those suits, however, were commenced in the district constituted within the limits of the political jurisdiction or state from which the defendants derived their authority. Civil suits may be brought against persons in their individual capacity, either in the district whereof they are inhabitants or in which they shall be found at the time of serving the writ. 1 Stat. 79. That provision, so far as the latter clause of it is concerned, does not apply to executors and administrators, for the reason that their authority is limited by

the territory of the state from which it is derived; and it has been expressly held by the supreme court, in repeated instances, that they cannot be sued in any district out of the state from which their authority proceeds. It was so distinctly held in Vaughan v. Northup, 15 Pet. [40 U. S.] 1; and such, as before remarked, is the settled law, both in this country and in England. Fenwick v. Sears, 1 Cranch [5 U. S.] 259; Dixon's Ex'rs v. Ramsey's Ex'rs, 3 Cranch [7 U. S.] 319; Kerr v. Moon, 9 Wheat. [22 U. S.] 565; Aspden v. Nixon, 4 How. [45 U. S.] 497; Stacy v. Thrasher, 6 How. [47 U. S.] 58; Hill v. Tucker, 13 How. [54 U. S.] 467. But reliance is placed upon the case of Clark v. Mathewson, 12 Pet. [37 U. S.] 170, as asserting a different doctrine. On a careful examination of the facts of that case, it does not appear to warrant any such conclusion. It was a bill in equity, brought by a citizen of the state of Connecticut against a citizen of the state of Rhode Island, for an account of certain transactions set forth in the bill, with a prayer for general relief. After the cause was at issue, it was by the agreement of the parties ordered by the court to be referred to a master to take an account, and pending the proceedings before the master the complainant died. Administration upon his estate was taken out by one John H. Clark, in the state of Rhode Island. By the laws of the state, no person not a resident thereof can take out letters of administration; and such administration is indispensable to the prosecution or defence of any suit in the state, in right of the estate of the intestate. Clark filed a bill of revivor in the circuit court of Rhode Island against the defendants in the original suit, in which he alleged that they were citizens of that state; and he also alleged himself to be a citizen of the same state, and administrator of the intestate. Judge Story dismissed the bill of revivor, on the ground that it was a suit between citizens of the same state. Whereupon the complainant appealed to the supreme court, where the decree of the circuit court was reversed, with the concurrence of the circuit judge; and it was held that the bill of revivor was a mere continuance of the original suit, and that, inasmuch as the parties to the original bill were citizens of different states, the jurisdiction of the court completely attached to the controversy, and could not be divested by the fact that the administrator of the complainant subsequently appointed was a citizen of the same state with the respondents. That principle is entirely consistent with the determination previously made, that the removal of the original plaintiff, after the commencement of the suit, into the same state with the respondent, does not divest the jurisdiction of the court, if they were citizens of different states at the time the suit was commenced. Morgan's Heirs v. Morgan, 2 Wheat. [15 U. S.] 290; Mollan v. Torrance, 9 Wheat. [22 U. S.] 537; Dunn v. Clarke, 8 Pet. [33 U. S.] 1. Besides, it will be perceived that the suit in that case was revived in a circuit court constituted and having jurisdiction in the state from which the administrator derived his authority; and consequently the decision of the court is perfectly consistent with all the previous and subsequent adjudications upon the subject. It was objected in that case, that the jurisdiction could not be sustained, because the complainant and respondent in the bill of revivor were citizens of the same state; but the supreme court held that congress, in the provision of the judiciary act under consideration, treated the revivor of the suit by or against the representatives of the deceased as a matter of right, and as a mere continuation of the original suit, without any distinction as to the citizenship of the representative, whether he belonged to the same state where the cause was depending, or to another state. This last remark was made by the court, in answer to the objection that both parties in the bill of revivor belonged to the same state, and without any reference whatever to the question, whether an executor or administrator appointed only by the probate court of another state could be made a party to such a proceeding without a new appointment. For these reasons I am of the opinion that the case of Clark v. Mathewson does not touch the question under consideration. Such being the fact, the proceeding stands without any authority to support it, and must be determined upon general principles. All of the reasons assigned in the adjudged cases to show that an executor or administrator cannot be made an original defendant in a state other than the one from which he derives his authority apply with equal force against making him a respondent to a suit in equity abated by the death of his testator or intestate. He has no official existence in such other state, and possesses no power there which he can exercise in his official character. Decided cases have established the doctrine, that the authority granted to him is strictly confined to the limits of the state from which it was derived; and if so, then it would seem to follow that any other person might be made a party defendant to the bill of revivor with equal propriety, and for the reason that, while here, in a jurisdiction where his authority is not acknowledged, he is not in any legal sense the representative of the estate of his testator. He cannot be liable de bonis propriis, and as there are no assets in this jurisdiction, there can be nothing on which a judgment would operate. Relief is prayed, not only for the payment of money, but that conveyances of real estate situated in California may be set aside, and that the same real estate may be conveyed to the complainant. Whether executors, as such, have authority, under the laws of California, to convey real estate does not appear, and is at least very doubtful. But if it were less so, it is difficult to see by what warrant this

court can recognize the respondent as the executor of the last will and testament of the decedent, while it appears that he is not such by the local law of the district in which the suit is pending, and that there are no assets of the estate within this jurisdiction. Counsel would hardly contend that a bill of revivor could be maintained against an executor or administrator appointed in England, without new probate of the letters testamentary, or new letters of administration in the state tribunals of the district where the original suit was brought. Nothing is better settled than the rule, that a person claiming under a will proved in one state cannot intermeddle with or sue for the effects of a testator in another state, unless the will be first proved in that other state, or unless he be permitted so to do by some law of that state authorizing such a proceeding. He cannot sue for the personal estate of the testator out of the jurisdiction of the power by which the letters of administration were granted, and upon the same principle and for the same reason he cannot be sued or compelled to defend a suit in any jurisdiction to which his authority as executor does not extend. Doe v. McFarland, 9 Cranch [13 U. S.] 151; Kerr v. Moon, 9 Wheat. [22 U. S.] 571. Devisees or heirs would not be bound by the decree, if one were made, so far as the real estate is concerned, for the reason that they are not made parties to the bill of revivor, and have had no notice of the proceeding. It is obvious, therefore, if the court should render a decree that the complainant is entitled to the relief prayed for, the respondent in the bill of revivor would have no authority to comply with the order of the court, and the court would have no power to enforce its mandate. In view of all the circumstances disclosed in the case, I am of the opinion that the plea to the jurisdiction of the court is sufficient, and that the demurrer must be overruled.

MELNOTTE, The (McGREW v.). See Case No. 8,812.

Case No. 9,406.

In re MELVIN et al.

[17 N. B. R. 543.] [1]

District Court, D. Minnesota. May 14, 1878.

BANKRUPTCY—PARTNERSHIP—SALE IN CONTEMPLATION OF INSOLVENCY—DIVISION OF PROCEEDS—STATE EXEMPTION.

Within a month prior to the commencement of the proceedings in bankruptcy, and while the firm was insolvent, a large amount of the partnership property was sold and the proceeds divided between the partners, and the firm then offered to settle with their creditors at fifty per cent. One of the partners, upon receiving his share of the proceeds of said sale, immediately purchased property which was exempt under the state statute. *Held*, that under the circumstances such property was not exempt, but must be regarded as partnership assets held in trust for creditors.

[Cited in Re Corbett, Case No. 3,220.]

The firm of [William S.] Melvin & [J. R.] Fox were adjudicated bankrupts March 8, 1878, on petition filed the 20th of February previous. On January 22d, 1878, being insolvent, a large amount of partnership stock was sold, and the proceeds divided between the partners without paying any firm debts, and an offer to settle with creditors at fifty cents on the dollar was then proposed. Fox immediately purchased, with the proceeds received by him, horses, wagons, harness, sled, cow, etc., which he now claims as exempt property under the laws of the state of Minnesota, and the fourteenth section of the bankrupt law [of 1867 (14 Stat. 522)], and refuses to turn over this property to the assignee. There had been no dissolution until bankruptcy adjudication. By the statute of Minnesota (Rev. St. p. 489) this class of property, to the extent claimed, is not liable to execution and sale.

Rogers & Rogers, for assignee.

Amos Coggswell, for bankrupts.

NELSON, District Judge. The question presented is not free from difficulty. Ordinarily such property, if owned by a debtor, is exempt under the laws of the state of Minnesota, and would not pass to the assignee under the 14th section of the bankrupt act. Fox purchased it with the proceeds of partnership stock received by him, with the consent of his partner, on a division mutually agreed upon between the partners. There was a severance of interest by the individual members of the firm in a portion of the partnership property about one month before the bankruptcy adjudication; but the firm was insolvent, and a short time afterwards made an effort to settle with creditors at a large discount. Under such circumstances, an appropriation of partnership property of an insolvent firm by one of its members to his own use, in equity would be regarded void as against creditors, and the property, if found in the hands of voluntary grantees, or purchasers with notice, can be recovered as partnership assets. Unless the severance of partnership funds, and the purchase by Fox of the property in controversy, is a legal transformation from partnership to individual exempt property, the assignee in bankruptcy is entitled to it. In several cases courts have, in applying the maxim that exemption laws should be liberally construed, decided that the conversion of property subject to execution into exempt property would not deprive the person of an exemption, although the property was disposed of for the purpose of investing the proceeds in that way; and even, in many cases, the individual members of a firm have been permitted to claim exemption from the property of the firm. On the other hand, the decisions are more numerous that no exemption is allowed. I

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should permit Fox to retain the property as exempt if the facts did not show a design, on his part at least, with the concurrence of his partner, by such appropriation of partnership property, to escape, if possible, the payment of partnership debts. The sale of the partnership stock and the division of the proceeds, and the purchase of property supposed to be exempt and beyond the reach of creditors, and the offer to compromise, were acts done, in my opinion, for the purpose of compelling creditors to submit to the terms proposed. The exemption law was not enacted for, and cannot be invoked to aid, any such transaction. I do not mean to decide that one partner cannot purchase property with funds taken from the partnership and charged to himself, which by law he could hold as exempt, although at the time the firm was insolvent, but only that inasmuch as partnership property is ordinarily a fund for the payment of partnership debts, a deliberate intention, on the eve of bankruptcy, under the conceded facts in this case, to place property beyond the reach of creditors, is an effort to perpetrate a legal fraud which courts must take notice of, and the property must be regarded as partnership assets held in trust for creditors. See In re Handlin [Case No. 6,018]; In re Towne [Id. 14,095; In re Blodgett [Id. 1,555]; In re Boothroyd [Id. 1,652]. Also 39 Wis. 571; [Phipps v. Sedgwick] 95 U. S. 3; 22 Minn. 384; In re Sauthoff [Case No. 12,380]; Johnson v. May [Id. 7,397]; In re McKercher, 8 N. B. R. 410; In re Richardson [Case No. 11,776]; In re Rupp [Id. 12,141]; 25 Mich. 367.

The petition of the assignee is granted, and the bankrupt must turn over to him the property now in his possession.

MELVIN (FARMERS' & MECHANICS' BANK v.). See Case No. 4,656.

Case No. 9,407.

MELVIN v. LACKLAND.

[2 Cranch, C. C. 636.] [1]

Circuit Court, District of Columbia. Dec. Term, 1825.

TRIAL—EVIDENCE—PAPER READ TO JURY—CONSENT OF COURT.

No paper can be read in evidence to the jury without the leave of the court.

Mr. Coxe, for defendant, offered to read a paper in evidence to the jury, to which the plaintiff's counsel objected.

THE COURT (MORSELL, Circuit Judge, absent) was divided in opinion upon its admissibility. The question then occurred as to the effect of this division of opinion, that is, whether the paper should be read or rejected.

THE COURT agreed, that no paper can be read in evidence to the jury, without the leave of the court; and as the court could not agree to admit it to be read, it must be considered as rejected. The paper was not read.

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

Case No. 9,408.

MEMORANDUM.

[1 Cranch, C. C. 114.] [1]

Circuit Court, District of Columbia. March Term, 1803.

COURTS—SESSIONS OF—CRIMINAL TRIALS.

On the first day of the adjourned session, Charles Lee moved for a special session, for the trial of criminal causes, and cited the acts of congress September 24, 1789 (Judiciary Act; 1 Stat. 73); February 13, 1801, § 8 (2 Stat. 89); and February 27, 1801, § 3 (2 Stat. 103).

THE COURT ordered a special session, to be holden on Wednesday next, for the trial of criminals, and a venire for a grand jury, &c.

The adjourned term from November, and the special court ordered for the trial of criminals, were held at the same time.

Case No. 9,409.

MEMORANDUM.

[1 Cranch, C. C. 159.] [1]

Circuit Court, District of Columbia. March Term, 1804.

COURTS—SESSIONS—ADJOURNED TERM.

The adjourned term is an extension of the preceding session.

The clerk had brought forward, from the rules held since November, all the office judgments in chancery cases.

THE COURT were of opinion that such causes were not regularly before them, the next term being the next succeeding court after the office judgments.

KILTY, Chief Judge, absent.

Case No. 9,410.

MEMORANDUM.

[1 Cranch, C. C. 253.] [1]

Circuit Court, District of Columbia. Sept. Term, 1805.

Mr. Mason's causes, which were non prossed at the former session of this term, were reinstated upon his stating that he was confined to his bed by sickness in the country, and unable to attend and to write.

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

Case No. 9,411.

MEMORANDUM.

[4 Cranch, C. C. 337.] [1]

Circuit Court, District of Columbia. Sept. Term, 1833.

COURTS—SPECIAL SESSION.

The circuit court of the District of Columbia cannot, at a special session for the trial of criminal causes, try a cause which was pending at the preceding stated session.

A special session of the circuit court, in Washington county, for the trial of criminal causes, was holden on the 2d of September, 1833, by virtue of the following order, made at the last term, on the 29th of May, 1833:

"Ordered, that a special session for the trial of criminal causes, be held on the first Monday of September next, and that the marshal summon the usual number of grand and petit jurors;" and of the following clause of the 5th section of the judiciary act of 1789 (1 Stat. 73;) "and the circuit courts shall have power to hold special sessions for the trial of criminal causes, at any other time, at their discretion, or at the discretion of the supreme court;" and of the following clause of the act of 2d of March, 1793 (Id. 333): "That any special session may be adjourned to any time or times previous to the next stated meeting of the circuit court; that all business, depending for trial at any special court, shall, at the close thereof, be considered, as of course removed to the next stated term of the circuit court;" and the 8th section of the act of the 13th of February, 1801, which provides, "That the said circuit courts," (that is, the circuit courts by that act established,) "shall have power, and are hereby authorized, to hold special sessions for the trial of criminal causes, at any other time or times than is hereby directed, at their discretion;" and the 3d section of the act of the 27th of February, 1801 (2 Stat. 89,) by which it is enacted, that "the said court," (the circuit court of the District of Columbia,) "and the judges thereof, shall have all the powers vested in the circuit courts, and the judges of the circuit courts of the United States."

A question was suggested, whether prosecutions, commenced at the last stated term, can be continued to, and tried at, this special session; and whether process upon presentments made, and indictments found, at that term, can be made returnable to this.

THE COURT (MORSELL, Circuit Judge, contra,) was, after argument, in which the following cases were cited and considered, namely, U. S. v. Hamilton, 3 Dall. [3 U. S.] 18; U. S. v. Insurgents of Pennsylvania [Case No. 15,442]; and U. S. v. Cornell [Id. 14,868]; decidedly of opinion that the court, at this special session, cannot try any cause which was pending at the last stated session.

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

Case No. 9,412.

The MEMPHIS.

[Blatchf. Pr. Cas. 202.] [1]

District Court, S. D. New York. Aug. 20, 1862.

PRIZE—APPRAISERS—LIBEL NOT FILED—NOTICE—CLAIMANT—ORDER SIGNED OUT OF DISTRICT.

1. This vessel having been sent in to the court as a prize, the court, on the application of the district attorney before libel filed, and before any appearance by any claimant, and without notice to any claimant, made an order appointing appraisers to value the prize, with the view to her being taken for the use of the government. After the libel was filed the claimant appeared in the suit, and moved to vacate the order because it was made without notice to him. *Held*, that the motion could not be granted.

2. Property captured as prize is under the control of the court from the time it is delivered to the court by the prize-master until it is finally disposed of, and the filing of a libel is not necessary to give the court cognizance of the property.

3. The fact that the order appointing appraisers was signed by the judge when out of this district is no objection to its validity.

In admiralty.

BETTS, District Judge. This vessel and cargo were captured, off Charleston harbor, July 31, 1862, and brought into this port, by a prize-master, on the 4th of August afterwards. On the 7th of August the district attorney addressed a letter to the judge, then absent from the city, and out of the district, stating that no appearance had been given in court for the prize, and, upon the usual evidence, requesting, in behalf of the government, that appraisers might be appointed to value the vessel and cargo, and that thereupon the prize might be appropriated and delivered over to the public use, on the deposit of its appraised value in the office of the assistant treasurer, subject to the judgment and direction of the court. The order was signed by the judge and remitted to the district attorney, and was filed in court on the 13th of August. By the papers filed on this motion it would appear that the order so signed was received here on the 9th of August. On the 8th of August the vessel and her fitments were libelled by the United States for condemnation as prize of war, and on the 9th of the month the claimants gave notice to the district attorney of their appearance in the suit. Upon these facts a motion is now made to vacate the above order of appraisal made in this suit, or for such other or further order as may be just. No specific order is indicated in the notice of motion, as sought for, other than one setting aside or vacating the order formerly granted, and the exception to that order would seem, on the papers, to be confined to a merely technical irregularity in the district attorney's office in not furnishing the claimants with previous notice of the application. The court would scarcely re-

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

gard as of sufficient force to rescind the order the circumstance that a severe strictness in the mode of procedure in obtaining it, it being substantially one of course, was not observed. No objection of substance or to the merits is now interposed, either to the qualifications or integrity of the appraisers named, or to the amount of appraisement; and the criticism that the claimants were not called in to participate in their selection would be entitled, in such case, to slight weight, connected with the consideration that it does not appear affirmatively that the claimants actually entered their appearance in the suit until after the libellants had obtained the ratification of the appraisers proposed. It is not supposed that any court would be prone to reverse proceedings resting upon the explicit consent and solicitation of a party in interest, because of the mere omission of formalities by him in obtaining the subject-matter of his pursuit, and with which no other party then before the court was entitled to interfere. The question of the jurisdiction of the court, or its competency to authorize the appointment of appraisers at the time, will be considered under the other and main objection raised and discussed on the counter motion of the district attorney to execute the order by delivering over the vessel to the use of the libellants.

The point most strenuously urged by the several counsel was that the prize court acquires no cognizance of a prize case except by means of a libel, which causes an arrest, in law, of the property captured, and subjects it thereafter to judicial jurisdiction. This, it appears to me, is a manifest misapprehension of the state of the matter under the jurisprudence of the United States. The prize vessel and all her cargo and papers are, in the first instance, transmitted by the officer making the capture to the charge of the judge of the district to which such prize is ordered to proceed. 2 Stat. art. 7. The standing prize rules, fully confirmed by the act of congress "relative to judicial proceedings upon captured property and the administration of the law of prize," approved March 25, 1862, place the property captured under the control of the court and its officers, until the final adjudication and disposal of it by the court. The notion, therefore, that the prerogative powers of the government can be exercised only directly by the United States in its military capacity, and not at all through the courts, cannot be supported under our laws. Those high functions are legitimately put in force by the instrumentality of the judiciary, in obtaining, through its agency, the active use of the possession of prize property, which first vests in that department. Accordingly, an order for the appraisal of captured property, and the surrender or transfer of it to governmental uses, under precautionary provisions to secure individual interests vesting in it, is palpably a judicial power, to be performed at the instance of the government, and need not, if indeed it can, be superseded or dispensed with by a direct and summary act of appropriation of the property by the executive authority.

It is not intended, in the decision of this case, to go beyond the facts directly involved in it. I accordingly hold that the order asked for by the district attorney was correctly granted by the judge, on the assent, on the part of the libellants, to his authority to make it before any party was known to have intervened in the suit; and that, no objections being established against the competency of the appraisers, or adopted and confirmed by the court, in all its terms, it be executed accordingly. This decision does not proceed upon the assumption that the judge, when out of his territorial district can, of his own option, perform functions strictly judicial. The act of appointing appraisers ex parte would be performed by an order of course, entered in the book of orders within the district, and the signature of the judge given thereto in a neighboring district does no more than authenticate the ministerial act of the officers of the court, or permit them to perform it apud acta. I think, therefore, that this objection, as made, does not invalidate the signature, as given, or the force of the order. Order accordingly.

[Subsequently a decree of condemnation and forfeiture was entered against the vessel (Case No. 9,413), which decree was affirmed upon appeal to the circuit court. Id. 9,414.]

Case No. 9,413.

The MEMPHIS.

[Blatchf. Pr. Cas. 260.] [1]

District Court, S. D. New York. Nov., 1862.[2]

PRIZE—BLOCKADE—CAPTURE — BY WHOM MADE—WHEN LIABLE TO CAPTURE.

1. Vessel and cargo condemned for an attempt to violate the blockade.

2. A seizure of a vessel for the violation of a blockade is lawful, if made by a national vessel, though not made by a vessel forming a part of the blockading force.

3. A vessel guilty of an unlawful trade with the enemy is liable to capture for the offence at any time during the voyage in which the offence is committed.

[The Memphis was captured July 31, 1862, and brought into the port of New York. Appraisers were appointed upon application of the district attorney before any claimant appeared, and without notice, and in fact before the libel was filed. After the libel was filed, the claimant appeared, and moved to vacate the order appointing appraisers, because of want of notice. The motion was overruled. Case No. 9,412. The case is now heard upon libel and proofs.]

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

[2] [Affirmed in Case No. 9,414.]

BETTS, District Judge. The allegation in the libel, filed August 8, 1862, is, that this vessel and cargo were captured as lawful prize July 31, 1862, off Charleston Harbor, South Carolina, by the United States steamship Magnolia, and sent to this port for adjudication. Thomas S. Begbie and Peter Denny intervene as claimants of the vessel, alleging that they are British subjects, and owners of the vessel, which is a British vessel, and denying that she is lawful prize. The test oath of ownership is made by Donald Cruikshank, her master. Theodore Andrews, also a British subject, claims the cargo, and denies that it was lawful prize at the time of seizure. He makes the test oath of ownership. Both claims allege that the Magnolia, when she made the seizure, was not a vessel employed in enforcing the blockade of Charleston, but was casually passing on the ocean eighty-five miles from that place. This point was also made on the argument. Both of the above claims were filed September 2, 1862, by the same proctor. The vessel, by due course of interlocutory proceedings, was appraised and delivered to the government for the use of the United States, and was put into the public service before the final hearing of the cause, and public sale was also made of the cargo, as being perishable, and perishing in fact.

The evidence is ample and unquestioned that the vessel and cargo were, at the time of seizure, neutral property. The libellants claim that both are forfeitable, because the vessel had entered the port of Charleston on the preceding voyage, carrying with her articles contraband of war, and also in evasion of the blockade, well knowing at the time that the port was under actual blockade by the forces of the United States; and that the cargo seized on her was laden on board at Charleston, and brought out with intent to violate the blockade of that port then existing.

The testimony is clear, and was unquestioned on the trial, that the cargo on the outward voyage, landed at Charleston, consisted largely of articles contraband of war, and that the master and owners of the vessel and cargo well knew that the government of the United States claimed that the port of Charleston had been since May, 1861, held in a state of efficient blockade, and that an adequate force was stationed there to maintain the blockade. The documentary, notorious, and judicial evidence, connected with the points of law made by the defence, has been adverted to and detailed so repeatedly on those heads during the progress of this war, in the disposition of prize suits contested in the courts of the United States on captures made during the war, that it is superfluous to make a further recapitulation of these points until a judgment of the supreme court of the United States shall indicate that they are unsound and not warranted by law. I accordingly rule that the testimony taken in preparatorio in this suit satisfactorily establishes that the owners of the vessel and of her cargo had full notice and ample knowledge, when she was fitted out in England and sailed therefrom on this voyage, that a state of war existed between the United States and the seceded states; that Charleston was under an efficient blockade by the United States; and that the master and owners of the vessel on her outward and return voyage intended that the ingress and egress of the vessel to and from that port should be effected by an evasion of its blockade.

The point taken by the claimants, that the capture in this case is invalid because not made by a vessel actually stationed at the blockaded port, is not supported by any authority produced, nor does it comport with any reason upholding the authority of a belligerent to repress infractions of a blockade. The guilty vessel does not purge her offence by a successful act of fraud or deceit in preventing an arrest by the force supporting the blockade. Her capture is lawful, although the blockading force may be entirely absent from its port when the culpable act is committed. 1 Kent, Comm. 145. Any public vessel of the belligerent whose rights are violated may be the agent or minister to apprehend the offender, though, by dexterity or superior speed, the culpable actor may escape arrest at the time or place of the perpetration of the wrong. The only question which seems to be allowed in that respect is, whether the capturing vessel possessed the attributes of a national ship, so as to be entitled to participate in prize proceeds. The Charlotte, 5 C. Rob. Adm. 280; The Melomane, Id. 50. Yet, aside from any right to a participation in the prize proceeds, the power to capture an enemy vessel by any national force at sea seems irrefragable, whether the liability of the vessel attached arises from her positive hostile character, or from her violation of the belligerent rights of the captor. The Charlotte, 1 Dod. 220; The Donna Barbara, 2 Hagg. Adm. 373. The vessel and cargo in this case were captured in flagrante delicto; and after the undisguised avowal by the officers, on their examination in preparatorio, and the open contract on the shipping articles, all recognizing the culpability of both voyages, with the papers on board verifying the reward paid to the crew for accomplishing the illicit enterprise, it is not without surprise that the court has witnessed a formal issue made by the claimants on the justness of the seizure of the vessel and cargo. The legal point which has been pertinaciously invoked by the defence, that the United States public ship which arrested the culprit, not being stationed off the port as one of the blockading squadron, had no authority to make the capture, has no foundation in American or English prize law. A vessel guilty of an unlawful trade with the enemy is liable to capture for the offense at any time during the voyage in which the of-

fence is committed. Hal. Int. Law, c. 21, § 12.

Decree of condemnation and forfeiture of the vessel and cargo ordered.

This decree was affirmed, on appeal, by the circuit court, July 17, 1863. [Case No. 9,414].

Case No. 9,414.

The MEMPHIS.

[Blatchf. Pr. Cas. 656.]

Circuit Court, S. D. New York. July 17, 1863.[1]

PRIZE—BLOCKADE—INTENTION TO RUN THE SAME.

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

[This case was first before the district court upon motion of claimants to vacate order appointing appraisers. Motion overruled. Case No. 9,412. Subsequently a decree of condemnation and forfeiture was entered against it. Id. 9,413. It is now heard upon appeal from this decree.]

NELSON, Circuit Justice. The steamer Memphis was captured on the 31st of July, 1862, by the United States sloop-of-war Magnolia, in latitude 33° 50′ north, and longitude 78° 19′ west, about eighty miles to the eastward of Charleston, South Carolina. The Memphis is an iron screw steamer, of 791 tons burden, by her register, Donald Cruikshank, master. She is a British vessel, and the cargo belongs to British subjects. Her voyage was, in fact, from Liverpool, England, to Nassau, and thence to Charleston, South Carolina. She left Liverpool on the 10th of May, and Nassau on the 19th of June, 1862, passing the United States blockading squadron, and entering Charleston, on the 23d of the same month. The cargo landed in Charleston consisted of eighty tons of gunpowder, a large quantity of rifles and muskets and general merchandise. She took on board, at Charleston, for her return voyage, some 1,500 bales of cotton and 500 casks of resin, which constituted her cargo at the time of her capture. Mr. Andrea, a part owner of the cargo which was put on board at Liverpool, says that it consisted of about 4,000 stands of arms and 900 barrels of powder; and that she had, when captured, 1,500 bales of cotton and 400 casks of resin.

The proofs are full to show that the master and Andrea, the owner of the cargo on board, knew of the blockade of Charleston at the time the vessel started for that place from Nassau, and intended to run it; and also when she left Charleston on her voyage home. They are too full and decisive of the criminal intent to call for any extended examination of them. Decree below affirmed.

[1] [Affirming Case No. 9,413.]

MEMPHIS (APPERSON v.). See Case No. 497.

MEMPHIS (BROOKS v.). See Case No. 1,954.

Case No. 9,415.

MEMPHIS v. BROWN (two cases).

[1 Flip. 188; 6 West. Jur. 495; 5 Am. Law T. Rep. 424; 11 Am. Law Reg. (N. S.) 629.][1]

Circuit Court, W. D. Tennessee. March, 1872.[2]

MUNICIPAL CORPORATIONS — CONTRACTS — CONDITIONS PRECEDENT — PAYMENT — INTENTION OF PARTIES—UNREASONABLE CONTRACT — MEASURE OF DAMAGES—NEGOTIABLE BONDS.

1. When contracts have been made, acts done, and labor performed in pursuance of a construction of a city charter, acquiesced in by all its citizens, such an interpretation will be sustained if justified by any possible reading of the statutes.

2. In reference to all acts which a municipal corporation has power in any mode, and by any agency, to perform, it may bind itself by those agents whom it suffers to act for it, and in the modes which it sanctions by its own usages.

3. Where the charter prescribes votes of shareholders, citizens or directors, or other formalities as conditions precedent to the performance of acts, and such acts are performed without such formalities, third persons acting in good faith may presume all has been done which the charter demanded, and the corporation will not be suffered to prove its own negligence or willful dereliction to defraud innocent parties of their labor, property or money.

4. A municipal, like a private corporation, may in the ordinary course of its government, and in the conduct of improvements it is its duty to execute, make promissory notes, bonds, guaranties, and all other agreements necessary or convenient for the economical and proper financial management of its affairs as fully as a natural person.

[Cited in Memphis v. Bethel (Tenn.) 17 S. W. 194.]

5. The mayor, city attorney and treasurer of the corporation having ordinarily been suffered to make similar agreements, may engage attorneys to collect demands due the municipality, when its interests demand such service.

6. If the service is in a suit in which the city is a party, or in which it is interested, and they are performed with the knowledge of the officials, it is liable for the services in the same manner as a natural person. Judgments holding the contrary depend upon statutes which expressly prohibit such retainers.

7. A guaranty of payment imposes an obligation to pay at the maturity of the security, and the holder need not wait the result of a suit against the principal debtor, but may demand the money from the guarantor immediately upon the dishonor of the paper.

8. The payment of a less sum is not a sufficient consideration for an agreement to discharge a greater, but the Code of Tennessee alters the common law rule, and enforces such contracts when in good faith fully performed according to the intention of the parties.

9. When an agreement is made by a debtor to deliver in full satisfaction of a large sum due, his notes or money for a less sum, even though there is a consideration for the agreement, it

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission. 11 Am. Law Reg. (N. S.) 629, gives only a partial report.]

[2] [Decree modified in 20 Wall. (87 U. S.) 289.]

must, in order to operate as a discharge, be fully and fairly performed in all its parts, both in time and amount.

[See Bank of North Carolina v. Dewey, Case No. 897.]

10. Equity will not enforce the performance of unfair or hard or unreasonable contracts.

11. In order to sustain a contract of settlement without other sufficient consideration, upon the ground that it was the compromise of doubtful claims, the doubt must be such as would arise in the mind of an ordinarily intelligent person familiar with the class of things which is the subject of the settlement.

12. The measure of damages for the non-payment of money, or the non-delivery of a debtor's obligations for money, is the amount due and interest, and as an almost universal rule, no collateral damages can be given.

13. If negotiable bonds, of a class which by the usage of trade, are vendible in market at established rates, are to be issued in payment, accompanied with a sinking fund to give them greater market value, such bonds are to be treated as if they were chattels and things in esse, and the damages for failure to provide the fund will be the difference between the value of the bonds as they were agreed to be made, and the value as they were in fact made.

Suit at law was originally brought by [T. E.] Brown & Co. in this court for paving; subsequently the city filed its bill in equity against Brown & Co. in the state court, on the same contracts, to restrain certain collections by Brown & Co., and for an accounting. This suit the defendants removed to this court, and by consent of parties the subject of the action at law was by cross-bill united with this suit. The action is based upon two contracts made by the city with the assignors of Brown & Co., for street paving. Under the first, paving at the intersections of streets and alleys and opposite public ground, was to be paid for in cash by the city, and that opposite lots of private owners, by such owners, on bills to be made out by the city engineer, one-half when each section of 400 feet was done, and the other half, in installments, due in thirty, sixty and ninety days, the payment of which the city guaranteed. Under the second contract, the whole work was payable by the city, as each such section was done, in 6 per cent. coupon city bonds, running five, ten and fifteen years, guaranteed by a sinking fund. [Bonds were delivered for the work done, and were sold by the contractors to prosecute the work; but the city established no fund for their payment, nor paid the interest on them, and the bonds sold at the price of other unsecured city bonds, which was less than a sinking fund bond would have brought, and such difference the contractors claimed.][3] After some work had been done, this second contract was modified so as to make the work opposite private lots payable in cash as under the first. After most of the work was done, when over half a million dollars were due, the city agreed to loan Brown & Co., first $100,000, then afterwards $175,000 of its bonds, upon an agreement to secure them by pledges, and to return them with interest in eighteen months, and also to release the city from all liability on the contracts unless it should be determined by the court of last resort that the lot owners were not liable. Some forty thousand dollars of the bonds under this loan agreement were not delivered. [By the contracts the city was to collect the bills for paving from the lot owners, but that was mainly done by Brown & Co., at the request of the mayor and city attorney. Brown & Co. claimed compensation for such services, and also the reimbursement of moneys paid out to them to attorneys for enforcing other like collections.][4]

EMMONS, Circuit Judge. [4][A distinct consideration cannot be given to the manifold objections made by the counsel for the city in reference to the power of the mayor, the treasurer, the city attorney, and other officials to perform various acts during the progress of this work. That the mayor and other officers could not make the agreements to take the bonds below par, that they could not, under the contract order the work suspended, could not authorize the retention of counsel to aid the city attorney in duties for the benefit of the corporation, without a vote of the council, and various similar objections were elaborately urged.

[Deeming every one of them to refer to powers which the city had in some form and some mode full right to exercise, and being referred to no express statutory prohibition, forbidding the performance in the manner which is shown to be usual in its administration of this whole class of duties, we consider them all answered by the familiar doctrine that corporations, like individuals, are bound by acts of those whom they have suffered to act as their agents, and by such modes of action with or without vote, as they have by common usage sanctioned as proper. We repeat, after careful reconsideration, the doctrines in this regard contained in Ray v. Nashville, in the middle district of Tennessee, 1871.

[We had, in that case, the benefit of a most careful and learned argument. The securities of the city had been, in violation of its ordinances, put upon the market much below their par value. The court, after explaining to the jury the distinction between acts and contracts, which were not authorized at all by the charter, and those which were so authorized, but required the performance of official acts in order to render them regular, said that the latter, even though made or performed without the formalities demanded by the statute, bound the corporation as to all parties not having actual notice as to the irregularity. That this principle was applicable alike to negotiable and non-negotiable securities, to municipal as well as to pri-

[3] [From 5 Am. Law T. Rep. 424.]

[4] [From 5 Am. Law T. Rep. 424.]

vate corporations. Among other charges, the following was given:

["It is in evidence, that, by usage, such instruments have been signed and issued by the officers who issued these. If you credit this evidence, it is sufficient to authorize you to find that the mayor, recorder, and treasurer were agents of the corporations for this purpose, and competent to bind it by these instruments. A corporation unless restricted as to manner by its charter, may, by holding out to the public officers as clothed with certain powers, be bound by their acts within the scope of the functions so equally exercised."

[This, it was said, was at least the law of the national courts, and most clearly that of Tennessee. In the same case we excluded offered evidence of irregularities in the issue of the securities sued on. The court in that case relied on the following federal judgments: Board of Com'rs of Knox Co. v. Aspinwall, 21 How. [62 U. S.] 539; Zabriskie v. Cleveland, C. & C. R. Co., 23 How. [64 U. S.] 381; Bissell v. Jeffersonville, 24 How. [65 U. S.] 289; Rogers v. Burlington, 3 Wall. [70 U. S. 654; Van Hostrup v. Madison City, 1 Wall. [68 U. S.] 291; Mercer Co. v. Hacket, Id. 83; Meyer v. Muscatine City, Id. 384; Supervisors v. Schenck, 5 Wall. [72 U. S.] 772; Mann v. Miami Co., 2 Black [67 U. S.] 722; Railroad Co. v. Howard, 7 Wall. [74 U. S.] 415; Mayor. etc., v. Lord, 9 Wall. [76 U. S.] 414. A great number of state adjudications were also cited and discussed by counsel in the case, which it is unnecessary to cite here, in view of the pointed character of the national and local state judgments in Tennessee. A small number from the extensive list are referred to, only to illustrate the principle we consider firmly embodied in the American common law. It is not peculiar to the federal courts or those of Tennessee. The citations of course might be greatly multiplied. They are collected by Messrs. Angell & Ames, by Mr. Redfield, and other writers upon this subject, to the propositions they deem long settled, and no longer questionable. Herm. Estop. 512: "Corporations are bound by estoppel in pais like natural persons." Trustees of Aberdeen Female Academy v. Mayor, etc., of Aberdeen, 13 Smedes & M. 647; [Supervisors v. Schenck] 5 Wall. [72 U. S.] 772: The court says (page 782): "Excess of power may be ratified by express act, or impliedly by assent by acts and conduct inconsistent with any other hypothesis."

[U. S. Bank v. Danbridge, 12 Wheat. [25 U. S.] 70: Where the law required the bond of the cashier to be approved by the board of directors, it was said practical adoption by action which presumed it was sufficient. San Francisco Gas Co. v. City of San Francisco, 9 Cal. 469: The city officers had lighted the city buildings with gas without any contract of the common council. The gas company sued for the value of the gas so consumed during several years. Field, J., says: "The city is bound by its acts and conduct as an individual or private corporation. It is impliedly bound, and liable whenever justice demands it to be."

[Peterson v. Mayor, etc., of New York, 17 N. Y. 453: The suit was for plans for market, made at the request of a committee; although the contract of employment was void, the city was held liable on a ratification by the use of the plans. The court, by Denio, J., says: "The ratification may be by acts or conduct inconsistent with any other supposition than that it is intended to own and adopt the acts done in its name." Quoting Kent, J., he adds: "The doctrine that corporations can be bound by implied contracts, to be deduced by corporate acts, without either a deed in writing or vote, is generally established in this country with great clearness and solidity of argument," and quotes many cases. See, also, Meyer v. City of Muscatine, 1 Wall. [68 U. S.] 393; Gelpke v. City of Dubuque, Id. 175; Allegheny City v. McClurkan, 14 Pa. St. 83; Dougherty v. Hunter, 54 Pa. St. 381.

[In Ardesco Oil Co. v. Gilson, 63 Pa. St. 150, a suit for damages from the explosion of an oil refinery, built under the direction of the president of the company, without any special authority from the company, the court says: "It is their officers, having charge of their business, who, for all practical purposes, must be regarded as the corporation itself. The same rule of liability must be applied to them as to natural persons." See, also, Bank v. Gilstrap, 45 Mo. 419. That where there is power in reference to the subject generally, the city may make all the contracts and do all the acts an individual may do. See, also, City of Galena v. Corwith, 48 Ill. 423; People v. City of Cairo, 50 Ill. 154; Blunt v. Walker, 11 Wis. 349; De Voss v. City of Richmond [18 Grat. 338]; San Francisco Gas Co. v. City of San Francisco, 9 Cal. 469; Trustees of Aberdeen Female Academy v. Mayor, etc., of Aberdeen, 13 Smedes & M. 647; 5 N. Y. (1 Seld.) 374; 12 Wheat. [25 U. S.] 61.

[Adams v. Railway Co., 2 Cold. 645, puts at rest all the objections in this case in reference to the want of authority to guarantee, to issue bonds generally, to agree to pay counsel for the collection of paying bills, to sell bonds below par, and all other subordinate acts in this case, germane to, and proper for, the execution of the main duty of contracting and paying for the paving of its streets. In that case the city guaranteed the bonds of the Little Rock R. R. Co., and to secure them mortgaged a tract of land donated to it by the United States. The charter contained no special provision authorizing this action. The supreme court of Tennessee deduced the right to make the mortgage and the instrument of guaranty solely from the implied power of the corporation. On page 660 they quote [White Water Valley Canal Co. v. Vallette] 21 How. [62 U. S.] 424, including the citations of state judg-

ments, as follows: "It is well settled that a corporation, in the course of its ordinary business, may make bonds, note, mortgages, and drafts, except when restrained by law. 25 Barb. 146; 1 Sand. Ch. 280; 14 Barb. 358; 5 Watts & S. 223; 4 Robb. 517; 4 B. Mon. 423; 6 Gill & J. 323; 32 N. H. 486."

[The citation of this clause, including these judgments and the comments accompanying them, render it clear that the law of Tennessee fully authorizes the city of Memphis not only to issue negotiable securities, but to make the guaranty in question. This judgment is equally conclusive that in this state the nonperformance of conditions by a corporation, necessary to render its action regular, will not affect parties who are not cognizant of the irregularity. On page 661, and onward, Zabriskie v. Cleveland, C. & C. R. Co., 23 How. [64 U. S.] 381, is approvingly cited, as follows: "Corporations cannot, by their representations or silence, involve others in erroneous engagements, and then defeat the calculations and claims their own conduct had superinduced." This language is frequently used by the U. S. supreme court. 24 How. [65 U. S.] 300; 3 Wall. [70 U. S.] 667, etc. They also cite and approve Mercer Co. v. Hacket, 1 Wall. [68 U. S.] 93; Board of Com'rs of Knox Co. v. Aspinwall, 21 How. [62 U. S.] 539; Avery v. Alleghany City, Id. 365; Van Hostrup v. Madison City, 1 Wall. [68 U. S.] 291. Although the case before the court was that of a municipal corporation, the rule was applied that it was estopped from setting up its own irregularities to defeat its apparently formal obligations with the same vigor as if it were a private company. All the cases referred to in support of the doctrine, except Zabriskie v. Cleveland, C. & C. R. Co. [supra], are also those of municipal corporations. Towns, counties, and cities, and railroad companies, are all, by the judgments of this state, put upon the footing.] [4]

The city is liable to the contractors for the difference between the value of the bonds it agreed to give, and the value of those it did in fact give, the same as if it had agreed to deliver chattels, or the bonds of other corporations.

The questions which have given us most difficulty, and about which from the first, we have had most doubt, are—can any, and, if so, what damages be given against the city for its failure to provide the sinking fund covenanted for in the second contract, and what shall be the measure of recovery for a failure to return the $240,000 of borrowed bonds? This covenant of guaranty was intended to give value to and went to the character of the thing it agreed to deliver in payment for the work performed by the defendants. It has caused us much study, and although we have been afforded all the assistance which able counsel could give—anxious to aid our attempts to arrive at correct results, such has been the extraordinary pressure upon our time from other duties, that we are compelled to concede that our conclusions, however much confidence we have in their rectitude, cannot be sustained by such an argument as we should, in better circumstances, have been glad to present.

Owing to the novelty of some of the applications of principles demanded by the decree we make, we felt authorized to depart from those general rules which prevent coordinate judges from troubling each other with their judicial difficulties. We have, in this instance, consulted several of our circuit and district court brethren, and have received some most valuable aid from learned justices of state courts of last resort. They were all, without exception, decided in favor of the general principle that damages should be given, and that for the failure to return the borrowed bonds, the measure of recovery should be the market value only.

The measure of damages for the conversion of the note or other obligation of a private person, not intended for common circulation, and where there was no class of securities to which it belonged, which had by frequent sales acquired a market value, in an action by the maker of an instrument, is the nominal amount of par of the note or security. The same rule applies in an action against the debtor, when there is a failure on his part to deliver his own obligations. The only compensation, with rare exceptions, ever given by the common law for the non-payment of money, or the non-delivery of the private securities of individuals for money, is the maximum legal interest allowed by the lex loci contractus.

That if the note of a private party be converted, its par value is the criterion of recovery, Murray v. Burling, 10 Johns. 173; Buck v. Kent, 3 Vt. 99; Decker v. Mathews, 12 N. Y. 313; Sedg. Dam.; Evans v. Kymer, 1 Barn. & Adol. 528,—and many like judgments decide. There is no conflict in the decisions or commentators. The reason given is, that however below its par value may be the security, as the subject of immediate sale to the wrongdoer, its negotiation has in contemplation of law subjected the maker to liability for its whole amount. This rule, counsel for the city say, in its proper extension sustains the position that the non-delivery of the kind of bonds described in the contract, cannot create a liability beyond the amount which the contractors have subjected the city to pay, by the negotiation of the bonds they have voluntarily received. If the bonds in this case are to be likened to the notes of private persons, this position would manifestly conclude all claim of the contractors for the damages allowed by the master.

That the non-payment of money, or the non-delivery of the debtors' own obligations for money, subjects to no collateral damages, and that the principal and interest are the limit

[4] [From 5 Am. Law T. Rep. 424.]

of recovery, is claimed to be the universal rule. 3 Pars. Cont. 214. This is too elementary and unquestioned to require verification, if it is asserted only as a general principle. Much reliance is placed upon its manifold applications in analogous agreements. The law, it is said, in all such cases, conclusively presumes there are no damages, because money, being the basis of the whole agreement, can always be obtained at the lawful interest. This old presumption, however, that money is always accessible on the instant, and that by no possibility can injury result which the statutory interest will not compensate, often so false in fact and frequently productive of the most substantial damages to the covenantee, caused by deliberate wrong and gross carelessness, has in modern times been frequently disregarded. Where, in the ordinary conventional process of commerce, upon which men are authorized to rely, losses have occurred, impossible of prevention by an ordinarily careful creditor, and clearly anticipated by a willful or negligent defaulting debtor, the most substantial and compensatory damages have been given. The distinction between the obligation to deliver a chattel and the payment of money, has been rejected. Courts of the very highest character have set these examples. In Rolin v. Steward, 14 C. B. 595, 78 Eng. Com. Law, 595, the defendant having funds, against which the plaintiff drew his check, neglected to pay it, and the paper was protested. In an action for non-payment, the jury found £500 damages. The court in deciding that substantial damages were lawfully awarded, although it deemed these excessive, approbate Marzetti v. Williams, 1 Barn. & Adol. 423, ruling the same principle, and hold that although it was but a debt in defendant's hands, inasmuch as the plaintiff was a trader, and would in all probability be injured by the failure to pay his drafts, the jury might find substantial damages. Sedg. Dam. (4th Ed.) 83, cites Boyd v. Fitt, 14 Ir. C. L. 43, where similar damages were given for a breach of an agreement to keep a sum of money in bank and to meet punctually plaintiff's drafts. Defendant having absented himself on a particular day, drafts were dishonored. Special damages were given for the loss of an agency by plaintiff, for the suspension of one branch of his business, and general injury to another trade. Rolin v. Steward is cited and approved. We do not overlook the real spirit of these decisions. They do not overrule the old doctrine that where one private citizen owes money to another, the creditor cannot on failure to pay, claim compensation for losses in future operations, predicated upon his expectations of the money. The rule applicable in all other cases, excluding remote and consequential injuries, would apply. Indeed we do not understand that any, but the most special circumstances, will sustain such a recovery at all. It is only when the probability of collateral loss is great—growing out of the accredited forms of business in so much that the irresistible presumption is, that both parties must have known and contemplated the results.

We know of no decisions which have as yet applied even such a limited rule to any case where the injury resulted from the peculiar private circumstances of the plaintiff. In those cited, the injury was such as might be presumed to attend similar defaults in reference to all traders, relying upon the regular performance of a financial duty, by defendant assuming a quasi public character—that of banker or broker. They partake strongly of the nature of an action on the case for negligence, although strictly in form ex contractu, and we do not suppose they intend to place in all cases the non-delivery of money in the same category with that of the like default in relation to personal property. In an extreme case where all the facts are known to the debtor, where he is, by the very face of the contract, by the nature of the subject, the amount required and the financial condition of the creditor or contractor, fully apprised that punctual payment is absolutely necessary for the prevention of irreparable losses, whether damages in any possible case could be given beyond interest, it is not necessary to decide. But I desire to say that further examination would be requisite if this record demanded a judicial answer before I would refuse to hold the municipal government of a large and prosperous city like that of Memphis, which ought at least to represent its wealth, and its gentlemen to that decent degree of responsibility upon its lawful contracts, to which the English courts have held its brokers and its bankers. The presumption of direct injury in cases like the present, is as forcible and general, it depends as little upon the exceptional condition of the contractor, as in the instances of traders whose checks are unlawfully dishonored. The contractor had as much right to rely upon the good faith of a government as upon the punctuality of a banker. When we take into consideration the magnitude of the work, the financial absurdity of supposing any man would place on deposit the million, necessary for its performance, and the knowledge derived, not from accidental information, but deduced with absolute certainty from the nature of the undertaking, that the proceeds of preceding portions were necessary for the completion of its successive sections—it would seem to present a case quite as urgently demanding substantial damages as any of those which have received such in judgment, and while the relief granted for the failure to provide a sinking fund, will not rest upon any assumption of a new general rule giving collateral damages for the non-payment of money, or the non-delivery of a defendant's private obligations for money, still the modern refusal to apply the rule which upholds it, to cases not

within its reason, gives us more confidence that we are not unwarrantably extending the principle upon which we do rely, beyond its true limits. The judgments which have likened these public bonds to chattels and held them, even in the hands of their makers, to be the subjects of sale, pledge and contract, wholly divested of their common law features as mere evidences of indebtedness, have sprung from precisely the same commercial reasons and necessities as those judgments to which we have referred, giving substantial damages for the non-payment of money. This decision, however, is rested upon the assumption that the subjects of the contract are in all their features involved in the question of damages, to be treated like chattels in possession, and the public securities of other corporations or states. The rule of damages, therefore, in reference to chattels and the implications of law resulting from their reception and use, where a warranty has been broken, will be applied in this case.

We shall give the two questions of damages for failure to provide the sinking fund and to return the borrowed bonds, no distinct consideration. The same principles substantially govern each. The measure of damages for the conversion of goods, or of the obligations of third persons, is their market value in all cases not accompanied with special injury to the owner. For the non-delivery of goods or the obligations of third persons of the kind and value contracted for, it is the difference between the value of the chattel or bond agreed to be delivered and that which is in fact furnished. The following cases among many others sustain this rule in its application to the non-delivery of the obligations of third persons, including bonds, shares in corporations, bank bills, etc.: Shelton v. French, 33 Conn. 489 (a recovery was had of the difference in value between a bond with and without a guaranty); Coolidge v. Bringham, 1 Metc. (Mass.) 552. The difference in value between a note with a genuine and a forged endorsement was given. Not the face of the note, but its value as shown by the evidence. And see Struthers v. Clark, 30 Pa. St. 210; Henegar v. Isabella Copper Co., 1 Cold. 241; Simpkins v. Low, 49 Barb. 382; Otter v. Brevoort Petroleum Co., 50 Barb. 247; Enders v. Board of Public Works, 1 Grat. 364; Smith v. Dunlap, 12 Ill. 184; Baird v. Tolliver, 6 Humph. 186; Younger v. Givens, 6 Dana, 1; Robinson v. Hurley, 11 Iowa, 410; Cleveland & P. R. Co. v. Kelley, 5 Ohio St. 180. See, also, Redf. Wills, pt. 2, p. 312, and Sedg. Dam. That this is the rule in the case of the non-delivery of personal property, books need not be cited. It is entirely clear. Within this principle the contractors claim their own case comes. If these bonds in the hands of the corporation which makes them for public sale are to be treated for all purposes germain to the contest here, like chattels or other things in esse, like the bonds and securities of third persons, and other public securities; if they cannot be upon principle, and are not in fact, by the courts treated in any degree like the obligations of private individuals, where they refuse to deliver them according to contract, the same rule of damages will apply as if chattels were the subject of the agreement.

It is fully conceded by the counsel for the contractors that no such rule could be applied, if the contract was for the delivery of private notes of citizens in ordinary business between individuals. After much consideration we think no distinction should be made between the contract before the court, and one between the same parties for the same work payable in the public bonds of another corporation where there has been a refusal to deliver those of the kind contracted for. It is believed the adjudications already made in reference to the nature of these bonds, go quite beyond the necessities of the present case. That these corporate securities, under seal, made payable to bearer, and intended for sale in the public market, are negotiable, in as ample and full sense as the circulating medium of the country, the following adjudications which decide it in manifold applications determine: White v. Vermont & M. R. R., 21 How. [62 U. S.] 575; Board Com'rs Knox Co. v. Aspinwall, Id. 545; Zabriskie v. Cleveland, C. & C. R. Co., 23 How. [64 U. S.] 381; Woods v. Lawrence Co., 1 Black [66 U. S.] 386; Moran v. Commissioners, 2 Black [67 U. S.] 722; Mercer Co. v. Hacket, 1 Wall. [68 U. S.] 95; Gelpcke v. Dubuque, Id. 175; Dunham v. Cincinnati, P., etc., Ry. Co., Id. 257; Van Hostrup v. Madison City, Id. 291; Meyer v. Muscatine City, Id. 391; Murray v. Lardaer, 2 Wall. [69 U. S.] 110; Thompson v. Lee Co., 3 Wall. [70 U. S.] 327; Rogers v. City of Burlington, Id. 654; Railroad Co. v. Howard, 7 Wall. [74 U. S.] 407; Campbell v. Kenosha City, 5 Wall. [72 U. S.] 197; Morris C. & B. Co. v. Lewis, 1 Beasley [12 N. J. Eq.] 329; Morris C. & B. Co. v. Fisher, 1 Stockt. [9 N. J. Eq.] 667; Mechanics' Bank v. New York & N. H. R. Co., 3 Kern. [13 N. Y.] 599; Brainerd v. New York & H. R. R. Co., 25 N. Y. 496; Delafield v. State, 2 Hill, 159, 8 Paige, 527; Connecticut Mut. Life Ins. Co. v. Cleveland & C. R. Co., 41 Barb. 9; Brown v. Ward, 30 Duer, 660; City of Bridgeport v. Housatonic R. Co., 15 Conn. 502; Bulkley v. Welch, 31 Conn. 342; Eaton & H. R. Co. v. Hunt, 20 Ind. 467; Commissioners v. Bright, 18 Ind. 96; Junction R. Co. v. Cleneay, 13 Ind. 161; Maddox v. Graham, 2 Metc. (Ky.) 79; Chapin v. Vermont & M. R. R., 8 Gray, 575; Craig v. City of Vicksburg, 31 Miss. 216; De Voss v. City of Richmond, 18 Grat. 338; Mills v. Gleason, 11 Wis. 488; Clark v. City of Des Moines, 19 Iowa, 213; Bank of Ashland v. Jones, 16 Ohio St. 145; all these judgments assert the general rule by which we have preceded them. Many of them go further and decide that such bonds are to be deemed essentially chattels, and things in esse, and not mere choses in action.

This has been done as often as exigencies required it. No judgment conceding their negotiability, has denied the additional feature of their similitude to chattels. Pennsylvania alone decides differently, confessing that this local rule is exceptional, and at war with well settled law here and in England.

It would be useful and very persuasive evidence of the conclusions at which we have arrived, to follow the numerous applications of this general principle through the cases which announce it. The pressure upon the court and the absence of all clerical assistance which forbids elaborate examination, render this impossible; a few instances only in illustration of how fully the courts have likened these bonds to chattels, and how substantially they have refused to apply the old rule of the common law, applicable to the non-delivery of the evidences of indebtedness of individual defendants, to bonds like these, can be referred to. If the note or other chose in action of a private party is pledged as security for a debt, the creditor, owing to the nature of the subject, takes only the power of collection, not that of selling it. See Morris, C. & B. Co. v. Fisher, 1 Stockt. [9 N. J. Eq.] 667; Morris C. & B. Co. v. Lewis, 1 Beasley [12 N. J. Eq.] 323; Wheeler v. Newbould, 5 Duer, 29, on appeal 16 N. Y. 392; Brown v. Ward, 3 Duer, 660; Garlick v. James, 12 Johns. 146. The reason given is that such securities have no market value like chattels, are not so dealt with in commerce and that there is, therefore, no implied power of sale. Where bonds of a corporation intended for general sale, like those now in question, are thus pledged, this rule has been in vain invoked to invalidate their sale by the pledge. That literally they come within this rule is conceded. That they are choses in action, evidences of indebtedness, is said; but of so different a nature from those included in the principle relied on, that they are to be treated like chattels, and must be subject to the same rule and property incidents. In Wheeler v. Newbould, 5 Duer, 29, on appeal 16 N. Y. 392, in deciding that private notes could not be sold, they go upon reasons necessarily involving the right to do so, if they had the incidents of such securities as those before us. The following case (Brown v. Ward) in 3 Duer, 660, had been tried, but not determined, when the preceding one was decided in the superior court. In the latter, the public bonds of a railroad company had been pledged and sold like personal property. The court sustaining the sale expressly distinguished the case from Wheeler v. Newbould upon the ground that the subject of the pledge was to be treated like things in esse, and not like the private notes in that case. In Morris C. & B. Co. v. Lewis, 1 Beasley [12 N. J. Eq.] 323, the company's own bonds were pledged to secure its own debt, and sold at about thirty cents on the dollar. The court says the bonds in the hands of the company making them were alike the subjects of pledge and sale as were personal chattels. They were not to be treated like those of private persons. See, also, Morris C. & B. Co. v. Fisher, 1 Stockt. [9 N. J. Eq.] 667. There are other similar judgments but this principle is undoubted. These have been particularly noticed only to say, that every reason upon which this whole case rests, shows that if the same defendant had three different classes of bonds—1st, 2d, and 3d, worth according to the priority of their respective liens, 100, 75 and 50 cents upon the dollar, and they should make a contract for work, or for the purchase of engines and cars, agreeing to pay therefor in their first mortgage bonds at par, and should deliver instead those of the third class of one-half their value in the market, the company would be liable in damages for the difference in value between what it agreed to and what it did deliver. Freed from all questions of waiver and unembarrassed by the old notion that interest is the measure of damages for the non-delivery of money, or a chose in action for money, and treating the subject of the contract as what the courts now affirm they are, chattels and things in esse, no plainer proposition can be stated than that the breach of the contract subjects the violater to substantial damages.

Hasbruck v. City of Milwaukee, 21 Wis. 217, Wills v. Gleason, 11 Wis. 488, Cady v. Watertown, 18 Wis. 322, and other similar cases, although not in their principle distinguished from White Water Val. Canal Co. v. Vallette, 21 How. 414, and the large class to which it belongs, are in their facts so like the case before the court as to entitle them to special mention. In 21 Wis. 217, the corporation contracted to pay for a public work in its bonds at par. City officials without special resolution agreed, if the contractors would proceed, they should have the bonds much below par. This modification was sanctioned by the court of last resort. It overruled manifold objections to the general power of the corporation to make such an agreement, and if it had the authority of its officials without formal corporate action to do so. A similar transaction between the citizens dealing with private notes would have been illegal upon many common law and statutory grounds. Reposing, however, upon the peculiar character of these securities, it was held the city might dispose of them at their market value. The whole treatment of the case necessarily includes the propositions essential to give these contractors substantial damages, where the corporation has contracted to deliver them one kind of bonds, and has constrained them to accept another. The other citations quite as forcibly, for our purpose here, apply the principle which holds these securities to be subjects of sale and payment by the city at the common price. It is well settled law, too, that when a citizen desires a loan of money, and makes his private note for the purpose of raising it,

that no device of sale, pledge or other collateral transfer can protect the ownership of him who receives it from the imputation of usury if taken at a price less than that which will allow him lawful interest. May v. Campbell, 7 Humph. 450; Taylor v. Bruce, Gilmer, 42; 10 N. Y. 198; 9 B. Mon. 530; 8 Cow. 689. The judgments are very numerous to this point. In circumstances identically like those where private paper has been held void for usury, a like disposition of this class of bonds has been held not to come within this rule. Municipal, railroad and other public and quasi public corporations, have, in numerous instances, where the sole object has been a loan, published and negotiated as such, and where no statute authorized a sale below par and where the question turned solely upon the essential and substantial character of the security sold, disposed of their bonds at rates giving the purchaser manifold the lawful interest, and it has been adjudged not to be usurious.

The point has been in all these cases directly raised, and the judgment always rested upon the answer to the question, are they to be treated like chattels or like the choses in action of private persons? The answer has been that where a corporation makes such securities for vendition in the market, they are to be treated as if it offered for sale its personal property, or the notes and bonds of other corporations. In White Water Val. Canal Co. v. Vallette, 21 How. [62 U. S.] 414, mortgage bonds of the corporation reciting that they were intended for a loan, were paid at fifty cents on the dollar to a contractor. It was claimed that the transaction was usurious, but the supreme court going upon the nature of the securities and the transaction, held it to be lawful. In Morris C. & B. Co. v. Fisher, 1 Stockt. [9 N. J. Eq.] 667, like bonds of the company to double the amount were pledged to secure a debt. In support of the plea of usury it was argued that it was but the pledge of one promise to secure another, that the legal consequences could not be different than if the whole transaction had been evinced by a single contract. It was quite conceded by the learned court that had it so been, or had the dealing been with the private paper of an individual in a like transaction, it would have been unlawful; nevertheless it was held that these public securities in the hands of the corporation which makes them, as well as in those of third persons, are to be treated like other personal property, and the objection was not sustained. In Bank of Ashland v. Jones, 16 Ohio St. 145, bonds of a railroad company having been guaranteed and sold at a price under par, and suit brought upon the guaranty, among other objections urged was that of usury. In the argument by which it was overruled, the court say the bonds in the hands of the original makers "are like chattels." The guaranty is substantially treated like the warranty of personal property, and see the cases of Curtis v. Leavitt, 17 Barb. 311, on appeal 15 N. Y. 200; Leavitt v. De Launy. 4 Comst. [4 N. Y.] 364; Tracy v. Talmage, 18 Barb. 456, 14 N. Y. 162; People v. Mead, 24 N. Y. 125. The argument and illustrations to be found in this whole class of judgments leave nothing for the court by way of analogy or extension of their principles, in order to decide that the delivery of a bond of less market value, and of materially a different character from that agreed upon, subjects the corporation to damages. The case comes within the conceded truism that the measure of recovery for the breach of an express warranty in the sale of personal chattels is the difference between the value of the thing as warranted and its value as actually delivered. Numerous decisions, many of which are obligatory upon this court, determine principles which we think brings the subject of this contract within the rule. That in this case the city should respond in damages in justice to the contractors, is apparent from the fact that upon a resale of some of these bonds with like warranty these very defendants were held liable to this measure of damages. Callanan v. Brown (1871) 31 Iowa, 333.

In the hurried examination we have been compelled to make, we find but one case of the exact application we make of these principles to the question of the liability of the contractors, for the bonds loaned, though we can affirm with much confidence there are others. In Tracy v. Talmage, 18 Barb. 456, 14 N. Y. 162, the state of Indiana sold its own bonds to a trust company. The sale was held void for illegality, but the company was held liable to the same measure of damages as if it had disposed of the bonds without any contract. The court below decreed their payment at par. The superior court modified the judgment in this respect and held their market value to be the true criterion. The case is one of the most elaborately argued upon the question of illegality to be found in the books. That of damages was not fully discussed, but from the character of the counsel, its re-argument in the court of appeals, the modification of the decree in that court upon this very point, it is very high evidence of the law that where such securities are converted the measure of recovery in a suit by the maker is their market value and not as in the like case of the private note of an individual, the sum which he may be ultimately compelled to pay. The different rules are naturally adapted to probable financial consequences of the act or omission complained of. The private citizen has circulating no class of securities having a well known price, and which, in theory and fact, he can, at any moment, purchase at market standard. If his note is borrowed and not returned he must pay its amount. If the bonds are converted or withheld which have an established price at which they are in fact purchasable, no possible injury beyond it can result from withholding them. Every familiar rule regulating

the right to damages, that which stops at the limit of loss but gives all which the real loss is, will sustain both branches of this portion of our decree. They will compensate for refusal to deliver the more valuable bond agreed upon by the city, and will restrain its recovery to the value in the market of what it loaned and what it can still purchase for the sum allowed by the master.

[4] [The acceptance and sale of the bonds was not a waiver of the claim for damages. The guaranty in this case is not technically a warranty of the bonds. It is for the performance of a collateral act affecting their value. The legal and financial consequences, however, are precisely the same as if the city had warranted the bonds to be of a particular character. Their treatment, therefore, has been and will be the same as if they were the special subjects of the guaranty.

[We are referred to no decision giving any countenance to the position that mere acceptance and use by the contractors is per se a waiver of the breach of warranty on the part of the city. Counsel have not relied upon them, but there are a few decisions holding that in action for the price of goods sold with a warranty the defendant could not show the breach if he had accepted the property, and a few commentators, misapprehending them, have erroneously supposed they rested upon the ground of waiver, and that there could be no recovery in any form for a breach of warranty after a voluntary appropriation of the subject. Those judgments, however, announce no such rule; but, on the contrary, some of them expressly, and all of them impliedly, concede there may be a cross action for the damages, notwithstanding the acceptance and use. The decisions say only, that under the general issue, in an action upon a contract, there could be no partial defense. It is a mere question of pleading and form of action.

[The general doctrine that the vendee of personal property with warranty may maintain an action for the breach, notwithstanding he has accepted and used it, is well established in this country, and especially in the federal courts. Withers v. Green, 9 How. [50 U. S.] 213; Benjamin v. Hillard, 23 How. [64 U. S.] 149; Lyon v. Bertram, 20 How. [61 U. S.] 150. Numerous similar cases are found in the circuit courts. It is, however, by no means peculiar to the national jurisprudence, for in its earlier history, there being some decisions tending the other way, they adopted the rule we have announced, because it was supported by so many state adjudications. Every American treatise announces the rule which is applied in the following judgments. They decide and illustrate the principle that waiver is a question of fact, depending upon the circumstances of each case, and that the law will not presume a waiver where it is not clear that the parties intend one. Kellogg v. Denslow, 14 Conn. 411; Reed v. Randall, 29 N. Y. 358; Muller v. Eno, 14 N. Y. 598; Borekins v. Bevan, 3 Rawle, 23; Osgood v. Lewis, 2 Har. & G. 496; Hastings v. Lovering, 2 Pick. 214; Field v. Kinnear, 4 Kan. 476; Babcock v. Trice, 18 Ill. 420; Coolidge v. Brigham, 1 Metc. [Mass.] 547; Fielder v. Starkin, 1 H. Bl. 17; Buchanan v. Parnshaw, 2 Term R. 745; Heyworth v. Hutchinson, L. R. 2 Q. B. 447; 1 Pars. Cont. (5th Ed.) 591; Benj. Sales, 463, 522, 673, et seq.; Sedg. Dam. (4th Ed.) 319.

[Within the rule of these cases, the acceptance and use of these bonds must either have ben sold or the work must have stopped. It is an irresistible inference from the proof that every city official knew the rate at which they were being disposed of—one utterly ruinous to the contractor, if he was to have no remedy for the city's default. So far from the circumstances under which the parties acted indicating an intention on the one part, or expectation on the other, of waiver, the presumption is much stronger of an understanding that they would be sold at a discount and the loss made good.] [4]

There is one objection to this limited measure of recovery by the city which deserves notice and which could not well be dealt with in other connections. It was said by the corporation's counsel that whatever other powers the city might exercise and howsoever its officers without vote might bind it in the ordinary and accustomed course, at least there was no power anywhere in the charter to make its bonds for the purpose of loaning them to third persons, and such a loan, upon the face of the papers, this transaction was. As a general proposition, if it were simply a loan and no more, I should say counsel are right. Few such corporations have any power of making negotiable securities solely for the purposes of loan and circulation. But here, although called a loan, being made to its own creditor and in furtherance of an object it was its duty to promote, it would seem quite clearly beyond the reach of any such objection. It is, however, wholly immaterial here, because if illegal then, as is decided in the case of Tracy v. Talmage, just cited, the contract being void, the defendant will be held to have wrongfully converted the bonds and the measure of recovery be what is here allowed, their market value. Although quite in another connection, and having reference to a matter before disposed of, we add that if this point is well taken, if the contract of loan is void for illegality, it necessarily renders also void the release which is a part of it. If void in part, it is so, of course, in whole.

It is to be regretted that a novel application of general doctrines, one believed to be

[4] [From 5 Am. Law T. Rep. 424.]

[4] [From 5 Am. Law T. Rep. 424.]

beneficial in all its rightful limitations, should for the first time come before the court in circumstances well calculated to startle a conservative judgment and challenge the severest criticism of the principle which allows such damages at all. We have endeavored, however, to disregard the accidents of this record, and not to be deterred from an assertion of what was thought to be a right rule, because in the instance before us the proof forces a decree beyond what (had there been a fit administration of the city finances,) ought to have resulted from similar defaults. There should with public confidence in the integrity and intelligence of the municipal government, be no such extraordinary difference in price as the witnesses establish. The city, for some reason, introduced no testimony whatever upon the difference in market value between bonds secured by a sinking fund and such as were delivered in their stead. It may be true, that such was the reputation of the city government, that no counter proof upon this point would have varied results; still, so far as the amount of damages is concerned, it would be more satisfactory to know whether such a consciousness withheld the efforts or a reliance upon the doctrine that the whole inquiry was immaterial. That a superior court will adopt our views, we are not confident; but being certain that at an early day the general principles upon which we rely, must be adopted into our law, we have not hesitated to declare it now, although no precedent precisely applicable has been found for our decree.

[NOTE. Upon appeal to the supreme court the decision in this case was reversed as to the amount to be recovered, several of the items being stricken out. 20 Wall. (87 U. S.) 289. In accordance with the mandate of the supreme court a decree was entered in the circuit court for $292,133.47 and costs. Execution was issued and returned nulla bona. The plaintiff then filed his petition for mandamus to compel the city of Memphis to levy a tax sufficient to pay his judgment. Upon a hearing the writ was issued (case unreported). This decision was affirmed by the supreme court. 97 U. S. 293. See, also, collateral appeals, Id. 284, 300. Subsequently the case was again heard in the circuit court upon the petition of the plaintiff for a writ of mandamus compelling an additional levy. The writ was granted. Case No. 2,020.]

Case No. 9,416.

MEMPHIS v. DAVIS.

[Nowhere reported; opinion not now accessible.]

MEMPHIS (WISDOM v.). See Case No. 17,903.

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